

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 158 OF 2019**

*(Arising from the decision of Temeke District Court in Misc. Civil Application No. 35 of 2019 dated 8<sup>th</sup> July, 2019 by Honourable Kihawa RM)*

**MAULID NGOWENGO & 3 OTHERS.....APPELLANTS**

**VERSUS**

**GENERAL MANAGER SONIA INDUSTRIES LIMITED....RESPONDENT**

**JUDGEMENT**

**Date of last Order:** 22/04/2020

**Date of Judgement:** 20/07/2020

**MLYAMBINA, J.**

The appellants filed this appeal to challenge the decision of Temeke District Court dated on 8<sup>th</sup> July, 2019 which decision had an effect of dismissing the appellants application for execution for being time barred.

The brief background of this matter as properly captured by the respondents is that; the appellants were employed as security guards by Sonia Industries Limited until 1998 when they were terminated on misconduct grounds. Appellants were aggrieved by the termination decision and appealed to the then Temeke District conciliation Board (the Board) which upon hearing the Board

ordered the respondent to reinstate the appellants. The respondent was faulted for failure to follow the procedure and not on allegations of misconduct.

Being aggrieved with the decision of the Board, the respondent appealed to the Minister to challenge the decision on the ground that since the alleged misconduct of stealing leveled against the appellants was confirmed by the Board, the Minister confirmed the Board's award in 2000.

The respondent was once again aggrieved by the decision of the Minister and commenced process to refer the matter to High Court for judicial review. Before the process for judicial review, the respondent was subjected under Receivership process where a receiver and Manager was appointed by National Bank of Commerce being the creditor for recovery of the loan which the respondent had borrowed and defaulted. The public was informed of the receivership and finally the company assets were disposed for sale to settle the liabilities. It is alleged that since then in 2000 the respondent never operated until to date hence a defunct company.

The appellants also communicated to the Receiver and Manager for payment of their claims unsuccessfully as the realized sum

could not settle all the liabilities. In September, 2007, the appellants applied through the Temeke District Labour Officer in charge to Temeke District Court for execution vide *Misc. Civil Application No. 49 of 2007* against the General Manager of Sonia Distributors. The appellant claimed therein for payment of the accrued salaries from 1998 to 2007, allowances for 4 members of each appellant's family for failure to repatriate them from 1998 to 2007 and accrued annual leaves from 1998 to 2007 all together for four appellants totaling TZS. 92, 120,000/=.

The General Manager of Sonia Distributors limited a was summoned to show cause why execution orders should not issue. Upon hearing parties to the execution, the Court (Hon. Riwa RM) delivered a ruling on 22<sup>nd</sup> March, 2010 allowing execution in favour of the appellants on the grounds that they were not paid from the receivership proceeds and that in alternative the Managing Director be liable to pay them.

Acting on the above Court order, the appellants approached the Court and prayed for attachment of the judgment debtor's properties and upon attachment of some properties, it was objected that the said properties were not for the judgement debtor and upon investigation the Court released them forthwith. Again, the appellants file a subsequent application for execution

now seeking to arrest the Director of the said company and put to prison as civil prisoner for failure to pay the decretal sum. This application was dismissed in 2013 by the Court on the grounds a corporate body is separate and distinct from its Directors and Shareholders and such that Directors and Shareholders cannot be held liable over the debts of the Company. Appellants appealed to the High Court vide Misc. Civil Appeal No. 1 of 2014 to challenge the dismissal order and the High Court through his lordship justice Mkasimongwa in 2015 nullified the proceedings of the subordinate Court saying that they were a nullity from the start and advised the decree holders to file a fresh application for execution.

In 2016 the appellants filed before Temeke District Court the same application for execution vide against Sonia Distributors Ltd claiming a total sum of TZs. 1,075, 460,000/= being accrued salaries and allowances from 1998 to 2016. The Temeke District Court through honorable Hamza granted for execution and ordered the Director of Sonia Distributors Ltd to be arrested and put to prison as civil prisoner for failure to pay the decree. The respondent challenged the decision by way of revision to High Court vide Civil Revision No. 52 of 2017 which was decided by her Ladyship Sameji by nullifying all the proceedings of the subordinate Court and the main reason was that from the start the appellants (decree holders)

sued a wrong party Sonia Distributors Ltd instead of Sonia Industries Ltd who was indeed their employer and judgment debtor. The Court advised the appellants to file a fresh application for execution vide Misc. Civil Application No. 35 of 2019 against Sonia Industries Ltd for the payment of the accrued salaries and allowances to the tune of TZs. 1, 321, 006,000/= . The respondent raised among others preliminary objections that the application was time barred and the Court dismissed it for being time barred. The appellants have appealed to this Court challenging the dismissal order of Temeke District Court in Misc. Civil Application No. 35 of 2019, on the following grounds:

- 1) That, the trial Magistrate erred in law and fact by holding that execution application was time barred without taking into consideration the fact that appellants have been in Court since 2007 making follow-up on execution of the same decree.
- 2) That, the trial Magistrate grossly erred in law and fact by deciding that, the decision made by Hon. Riwa in Misc. Civil Application No. 49 of 2007 in favour of the appellants herein, was nullified by High Court through Mkasimogwa, J. on 13/11/2015.

- 3) That, the trial Magistrate erred in law and fact by failing to ascertain fraud committed by the respondent as alleged or claimed by the appellants despite the fact that the respondent failed to deny alleged fraud.
- 4) That, the trial Magistrate grossly erred in law and fact by deciding the case against the appellants basing on decision of Honourable Kalli which was already quashed and nullified by the High Court (Mkasimongwa. J.) in Misc. Civil Appeal No. 1 of 2014.
- 5) That, the trial Magistrate erred in law and fact by deciding that, Director and or General Manager of the company cannot be sued for the debt (s) of the company without considering exceptional circumstances of the case.
- 6) That, the trial Magistrate erred in law and fact by delivering ruling which varies with its drawn order.
- 7) That, the trial Magistrate erred in law and fact by holding that, the application is dismissed with cost without considering the fact that it is a labour matter.
- 8) That, the trial Magistrate erred in law and fact by giving decision against the appellants basing on procedural technicalities.

9) That, the trial Magistrate erred in law and fact by giving decision without evaluating evidences in the written submission by the appellants hence reached to unfair decision.

10 That, the trial Magistrate erred in law and fact by giving decision on a matter which she was *functus officio*.

Wherefore, the appellants prayed this honorable Court be pleased to allow this appeal by.

1) Quashing and setting aside the entire proceeding, ruling and order of the trial Court in Misc. Civil Application No. 35 of 2019, dated 8<sup>th</sup> July, 2019 by honorable Kihawa, RM.

2) Declaring that the appellants are entitled to apply a fresh application for execution of the decree from 29<sup>th</sup> October, 2018 where by it was a date in which mistake or fraud was discovered through a letter from BRELA.

3) Declaring that the appellants are entitled to exclusion of time consumed in prosecuting other suit or applications against the respondent as far as computation of limitation of time to file application is concerned.

4) Any other orders this Court may deem fit and just to grant.

The appeal was argued by way of written submissions. The first appellant was represented by Khalifa Seif Ngemba, Attorney. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> appellants were un-represented. The respondent was represented by S. Ishengoma, Advocate.

The first ground of appeal was that the trial Magistrate erred in law and fact by holding that execution application was time barred without taking into consideration the fact that the appellants have been in Court since 2007 making follow up on execution of the same decree. The appellants submitted that the application for execution of the decree at hand was brought before the trial Court within time since the year 2007, where the trial magistrate held that decree holders (appellants) are entitled to execution of the said decree. However, in fallowing execution of the said decree, the appellants have been facing with preliminary objections of procedural technicalities as a result several time their application for execution have been dismissed without being heard on merits.

The appellants submitted that the High Court had been giving directive as to whom to be sued and what to be done, however direction of High Court could not be effected due to controversial of information from Business Registration and Licensing Agency (BRELA) which was intended to mislead the appellants and denying that respondent's company is not in existence. In different period



the appellants have been misled by BRELA that the respondent company is not recognized and no record of existence of the same.

It was maintained by the appellants that, according to aforesaid controversial, Honorable Riwa (First trial Magistrate) held that Tanil Somaiya (Managing Director/General Manager of the respondent company) personally liable for the debt (s) of his company and the High Court never nullified such a ruling up to date. Since the appellants were not represented by advocate, the appellants continued basing on such controversial information. BRELA admitted and gave the appellants information that the said company was there and it was registered since the year 1993.

It was argued that since the appellants knocked the door of the Court in time since 2007 but their application for several time faced with obstacles of procedural irregularity and since BRELA now has already admitted on its fraud which it did commit, then, all the period consumed in Court to prosecute and making follow-up other proceedings are entitled to be excluded from computation of limitation of time as stipulated under *Section 21 & 3 (c) of the Law of Limitation Act, [cap 89 R.E 2002]*.

The appellants cited the case of **Jitenda Kumar Gupta v. Sukhbit Singh Saini**, where the High Court of India, was

interpreting Section 14 of the Indian Limitation Act which is *pari material* to our *Section 21 (2) and (3) (c) of the Tanzania Law of Limitation Act (supra)*.

Also, in the case of **Eshikaeli N. Makere v. Tanzania Telecommunications Co. Ltd and Another**, Court of Appeal of Tanzania, 2017 (unreported) where the Court *inter alia* stated that;

*according to Section 21 (1) of the Law of Limitation Act in computing the period of limitation prescribed in any suit the time during which the plaintiff has been prosecuting with due diligence other civil proceedings whether in a Court of first instance or in a Court of appeal against the defendant such time shall be exclude.*

Another authority cited by the appellants is the case of **Elibariki Asseri Nnko v. Shifaya Mushi** (1998) T.L.R 81 where the Court held that;

*as the applicant had all the time acting with due diligence...The delay in appeal fell under the ambit of section 21 of the Law of Limitation Act (supra).*

On the second ground of appeal, the appellants argued that the trial Magistrate grossly erred in law and fact by deciding that, the decision made by Honorable Riwa In Misc. Civil Application No. 49

of 2007 in favour of the appellants herein, was nullified by the High Court on 13/11/2015. The appellants were of submission that the High Court on 13/11/2015 nullified proceedings and decision made by Honorable Kalli as from 13/8/2013 up to 28/11/2013 but not the decision of Honorable Riwa which was issued on 22/3/2010.

On the third ground of appeal, the appellants denied the fact claimed by the respondent that the purported company was liquidated hence the decree in question cannot be executed. Thus, until he completed his work of receivership, Sonia industries ltd was neither dead nor liquidated.

Further, the purported receivership documents (notice of appointment of Joint Receivers and Mangers by NBC Bank to the Registrar of the Company) shows that, the company against which the receiver was appointed is not Sonia Industries Limited which is subject to the application at hand, rather, a company which was mentioned there is so called Sonia Group of Companies Ltd. Thus, the judgment debtor had fraudulently involved the documents with Sonia Industries Ltd so as to escape and prevent execution of the order in question. It was the view of the appellants that, as per *Section 39 (2) (a) of the Civil Procedure Code, [CAP 33 R.E. 2002]* the Court is legally under duty to order execution of decree/order even if it was presented after expiration of term of twelve years

provided that the judgment debtor has by fraud prevented execution of the same.

Furthermore, by virtue of *Section 26 of the Law of Limitation Act*, (supra) provides that;

*where in the case of any proceeding for which a period of limitation is prescribed:*

- a) The proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims:*
- b) The right of action is concealed by the fraud of any such person as aforesaid; or*
- c) The proceeding is for relief from; the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered it...*

On the sixth ground of appeal was that the trial Magistrate erred in law and facts by delivering ruling which varies with its drawn order the appellants submit that the contents of ruling and drawn order are quite different. Bad enough, in the ruling there is no decision of Court rather the same is seen in the drawn order. It

was the appellants' view that it is incurable defective and it is contrary to *Order XX Rule 6 of the Civil Procedure Code (supra)*.

The eighth ground of appeal was that the trial Magistrate erred in law and fact by giving decision against the appellants basing on procedural technicalities. The appellants submitted that in dispensing justice the Court is not required to base on provisions of procedural technicalities and that it is required to consider the general principle of overriding objective which requires the Court *inter alia* to deal with the suit/application brought before it on time and not dismissing the same as a result of the raised preliminary objections. This is by virtue of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 and also *Section 3A of the Civil Procedure Code (supra)* as amended by [Written Laws (Miscellaneous Amendments) No. 3 Act, 2018].

The respondent's reply was based on the first ground of appeal only. The respondent submitted that for the first time the appellants filed their application for execution on September, 2007 vide Misc. Civil Application No. 49 of 2007 against the General Manager of Sonia Distributors Limited as the judgment debtor. They called upon the Court to note right from here that the appellants had executed against a wrong party as the proper party was Sonia Industries Limited. Again in 2016 the appellants filed

another application for execution vide Misc. Civil Application No 49/2007, Miscellaneous Civil Application No. 96 of 2016 against the Director of Sonia Distributors Limited (wrong party) which proceedings were later on nullified by this Court through her ladyship Sameji via Civil Revision No. 52 of 2017.

According to the respondent, time limitation for execution of a decree is governed by the Law of Limitation Act Cap 89 R.E. 2002 and as revised 2018 and precisely Item 20 of Part III Column Two of the Schedule which reads as follows;

*to enforce a judgment, decree or order of any Court where the period of limitation is not provided for In this actor any other written la is twelve years 12.*

The appellants award/decreed was derived in 1999 and the Minister's Order was in 2000. The right to execute accrued from 2000. Counting 12 years the last year for demarcation for the appellants to file execution against the judgment debtor would be in December, 2012. The respondent was therefore of submission that the appellants application for Execution No. 35 of 2019 was out of time for about 7 years.

Further to that, it was the respondent's argument that the Law of Limitation (*supra*) under Section 3 (1) strictly requires whatever proceedings filed out of the prescribed time has to be dismissed.

Guided by the above cited proviso, this Court in the case of **John Cornel v. Grevo (T) Ltd**, Civil Case No. 70 of 1998, while determining a preliminary objection on time limitation, in its ruling at page 8 had this to say:

*The law of limitation, on actions, knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web.*

Further to the foregoing, in the case of **Tanzania Revenue Authority v. Dawson Ishengoma**, Civil Appeal No. 126 of 2011 (unreported) the Court of appeal instead that the time limit starts to accrue from the date when the part becomes aware of his/her rights for execution, in which in the present case the parties/deed holder were aware since 2000.

As well said by the trial Magistrate (Honorable Kihawa, RM) in her ruling, that the appellants lateness to file execution in time was actuated by the appellants themselves and no one to blame by keeping filing execution application against a wrong party Sonia Distributors instead of Sonia Industries Limited. As such, there is

nothing wrong the trial Magistrate can be faulted for dismissing the matter filed out of time while guided by the cited cases of this Court and the Court of appeal which bid upon the subordinate Courts.

It was the humble submissions of the respondent that by the strength of the proviso in the *Law of Limitation Act Cap [89 R.E 2002] as amended* in particular *Section 3 Item 20 of part III of the Second Column of the Schedule* and cited cases in support of the law, the ruling of the trial Court is valid and the appellants appeal is of no merit deserving to be dismissed with cost.

I do agree with the respondent that under the provisions of *Section 3 of the Law of Limitation Act (supra)* any matter filed out of time has to be dismissed. I further agree with both parties that the time limit to enforce a judgement decree award or order of the Court is twelve years, as per Item 20 of Part III Column Two of the Schedule to the Law of Limitation Act (*supra*).

Indeed, there is no dispute that the award sought to be executed was given in the year 1999. As such, the 12 years for execution has expired. However, the records are every clear. The appellants have been in Court corridors seeking for execution of the same award since September, 2007 to date.



Through I understand the law is that once a judgement has been rendered, the decree thereof must be executed within 12 years; and that no fresh action for enforcement of the decree/award/order can be brought after the expiry of 12 years from the date of delivery of the judgement, I however do not find that the judgement in question do not fall within the ambit of *Section 3 of the Law Of Limitation* because the execution process started before the lapse of 12 years from the date of the award. As such, I do agree with the appellants that in terms of *Section 21 (2) and (3) (c) of the Law of Limitation Act*, the time spent before the trial Court must be excluded. On that note, excluding the year 2007 to 2018 makes the appellant within the required 12 years for execution of their award.

Further, I have noted the respondent never resisted the rest of the grounds of appeal in their written submissions. I therefore uphold all of the rest of grounds. Needless the afore state of facts, let me give a general observation in respect of the personality of a corporate entity which it appears to be an issue in this matter.

In essence, there is no divergence of opinion from both sides on the legal personality of the corporate entity which has its own property, right and liabilities separate from its shareholder upon its

incorporation. (See **Salomon v. Salomon Company Ltd** (1895-99) All ER33.

Indeed, there is no dispute between the parties that the proper plaintiff in any proceedings or action in respect of alleged wrong done to the company is the company itself. (see **Foss v. Harbottle (1843) 67 E.R 189**. In the case of **Edwards v. Halliwell** (1950) all E.R 1064, Jenkins L. J stated:

*The rule in Foss v. Harbottle, as I understand it, comes to no more than this first, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then candid question or if the simple majority challenges the transaction there is no valid reason why the company should not sue.*

However, as correctly stated by the appellants, there is no record to prove that Sonia Industries was liquidated at any point of time. The notice of appointment of Joint Receivers and Managers by NBC Bank to the Registrar of Companies shows that the company subject of receivership was *Sonia Group of Companies Ltd.* Therefore, involving Sonia Industries Ltd into Sonia Group of Companies Ltd is dirty game of escaping and preventing the appellants from executing their awards. This Court worth of its meaning cannot allow it.

In the circumstances of the above, this appeal is upheld with costs. The ruling and order of the Trial Court in *Misc. Civil Application No. 35 of 2019* dated 8<sup>th</sup> July, 2019 is quashed and set aside, the execution proceedings to proceed before another Resident Magistrate of competent jurisdiction on merits and on urgent basis.



**Y. J. MLYAMBINA**  
**JUDGE**  
**20/7/2020**

Judgement pronounced and dated 20<sup>th</sup> July, 2020 in the presence of Khalifa Ngemba, Attorney of the 1<sup>st</sup> Appellant, the 3<sup>rd</sup> and 4<sup>th</sup>

Appellants in person, Counsel Zacharia Daudi for the respondent and in the absence of the 2<sup>nd</sup> appellant. Right of appeal explained.



**Y. J. MLYAMBINA**  
**JUDGE**  
**20/7/2020**