**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: KOROSSO, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 31 OF 2018**

**THE JUBILEE INSURANCE COMPANY (T) LIMITED (The Third Party) ..... APPELLANT**

**VERSUS**

**SOPHIA MLAY ..... 1ST RESPONDENT**
**NEEMA OSCAR ..... 2ND RESPONDENT**
**RUKIA JOHN MSUNGU ..... 3RD RESPONDENT**
**SESILIA MLAY ..... 4TH RESPONDENT**
**NEEMA OSCAR MAWOLE (*As a next friend of Sia Oscar*) .. 5TH RESPONDENT**
**RUKIA JOHN MSUNGU (As a next fried of Sebastian Msungu, Jennifer Msungu and Gloria *Msungu* ..... 6TH, 7TH & 8TH RESPONDENTS**
**GIFT ELIANGIRINGA ..... 9TH RESPONDENT**
**GIFT ELIANGIRINGA (*As a next friend of Emmanuel & Ruth Eiiangiringa*) ..... 10TH & 11TH RESPONDENTS**
**SOPHIA MLAY (As the next friend of Raymond Mlay & Sesisilia/Hilda Mlay ..... 12TH & 13TH RESPONDENTS**
**DOREEN ALBERT TEMU .....14TH RESPONDENT**
**PHILIP MLAY ..... 15TH RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania, Dar es Salaam Registry, at Dar es Salaam)**

**(Kibela, J.)**

**dated the 22nd day of December 2015**
**in**
**Civil Case No. 67 of 2015**
**.....**

## JUDGMENT OF THE COURT

29th April, & 5th September, 2022

## KOROSSO, J.A.:

The Jubilee Insurance Company (T) Limited (the appellant) was a third party in Civil Case No. 67 of 2007 lodged jointly by the respondents (then, plaintiffs) against the 14th and 15th respondents (then, defendants)

in the High Court of Tanzania, Dar es Salaam Registry, at Dar es Salaam. The relief sought as particularized in the plaint, was essentially a claim for loss of life, injuries, and damages, to wit; payment of specific damages and general damages plus interest at the commercial rate from the date the claim was lodged to the date of judgment and interest on the decretal sum on the claimed amount at the court rate from the date of the judgment to the date of full settlement of the claim. The suit proceeded *exparte* upon failure of the appellant to enter appearance on the day it was called for hearing. The High Court found in favour of the respondents and awarded them Tshs. 284,884,300/- as specific damages and Tshs. 262,000,000/- as general damages.

A brief background of the matter leading to the claims surmises from the fact that on 9/01/2005 at Makanya area, Same District, Kilimanjaro Region an accident occurred that involved a motor vehicle Toyota Prado make, Station Wagon Registration Number T237 AEG. The accident occasioned the death of Anna Mlay (deceased) who was also the owner of the respective motor vehicle. Upon Anna Mlay's death, her estate was administered by Doreen Albert Temu and Philip Mlay the 14th and 15th respondents. The accident led the other respondents to institute a suit against the 14th and 15th respondents as administratrix and administrator of the estate of the deceased. The appellant was the insurer of the

respective motor vehicle under a comprehensive cover Policy with interim cover note 012344939 issued on 20/9/2004 by Astra Insurance Brokers (T), the insurer's agent. The appellant as the insurer was joined to the suit as a third party upon application by the respondents in terms of Order 1 Rule 14 of the Civil Procedure Code [Cap 33 R.E 2002] now [R.E 2019] (the CPC).

As stated earlier herein, upon the hearing proceeding *exparte*, the trial court on 26/11/ 2009 guided by Order 19 (1)(a) of the CPC entered a default judgment against the appellant who had failed to file a written statement of defence and to appear on the date set for hearing. However, execution of the *exparte* decree failed to proceed hindered by the fact that the third party's name and the particulars of the amount claimed were not clearly outlined in the impugned decree, which led the respondents on 16/04/2010 to apply to the court for the amendment of the decree. The trial court refrained from granting the application for reason that the respondent had not proved their case and then ordered the thirteen respondents to prove their claims against the third party. The 14th and 15th respondents were called to enter their defence as found on page 113 of the record of appeal.

Subsequently, on 16/3/2011 the case commenced for *exparte* proof, and a judgment in favour of the 1st to 13th respondents was delivered on

22/9/2011 and the appellant was ordered to pay the claims on behalf of the 14th and 15th respondents. The High Court on 16/5/2012 issued a garnishee order *nisi* to attach the appellant's bank account at DTB Bank.

The appellant was dissatisfied with the decision and lodged an application that sought the Court to set aside the *exparte* judgment and decree and stay of execution of the impugned decree and uplift the garnishee order *nisi* issued against the third-party bank account pending hearing and determination of the application. The application was struck out for being time-barred.

Aggrieved, the appellant has preferred an appeal before us as founded in a memorandum of appeal premised on four grounds which compressed give rise to complaints that fault the High Court thus: One, that it misconceived the law in holding that the applicant's application to set aside the default judgment was out of time. Two, failing to consider the circumstances which led to a misconceived holding that the application by the appellant to set aside default judgment ought to have been preceded by the grant of leave.

On the day the appeal was called for hearing on 29/4/2022, the appellant was represented by Mr. John Kamugisha learned counsel. Ms. Nakazael Lukio Tenga assisted by Mr. Hamis Albaraka Mfinanga and Mr.

Grayson Laizer, learned counsel represented the 1st to 13th respondents. The 15th respondent was present in person, unrepresented, while the 14th respondent was absent. Upon the prayer by the appellant's counsel which was supported by the counsel for the 1st to 13th respondents and the 15th respondent, we ordered for hearing to proceed in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2019 (the Rules) being satisfied that the 14th respondent was duly served with the notice of hearing of the appeal since the affidavit of the process server averred that to be the case.

At the inception of his submission, the learned counsel for the appellant adopted the written submissions filed on 12/4/2018 and authorities he expected to refer, to reinforce his points of argument. He informed the Court that from the grounds of appeal filed they have drawn three issues for determination of the Court. First, was on when did the 30 days limitation period to set aside the *exparte* judgment start to run against the appellant? Second, whether the appellant did prove the time he was notified or became aware of the *exparte* judgment, and third, whether the application to set aside the *exparte* judgment was time-barred.

Expounding on the first issue, the learned counsel for the appellant contended that item 5 of Part III of the Schedule to the Law of Limitation

Act [Cap 89 R.E 2019] (the Limitation Act) prescribes that the application to set aside a default judgment must be filed within 30 days but does not state when the limitation period starts to run. To bolster his argument, he cited decisions of the High Court and urged us to be inspired by them, these include; **The Editor Nipashe Newspaper and Another Vs Martin Nashokigwa and Another,** Misc. Civil Application No. 23 of 2014 (unreported) and **Atilia Mosca Vs Hassanali Kassam Damji** [1967] HCD No. 170. The learned counsel argued that the said decisions pronounce that the time starts running from the date the judgment was delivered only where the notice of the date the judgment is delivered was served to the applicant. He thus argued that this position in essence means the limitation period starts running against the applicant upon notification of or when he/she becomes aware of the existence of the judgment.

Mr. Kamugisha asserted that as averred in the affidavit that supported the application to set aside the *exparte* judgment, the appellant was unaware of the date of judgment and that it was delivered until when the garnishee *nisi* was filed and he received notification from his banker. According to the learned counsel if the principle was to apply in the instant case, when the time is counted from the date of notification of delivery of the default judgment to the date when the application was filed on

4/6/2012, the High Court should have found that the application was within the legally prescribed time.

On the second issue of whether the date was proved, the learned counsel contended that a scrutiny of the respective ruling found on page 23 of the supplementary record and the garnishee order *nisi* attached, shows them to be dated 1/6/2012 and affirmed on the same date. He contended further that the supporting affidavit was also signed on the same date while the application to set aside was filed on 4/6/2012 and thus proof of the date. The learned counsel maintained that the application was filed within 30 days as prescribed by the law. He thus urged us to allow the appeal.

Mrs. Tenga who was the lead counsel for the 1st to 13th respondents commenced her response by adopting the written submissions filed on 11/5/2018 and cited authorities to augment the respondents' position. She contested the argument by the learned counsel for the appellant that time to set aside a default judgment started running when the aggrieved became aware of the impugned decision. She urged us to find the case cited, **Attilio Mosca** (supra), a High Court decision, not binding to the Court but with persuasive standing only. She also argued that it is distinguishable since it is an old case decided based on section 154 of the Limitation Act which has been amended and that the current Act does not

have a similar provision and thus per incuriam. The learned counsel further argued that the Limitation Act [Cap 89 R.E 2002] sections 4 and 5 do not envisage nor specify the time for a party to be provided with an *exparte* decision. She contended that the limitation period is a creature of statute and states where a case has been filed beyond the time prescribed it should be dismissed.

According to Mrs. Tenga, the available remedy for the appellant in the instant case would have been to seek for extension of time first before filing the instant appeal. She further emphasized that in the said application for extension of time, the appellant's argument of the late receipt of the *exparte* judgment could have been used to justify the delay to file the requisite application on time. The learned counsel for the respondents maintained that the applicant's failure to file the application on time without justifying the delay should lead to a finding that there was an inordinate delay on his part to file the application on time, and thus, time-barred.

Furthermore, she contended that the affidavit of one Aurelia which supported the application did aver that the appellant had perused the file on a date after the elapse of the 30 days to file the application to set aside an *exparte* judgment and thus defeated the contention by the learned counsel for the appellant that the time starts to run when the judgment

is delivered or notified to the applicant. She contended further that the said argument is misconceived since it only applies in labour matters governed by the Labour Relations Act, 2004 and not on matters under the Limitation Act. Mrs. Tenga asserted that where the Limitation Act applies, once the limitation period elapses an aggrieved person is expected to seek for extension of time to file the application out of time. She implored the Court to dismiss the appeal and reaffirm the decision of the High Court.

Mr. Philip Mlay, the 15th respondent, being a lay person did not have much to state regarding the appeal. He however expressed his discontent with the fact that the case was still ongoing and argued that the appellant is just using the court process to delay compensating the respondents as ordered by the trial court. He prayed for the matter to come to its conclusion, that the appeal be dismissed, and the judgment of the High Court be confirmed.

Mr. Kamugisha's rejoinder was brief. He reiterated his submission in chief. He countered the argument by the learned counsel for the 1st to 13th respondents by referring us to paragraphs 4 and 5 of the affidavit in support of the application to set aside the *exparte* judgment stating they expounded on the dates for the garnishee order *nisi* and informed us that the perusal of the file was on 5/6/2012, which is a date after the application had been filed. The learned counsel conceded the fact that the

Limitation Act does not prescribe the time to start running from the date an aggrieved party becomes aware of the judgment. He also conceded that the cited decision was per incuriam as argued by the learned counsel for the 1st to 13th respondents. Regarding the contention by the learned counsel and the 14th respondent that the case has taken a long time, whilst conceding to this, he however maintained that what was being sought is justice for both parties and it is their right to seek it, which is what the applicant is doing in the instant appeal.

We have given due consideration to the oral submissions and cited decisions before us from all the parties and the record of appeal. Having considered the grievances advanced by the appellant and the drawn issues therefrom, we are of the view that this appeal can be determined by deliberating on grievance number one and particularly the first issue as generated by the appellant, which we phrase it as; whether upon becoming aware of the existence of the *exparte* judgment, the appellant took proper steps to set aside the judgment, knowing he was out of time.

In the instant appeal, it is undisputed that the High Court (Commercial Division) on 22/11/2011 delivered an *exparte* judgment after *exparte* proof against the appellant. The appellant lodged an application to set aside the *exparte* Judgment on 4/6/2012, which was essentially after about 180 days had elapsed. The relevant matters were under the

umbrella of Civil Case No. 67 of 2007, and the application was pursuant to Order IX Rule 13(1) and (2), Order XXI Rule 24(1), and section 95 of the CPC, meaning essentially a civil matter. Certainly, as agreed by the learned counsel for both sides, an application to set aside an *exparte* judgment or order is governed by the Limitation Act. Part III, item 5 of the Schedule to the Limitation Act states:

> *"For an order under Civil Procedure Code set aside a decree ex parte .... thirty days."*

Indeed, the above provision articulates that the limitation period to set aside an *exparte* decree is thirty days. The fact that the law has not clearly provided on when the time starts to run is not disputed. However, the learned counsel for the appellant contended that in the circumstances, notwithstanding the fact that a look at the date the application to set aside the *exparte* decision was filed it may seem that it was filed beyond the prescribed period of thirty days, this was not the case. His argument was that in the instant case, since the appellant was unaware of when the *exparte* judgment was delivered, the counting of the limitation period should be from the time the appellant became aware that such judgment existed. That this was when he was served with the order of garnishee *nisi* issued by the High Court on 16/5/2012 from its bank as averred in paragraph 5 of the affidavit supporting the chamber summons filed on

4/6/2012 (page 239 of record of appeal). He argued that when that is taken into consideration, clearly, the application to set aside the *exparte* judgment was well within the thirty days.

In determining this issue, the High Court judge agreed with the learned counsel for the respondents that the appellant had filed the application out of time. He stated:

> *"Certainly from the submission by both sides, it is crystal clear that this application has been filed while out of time and without leave of the court. Under such circumstances, such application ought to be dismissed as it is provided under section 3(1) of the Law of Limitation Act [Cap 89 RE 2002]... The above provision of law is mandatory which must be complied with. This is because the issue of time limit takes preference over the issue of jurisdiction. That is a suit or (application) which is timebarred cannot be entertained by any court... "*

We are of the firm view that the High Court properly restated the position of the law as regards the limitation period for filing an application to set aside an *exparte* decision. Item 5, part III of the Schedule to the Limitation Act, as stated above stipulates 30 days for one to seek to set aside an *exparte* decision.

We find it important at his juncture to traverse for a better understanding of the concept of the limitation period as prescribed by the law. In the case of **M/S Sopa Management Limited Vs M/S Tanzania Revenue Authority**, Civil Appeal No. 25 of 2010 (unreported), the Court addressed the issue by reproducing B. B. Mitra - The Limitation Act 1963, 20th Edition where it cites the Halsbury' Laws of England on the policy of Limitation Act. Mitra also cites Andrew McGee in Limitation Periods (2nd Edition 1994) wherein he states:

> *"Arguments with regards to the policy underlying statutes of limitation fall into three main types. The first relates to the position of the defendant. It is said to be unfair that a defendant should have a claim hanging over him for an indefinite period and it is in this context that such enactments are sometimes described as 'statutes of peace'. The second looks at the matter from a more objective point of view. It suggests that a time limit is necessary because with the lapse of time, proof of a claim becomes more difficult, documentary evidence is likely to have been destroyed and memories of witnesses will fade. The third relates to the conduct of the plaintiff, it being thought right that a person who does not promptly act to enforce his rights should lose them. All these justifications have been considered by the courts."*

The Court found the above to be good principles where inspiration can be drawn, a finding we reaffirm and especially when Mitra stated further that:

> "*An unlimited and perpetual threat of litigation creates insecurity and uncertainty; some kind of limitation is essential for public order.*"

Regarding the invitation by the learned counsel for the appellant for this Court to find that application of item 5, part III of the Schedule to the Limitation Act, should consider when the said judgment is received or comes to the knowledge of the aggrieved parties, we find this to be an attempt to impute new matters into the provision. Clearly, the case cited by the learned counsel for the appellant to reinforce the stance as argued by the learned counsel for the 1st to 13th respondent is distinguishable. The cited cases are High Court cases and thus are not binding but with persuasive status apart from addressing different circumstances. Additionally, as conceded by the learned counsel for the appellant, the case of **Atilia Mocra** (supra) did not consider the correct provision of the law.

Essentially, after the appellant had become aware of the default decision after the 30-day period had expired, his remedy as rightly argued by Mrs. Tenga, should have been for the appellant to seek for extension of time to file an application to set aside the *exparte* judgment. (See

**Artibibes Pius Ishebabi Vs Hassan Issa Likwedembe and 3 Others**, Civil Appeal No. 5 of 2019 and **Golden Palm Limited Vs Cosmos Properties**, Civil Application No. 209/01 of 2019 (both unreported).

For the foregoing, we entertain no doubt that the High Court, upon consideration of the evidence and record before it, properly found that the application to set aside the *exparte* judgment was time-barred. For the foregoing, we find the complaint to lack substance.

Having found as above, we now venture into determining the available remedy for the appellant under the circumstances. Section 3(1) of the Limitation Act stipulates:

> *"Subject to the provision of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence,"*

In essence, having regard to the above provision, the only available remedy was for the application to be dismissed, which is what was effected by the High Court. In the circumstances, we thus find nothing to move us to disturb the High Court finding, since having been satisfied

that the application was time-barred in terms of Item 5 of Part III of the Schedule to the Law of Limitation Act, the High Court was enjoined by the express provisions of section 3(1) of that law to dismiss the said proceedings.

In the premises, we find the instant appeal devoid of merit. The appeal is dismissed with costs.

**DATED** at **DAR ES SALAAM** this 25th day of August, 2022.

W. B. KOROSSO
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The judgment delivered this 5th day of September, 2022 in the presence of Mr. Rashid George who holds brief for Mr. John Kamugisha, learned advocate for the appellant and Mr. Grayson Laizer, learned advocate for the 1st to 13th respondents, and Mr. Philip Mlay, learned advocate for 15th respondent and in the absence of 14th respondent is hereby certified as a true copy of the original.

J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**