

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAM MAIN REGISTRY**

MISC. CIVIL. Cause. NO. 11 OF 2017

(CORAM: TEEMBA, KITUSI, ARUFANI, JJJ)

JOHNSON AMIR GARUMA.PETITIONER

VERSUS

THE ATTORNEY GENERAL.1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE2ND RESPONDENT

**THE PERMANENT SECRETARY MINISTRY
OF THE HOME AFFAIRS 3RD RESPONDENT**

JUDGMENT OF THE COURT

TEEMBA. J.

By way of an Originating Summons under Articles 26(2) and 30(3) of the Constitution of the United Republic of Tanzania; Section 4 and 5 of the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002]; and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 the Petitioner JOHNSON AMIR GARUMA, is challenging the constitutionality of Section 3 (1) of the Law of Limitation Act, [Cap 89 RE 2002] hereafter to be referred to as the Act. He alleges that this provision is unconstitutional and discriminatory in its effect and it is in direct conflict with Articles 13(1); 13(2); and 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (hereinafter referred to as the Constitution). It

is contended that Section 3(1) of this Act, bars a person to a fair hearing in court, on merit, where an application is time barred. It is further alleged that a dismissal of an application under Section 3(1) of the Act for being time barred takes away a litigant's constitutional right and entitlement to a fair hearing against the decision of the court, thereby declaring that a dismissal of an application is the end of the road for an applicant's constitutional right. The petitioner added that the principle of Res Judicata which means that a matter has come to an end presupposes that there have been fair and full hearing before the court on merit. The fourth ground upon which this petition is based is that section 14(1) of the Act overrides and overrules the provisions of section 3(1) of the same Act. The Petitioner is therefore moving this court to declare that the provisions of Section 3(1) of the Act are unconstitutional for offending Articles 13(1), 13(2) and 13(6) (a) of the Constitution. He is also praying the court *"to examine and remove the unconstitutional legal block under section 3(1) of the Act which prevents the petitioner from pursuing his constitutional right under Article 13 of the Constitution of the United Republic of Tanzania .*

The facts which gave rise to this petition are summarized as follows: The petitioner was a police officer for 26 years and he was stationed at Kigoma until on 12/11/2015 when he was dismissed from employment by the Regional Police Commander, Kigoma. This was after an inquiry over exchange of arising from messages regarding the Inspector General of Police (IGP) meeting with police officers at Kigoma. The Petitioner left Kigoma police camp for Musoma three days after dismissal. As he was aggrieved, he appealed to the IGP immediately. The latter decided the appeal in writing on 29/12/2015 while the petitioner was in the village.

The petitioner requested his brothers who were in Dar es Salaam to visit the police headquarters to collect the IGP's decision on his behalf. In the long run, the petitioner received the IGP's decision in March 2016 and instructed a lawyer to file an application for leave for orders of certiorari. Unfortunately, it was filed but rejected by the Registrar for being defective. The same was filed afresh on 8th July 2016 but was dismissed on 19/8/2016 for being time-barred.

Another application for extension of time to file application for leave to apply for orders of certiorari and Mandamus was filed on 9th September 2016 under section 14(1) of the Act. The court invited the parties to address it on the issue, whether after dismissal of the application for leave to file for orders of/Certiorari on ground of being time-barred, the applicant (petitioner) could still pursue his application for extension of time before the same Court. The parties filed written submissions on the basis of which and relying on the case cited by Attorney General **East African Development Bank versus Blue line Enterprises Ltd CAT**, Civil Appeal no. 101 of 2009 (unreported), it was held that when a matter is dismissed under S.3 (1) of the Act that matter comes to an end and no application can be entertained for extension of time before the same court. Eventually, that application for extension of time was dismissed for the reason that it was Res Judicata. We are aware that the petitioner filed a Notice to appeal to the Court of Appeal but the same was later on withdrawn. The Petitioner has then decided to raise this constitutional issue as he believes that Section 3(1) of the Act is unconstitutional allegedly because it takes away his right to address the grievances, a right stipulated under the Constitution.

The petitioner is represented by Mr. Winfred Mathias Mnzava, learned advocate, while Mr. Mark Mulwambo, learned Principal State Attorney was the lead Attorney for the Respondents. We commend learned counsel for the effort and industry in arguing the petition and representing their parties' positions in this matter in the course of which they cited quite a number of authorities. Much as we appreciate their work, we may not be able to address everything that was put forth by them.

In the course of filing written submissions, the learned counsel agreed to address the following four issues, namely:

- (i) Whether Section 3(1) of the Law of Limitation Act is unconstitutional and in conflict with Article 13 of the Constitution of the United Republic of Tanzania 1977 (as amended).
- (ii) Whether a harmonious interpretation of S. 3 (1) and S.14(1) of the Law of Limitation Act has the effect of bringing litigations to an end and thereby barring aggrieved parties from exercising their constitutional rights to be heard on merit.
- (iii) Whether a law made under the Constitution may lawfully bar an aggrieved party from access to one's Constitutional rights to be heard and still remain valid.
- (iv) What remedy are the parties entitled to?

After considering the import of the issues we have found ourselves satisfied that the issue for determination is only one, that is, whether by providing for dismissal of a time barred matter, section 3(1) of the Act denies a party his or her right to a fair trial and therefore becomes

unconstitutional. In essence that is what issues No.1 is all about. We are going to treat issue No.2 and 3, if and where necessary, as sub issues and factors for determining the main issue.

Mr. Mnzava submitted in respect of the first issue that the criteria for deciding whether a law made under the Constitution is unconstitutional or not, was laid down by the Court of Appeal of Tanzania in the land mark cases of **(i) KUKUTIA OLE PUMBUN & ANOTHER VS. THE ATTORNEY GENERAL & ANOTHER [1993] TLR 159;**

(II) DIRECTOR OF PUBLIC PROSECUTIONS VS DAUDI PETE [1993] T.L.R.22.

Mr. Mnzavas referred to the three principles as follows:

“(I) Articles 13(3) and 30(3) of the country’s Constitution guarantees unimpeded access to the Court to have one’s grievances heard and determined there.

(II) In considering any act which restricts fundamental rights of the individual, such as the right to free access to the court of law in this case, the court has to take into account and strike a balance between the interests of the individual and those of the society of which the individual is a part.

(III) A law which seeks to limit or derogate from the basic right of the individual on the grounds of public interest will not be declared unconstitutional if it satisfies two requirements:

- (a) *That it is lawful and not arbitrary.*
- (b) *That the limitation imposed by such law is not more than reasonably necessary to achieve the legitimate object. This is the principle of proportionality."*

The same arguments and cases were put forward by the respondents counsel who also cited the case of **Julius Ndyanabo Vs Attorney General** [2004] T.L.R. 14

On the basis of the principles ^{laid down} ~~law~~ in **Kukutia Pumbun, Daudi Peter and Julius Ndyambo** and as rightly submitted by learned counsel for both the petitioner and the respondents it is settled law that in order for a provision which derogates into a basic right to be constitutional it must not be arbitrary and must pass the proportionality test. We shall therefore proceed to test S. 3(1) of the Act against those factors. We wish also to restate the essence of the Act as being the interest of the public to see litigations come to an end, a principle that has been pronounced in many decisions. For instance in the case of **Bank of Tanzania Versus Said A. Marinda & 30 Others**, Civil Reference No 3 of 2014, CAT at DSM (Unreported), it was held inter alia;

"Always any step in which a party to any proceedings intends to take, must be taken within a prescribed time so that litigation should come to an end – hence the Latin maxim – *Intereste rei publicae ut sit finis litium.*"

The learned advocate argued that while Article 13 of the Constitution provides for equality before the law without discrimination, the right for a fair hearing and right of appeal are denied by the provisions of section 3 (1) of the Act which bars free access to the courts of law. He added that, the rights of a person to be heard are extinguished forever by section 3(1) of the Act which is not in harmony with the provisions of S. 14(1) of the same Act because the latter allows the court to extend time for filing of an application or appeal against a decision of the court. The learned advocate also posed a question suggesting that the impugned provision is inconsistent with the principle of RES JUDICATA which only applies when a matter is finally and conclusively determined upon the parties being heard on merit.

The Respondents' submission on the same issue opened by a general statement of admission that the Constitution as the basic law has provided numerous rights under Article 12- 29. The learned State Attorney submitted that Article 30(3) of the same Constitution provides the procedure for instituting proceedings for redress in the High Court if any right or duty owed to a person has been or is likely to be violated. It was further submitted, and there is no dispute that, the Basic Rights and Duties Enforcement Act, [Cap 3 RE 2002] was enacted by the Parliament to give force to the basic rights provided in the Constitution. However, the respondent Attorney added, and once again there is no dispute that, all rights provided in the Constitution are not absolute and can be limited from time to time for good cause, citing the decision in the case of **Julius Ndyanabo Vs Attorney General (supra)**, where it was held;

"The Constitution rests on three fundamental pillars namely, (1) rule of law; (2) fundamental right; and (3) independent, impartial and accessible judicature. These three pillars of the Constitutional order are linked together by the fundamental right of access to justice . . . it is access to justice which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day".

The respondent attacked the petition by submitting that the issue at hand is not about access to justice, the right to be heard under the rule of law or impartiality of the judiciary but rather when and where to access justice according to procedure established by law.

It was argued that Section 3(1) of the Act does not restrict the right to access the courts but that, this provision sets time limit within which to bring a matter before the court after expiration of which the matter will not be entertained. The respondent cited the case of **Majuru Vs Zimbabwe 2008 AHRTR 146 (ACHPR 2008)** of the African Commission to show the practice from other regional and international jurisdictions that, it is normal for limitations to be put in place for instituting proceedings.

The petitioner's advocate suggested that instead of using the word ***dismissed*** which appears under Section 3(1) of the Act the consequences of one being out of time should be to "*Strike out*" the matter so that it

conforms with the Constitution. The learned advocate went further to suggest rephrasing of the same Section 3(1).

In order to appreciate the arguments of the learned counsel, let us reproduce the provisions of Article 13(1), (2), (3) and (6) of the Constitution which are relevant to the rights allegedly interfered with Section 3(1) of the Act. Article 13 states:

"13 (1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

13 (2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.

13 (3) The civil rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.

"13 (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles namely:

(a) When the rights and duties of any person are being determined by the court or any other agency, that

person shall be entitled to a fair hearing and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned."

In this case, both sides are on common territory that every citizen is entitled to equal right and protection before the law. It is also agreed that the rights have to be protected and determined by courts through a fair hearing and providing right of appeal or other legal remedies in case one is aggrieved by any decision of the court. Their point of departure is how and when an individual can enjoy those rights without interfering with the rights of other citizens. The respondents' attorney was of the view that the rights stipulated in the Constitution are not absolute. In the case of **Julius Ndyanabo Vs Attorney General (supra)** the Court held that

(b) *"Under the Constitution, an individual's fundamental right may have to yield to the common weal of the society . . .*

(c)

(d) ***"There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade,***

*occupation, or calling at his pleasure and to any other thing which he can lawfully do without let hindrance by any other person. On the other hand, **for the very protection of these liberties the society must arm itself with certain powers. What the constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. Personal freedoms and rights must necessarily have limits . . .***

(e)

(f) A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few"

(g) (Emphasis added)

We do agree with the petitioner that the Constitution requires free access to the courts of law for a fair hearing of person's grievances. We also agree with him that the hearing procedure should allow other legal remedies against the decision of the court. However, the same Constitution under Article 30(1) (2) and (4) makes it clear that the rights and freedoms provided therein **shall not be exercised in a manner that will cause interference with the rights and freedoms of other persons or of the public interest.** Article 30(2) provides:

*" (2) It is hereby declared that the provisions contained in this part of this Constitution which set out the principles of rights, freedom and duties, **does not render unlawful any existing law or***

- b)
- c)
- d)
- e)
- f) *Enabling any other thing to be done which*
promotes or preserves the national
interest in general." *(Emphasis is ours).*

Before we conclude we are going to discuss the two sub issues that relate to interpretation of Section 3(1) and Section 14(1) of the Act and whether a provision may remain constitutional while it violates constitutional basic rights. We will combine these two issues because they are almost similar as they challenge the legality of law which bars an aggrieved party from access to his constitutional rights to be heard in court.

It is a common principle that a correct interpretation of laws must abide by the Statute of Interpretation of Laws Act, Cap 1 RE 2002. In his submissions, Mr. Mnzava took the view that sections 3(1) and 14(1) are contradictory. On the other side, Mr. Mulwambo submitted that the law is

harmonized and there is no any contradiction in those two provisions. The attacked sections 3(1) and 14(1) of the Act provide:

*"3(1) Subject to the provisions 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 therefor opposite thereto in the second column, **shall be dismissed** whether or not limitation has set up as a defence."*

*"14(1) Notwithstanding the provisions of this Act, **the court may** for any reasonable or sufficient cause, extend the period of **limitation for the institution of an appeal or an application** other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such **appeal or application.**" (Emphasis is ours)*

Mr. Mnzava submitted that the controlling clause in Section 3 (1) above is "**Subject to the provisions of this Act**" which, according to him, **is not final or conclusive** because it is subject to other provisions of this Act. He further argued that if there is any provision in the same Act that can cure limitation of time or a time bar, then S.3(1) shall submit to that provision because the dismissal is not final. The learned counsel added that it is only by adhering to the Interpretation of Laws Act that

interpretation of laws can be consistent and certain. Mr Mnzava also insisted that the controlling clause in section 14(1) is **“Notwithstanding the provisions of this Act”** which is construed to state that whatever else is stated in the Act, as to matters of time, is subject to the provisions of S.14(1) of the Act. He therefore concluded that this notion includes the provisions of Section 3(1) of the Act which are subject to S.14 (1). His argument is that S.14 (1) gives unfettered power to the court to extend time and the consideration to be taken into account in accepting or rejecting an application for extension of time is reasonable or sufficient cause. The learned advocate cited a number of authors who have written extensively on this area. Reference was also made to a number of cases including:

- (1) Julius Ndyanabo Vs Attorney General (supra).**
- (2) Zakaria Kamwela and 126 others vs. The Minister of Education and Vocational Training & the Attorney General 2016 TLS-LR 198.**

Responding to the petitioner’s submission, Mr. Mulwambo argued the second and third issues together. He submitted and conceded that the Interpretation of Laws Act, [Cap 1 RE 2002] clearly provides what the law says on extension of time and the powers of court to extend time under section 63 of the Interpretation of Laws Act or Section 14(1) of the Law Act. The learned State Attorney argued that the problem explained by the petitioner arose when he asked for an extension of time in an application for Review. It was argued that the provisions of Section 3(1) of the Act do not in any way upon interpretation bar an individual from accessing constitutional rights nor does it end litigation once reasons for extension of time have been given to court under section 14(1) of the same Act.

for execution. Thus, in our considered view, any person can file an application in court for extension of time as long as there are sufficient reasons to do so. It is therefore our observation that these two sections are consistent and certain in their interpretation. Any person who wants to enjoy his right for a fair hearing as stipulated under the Constitution, he has obligation to observe the rights of others including the public at large.

Even if sections 3(1) and 14(1) of the Act may appear to mean different things, we do not take that to mean they are contradictory. For we take the position by the court of Appeal in the case we are citing below to have been instructive. In the case of **The Director of Public Prosecution Vs Li Ling Ling** Criminal Appeal No. 508 of 2015(CAT (unreported) it was held:

"It is trite principle of statutory interpretation that one section of a statute cannot be used to defeat the other. The statute must instead, be read as a whole"

In our view, giving a proper interpretation to section 3(1) of Act, we think the dismissal of the matter by the High court does not bar the aggrieved

party from lodging an appeal which in fact the petitioner had intimated to do. It is also necessary for us to state at this juncture that one has no right to apply for relief to the High Court under the Basic Rights and Duties Enforcement Act, Cap 2 RE 2002 where the law has already prescribed a statutory or alternative remedy. This was decided in the case of **Tanzania Cigarette Company vs The Fair Competition Commission and Another, Misc. Civil Case no. 31 of 2010** (Unreported).

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 Article 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 of 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 of instituting the suits and the social control in terms of time limit.

In our views, the **concept of proportionality** was used in a sound manner in enacting section 3 complained of. There is a balance between the restriction imposed by section 3(1) of the Act and the severity of the nature of restriction. The restriction imposed under the impugned law is of more interest to the public when compared to the infringement on the part of the individual persons.

Time limit is applied worldwide to control wrongful exercise of rights and freedoms of individuals in bringing up their suits in courts and in other state agencies. This is evidenced in the cited case of **Majuru vs Zimbabwe (2008) AHRLR** in which the African Commission made a ruling on what is "considerable time". The Commission which has a duty to protect the human and people's rights according to the African Charter had this to say:

*"108. The Charter does not provide for what constitutes "reasonable period". However, the Commission has the mandate to interpret the provisions of the Charter and in doing so, it takes cognizance of its duty to protect human and people's rights as stipulated in the Charter. The provisions of other international/regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they . . . 'may only deal with the matter . . . **within a period of six***

months from the date on which the final decision was taken' after this period has elapsed the court/Commission will no longer entertain the communication."


In other jurisdiction such as Indian they still retain provision such as section 3(1) of the Act.

The provision as to limitation of time and the consequences there of is not peculiar to this jurisdiction. If we may cite but ^{one} ~~two~~ examples from ~~England and~~ India, the position is told by the following information obtained from an Article~~s~~ found in the website: <https://www.Ukpandi.com> In that Article **V. Subramanian Kumar, Advocate** when discussing the limitation Act, 1963 of India he stated that;

" section 3 of the aforesaid Act specifically lays down that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

With the above in mind, we are persuaded and therefore agree with the respondent's submissions that, it is normal for limitations to be put in place for instituting proceedings. Without limitation, the individual's liberty will go uncontrolled and eventually leading to anarchy and disorder (See: **Ndyanabo Vs Attorney General** (supra). To conclude, we wish to point out that the petitioner's right to institute a suit is not barred by section 3(1) of the Law of Limitation Act. His right is curtailed by his failure to fulfill his

obligation in maintaining time limit and/or by seeking extension of time within which to institute his suit. For the above reasons, we are firm that the petition lacks merit and the same is hereby dismissed but without costs.


R.A. TEEMBA

JUDGE

22/6/2018


I. P. KITUSI

JUDGE

22/6/2018


I. ARUFANI

JUDGE