

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE NO. 134 OF 2021

PETRO MWAJA MKWASA.....PLAINTIFF

VERSUS

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED1ST DEFENDANT

FRED WILLUM NTALISA..... 2ND DEFENDANT

UAP INSURANCE TANZANIA LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Date of the last Order: 07/06/2022

Date of the Ruling: 10/06/2022

E.E.KAKOLAKI, J.

On 27th August, 2021 the Plaintiff herein, one Petro Mwaja Mkwasa filed a suit against the defendants above named claiming from them jointly and/or severally payment of Tshs. 200,000,000/= being general and special damages for costs and losses incurred resulting from road accident, being a passenger in the bus with Registration No. T. 466 CVV make Eicher, owned by 1st defendant, driven by 2nd defendant and insured by the 3rd defendant. Further to that, he is claiming for payment of 20% interest per annum of the

special damages from 25th day of April, 2019 to date of judgment, interest on the decretal sum at the court's rate of 12% per annum from the date of judgment to the date of payment and costs of the suit.

Briefly it is gleaned from the Plaintiff's plaint that, on 25/04/2018, the plaintiff being a passenger in the above mentioned bus which got involved in accident at the traffic light along Mandela and Kilwa road, sustained body multiple injuries, pelvic girdle and cheek, the injuries that disabled him from working for gains for some time while undergoing treatment that costed him much. It appears in the process of seeking for compensation several demands were tabled before the defendants who unfortunately remained adamant and turned deaf their ears hence the present suit.

When served with the plaint both defendants save for the 2nd defendant in their Written Statements of Defence to the said plaint filed Notices of preliminary objections on a point of law. The 1st and 4th defendants had two grounds namely **one**, the suit being founded on tort, is time barred for contravening the mandatory provision of item 6 of Part 1 to the Schedule made under section 3 of the law of limitation Act, [Cap 89 R.E 2019](the LLA) and **second**, that the plaintiff have no cause of action against the 1st and 4th defendants. The 3rd defendant like the 1st and 4th defendants in

their first ground of objection asserted that, the suit is bad in law for being hopelessly time barred.

The objections raised by both defendants were scheduled to be heard on 7/6/2022, which date neither 1st and 4th defendants' counsel nor any officer from them appeared in Court to prosecute objections the result of which was to dismiss them moved by the prayer from the plaintiff's counsel and proceeded to hear and determine the ground of objection raised by the 3rd defendant. On that date only Mr. Jamhuri Johnson and Mr. Mwenda both learned counsels for the plaintiff and 3rd defendant, respectively appeared before the court and were read to be heard on the raised ground of objection by the 3rd defendant. Both parties were heard viva voce.

It was Mr. Mwenda for the 3rd defendant who staged first and submitted that; the suit being premised on tort whose time limitation for its institution is three (3) years as prescribed in item 6 part 1 of the 1st schedule of the LLA was preferred beyond time limitation. He said, as averred by the plaintiff in paragraph 7 of the plaint, the accident subject of this suit occurred on 25/04/2018 and this suit was filed in court on 27/08/2021, in which almost four years had passed. He submitted since the same was preferred outside the prescribed time limitation then ought to have suffered dismissal as

provided by section 3(1) of LLA, that any matter instituted out of time limit specified under the law shall be dismissed. He further submitted that, the provision section 53(2) of the Law of interpretation Act, [Cap 1 R.E 2019], provides that where in any written law the word "shall" is used , the same must be interpreted to mean that the function so conferred shall be performed. Therefore according to him the word shall as used under section 3(1) of the LLA was designed to let any matter filed outside the prescribed period of time to be dismissed in which he pressed this Court to do with costs.

In rebuttal Mr. Johnson for the Plaintiff while arguing in support of the position of the law as stated by Mr.Mwenda, urged this Court not to take the course proposed by the 3rd defendant as the facts of this case do not fit in. He contended that, this matter was formerly instituted before the Resident Magistrate's Court for Dar es salaam Region at Kisutu as Civil Case No. 216 of 2020 against the 1st, 2nd and 3rd defendants in the present suit. However, same was struck out on 19/4/2021, on the reason of non-joinder of party. Copy of the ruling in the said RM's Court was supplied to the Court for easy of reference. He said, since the defendant was busy diligently prosecuting that case before the subordinate Court in which parties are the same and

the same cause of action or other cause of the like nature then the provision section 21(1) and 2(c) of LLA is applicable and should come to the plaintiff's rescue by excluding the period in which the plaintiff spent there prosecuting that action or cause. In his view since the Plaintiff was before the RM's Court diligently prosecuting Civil Case No.216 of 2020 in which it was found to be incompetent hence struck out on 19/3/2021, then this suit which was preferred on 26/08/2021, was filed in time, and therefore the raised preliminary objection be dismissed with costs.

In his rejoinder submission Mr.Mwenda, consistently maintained his submission in chief that the suit was filed out of specified time. On the relied provision of section 21 (1) and 2(c) of the LLA by the plaintiff's counsel he argued that, the same does not bail him out of the situation he is in, as the section would be applicable if the first case was struck out for reasons of jurisdiction which is not the case. He contended that, the Civil Case No.216 of 2020 before RM's Court was struck out on the two grounds of objection raised by the 1st defendant there that, **One**, the suit was prematurely filed for want of statutory notice of 90 days and **Second**, on the defect of verification clause. Therefore, there is nothing on the issue of jurisdiction, he stressed. On top of that Mr.Mwenda averred that, the parties in Civil Case

No. 216 of 2020 are different to the one before this honourable court as in this matter there is addition of the 4th defendant, therefore it cannot be concluded that parties are the same. He was of the view therefore that, invoking the provision of section 21(1) of the LLA, to cover this situation is misconception of the law hence pressed the Court to dismiss the suit with costs.

I have carefully considered the rival submissions from both counsels for the Plaintiff and 3rd defendant as well as perused the record and the supplied ruling of the RM's Court for Dar es salaam at Kisutu in line of the contentious issue by the parties. Parties are all at one that this matter was filed on 26/08/2021 more than three (3) years provided by the LLA, after the accrual of the cause of action which is the date of accident 25/04/2018 as prescribed by section 4 of the LLA and that, an action preferred outside the prescribed time limitation under section 3(1) of the LLA, is liable to suffer dismissal. What are they parting their ways is on the issue whether provisions of section 21(1) and 3(c) of the LLA, covers the plaintiff who alleges was before the RM's Court diligently prosecuting another case under the same cause of action or other cause of the like nature with same parties before the same was struck out for non-joinder of party, hence that period should not be

reckoned while Mr. Mwenda is of the contrary view that, the provision does not cover him as the cause of striking it out was not jurisdictional issue but that the matter being filed out of time.

As alluded to above in this matter the date of accident in cause of action was to accrue from is 25/4/2018 and the date of filing of this suit is 2/8/2021 when the filing fees was paid by the plaintiff which is three (3) years and more than four (4) months. Thus the suit is assumed to have been filed out of time for more than four (4) months in which Mr. Johnson places reliance on the provisions of section 21(1) and 3(c) of the LLA, to have the time spent by the plaintiff in litigating the Civil Case No.216/2021 at the RM's Court until 19/04/2021 when the said suit struck out be excluded, hence a finding that the suit is filed within time. For easy of reference section 21(1) and 3(c) of the LLA provides and I quote:

*21.-(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, **against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect***

of jurisdiction or other cause of a like nature, is incompetent to entertain it.

(2) N/A

(3) for the purpose of this section –

(a).....

(b)...

(c) ***misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with the defect of jurisdiction.***

Applying the above provision to the facts of this case, it is evident to me that, in order for the Plaintiff to benefit from it he has to show that, he was prosecuting the previous case which is Civil case No.216/2021 before Kisumu Rms Court with due diligence, on the **same cause of action and against the defendant** and that the court failed to entertain it **due to defect of jurisdiction or other cause of the like nature** which as per subsection 3(c) of section 21 of the Act, other causes of like nature are ***misjoinder of parties or of causes of action.***

I had an ample time to go through the ruling of the RM's Court in Civil Case No. 216 of 2020, relied on by Mr. Johnson for the plaintiff to convince this Court that, he was prosecution the case on same cause of action to the

present one, preferred against the same defendants and that, the case was struck out on the reason non-joinder of parties. With due respect to Mr. Johnson, I am unable to buy his propositions as above submitted on the reason that, One, the ruling does not state facts of the case to enable this Court discover and compare the cause of action to the one in the present matter. Thus no proof as asserted by Mr. Johnson that, the plaintiff was prosecuting a matter of same cause of action to one in the present matter. **Second**, the defendants in the RM's Court case were three (3) whereas in the present case there is additional of the 4th defendant (Attorney General), hence suit not brought against the same defendants. **Third**, the striking out of the suit at the RM's Court was not on reason of non-joinder of party as submitted by Mr. Johnson but rather on the suit being filed prematurely and in contravention of section 6(6) of the Government Proceedings Act, Cap. 5 as amended, for want of statutory notice of 90 days to the 1st defendant therein who is also the 1st defendant herein, as the first ground of objection. The second ground which was not considered on the reason that the first ground was sufficient to dispose of the matter was to the effect that, the verification clause in the plaint was defective. Therefore failure of the RM's Court to entertain the said suit was neither resulted from defect of

jurisdiction of the Court as provided under section 21(1) of the LLA, nor from non-joinder of part as Mr. Johnson would want this Court to believe. Similarly it cannot be assumed that the RM's Court failed to entertain the matter on other cause of like nature as provided under section 21(1) and qualified by section 21(3)(c) of LLA, as the reason for striking out the said suit was not due to ***misjoinder of parties or of causes of action***. **Fourth**, in the lower court the Plaintiff being represented by a learned counsel Mr. Johnson a seasoned advocate, was expected to make sure that the law is adhered to the letter before the case is preferred but to the contrary acted in ignorance of the law. Hence this matter was not prosecuted diligently there as he would like this court to believe. I say he acted in ignorance of the law basing on the finding of the ruling of the RM's Court in which this Court was invited by Mr. Johnson to take judicial note of and consider its relevancy as provided under section 45 of Evidence Act, [Cap. 6 R.E 2019]. On ignorance of the law the learned trial Magistrate in the said ruling of Civil Case No. 216 of 2020, had this to say at page 6 and I quote:

"..., the plaintiff was duty bound to know the status of the 1st defendant whom he was suing, the 1st defendant was made a public company by law which was passed by the parliament where there was a presumption that when the bill is being

*discussed it is where all members of the public are made aware about existence of such law. Also **there is Latin maxim that ignorance of law has no excuse so even at this case at hand the fact that plaintiff was not aware that since in 2018 the 1st respondent become the public company by operation of the law cannot act as excuse for noncompliance of filing the suit against the 1st defendant in contravention of section 6(2) of Cap. 5 (supra).** Having argued as afore going above I find the objection by the 1st defendant has merit ...” (Emphasis added)*

What is deciphered from the above excerpt is that, the plaintiff’s counsel failure to comply with the provision of Cap. 6 of the laws, amounted to failure to exercise due diligence as rightly submitted by Mr. Mwenda, hence, I hold he acted negligently. The Court of Appeal in the number of cases has been insistent that ignorance of law or negligence on the part of advocate or plaintiff/applicant is not an excuse. In the case of **Hamimu Hamisi Totoro @Zungu Pablo and 2 others vs The Republic**, Criminal Application No. 121/07 of 2018, where the Court of Appeal quoted with approval the case of **Hadija Adam Vs. Godbless Tumba**, Criminal Application No.14 of 2013 (CAT-unreported), it was held thus:

*"As regards the applicant's ignorance of law and its attendant rule of procedure, I wish to briefly observe that such ignorance has never been accepted as a sufficient reason (see for instance, **Charles Machota Salugi v. Republic**, Criminal Application No.3 of 2011 (unreported)).*

In view of the fore stated reasons, I am satisfied that the provision of section 21(1) and 2(c) of LLA, does not cover the plaintiff as he has failed to satisfy that was prosecuting diligently another Civil Case No. 216 of 2020, founded on the same cause of action to the one in present matter and that that RM's court failed to entertain it on the reason of defect of jurisdiction or other cause of a like nature. Hence the period of limitation commencing from 25/4/2018 when the cause of action to this matter accrued up to 26/08/2021 when this suit was filed could not be justified, hence the conclusion that this case was filed outside the prescribed time limitation of three (3) years. The preliminary objection therefore is hereby sustained.

Having so found the next question is the consequence for filing the suit/matter outside the time limitation. It is a position of the law under section 3 (1) of the LLA, that such suit or matter shall be dismissed. Section 3(1) of LLA reads:

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 therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

In this matter since the plaintiff preferred this suit outside the prescribed time limitation, I find no other remedy than dismissing the suit, the order which I hereby enter.

Considering the nature to the case, I find myself with silly ground to make an order for costs. I thus direct each party to bear its own costs.

It so ordered.

DATED at Dar es Salaam this 10th day of June, 2022.



E. E. KAKOLAKI

JUDGE

10/06/2022.

The Judgment has been delivered at Dar es Salaam today 17th day of June, 2022 in the presence of Mr. Jamhuri Johnson, advocate for the Plaintiff, Mr. Charles Mtae, State Attorney for the 1st and 4th Defendants, Mr. James Mwenda advocate for the 3rd Defendant, and Ms. Asha Livanga, Court clerk and in the absence of the 2nd Defendant.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
10/06/2022

