

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

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 379 OF 2019

**THE INTERNATIONAL AIRLINES OF THE
UNITED ARAB EMIRATESAPPELLANT
VERSUS**

**NASSOR NASSOR..... RESPONDENT
[Appeal from the Judgment and Decree of the High Court of Tanzania,
(Dar es Salaam District Registry) at Dar es Salaam]**

(Mkasimongwa, J.)

**dated 4th day of April, 2016
in
Civil Appeal No. 67 of 2014**

JUDGMENT OF THE COURT

26th October & 8th November, 2022

MKUYE, J.A.:

The appellant, the International Airlines of the United Arab Emirates has appealed against the decision of the High Court of Tanzania (Dar es Salaam Registry) sitting in its first appellate jurisdiction in Civil Appeal No. 67 of 2014 in which it made a finding that the appeal had been lodged out of time and dismissed it.

For better appreciation of the matter, we find it appropriate to give a brief background as follows:

On 7th August, 2008, the respondent, Nassor Nassor travelled from the United Republic of Tanzania (URT) to Mascot Oman Emirates on board, a flight chartered by the appellant. The purpose of his journey was to shop for his son's upcoming wedding. On his flight back to the URT, the respondent was accompanied with two bags containing clothing bought from the shopping he made. However, alas! on arrival at Julius Nyerere International Airport (JKIA) and upon checking out he realised that one of his bags was missing and he could not easily trace it.

He reported the matter to the airlines authorities who on their part could not immediately trace it (the lost bag). The respondent was requested to make follow up on a later date which he did. The follow up, however, did not bear fruits and the respondent was advised to fill a Claim Settlement Form in which the appellant offered to compensate the respondent by paying him USD 20 for each kilogramme of the lost bag which meant that the respondent was to receive a sum of USD 220 in total.

However, the respondent did not accept their offer. This prompted the respondent to institute civil proceedings against the appellant in the Resident Magistrates' Court for Dar es Salaam at Kisutu (Civil Case No. 130 of 2011) based on tort of negligence and breach of trust. In the said suit, the respondent claimed for among others, compensation for the contents of his

lost bag; travelling expenses to and from Oman; general damages and costs of the suit.

On her part, the appellant in her written statement of defence denied each claim contending that the respondent did not suffer any damages for the loss of bag and, therefore, was not entitled to any payment or compensation for a return ticket to and from Oman and that the respondent was entitled to Oman Rial (OR) 340 or its equivalent in Tanzania shillings which is Tshs. 1,050,000.00 only.

Upon hearing both sides, the trial court found in favour of the respondent upon being satisfied that the appellant was in breach of her duty and thus she was liable to compensate the respondent.

Dissatisfied by the trial court's decision, the appellant appealed to the High Court. However, during the hearing of the appeal, the appellant (the former respondent) raised a preliminary objection that the appeal was out of time as the same had been lodged late by three days.

The High Court upon hearing submissions from both parties, delivered its ruling and overruled the objection and thus paving way for the appeal to be heard. However, as it turned out, the appellate Judge while composing the judgment re-opened the discussion on the competence of the appeal, as

to whether or otherwise the said appeal was lodged within time. This time around, the appellate Judge came up with a different view and observed that the appeal had been lodged out of time. Consequently, the appeal was dismissed with costs.

Aggrieved by the High Court decision, the appellant has come to this Court with a memorandum of appeal on three grounds of appeal to the effect that **one**, the High Court erred in law to determine the appeal on a point of objection which it had already overruled during the preliminary stage of the appeal; **two**, the High Court failed to order/issue due notice for the judgment to the appellant after the case lost track and judgment stayed undelivered for almost a year; and **three**, the High Court erred in entertaining written submissions by the respondent which were filed out of time and without leave of the court.

When the appeal was called on for hearing, the appellant was represented by Mr. Joseph Sang'udi learned counsel whereas the respondent appeared in person without any representation.

On being given the floor to expound his grounds of appeal, Mr. Sang'udi in the first place sought and leave was granted to him to abandon the third ground and thus remaining with only two grounds of appeal. He

then prayed to adopt the appellant's written submissions filed on 28th January, 2020 as well as the list of authorities filed on 19th October, 2022 to form part of her submission. After having done so, he submitted in relation to the first ground of appeal that after the appeal was lodged at the High Court, the respondent (appellant herein) filed a notice of preliminary objection to the effect that the appeal was time barred as shown at page 117 of the record of appeal and upon hearing both parties, the High Court overruled it and held that the appeal was within time (see pages 123 – 125 of the record of appeal). He submitted further that having overruled the preliminary objection the High Court ordered the appeal to be argued by way of written submission as per the schedule that was duly complied with. However, it was submitted that the same High Court in its final determination dated 4th April, 2016, overruled itself when it stated that:-

"As the appeal was lodged out of time and that it was so lodged without leave of the court, the same is incompetent for it is time barred. For that reason the appeal is dismissed with costs."

It was the learned counsel's further contention that after having overruled the preliminary objection based on limitation, the first appellate Judge became *functus officio* and had no jurisdiction to entertain or raise a similar issue *suo mottu* on an issue that had been determined. To fortify his

argument, he referred us to the case of **James Kibalo Mapalala v. British Broadcasting Corporation** [2004] TLR 143 at page 149.

Mr. Sang'udi also challenged the first appellate Judge for basing his decision on time limitation without availing the parties opportunity to be heard under the principle "*Audi Atteram Partem*".

In relation to the second ground of appeal, the learned counsel contended that after the conclusion of hearing of the matter at the High Court, it was set for judgment on 27th July, 2013. However, it came to be delivered on 4th April, 2016, almost after more than one year, without notice to the appellant. According to him, this contravened the provisions of Order XX rule I of the Civil Procedure Code, [Cap 33 R.E. 2019] which requires the court to deliver judgment instantly and if it is to be delivered on another date, then, due notice is to be issued. In support of his argument, he cited to us the case of **Dar Es Salaam Education and Office Stationary and Another v. NBC Holding Corporation and 2 others**, Civil Application No. 39 of 1999 page 7 (unreported).

In this regard, the learned counsel beseeched the Court to find that the appeal is merited and nullify the Judgment and order for a re-hearing of the appeal.

In reply, the respondent in the first place prayed to adopt his written submission in reply he had filed earlier on. He insisted that Hon. Mkasimongwa J. was right to find that the appeal was out of time and that what was required to be done by the appellant was to seek for extension of time which she did not do. He then urged the Court to find that the appeal has no merit and dismiss it.

Having examined both written and oral submissions, we think, the issue for our determination is whether the High Court was *functus officio* to entertain the issue it had already determined earlier on.

As to what entails *functus officio* was well dealt with by the Court of Appeal for Eastern Africa in the case of **Kamundi v. Republic**, [1973] 1 E.A. 540 and stated as follows:

"The court becomes functus officio when it disposes of a case by a verdict of guilty or by-passing sentence or making some orders finally disposing of the case".

See also **James Kibalo Mapalala's** case at pg. 136 (supra); **Tanzania Telecommunications Co. Ltd and 3 Others v. Tri Telecommunications Tanzania Ltd**, Civil Revision No. 62 of 2006 and **John Mgya and 4 Others v. Edmundi Mjenga and 6 Others**, Criminal Appeal No. 8 (A) of 1997 pg. 9 (both unreported).

Also, in the case of **NBC Limited and Another v. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 (unreported), although the facts in the said case may be slightly different from the case at hand, the principle established is relevant to this matter. In that case, the appellant raised a preliminary objection on time limitation and it was heard and overruled. Yet, the same issue cropped up again in the appellant's final submissions and the High Court once again entertained and maintained its earlier position only after it had addressed itself on the merits. On appeal to this Court, it was observed that it was not justifiable for the High Court to entertain issues which it had already determined as it was *functus officio*. Also, in the case of **Selina Michael v. Mtanzania Newspaper and 6 Others**, Civil Appeal No. 320 of 2017 (unreported), the Court observed that the successor judge was *functus officio* in determining what had been already determined by the predecessor judge.

In the case at hand, it is patent in the record of appeal as depicted at pages 117 and 151 – 156 that the High Court made two contradicting findings on the same issue of whether the appeal before it was time barred or otherwise. At page 117 of the record of appeal it shows that the respondent had on 6th March 2015 lodged a notice of preliminary objection

to the effect that the appeal (Civil Appeal No. 67 of 2014) was hopelessly time barred.

On 23rd March 2015 as shown at pages 122 to 125 of the record, the preliminary objection was heard and at page 125 the learned first appellate Judge (Mkasimongwa, J as he then was) overruled the preliminary objection and found that the same was filed in time. Then, the appeal was fixed to come up for hearing on 23rd April 2015.

The record is silent as to what transpired on 23rd April 2015, however, on 7th May 2015 an order to dispose of the appeal by way of written submission was issued whereby the schedule for filing the written submissions was given and further that the date of delivery of judgment was fixed to be on 27th July, 2015.

It would appear that the counsel for the appellant, in her written submissions (see 130 of the record of appeal) made arguments on the first ground of appeal in which the complaint was to the effect that the trial court erred in entertaining the suit which was instituted hopelessly out of time. The respondent resisted that proposition arguing that the suit was not time barred because being tortious the time limitation was three years.

In its judgment, the first appellate Judge seems to have raised the issue which was not put before him and for that matter not addressed by the parties. He swayed and started dealing with the issue whether the appeal was lodged within the prescribed limitation period. For clarity we let the record speak for itself as under:

"Going through the record it is clear that the judgment of the trial court was delivered on 23^d December, 2013. It was so delivered in the presence of both parties. It is on that date when the right of appeal accrued to any of the parties if were aggrieved by the judgment. As from the date the party aggrieved by the decision had ninety (90) days within which to file an appeal challenging it. That is by virtue of item 1 Part II of the Schedule to the Law of Limitation Act (Cap. 89 R.E. 2002). In any case the appellant in this matter ought to have filed the appeal by 22nd March, 2014. When the appellant filed this appeal on 18th June, 2014 as he indicates he did that out of time. He did that without having the time extended under section 14 (1) of the Law of Limitation Act...."

Then, the High Court concluded that:

"As the appeal was lodged out of time and that it was so lodged without leave of the court, the same is

incompetent for it is time barred. For that reason, the appeal is dismissed with costs.”

Looking at the above excerpts, it is without dispute that the appeal was determined based on the incompetence of the appeal being lodged out of time. There is no doubt that the order of the High Court that was made on 23rd March, 2015 which overruled the Preliminary Objection on time limitation conclusively determined the issue of whether or otherwise the appeal was time barred. In our settled view, it was inappropriate for the same court to overrule its own earlier decision. This is because, the High Court was *functus officio* and could not re-open the same subject once again (See **Kamundi’s** case (supra); **NBC Limited and Another** (supra) and **Celina Michael** (supra) where the court observed that it was a misdirection of the successor Judge to sit as an appellate Judge over a decision of a fellow Judge of the same court as it was irregular. We think, this ground suffices to dispose of the entire appeal and, therefore, we will not venture to deal with the remaining ground of appeal.

Given the circumstances, we invoke our revisional powers bestowed on us under section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and quash the judgment of the High Court and its decree and order

that the matter be remitted back to the High Court for composition of another judgment by the successor Judge.

It is so ordered.

DATED at DAR ES SALAAM this 7th day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered on 8th day of November, 2022 in the presence of Mr. Mahfudhu Mbagwa, learned counsel for the appellant and in the absence of the Respondent though duly notified through his mobile phone No. 0784 342193, is hereby certified as a true copy of original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL