IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NUMBER 26 of 2010

[JUMA, J., UTAMWA, J., and MUTUNGI, J.]

(From Revision No. 76/2008 Industrial Court of Tanzania-by E.L.K. Mwipopo [Judge, CM], E.J. Mkasimongwa [Acting Deputy CM] and A.I. Mtiginjola [Acting Deputy CM] dated 02-02-2010)

BETWEEN

PETER NJIBHA..... APPELLANT

VS

TANZANIA POSTAL BANK..... RESPONDENT

JUDGMENT

Date of last Order: 16-08-2011
Date of Judgment: 19-08-2011

JUMA, J.:

This is an appeal against the decision of the Industrial Court of Tanzania in Revision Application No. 76 of 2008. Appellant Peter Njibha would like this court to quash the decision of the Industrial Court of Tanzania (hereinafter referred to as ICT) and restore the decision of C.E.R. William (Deputy Chairman) in

Trade Inquiry No. 35 of 2007 which was delivered on 9th July 2008. The Tanzania Postal Bank is the respondent in this appeal.

Appellant has preferred three (3) grounds of appeal. In the first ground appellant contends that while revising the Trade Inquiry No. 35 of 2007 the ICT failed to make a finding on the preliminary point of law which the appellant had raised. In the second ground, appellant asserts that the ICT erred in law when it decided the revision proceedings *suo motu* without hearing the parties on the issue whether the whole of Trade Inquiry No. 35 of 2007 was time barred or not. In his third ground, appellant maintains that the ICT should not have held that the Trade Inquiry No. 35 of 2007 was time barred; this is because the letter dated 11-04-2007 by the Labour Commissioner specifically stated that the matter was first filed in the High Court as Civil Case No. 107 of 1999 and was struck out on 29th April 2005 for want of jurisdiction.

The hearing of this appeal proceeded by way of written submissions. Mr. Ngudungi prepared and filed submissions on behalf of the appellant. Respondent's submissions were drawn and filed by REX ATTORNEYS. Before considering the

submissions on the grounds of appeal it is important to reflect back on the facts giving the background leading up to the present appeal. The Appellant was employed by the Respondent from 13th June 1994 until 15th March 1999 when his employment was terminated. The termination was allegedly occasioned by the restructuring of the respondent bank that resulted in the merger of one department together with the department which the appellant headed. According to the respondent, that restructuring also necessitated changes of employment terms and the establishment of a new organisational structure of the respondent bank. The new organisational structure required specific qualifications for office holders. Respondent maintained that the appellant was duly informed about the restructuring that led to the abolition of the position he had.

Appellant was dissatisfied by termination of his employment. He contended before the Trade Inquiry that the department which was abolished following the restructuring was Commercial Banking Department which he headed in an acting capacity. Appellant was of the view that his own post of Principal Banking Operations Officer; was not abolished under the restructuring of

the respondent bank, and that the directives of the Board of Directors dated 8th May 1998 which were not complied with.

Appellant referred the trade dispute to the Trade Inquiry. The Trade Inquiry formulated the following three inter-related issues to guide its determination of the dispute:

i) whether appellant's post was abolished under the restructuring exercise;

ii) whether proper procedures were followed when terminating the appellant's employment; and

iii) whether the appellant was given an opportunity to be heard.

It is apparent from the records, the Trade Inquiry agreed with the appellant by holding that the position of the appellant was not abolished under the restructuring and Inquiry held that to all intents and purposes the appellant's post of Principal Banking Operations Officer was still intact, it remarked thus:-

> *"... Because the Department which the appellant headed in an acting capacity and since his acting capacity was never confirmed, employer was supposed to reinstate the appellant to his post of Principal Banking Operations Officer Grade II."*

On the issue whether proper procedures were followed when terminating the employment of the appellant; the Inquiry was informed that employment of the appellant was governed by the employment contract which specified that any party to that contract may terminate it by issuing a three-month notice to express the intention to terminate. The Trade Inquiry found that the termination letter which the respondent sent to the appellant did not comply with the terms of employment of the appellant's contract. That is, a three-month notice was not issued. The respondent's letter dated 15th March 1999 informed merely the appellant:

> *"**ABOLITION OF OFFICE***
>
> *Following the abolition of your position and Department, in the process of restructuring the Bank, I have been directed to inform you that your services with Tanzania Postal Bank are being terminated with effect from 17/03/1999."*

The Trade Inquiry held that the governing procedure for termination of the appellant's employment was not followed.

With regard to the issue whether the appellant was given an opportunity to be heard, the Inquiry revisited the Minutes of the Board Meeting of 15th March 1999. It noted that there is neither

any mention of the employment of the appellant nor about the abolition of his Department. That the Board only deliberated on the issue of one person; Mr. Magee, who was the Principal Accountant and whose services were terminated. The Trade Inquiry found and also held that the appellant was condemned unheard because he was not accorded any opportunity of being heard. Finally on 9th July 2008, the Trade Inquiry (C.E.R. William) ordered the respondent to pay the appellant:

i) his 36 months' salaries from the time he was terminated at the rate of TZS 578,800/= per month;

ii) statutory compensation amounting to a 12 months' salary due to the unlawful breach of the employment contract; and

iii)a three months salary in lieu of notice.

Dissatisfied with the decision of the Trade Inquiry; the respondent on 25-07-2008 presented his application before the Industrial Court of Tanzania **(Revision No. 76 of 2008- E.L.K. Mwipopo-Chairman, E.J. Mkasimongwa- Acting Deputy Chairman and A.I. Mtiginjola Acting Deputy Chairman)** seeking for the revision. In response to respondent's application for revision, appellant raised a Preliminary Point of Objection contending that the respondent's application for revision was brought out of time. On 2nd February 2010, the Industrial Court

of Tanzania found that the Trade Inquiry No. 35 of 2005 was void since it was filed by the appellant out of the prescribed period of limitation.

In this appeal before us; and submitting on the contention by the appellant that the respondent was time barred when it filed Revision No. 76 of 2008, Mr. Ngudungi referred this court to Rule 5-(1) of the **Industrial Court (Revision Proceedings) Rules, 1990** which provides that an application for revision shall be made fourteen days from the date on which the decision is delivered. According to the learned Advocate, the decision against which an application for revision was requested by the respondent; was delivered on 09-07-2008 and the application for revision was supposed to have been filed by 22-07-2008 but was instead filed by the respondent on 25-07-2008. Mr. Ngudungi insists that the respondent should have first sought an extension of time before applying for the revision.

Submitting why he thought that the revision court erred in law for failing to make a finding on appellant's preliminary point of objection, Mr. Ngudungi submitted that the revision court should not have proceeded *suo motu* to revise the Trade Inquiry

while writing its decision and without affording the parties a chance to be heard on the issue whether proceedings before the Trade Inquiry were out of the prescribed period of limitation. The learned Advocate cemented his submission by citing the **Industrial Court (Revision of Proceedings) Rules, Government Notice No. 268 of 1990**.

In its replying submissions, the REX ATTORNEYS combined the first and the second grounds of appeal together. The learned firm of Advocates submitted that contrary to what is alleged by the appellant, the record of proceedings shows that the revision court dealt with the preliminary point of objection. It was further submitted on behalf of the respondent that the revision court was correct in its finding since the original complaint that eventually led to the revision proceedings was from the very beginning out of the prescribed period of limitation; there was no valid application for revision before the revision court.

On the issue of alleged error of law occasioned by the determination of issue of limitation period *suo motu*, the REX ATTORNEYS submitted that any court has the power to deal with the issue of limitation the way the revision court did.

According to the REX ATTORNEYS, section 3 (1) of the **Law of Limitation Act, Cap. 89 R.E. 2002** courts are vested with power to dismiss any proceeding preferred out of time whether or not the question of limitation is raised or not. Finally, the learned REX ATTORNEYS pointed out that the right to be heard under **Industrial Court (Revision of Proceedings) Rules, Government Notice No. 268 of 1990** does not apply where the court lacks jurisdiction by reason of the prescribed period of limitation.

The central theme cutting across all the three grounds of appeal revolves around the prescribed period of limitation. Inevitably, submissions of the learned counsel on these grounds of appeal overlap considerably. As to the first ground of appeal the issue between the parties is whether or not the revision court failed to make a finding on the point of preliminary objection. We do not agree with the submission made on behalf of the appellant that the ICT on revision did not consider the preliminary point of objection that was raised by the appellant. It is clear from the decision of ICT that the revision court not only sought the opinion of assessors on the point of objection, but also considered the point of objection from the wider question

whether the Trade Inquiry No. 35 of 2005 was filed within the prescribed period of limitation. The following extract from the decision of the revision court clearly shows that the preliminary point of objection was considered:

> *"... Katika maoni yao waungwana washauri wa mahakama Bw. L. Masoud (CHODAWU) na Bw. Juma A. Fundi (ATE) wanasema kuwa pingamizi la awali lililoletwa na Mjibu Marejeo halina msingi na kwa sababu hiyo litupiliwe mbali. Wao kila mmoja anasema kuwa maombi haya ya marejeo yameletwa ndani ya muda kisheria." [page 3]*
>
> *"...Jopo limetafakari maombi ya marejeo, pingamizi, hoja za pande zote mbili na maoni hayo ya waungwana washauri. Ni hoja yetu kuwa suala la Ukomo wa Muda wa kuleta Shauri mahakamani linakwenda kwenye kuhoji uwezo wa Mahakama kupokea, kusikiliza na kuamua Shauri lililoko mbele yake. Mahakama itakosa uwezo wa kupokea, kusikiliza na kuamua Shauri lililoletwa mbele yake ikiwa limeletwa nje ya muda uliowekwa kisheria..... Hapa tumepokea pingamizi la awali kwamba Maombi haya ya Marejeo yameletwa nje ya muda bila kibali cha Mahakama kufanya hivyo. Kimsingi pingamizi hilo lina msingi na tulidhani tulikubali. Hata hivyo kabla ya kufanya hivyo, Jopo lilitaka kujiridhisha kama kumbukumbu (Record) iko safi..."*

According to the ICT, appellant's cause of action accrued on 15-03-1999 when he was terminated. But it was 7 years and 6 months later on 13 October 2006 when appellant took his dispute to the Commissioner for Labour. ICT also noted that the

dispute entered the Labour Court system on 18-04-2007 which was 8 years from 15-03-1999. The ICT had observed that the appellant should have filed his trade dispute within six years from 15-03-1999. The ICT held that the appellant had filed the trade dispute outside the prescribed period. Having found that the trade dispute leading up to the Trade Inquiry No. 35 of 2007 was barred by prescribed period of limitation, the revision court was perfectly entitled to look at the period of limitation not only with regard to the Revision Application Number 76 of 2008 but also with regard to the earlier Trade Inquiry No. 35 of 2007.

It is clear from the foregoing that the appellant's first ground of appeal contending that the revision court failed to make a finding on the Preliminary Point of law is not borne out by the decision of the Revision Court. The first ground of appeal lacks merit and is hereby dismissed.

With regard to the second ground of appeal with respect to the decision of revision court to revise *suo motu* the original complaint which was filed outside the prescribed period, we note that the issue here is whether or not the ICT was legally right to raise and decide the issue of limitation of time *suo motu*. We are

of the different view from the one espoused by the appellant. The learned REX ATTORNEYS are correct to submit that courts are vested with power to dismiss any proceeding preferred out of time whether or not the question of limitation is raised or not. There are several decisions of the Court of Appeal of Tanzania which support the decision of the revision court to determine the issue regarding limitation period *suo motu*. In **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation, Court of Appeal at Mwanza, Civil Application No. 3 of 2004** the Court of Appeal held that courts can *suo motu* raise and decide on issues of law touching upon jurisdiction. Another useful guidance with regard to the power of the court to deal with the question of prescribed period of limitation at any stage of proceedings without hearing the parties concerned is furnished by the Court of Appeal in **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers 2. Organization of Tanzania Workers Union Civil Appeal No. 79 of 2001 (At DSM)** which stated that:

> *The Law of Limitation has a provision for the consequence where a proceeding is instituted out of time*

without leave of the Court. It is Section 3. Under that provision, that is, Section 3, the consequence is that, such proceeding shall be dismissed whether or not limitation has been set up as a defence.

With due respect to the learned counsel for the appellant the issue of prescribed period of limitation is distinct and different from the right to be heard under the **Industrial Court (Revision of Proceedings) Rules, Government Notice No. 268 of 1990**. The learned REX ATTORNEYS are correct to submit that the right to be heard provided for by the **Industrial Court (Revision of Proceedings) Rules, Government Notice No. 268 of 1990** presupposes the beneficiary of these Rules is within prescribed period of limitation.

From the foregoing, the contention by the appellant that the revision court erred when it decided to revise the proceedings from the moment the complaint was originally filed is clearly not supported by the law governing limitation periods. We thus determine the issue in respect of the second ground of appeal positively and we hold that this ground of appeal is as a result dismissed.

The third ground of appeal in essence centres on the contention that the revision court should not have counted for purposes of limitation period, the period the appellants had taken to prosecute a Civil Case Number 107 of 1999 before it was struck out on 29th April 2005. Mr. Ngudungi for the appellant does not dispute the applicable law that the time limit for a trade inquiry is six years. The learned Advocate further concedes that the trade dispute was filed in April 2007 which on face of it was outside the prescribed period of limitation. Mr. Ngudungi hastened to add that the period the appellant spent to file the High Court Civil Case No. 107 of 1999 before it was struck out is governed by section 21 of the **Law of Limitation Act, Cap 89** to exclude from computation of time the period when the appellant was diligently prosecuting another civil proceeding.

Responding to the issue regarding the time spent to prosecute the High Court Civil Case No. 107 of 1999, the learned REX ATTORNEYS submitted that the appellant should have expressly pleaded so in his pleading.

From the two opposing positions taken by the learned counsel on behalf of the appellant and respondent on the third ground

of appeal, we have asked ourselves whether the period taken to prosecute the High Court Civil No. 107 of 1999 should have been considered by the revision court. There is no doubt that the appellant had spent some of the time to prosecute a Civil Case No. 107 of 1999 in the High Court before that case was struck out on 29th April 2005 for want of jurisdiction. With due respect, the REX ATTORNEYS are correct in their submission that the appellant cannot seek the exclusion of time he took to prosecute a civil case at this level. We must also point out that the appellant herein should have applied for an extension of time before initiating his labour dispute leading up to Trade Inquiry No. 35 of 2007. It is during that application for extension of time when the appellant would have explained about the time he took to prosecute the civil case at the High Court. We thus decide the issue raised above negatively and we hereby find that the third ground of appeal also lacks merit and it is hereby dismissed.

For the foregoing reasons, the appeal in its entirety is devoid of merit and is as a result dismissed with costs. We do hereby order accordingly.

I.H. JUMA
JUDGE
19-08-2011

J. H. K. UTAMWA
JUDGE
19-08-2011

B.R. MUTUNGI
JUDGE
19-08-2011

Delivered in presence of Mr. Daudi Ramadhani, (Advocate) for the Respondent, who also holds brief for Mr. Ngudungi, (Advocate) for the Appellant.

I.H. JUMA
JUDGE
19-08-2011

J. H. K. UTAMWA
JUDGE
19-08-2011

B.R. MUTUNGI
JUDGE
19-08-2011