

**IN THE COURT OF APPEAL OF TANZANIA**

**AT Mtwara**

**(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)**

**CIVIL APPEAL NO. 287 OF 2019**

**RAJABU HASSAN MFAUME (The Administrator  
of the Estate of the Late HIJA OMARI KIPARA) ..... APPELLANT**

**VERSUS**

**PERMANENT SECRETARY, MINISTRY OF HEALTH, COMMUNITY  
DEVELOPMENT, GENDER, ELDERLY AND CHILDREN ... FIRST RESPONDENT**

**THE BOARD OF TRUSTEES OF**

**ST. WALBURG'S NYANGAO HOSPITAL ..... SECOND RESPONDENT**

**THE ATTORNEY GENERAL ..... THIRD RESPONDENT**

**DISTRICT EXECUTIVE DIRECTOR LINDI RURAL ..... FOURTH RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Tanzania at  
Mtwara)**

**(Ngwembe, J.)**

**dated the 31<sup>st</sup> day of May, 2019**

**in**

**Civil Case No. 1 of 2019**

**.....**

**JUDGMENT OF THE COURT**

22<sup>nd</sup> & 28<sup>th</sup> March, 2022

**NDIKA, J.A.:**

The appellant, Rajabu Hassan Mfaume, acting as the administrator of the estate of his deceased wife, Hija Omari Kipara ("the deceased"), lodged an action based on the tort of negligence in the High Court of Tanzania at Mtwara for, among others, payment of TZS. 950,000,000.00 as general, exemplary and aggravated damages for the deceased's

death. The loss occurred on 7<sup>th</sup> March, 2012 during delivery at the second respondent's hospital, St. Walburg's Hospital Nyangao, Lindi. The Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children, the Attorney General and the District Executive Director – Lindi Rural (the first, third and fourth respondents respectively) were impleaded, it seems, as necessary parties to the suit.

The appellant's action, being founded on tort, had to be lodged, in terms of Item 6 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2002 (R.E. 2019) ("the Act"), within three years of the accrual of the cause of action. There was no dispute that the cause of action accrued on 7<sup>th</sup> March, 2012 upon the deceased's death, meaning that the appellant's action had to be lodged by 6<sup>th</sup> March, 2015 but none was filed. Desirous of pursuing justice in the matter, the appellant sought and obtained an order of extension of the prescribed period of limitation made under section 44 (1) of the Act by the then Minister for Constitutional and Legal Affairs, Prof. Palamagamba J.A.M. Kabudi dated 8<sup>th</sup> May, 2017. In the operative part of that order, the Minister stated that:

***"NOW THEREFORE, I, PROF. PALAMAGAMBA J.A.M. KABUDI (MP), Minister for Constitutional and Legal Affairs of***

*the United Republic of Tanzania, in exercise of the powers conferred upon me by section 44 (1) of the Law of Limitation Act, Cap. 89, **DO HEREBY EXTEND** the period of limitation [within] which the said **RAJABU HASSAN MFAUME** may wish to commence [proceedings] as aforesaid, by a period not exceeding one-half of the period prescribed by the Law of Limitation, Cap. 89, which shall commence on 20<sup>th</sup> May, 2017 and end on 19<sup>th</sup> November, 2018.*

*Dated at Dodoma this 8<sup>th</sup> day of May, 2017."*

Relying upon the above order, the appellant instituted his action on 19<sup>th</sup> November, 2018, which was apparently the last day of the extension granted by the Minister.

In its defence, the second respondent denied liability and raised a preliminary objection on three points, one of which was to the effect that despite the Minister's order, the suit was time-barred. The first, third and fourth respondents, through their joint defence, also denied liability and raised a separate preliminary objection that the suit was incompetent and bad in law for suing the fourth respondent who was a wrong party.

Having heard the contending arguments of the learned counsel for the parties, the High Court (Ngwembe, J.) sustained the point that the action was forlornly time-barred. In his ruling, the learned Judge acknowledged, rightly so, that the Minister had powers under section 44

(1) of the Act to extend a limitation period by a period not exceeding one-half of the prescribed period for such suit. However, he held that in terms of section 44 (2) of the Act, the period extended by the Minister, whether so extended before or after the prescribed period had elapsed, must commence to *"run immediately upon the expiry of the period prescribed by the Act."* On that basis, he took the view that the one-half of the prescribed period (that is, eighteen months period in the case) extended by the Minister commenced immediately upon the expiry of the prescribed period of three years for tort on 6<sup>th</sup> March, 2015. Thus, the Minister's order, purporting to set forth the commencement date as 20<sup>th</sup> May, 2017 was ineffectual. Consequently, the learned Judge dismissed the action, ordering each party to bear its own costs. It should be presumed, we think, that the dismissal was predicated upon section 3 (1) of the Act, which states expressly that any proceeding instituted after the period of limitation prescribed for it has expired shall be dismissed whether or not limitation has been set up as a defence.

The aforesaid order by the High Court is the subject of this appeal, which was initially premised on three grounds of complaint.

At the hearing of the appeal before us, Mr. Wilson Edward Ogunde, learned counsel, stood for the appellant while the first, third and fourth

respondents had the services of Mr. Mark Mulwambo, learned Principal State Attorney, who was assisted by Ms. Happiness Nyabunya, also learned Principal State Attorney, Ms. Mukabatunzi Dereck and Ms. Gertruda Songoi, learned State Attorneys. Mr. Hussein Mtembwa, learned counsel, appeared for the second respondent.

Ahead of the hearing of the appeal on the merits, Mr. Mulwambo raised a preliminary objection, with leave of the Court, that the appeal was incompetent for being lodged without leave in contravention of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 ("the AJA").

It was his contention that although the High Court was exercising its original jurisdiction, it did not hear the matter on the merits and, therefore, its order of dismissal of the suit was not a decree appealable as of right under section 5 (1) (a) of the AJA. He submitted that the order fell under section 5 (1) (c) of the AJA for which an appeal is subject to seeking and obtaining the leave of the High Court or of this Court. He pegged his proposition on two decisions of the Court: **Organization of Tanzania Trade Unions (On Behalf of One Hundred and Twelve Employees of National Poultry Co. Ltd.) v. Presidential Parastatal Sector Reform Programme & Two**

**Others**, Civil Appeal No. 20 of 1999; and **Fatuma Khatibu v. The Treasury Registrar**, Civil Appeal No. 397 of 2020 (both unreported). Accordingly, he urged us to strike out the appeal with costs on account of its incompetence.

Replying, Mr. Ogunde disagreed with his learned friend. He argued that the impugned order of dismissal by the High Court in exercise of its original jurisdiction had the effect of determining the rights of the parties finally and conclusively and, therefore, it was appealable under section 5 (1) (a) of the AJA as of right. He distinguished the cases cited by Mr. Mulwambo essentially on the ground that they did not concern an order of dismissal by the High Court in exercise of its original jurisdiction. In the premises, he moved us to dismiss the preliminary objection.

In a brief rejoinder, Mr. Mulwambo referred us to section 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 ("the Code") defining the terms "decree" and "order", which are referred to, respectively, in paragraphs (a) and (c) of section 5 (1) of the AJA. He maintained that the impugned order was no more than a formal expression of a decision of the High Court that did not amount to a decree.

We have considered the contending learned submissions of the counsel along with the authorities cited. The crisp issue between the

parties is whether the present appeal from the High Court's order dismissing the suit for being time-barred is appealable with or without leave.

Section 5 of the AJA, governing the appeals to this Court from the High Court's decisions, provides as follows:

*"5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;*

*(b) against the following orders of the High Court made under its original jurisdiction, that is to say—*

*(i) to (ix) [Omitted]*

*(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."*

Both parties appreciate that an appeal lies as of right under section 5 (1) (a) above against *every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Code*, in the exercise of its original jurisdiction. Furthermore, it was also undisputed that any appeal against *every other decree, order, judgment, decision or finding of the High Court* not falling within paragraph (a) or paragraph (b) of subsection 1 above would certainly be pigeon holed in paragraph (c) of that subsection, meaning that such appeal would lie with the leave of the High Court or of the Court of Appeal. The disagreement we are enjoined to resolve is that while Mr. Mulwambo contended that the impugned dismissal did not result into a decree for it be appealable as of right under section 5 (1) (a) of the AJA, his learned friend took the opposite view.

Section 2 of the Code defines the term "decree" as follows:

*"decree' means the formal expression of an adjudication which, so far as regards the court expressing it, **conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final** and it shall be deemed to include the rejection of a plaint and the determination of any question*



*within section 38 or section 89, but shall not include-*

*(a) an adjudication from which an appeal lies as an appeal from an order; or*

*(b) any order of dismissal for default."*  
[Emphasis added]

The same provision goes on to define the term "order" thus:

*"order' means the formal expression of **any decision of a civil court which is not a decree.**"*[Emphasis added]

From the above definitions, what necessarily distinguishes a "decree" from an "order" is that a decree, whether preliminary or final, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

In **The Hon. Attorney General & Three Others v. Southern Atlantic Grain Agent (Pty) Ltd.**, Civil Appeal No. 53 of 2000 (unreported), this Court acknowledged that some orders amount to decrees where the rights of the parties were finally and conclusively determined. In that case, the Court cited its previous decision in **Olam Uganda Limited** (suing through its attorney **United Youth Shipping Limited**) **v. Tanzania Harbours Authority**, Civil Appeal No. 57 of

2002 (unreported) as authority. In **Olam Uganda Limited** (*supra*), a suit against the respondent's authority was dismissed for being instituted beyond 12 months limitation period in contravention of section 67 (b) of the Tanzania Harbours Authority Act, 1977 ("the THAA"). It should be noted that the aforesaid period of limitation prescribed by the THAA is deemed in terms of section 46 of the Act to be a period of limitation prescribed under the Act and, as a result, it would attract the consequences provided for by section 3 (1) of the Act. The Court firmly held that an action instituted beyond the prescribed limitation period would be liable for dismissal under section 3 (1) of the Act. On the effect of such a dismissal order, the Court was unwavering that:

*"In our considered opinion the, **the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable.** The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the **dismissal order** has been vacated either on review by the same court or on appeal or revision by this Court ..."* [Emphasis added]

Furthermore, the decision of the Court in **Diamond Trust Bank Tanzania Limited v. Puma Energy Tanzania Limited**, Civil

Application No. 40 of 2016 (unreported) is equally relevant. In that case, the Court grappled with the question whether an order dismissing a suit under Order XVII, rule 3 of the Code upon failure by a party to produce evidence amounts to a decree which is appealable as of right pursuant to section 5 (1) (a) of the AJA or it is appealable with leave under section 5 (1) (c) of the AJA. After revisiting several decisions including **Salem Ahmed Hasson Zaidi v. Faud Hussein Humeidan** [1960] 1 EA 92 (CAA) rendered by the erstwhile Court of Appeal for Eastern Africa and its decision in **Ally Khalfan Mleh v. Attorney General**, Civil Application No. 40 of 2012 (unreported), the Court was emphatic that a dismissal order made under Order XVII, rule 3 of the Code upon a party's failure to produce evidence is one on the merits of the case and thus appealable as of right under section 5 (1) (a) of the AJA. In so holding, the Court relied upon its decision in **Ally Khalfan Mleh** (*supra*) where it held thus:

*"From the above discussion it will be accepted without further elaboration that the dismissal of the petition on 28<sup>th</sup> March, 2012 was a decision on the merits. The applicant cannot institute another petition claiming the same reliefs unless and until the dismissal order has been quashed or vacated either on appeal by this Court or on*

*review by the trial High Court. It goes without saying, therefore, that the **dismissal order dated 28<sup>th</sup> March, 2012, amounted to a decree in terms of section 3 of the C.P.C.:** see, for instance, **Olam Uganda Ltd v. T.H.A., Civil Appeal No. 57 of 2002 (unreported).** This decree could only be vacated on an appeal or revision, by this Court.”[Emphasis added]*

See also: **South British Insce Co. Ltd. v. Mohamedali Taibji Ltd.** [1973] 1 EA 210 (CAM); **East African Development Bank v. Blue Line Enterprises Limited**, Civil Appeal No. 101 of 2009; and **MM Worldwide Trading Company Limited & Two Others v. National Bank of Commerce Limited**, Civil Appeal No. 258 of 2017 (both unreported). Having read the above two authorities cited by Mr. Mulwambo, we think that they do not advance his position.

Based upon the foregoing discussion, we think it is firmly established that irrespective of its description as an “order”, the impugned order dismissing the appellant’s action under section 3 (1) of the Act for being time-barred marked the final and conclusive determination of the rights of the parties in the matter. The appellant is, therefore, barred from reinstating the action, it being *res judicata*. Given this standpoint, we find and hold that the impugned order was, in

effect, a decree against which an appeal lay as of right pursuant to section 5 (1) (a) of the AJA. Accordingly, we find no merit in the preliminary objection, which we hereby overrule.

We now advert to the substance of the appeal, which, as we hinted earlier, was initially predicated upon three grounds of appeal. Before us, Mr. Ogunde argued conjointly the first and second grounds but abandoned the third point of complaint. The two grounds he pursued raise the following issues:

- 1. Whether it was proper for the learned trial Judge to hold that section 44 (2) of the Act limits the powers of the Minister to extend time outside of the statutory limit and that the Minister had no legal mandate to grant extension of time after 5<sup>th</sup> November, 2016.*
- 2. Whether the learned trial Judge properly interpreted section 44 (2) of the Act.*

In his oral and written submissions in support of the appeal, Mr. Ogunde criticized the learned High Court Judge for misinterpreting subsection (2) of section 44 of the Act to the effect that it restricted the Minister's exercise of power of extension under subsection (1) of that section. It was his contention that the only condition constricting the

Minister's power is that the extension that he may grant, if it is just and equitable so to do, should not exceed one-half of the period of limitation prescribed by the Act for such suit. He added that, even if the Minister extends time ten years after the expiry of the prescribed period of limitation, "the time so extended shall be treated as if it commenced upon expiry of the period stipulated under the Act." It was his further contention that by holding that the Minister ought to have given his order of extension of time from 6<sup>th</sup> March, 2015 to 5<sup>th</sup> November, 2016 and not thereafter, the learned Judge effectively but unjustifiably restricted the Minister's exercise of his powers.

Replying, Mr. Mulwambo supported the learned Judge's reasoning and decision. He stressed that whatever extension granted by the Minister under subsection (1) of section 44 of the Act, not exceeding one-half of the limitation period set by the Act for the suit, it ought to have commenced to run immediately upon the expiry of the period prescribed by the Act. Thus, it was his contention that the eighteen months period extended by the Minister on 8<sup>th</sup> May, 2017 must have commenced to run on 6<sup>th</sup> March, 2015 when the three years period set by the Act elapsed. On that basis, the extended period elapsed on 5<sup>th</sup> September, 2016 and not 5<sup>th</sup> November, 2016 as stated by the learned

Judge. The suit was, therefore, time-barred at the time it was instituted on 19<sup>th</sup> November, 2018.

For his part, Mr. Mtembwa, having associated himself with Mr. Mulwambo's submissions, referred us to a decision of the High Court of Tanzania at Dar es Salaam in **Selemani Mohamed Mtoni v. Minister of Justice and Attorney General**, Miscellaneous Civil Application No. 27 of 2002 (unreported). In that case, the applicant sought leave to apply for the order of certiorari quashing the decision of the Minister of Justice and Constitutional Affairs' refusal to extend time under section 44 (1) of the Act. The learned counsel referred us to a passage, in Ihema, J.'s ruling in that case, dismissing the application thus:

*"Under the provisions of section 44 (1) of the Law of Limitation Act, 1971, the Minister has discretion to extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation for such a suit. The facts in the present case, an alleged tortious cause, the prescribed time for any [such] action is three (3) years. The cause of action arose on 14<sup>th</sup> January, 1996 upon the demise of the applicant's daughter. As such on 14<sup>th</sup> day of January, 2001 when the applicant sought the extension of time the allowable period of one-half of the period of*

*limitation had already lapsed. There is, therefore, nothing the Minister could do in the circumstances."*

While acknowledging that the above decision was not binding upon us, Mr. Mtembwa urged us to find it persuasive for its holding that the Minister has no power to grant an extension of the prescribed period of limitation where the allowable period of one-half of the period of limitation set by the Act has already elapsed.

We have examined the record of appeal and taken account of the contending submissions made by learned counsel for the parties. In our view, the parties are head-to-head on the interpretation of subsection (2) of section 44 of the Act.

To resolve the above issue of contention, it is necessary to extract the provisions of section 44 of the Act:

***"44.-(1) Where the Minister is of the opinion that in view of the circumstances in any case, it is just and equitable so to do, he may, after consultation with the Attorney-General, by order under his hand, extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation prescribed by this Act for such suit.***



*(2) Where an order under subsection (1) is made in relation to any suit, the provisions of this Act shall apply to such suit as if references herein to the period of limitation were references to the aggregate of the period of limitation prescribed for such suit by this Act and the period specified in such order, **such later period commencing to run immediately upon the expiry of the period prescribed by this Act.***

*(3) [Omitted]*

*(4) For the avoidance of doubt it is hereby declared that an order under subsection (1) may be made in relation to a suit before or after the expiration of the period of limitation prescribed for such suit.”[Emphasis added]*

We have reflected on the above section in its ordinary and natural meaning. In our considered view, this provision poses no difficulty. In fact, we wondered what the fuss was all about between the parties to this matter.

As rightly argued by all learned counsel, the Minister has broad discretion under subsection (1) of section 44 of the Act to extend the period of limitation prescribed for any suit, by an order under his hand, subject to three conditions: **one**, the extension may be granted if the

Minister is satisfied that it is just and equitable to do so in view of the circumstances of the case. **Two**, the grant should be made by the Minister after consultation with the Attorney General. **Three**, the allowable extension must not exceed one-half of the period of limitation for such suit. In terms of subsection (4), the order of extension under subsection (1) may be made in respect of a suit before or after the expiry of the period of limitation set for such suit.

So far as subsection (2) is concerned, with respect, we do not go along with Mr. Ogunde's submission on its construction and effect. We agree with Mr. Mulwambo and Mr. Mtembwa that subsection (2) restricts the Minister's power under subsection (1). It does so, first and foremost, by expressly providing that once an extension is granted, the provisions of the Act will apply to such suit as if references to "the period of limitation" were references to "the aggregate" of the period of limitation prescribed for such suit by the Act and the period specified in such order. To illustrate the point, we should say that if a one-half limitation period for a claim on tort (that is, one and a half years) is extended by the Minister, the reference to the period of limitation under the Act would mean a reference to the aggregated period of limitation, which would, therefore, be four and a half years.

Secondly and more importantly, subsection (2) stipulates in clear terms that the period of extension so granted must commence to run immediately upon the expiry of the period prescribed by this Act. It does not matter whether the grant is made before or after the expiry of the limitation period set by the Act for the suit.

By way of emphasis, we wish to restate, with approval, what the High Court held in **Selemani Mohamed Mtoni** (*supra*) that the Minister has no power to extend the period of limitation prescribed by the Act for a suit where the allowable period of one-half of the said period of limitation set by the Act has already elapsed.

Applying the above position to the instant case, we are of the settled mind that the learned High Court's finding that the suit was caught by the web of limitation is unassailable. He correctly held that the Minister's extension of the limitation period by one and a half years must be deemed to have commenced on 6<sup>th</sup> March, 2015 upon expiry of the period of three years prescribed by the Act, the cause of action having accrued on 7<sup>th</sup> March, 2012 upon the deceased's demise. We also uphold his finding that the Minister's order dated 8<sup>th</sup> May, 2017, purporting to extend the prescribed period of three years with effect from 20<sup>th</sup> May, 2017, was evidently *ultra vires* and ineffectual. Thus, the appellant's

action instituted on 19<sup>th</sup> November, 2018, well after the aggregate period of limitation of four and a half years had elapsed on 5<sup>th</sup> September, 2016, was miserably time-barred. It was rightly dismissed under section 3 (1) of the Act. Consequently, the two grounds of appeal fail.

The upshot of the matter is that the appeal is unmerited. We dismiss it in its entirety. Each party to bear its own costs.

**DATED** at **MTWARA** this 26<sup>th</sup> day of March, 2022.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 28<sup>th</sup> day of March, 2022 in the presence of Mr. Hussein Mtembwa, holding brief for Mr. Wilson Edward Ogunde counsel for the appellant and Ms. Getruda Songoi, State Attorney for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and Mr. Hussein Mtembwa learned counsel for the 2<sup>nd</sup> respondent is hereby certified as a true copy of original.



  
D. R. Lyimo  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**