IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A, And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 206 OF 2018

JOHNSON AMIR GARUMA.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF HOME AFFAIRS.....3RD RESPONDENT

(Appeal from the judgment of the High Court of Tanzania (Constitutional Court) at Dar es Salaam)

(Teemba, Kitusi, Afurani, JJ.)

dated the 22nd day of June, 2018

in

Misc. Civil Cause No. 11 of 2017

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JUDGMENT OF THE COURT

07th February & 15th March, 2023

MWANDAMBO, J.A.:

The appellant Johnson Amir Garuma petitioned the High Court under the Basic Rights and Duties Enforcement Act (the BRDEA) challenging the constitutionality of section 3 (1) of the Law of Limitation Act (henceforth the Act) giving power to the courts to dismiss matters found to be instituted outside the prescribed time allegedly without a fair hearing. The High Court (Teemba, Kitusi and Arufani, JJ.), dismissed the petition resulting in the instant appeal.

A brief factual background leading to the filing of the unsuccessful constitutional petition before the High Court runs as follows. The appellant was, until 12/11/2015, an employee of the police force stationed at Kigoma. He was dismissed from employment along with his two colleagues on disciplinary grounds. Afterwards, he preferred an appeal to the Inspector General of Police (second respondent) challenging the dismissal.

Apparently, the second respondent dismissed the appellant's appeal on 29/12/2015 but the appellant claimed that the decision dismissing his appeal reached him belatedly after several follow-ups through relatives. Through an advice from the Permanent Secretary, Ministry of Home Affairs to whom the appellant had sought intervention on the fate of his appeal, the appellant sought to apply for judicial review for certiorari and mandamus before the High Court. This he did by applying for leave to do so in Miscellaneous Civil Application No. 42 of 2016 filed on 28/06/2016. Due to some defect in the application the Registrar of the High Court rejected it and directed its rectification. Nonetheless, the applicant filed a fresh application; Miscellaneous Civil Application No. 42 of 2016 on 08/07/2016.

That application was found to be time barred. In consequence, the High Court dismissed it on 19/08/2016. That resulted into filing of an application for extension of time to lodge a fresh application for judicial review. The High Court (Wambali, JK. - as he then was) dismissed that application on the ground that since the earlier application had been dismissed under section 3 (1) of the Act for being time barred, the court could not entertain an application for extension of time to refile the application. Aggrieved, the appellant sought to challenge that ruling by an appeal but subsequently abandoned that path and opted to challenge the constitutionality of section 3 (1) of the Act vide Miscellaneous Civil Cause No. 11 of 2017, from which this appeal has arisen.

The appellant predicated his petition on four grounds set out in the originating summons namely; **one**, that section 3 (1) of the Act is unconstitutional and discriminatory in its effect and in direct conflict with Article 13 (1) (2) and 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 (the Constitution) as it bars courts from hearing matters on merit once it is found to be time barred; **two**, section 3 (1) of the Act is not saved by Articles 30, 31 and 32 of the Constitution; **three** a dismissal order on time bar marks the end of the road of the applicant's constitutional right to a hearing on merit and;

four, section 3 (1) of the Act is not in harmony with section 14 (1) of the same Act which empower the court to extend time for the institution of an application. It was further claimed in the fourth ground that the decision of the Court in **East African Development Bank v. Blue Line Enterprises Ltd.,** Civil Appeal No. 101 of 2009 (unreported) **(EADB**'s case) that once a matter is dismissed for being time barred the decision of the court becomes *res-judicata* was problematic.

The High Court determined the petition on the issue whether by providing for dismissal a time barred matter, section 3 (1) of the Act denies a litigant his right to a fair trial and thus unconstitutional. Upon considering the submissions for and against the petition, the High Court did not find any merit in it. It dismissed it upon being satisfied that, contrary to the appellant's contention, section 3 (1) of the Act is neither arbitrary nor does it bar an aggrieved party from lodging an appeal from a dismissal order which is what the appellant had attempted to do following the order dismissing his application. The High Court stressed that, section 3 (1) of the Act was in conformity with Article 30 of the Constitution having met the test of proportionality in line with the Court's decision in **Kukutia Ole Pumbun and Another v. Attorney General and Another** [1993] T.L.R. 159.

The appellant's memorandum of appeal raises four grounds of appeal. Ground one faults the judgment of the High Court as *per incuriam* for ignoring authorities cited in the appellant's written submissions. In ground two, the complaint is that the High Court erred in fact and in law by ignoring the law of precedents governing conflicting decisions of the Court of Appeal of Tanzania in the constitutional case before it in preference for Indian precedents. The appellant's quest in ground three is an invitation to convene a full bench of the Court to resolve conflicting decisions on section 3 (1) of the Act and the law on *res judicata*. Lastly, ground four consists of three limbs namely; first, the High Court is faulted for misdirecting itself on the standing precedents on the principle of *res judicata* between India and Tanzania; second, misinterpreting section 14 (1) of the Act by segregating and extinguishing the appellant's constitutional right to have access to the courts of law and finally, misinterpreting section 3 (1) of the Act to override Article 13 of the Constitution.

Mr. Winfred Mathias Mnzava, the learned advocate who represented the appellant in the High Court continues to represent him before the Court. The learned advocate lodged his written submissions in support of the appeal urging the Court to set aside the decision of the

High Court which dismissed the appellant's petition. Despite being served with the notice of hearing, Mr. Mnzava did not appear when the appeal was called on for hearing on 07/02/2023. Since he had already lodged his submissions in accordance with the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court treated him as having argued the appeal and appeared in terms of rule 106 (12) (b) and 112 (4) of the Rules.

Ms. Alesia A. Mbuya, learned Principal State Attorney from the office of the Solicitor General prepared and lodged the respondents' written submissions in reply. At the hearing, Mr. Hangi Chang'a, learned Principal State Attorney assisted by Mr. Charles Mtae and Ms. Ansila Makyao, both learned State Attorneys represented the respondents. Mr. Chang'a had very little to address the Court orally in addition to the written submissions in reply which he urged the Court to consider. At the Court's prompting in relation to ground three, Mr. Chang'a argued that ground three in the memorandum of appeal did not qualify as a ground of appeal rather, a prayer and urged the Court to treat it as such. We shall revert to this aspect at a later stage. We now turn our attention to the arguments for and against the appeal.

The first ground contends that the decision of the High Court was made *per incuriam* ignoring authorities in the petitioner's (appellant's) list of authorities and submissions. Mr. Mnzava took off on this ground by urging that, section 3 (1) of the Act is too clear and unambiguous to attract conflicting interpretations amongst what he calls eminent judges of the High Court and the Court of Appeal. To reinforce his argument, the learned advocate cited the Court's decisions in **Hashim Madongo & 2 Others v. Ministry of Industry and Trade & 2 Others**, Civil Application No. 78 of 2001 (unreported) and **EADB**'s case as representing a school of thought holding that once a proceeding is dismissed for being instituted out of time under section 3 (1) of the Act, that renders it *res judicata* with no room for going back to the court to seek extension of time because the court is already *functus officio.*

The learned advocate pointed out that the second school of thought holds that, dismissal of a matter for being time barred does not close doors to a litigant; such litigant is at liberty to go back to the court for extension of time because the matter does not become *res judicata.* Mr. Mnzava cited **Tanzania Fertilizer Company Limited v. National Insurance Corporation of Tanzania & Another** [2016] TLSLR 55; a decision of the High Court (Massati, J. as he then was) to reinforce his

argument. The learned advocate argued that, the second school of thought represents a correct interpretation of the law since the court does not become *functus officio* until the application for extension of time is heard and determined as mandated by section 63 of the Interpretation of Laws Act. He also referred to the Court's decision in **Yahya Athumani Kissesa v. Hadija Omar Athumani & 2 Others**, Civil Appeal No. 105 of 2014 (unreported) wherein the Court reiterated the distinction between an order dismissing a suit, appeal or an application and one striking it out. The learned advocate faulted the High Court for not holding that the appellant's application for extension of time was not rendered *res judicata* by an order dismissing the application for judicial review for being instituted out of time.

Mr. Mnzava urged further that, since there was a patent conflict on the issue whether a dismissal order under section 3 (1) of the Act constituted *res judicata*, the High Court was bound to follow the latter decisions holding that such an order did not result in the court becoming *functus officio.* The Court's decision in **Arcopar (O.M) SA v. Harbert Marwa Family Investments Co. Ltd. & 3 Others** [2015] T.L.R 76 was cited to bolster the proposition that where there are conflicting decisions of the same court on a fundamental principle of law, the court

should follow the latter until the full bench is convened to resolve such conflict.

According to the learned advocate, since **EADB**'s case (supra) was in conflict with the latter decisions on the issue, it should not have been followed by the High Court as it did not reflect a correct legal position on the effect of dismissing a matter instituted outside the prescribed time. The learned advocate's submissions on ground two was a reiterate of submission in ground one.

Not surprisingly, the learned State Attorneys supported the decision of the High Court combining their arguments on ground one and two. Essentially, they submitted that, contrary to the appellant's submissions, the High Court properly considered the submissions and authorities cited before making a determination on the petition and dismissing it. In particular, responding to the appellant's complaint faulting the High Court for not considering his submissions and authorities cited, the learned State Attorneys drew the Court's attention to some pages in the record of appeal showing that such submissions and authorities were considered. On the other hand, the learned State Attorneys submitted that, contrary to the appellant's contention, as held by the Court in **EADB**'s case, sections 3 (1) and 14 (1) of the Act should

not be read in isolation but in harmony and thus, a party who finds himself late in instituting a proceeding has a remedy by way of an application for extension of time under section 14 (1) but he cannot do so after the dismissal of such proceedings under section 3 (1) of the Act. The learned State Attorneys implored the Court to dismiss both grounds for lack of merit.

Having examined the submissions of the appellant's advocate it becomes clear that grounds one and two of appeal revolve on one main issue that is, the effect of a dismissal order under section 3 (1) of the Act on the one hand and whether a litigant whose matter is dismissed for being instituted out of time can still go back to the court for extension of time to institute an appeal or application under section 14 (1) of the Act on the other. It will be recalled that, Mr. Mnzava started from the premise that there were conflicting schools of thought on the issue we have posed urging the Court to follow the latter position represented by **Tanzania Fertilizer Company Limited** (supra). Indeed, it is plain from the learned advocate's submissions that, what he calls an erroneous interpretation of section 3 (1) and 14 (1) of the Act in **EADB**'s case is premised on the use of the phrase *res judicata*. We shall start by a revisit of the Court's decision in **EADB**'s case which was at the

centre of the determination of the petition now challenged in this appeal.

As evident from page 6 of the said decision, the appeal arose from a decision of the High Court (Sheikh, J.) striking out an application for extension of time to lodge a petition for setting aside an arbitration award made against the appellant Bank. Earlier on, the High Court had dismissed a petition for setting aside an arbitration award for being time barred. Although the appellant initiated an appeal process by lodging a notice of appeal, it abandoned that route and preferred an application for extension of time for filing a petition for setting aside the impugned award. It was contended by the respondent's learned advocate that the appeal against the order by Sheikh, J. striking out the application for extension of time on account of that court becoming *functus officio* was misconceived. Despite arguments from the appellant's advocates to the contrary stressing that such order did not constitute a finality, the Court rejected such arguments reiterating its earlier decisions in **Olam Uganda Suing Through its Attorney United Youth Shipping Company Limited v. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 and **Hashim Madongo and 2 Others v. Minister for**

Industry and Trade and 2 Others, Civil Appeal No. 27 of 2003 (both unreported). The Court stated as follows:

> *"...Once an order of dismissal is made under section 3 (1) it is not open to an aggrieved party to go back to the same court and institute an application for extension of time. The rationale is simple that is, as far as the court is concerned the issue of time limitation has been determined. So, a party cannot go back to the same court on the same issue. In short, the application before Sheikh, J. was res judicata...." (At pages 11 and 12).*

Addressing itself on the arguments canvassed by the advocates for the appellant on the application of the principle of *res judicata* under section 9 of the Civil Procedure Code (the CPC), the Court took the view that the cases relied upon by the said advocates on the scope and application of res judicata were relevant in the context in which they were decided. It stressed that, in the context of the appeal before it, *res judicata* applied in the manner expressed. Having so said, the Court proceeded with a discussion on the proper construction of sections 3 (1) and 14 (1) of the Act adopting a harmonious approach. It stated:

> *"Without much ado we are of the view that in enacting the Limitation Act, specifically sections 3 (1) and 14 (1), the legislature intended that there must be an end to litigation. Under section 14 (1) an intended application*

may bring an appeal or an application before or after the expiry of the prescribed period. So, if an appeal or an application is instituted beyond that period it shall be dismissed under section 3 (1). An applicant who wishes to play it safe must bring an application for enlargement of time ***before*** *or* ***after*** *the expiry of the stipulated period (before instituting the contemplated proceedings, of course). If the application is granted then he/she will be free to institute the appeal or the application. We do not read anything under section 14 (1) to suggest that an applicant is free to bring an application for extension of time after a* ***legal proceeding*** *is dismissed under section 3 (1), as happened here. To do so, would be res judicata as we have attempted to show above. In this regard, the application before Sheikh, J. was res judicata because as far as the High Court was concerned the issue of time limitation had already been determined by Mandia, J." [At pages 13 and 14).*

It will be recalled that **Olam Uganda**'s case was decided on 11/06/2007 while **Hashim Madongo**'s decision was delivered on 28/12/2007. That means, **EADB**'s case attacked by Mr. Mnzava simply restated the law on the proper construction of section 3 (1) and 14 (1) of the Act. As one can read from the Holy Bible in the gospel written by Matthew 5:17, just as Jesus did not come to destroy the law and the prophets, **EADB**'s case did by no means come to destroy the existing

law but to fulfil it. On the other hand, **Tanzania Fertilizer Company Limited** (supra) championed by Mr. Mnzava to have been correctly decided was delivered on 06/03/2007; three years before **EADB**'s case and three months before **Olam Uganda**'s case. Be it as it may, **Tanzania Fertilizer Company Limited** being a decision of the High Court, it could not stand in the same status with the decisions of the Court of Appeal and thus it could not be treated as a decision in conflict with other decisions of the Court. At any rate, by the learned advocate's argument on the procedure to be followed in the event of two conflicting decisions in the light of the Court's decision in **Arcopar**'s case (supra), it is obvious that **EADB**'s case subsequently decided was to be followed. The High Court followed that decision not because it was subsequently decided but because it was bound by it by the operation of the doctrine of precedent which Mr. Mnzava is undoubtedly aware of.

Furthermore, we understood Mr. Mnzava that the High Court should have followed **Yahya Athumani Kissesa v. Hadija Omar Athumani** (supra) together with other decisions cited in the learned advocate's written submissions which correctly discussed what constitutes a finality in a court's decision and the distinction between the terms; dismissal and striking out. With respect, that decision cannot be

said to be in conflict with **EADB**'s case in view of the context in which the principle of *res judicata* was referred to in both cases. Indeed, in **EADB**'s case the Court was referred to the decision of the defunct Court of Appeal for East Africa in **Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimahomed Osman** [1959] EA 577 and held as it did that, a dismissal order under section 3 (1) of the Act constituted a finality of the suit, appeal or application with no room for a litigant going back to the same court for extension of time. It is plain that the Court reiterated what it had already stated in **Olam Uganda**'s case (supra). Accordingly, the cases relied upon by Mr. Mnzava particularly, **Yahya Athumani Kissesa** (supra) are irrelevant and distinguishable to the instant appeal. Ultimately, we find no merit in grounds one and two and dismiss them.

Next, we shall revert to ground three. This ground calls for a constitution of the full bench to resolve what Mr. Mnzava refers to a conflict in the decisions of the Court on the proper interpretation of sections 3 (1) and 14 (1) of the Act in respect of the effect of an order dismissing a proceeding for being instituted out of time. As submitted by Mr. Chang'a, this is not a ground of appeal envisaged by rule 93 (1)

of the Rules. It is an invitation which should have been made in the written submissions in pursuance of rule 106 (4) of the Rules.

Be it as it may, even if we were minded to treat it as a proper ground of appeal, it would be superfluous to accede to it since we have held that there is nothing to support the argument that **EADB**'s case was decided *per incuriam* and so the invitation to constitute a full bench does not arise.

Finally, we shall discuss ground four which consists of three limbs as alluded to earlier.

Regarding the first limb, ignoring the unusual language he used in addressing the Court, the essence of his submission was that the High Court placed too much reliance on Indian Laws and precedents on the effect of a dismissal order under section 3 (1) of the Act in contrast with the local precedents holding that a dismissal order has no effect of rendering the matter *res judicata.* It is for this reason the learned advocate urged that the High Court ought to have held that a dismissal order of the applicant's application for judicial review an account of time bar did not have the effect of barring him from seeking extension of time under section 14 (1) of the Act.

The learned advocate's submissions in the second and third limbs of this ground are a repeat of what he canvassed in ground one and two. He reiterates his contention that section 3 (1) and 14 (1) of the Act are contradictory and mutually exclusive and thus the High Court's interpretation of both sections was erroneous resulting into denying the appellant access to the court for extension of time contrary to the provisions of section 63 of the Interpretation of Laws Act and Article 13 of the Constitution. Submitting further, the learned advocate contended that, section 3 (1) of the Act is a procedural provision which cannot prevail over the Constitution and thus, its interpretation should not result in defeating justice. Mr. Mnzava was resolute in his submission and urged that, the interpretation of section 3 (1) of the Act based on **EADB**'s case was erroneous because that case wrongly held that a dismissal order constituted *res judicata* in conflict with the host of judicial precedents to the contrary.

In their reply, the learned State Attorneys advanced the following arguments. **One,** the High Court did not determine the petition based on Indian law or judicial precedents but was only persuaded by the decided cases on an equivalent provision. **Two,** the High Court subjected section 3 (1) and 14 (1) of the Act to Article 13 of the Constitution and was

satisfied that it was not arbitrary as it was enacted in conformity with Article 30 of the Constitution with the sole purpose of regulating the procedure for instituting proceedings. **Three,** section 3 (1) did not supersede Article 13 of the Constitution neither does section 14 (1) curtail access to justice. They thus invited the Court to dismiss this ground.

We think we should not belabour much in this ground. As rightly submitted by the learned State Attorneys, the criticism against the High Court allegedly for disregarding the local precedents in preference for Indian law and precedents is wholly misplaced. There is no dispute that the Act is, by and large similar to the Indian Limitation Act and thus, the interpretation of the identical provision by courts in India has a persuasive value to the Court's decisions in our jurisdiction. It is evident and at any rate not unusual, all what the High Court did in its decision was to point out that such provisions as section 3 (1) of the Act were not peculiar to Tanzania but present in other jurisdictions, particularly India. By doing so, the High Court did not become subservient to Indian laws and judicial precedents as claimed by Mr. Mnzava. We have demonstrated when addressing grounds one and two that, there was no evidence of conflicting decisions on the effect of a dismissal order under

section 3 (1) of the Act, that is, a litigant against whom such order has been made cannot go back to the court for extension of time under section 14 (1) of the Act. It has been equally demonstrated that, the only remedy such a person has is to appeal against that order. Notwithstanding the attempts to argue before us that section 3 (1) of the Act is unconstitutional, we wholly subscribe to the reasoning of the High Court in its judgment thus:

> *"The petitioner had a remedy to challenge the decision of the High Court by lodging an appeal to the Court of Appeal.*
>
> *On the basis of the above cited provisions of the Constitution, we are of the views that section 3 (1) of the Act (supra) is not arbitrary or unconstitutional. This section was enacted in conformity with Articles 30 of the Constitution which requires the relevant authorities to enact legislation for the purpose of regulating procedure for instituting proceedings. The petitioner's right to file a suit in court has not been denied in any manner as long as it is instituted within the prescribed time. The time limit given under the Act has a purpose. It regulates the exercise of right and freedoms by individuals in filing suits without interfering with the rights others.*
>
> *It is a public policy and interest that litigation should not continue forever. Litigation must come to an end so that the litigants will be able to focus on other important*

things in their life. The provisions of section 3 (1) of the Act is one of the ways in which the state can strike a balance between individual's right to instituting the suit and the social control in terms of time limit." [At page 298 of the record].

On the whole, we have seen no merit in ground four and dismiss it in its entirety.

In the event and for the foregoing reasons, we dismiss the appeal for lack of merit. Given the nature of the matter, we make no order as to costs.

DATED at **DAR ES SALAAM** this 10th day of March, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of March, 2023 in the presence of Mr. Winfred Mnzava, learned counsel for the Appellant and Mr. Charles Mtae, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL