

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 169 OF 2017**

MALCELINO MLOWE.....PLAINTIFF

Versus

ERNEST MANG'ATI.....1ST DEFENDANT

TOWN DIRECTOR TOWN COUNCIL NJOMBE..... 2ND DEFENDANT

MINISTRY OF HEALTH..... 3RD DEFENDANT

ZANZIBAR INSURANCE CORPORATION.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Date of last Order: 13/09/2022

Date of Ruling: 07/10/2022

E.E.KAKOLAKI, J.

This ruling seeks to determine the preliminary objection raised by the 2nd, 3rd and 5th Defendants in this matter to the effect that, this Court has no jurisdiction to entertain the suit as the same is hopelessly time barred.

Briefly the suit in which jurisdiction of this court to entertain it is questioned, is founded on tort whereby the plaintiff is claiming against the defendants for payment of specific damages of Tshs.165,708,516/=, being compensation for monetary loss following personal injuries caused to him on 20/02/2013, by a motor vehicle with registration No. DFP 694 Toyota Land

Cruiser driven carelessly by the 1st defendant. It is averred, the said motor vehicle owned by the 3rd defendant and insured by the 4th defendant was under the use of the 2nd defendant when caused accident to the plaintiff herein. Due to undisclosed facts in the plaint the plaintiff found himself time barred to bring the action in court within three years period of time sanctioned under item 6 Part I to the schedule to the Law of Limitation Act, [Cap. 89 R.E 2019] (the LLA), the result of which he successfully applied for extension of time to Minister commencing on 26/06/2016 and ending on 26/08/2017, hence the present suit which was filed in Court on 25/08/2017.

When the matter came for hearing of the raised preliminary objection parties who were represented prayed the Court and cordially granted with leave to proceed by way of written submission, save for 1st and 4th defendants who seemed not interest to. The plaintiff hired the services of Ms. Joyce Sojo, learned advocate while the 2nd,3rd and 5th defendants proceeded under representation of Mr. Ayoub Gervas Sanga and Kause Kilonzo, both learned State Attorneys.

Submitting in support of the sole ground of objection Mr. Sanga informed the Court that, the tortious action subject of this suit emanates from the accident which occurred on 20/02/2013, which is also an accrual date of

cause of action in which a period of three (3) years lasted on 19/02/2016 before the plaintiff successfully sought extension of time from the Minister one-half of the period of limitation prescribed by the Act, commencing on 26/06/2016 and ending on 26/08/2017, under section 44(1) of LLA. He said, under section 44(2) of LLA, time extended by the Minister under subsection (1) commences to run immediately upon expiry of the period prescribed by the Act. According to him, time for the extended period is reckoned from 19/02/2016, the statutory expiry time of cause of action ending 18/08/2017 and not on 26/08/2017 as the Minister did. Hence by filing the same on 25/08/2017, the suit was outside time limitation by seven days. He argued, the Minister's order of extension of time by shifting the commencement date went far overboard and in excess of his power imposed by the law, hence ultra vires and ineffectual. To bolster his stance he cited the case of **Rajabu Hassan Mfaume (the Administrator of Estate of the late Hija Omary Kipara Vs. Permanent Secretary, Ministry of Health, Community Development, Gender, Eldery and Children and 3 Others**, Civil Appeal no.287 of 2019, (CAT- unreported), where the Court held the Minister's act of extending time over the period of one-half of the prescribed period by the law was evidently ultra vires and ineffectual and **Apolo Lusato Bhiseko**

Vs. Tanzania Rural and Urban Road Agency and AG, Civil Case No.169 of 2021(HC- unreported) which followed the above cited case and held that, Minister's act of extending time to the plaintiff in excess of one-half of the prescribed period of limitation was outside his scope of powers. Mr. Sanga was therefore of the submission that, since the suit was time barred by 7 days, deserves to be dismissed under section 3(1) of the LLA and so prayed the Court to do as the Court has no jurisdiction to entertain it. To fortify his prayers the Court was referred to the cases of **Yussuf Vuai Zyuma Vs. Mkuu wa Jeshi la Ulinzi TPDF and 2 Others**, Civil App.No.15 of 2009 and the case of **Fortunatus Lwanyantika Masha and Another Vs. Claver Woshi Motors Ltd**, Civil Appeal No.144 of 2019.

In rebuttal submission Ms. Sojo, was not at issue with the fact that, this suit emanates from tortious liability, in which the time limitation is three (3) years accruing from the date when the cause of action arose. And the fact that, the Minister can only extend time for one-half of the prescribed time by the law which in aggregate in this matter is four and a half (4½) years. As regard to the submission that the suit is time barred, she strenuously resisted Mr. Sanga's submission on three reasons. **One**, she argued the provision of section 44(2) the LLA must be read not in isolation of other provisions. That

it ought to have been read together with section 15 of LLA, so as appreciate the circumstances under which the period spent by a party while under disability is excluded from computation. According to her, in this matter plaintiff's knee joint was crushed beyond repair before it was amputated, hence spent 37 days in hospital at Njombe Town Hospital and thereafter Ikonda Hospital for further management (attachment LA-5) hence ought to be excluded from computation. Basing on the above fact, Ms. Sojo contended the submission by Mr. Sanga that the suit is out of time for seven (7) days is absolutely wrong as he counts days from the date of accident, forgetting that, time was suspended by law when the plaintiff was totally disabled and hospitalized hence bed ridden for 37 days, thus unable to pursue his rights. She urged the Court to exclude the said 37 days from the days spent by the plaintiff prior to institution of the suit and find it to be in time. The case of **Sisti Marishay (suing as next friend of Emmanuel Didas) Vs. (1) The board of Trustee (2) Muhimbili Orthopaedic Institute (MOI), Permanent secretary, Ministry of health and social Welfare and (3) Attorney General**, High Court Civil Case No.129 of 2012(Unreported), was relied on to cement her stance that, time under

which the party is under disability is excluded when reckoning the period spent prior to institution of court proceedings.

The second reason is on the date of commencement of the extended time by the Minister as provided under section 44(2) of the LLA, where Ms. Sojo contended that, with the wording of the provision that **"...commence to run immediately upon the expiry of the period prescribed by the Act"**, the submission by Mr. Sanga that, in this matter the same commenced on the 19th February, 2016, when the three years expired is a misconception of the law as the word "immediately" as defined by **Blacks Law Dictionary** and **Oxford English Dictionary** to mean **'occurring without delay'** and **'nearest in time'** respectively, meant to imply, without delay or the nearest time. According to her, time could not have commenced on the ending date of 19/02/2016 hence there was a gap of five (5) days only to 26/02/2016 which was the date for commencement of the extended period of one-half of the period of three years prescribe by the law in this matter. With the above definition of the word immediately whether the skipped days 5 or 7 as alleged by Mr. Sanga, all are well within the meaning of the term 'immediately upon expiry'. Hence the extension by Minister is absolutely not erroneous but correctly done pursuant to the requirement of the law.

As regard to the cases cited by the defendants Ms. Sojo submitted all are extensively irrelevant as they were dealing with the question of time limitation and extension of time by the Minister which is the subject of contention in this matter, save for two cases of **Rajabu Hassan Mfaume** (supra) and **Apolo Lusato Bhiseko** (supra) where the issue of extension of time by the Minister was under discussion.

The third and last reason is based on the maxim, "he who goes to equity must go with clean hands". Relying on that maxim, Ms. Sojo submitted that under section 44(1) of the LLA, time is extended by the Minister after consultation with the Attorney General unless the minister finds no need of extending it. She said, in this matter it is the Attorney General, the 5th defendant who is contesting the extended time by the Minister in which he took part in the process of its grant, thus he is prevented from benefiting from his/her own wrong. She relied on the case of this Court in **Tabu Mayombi Bhaya Vs. Msafiri Fale Kidawaya**, Land Appeal No 10 of 2021 (HC-unreported) and urged this court to dismiss the raised preliminary objection with costs as it has no basis rather intends to defeat ends of justice.

In rejoinder submission Ms. Kilonzo, attacked the plaintiff's submission by relying on the ground of disability to seek exclusion of alleged 37 days in

which the plaintiff was under disability equating to amending the pleading the practice which is very much detested under the law. She said, much as the plaintiff did not plead disability in the plaint the provisions of section 15 of the LLA, is not applicable to him. She argued, if the plaintiff wanted to invoke the said section, he should not have opted to go for extension of time to the Minister but rather plead it directly in the plaint like it was the case in **Tabu Mayombi Bhaya** (supra). According to her, the provision is inapplicable to a person who is already in court of law after being granted with extension of time from the Minister and who did not pleaded those facts in their plaint as per the requirement of Order VII Rule 6 of the CPC, as parties are bound by their own pleadings. To cement her position she cited the case of **James Funge Ngwagilo Vs. Attorney General** [2004] TLR 161. She further referred to paragraph 8 of the plaint with insistence that in this matter, the cause of action arose on the day when an accident occurred. It was her further submission that, in order to rely to section 15 of the Act, three conditions must be met, namely; **One**, reliance is supposed to be made on that section before resorting to extension of time by the Minister; **Secondly**, exclusion of computation of time is done by the court and not by the Minister when extending time under section 44 of the Act and **thirdly**,

the exemption/exclusion of time must be pleaded in the plaint as per Order VII Rule 6 of the CPC. To fortify her argument Court was referred to the case of **Ali Shabani and 48 Others Vs. Tanzania National Roads Agency and the Attorney General**, Civil Appeal No.261 of 2020. Ms. Kilonzo further distinguished the cited case of **Sisti Marishay (suing as next friend of Emmanuel Didas** (supra) with this case stating that, facts in the **Sisti's case** show that, after ceasing of disability the plaintiff directly filed the case and pleaded that ground of disability in the plaint as per Order VII Rule 6 of the CPC, for the purposes of exemption time by the Court.

With regard to the plaintiff's submission that the Attorney General being advisor to the Minister is benefiting from his own wrong, Ms. Kilonzo argued that, the submission is misplaced and misconceived as the Attorney General is duty bound to advice the Government, hence his role ended up with advisory role while the decision whether to extend time or not is exclusively in the Minister's discretion. She therefore implored the Court to find the objection is meritorious.

I have had an ample time to peruse the pleadings and follow the fighting arguments by the counsels from both parties on the raised preliminary objection. It is a trite law that, a suit or application filed in court outside the

prescribed period of limitation falls into a risk of being dismissed under section 3(1) of the LLA, unless there are circumstances leading to exclusion of certain delayed period. The said position has been expounded in many cases without number to mention few is the case of **Ali Shabani and 48 Others Vs. Tanzania National Roads Agency (TANROADS) & Another**, Civil Appeal No. 261 of 2020 and **Paradise Holiday Resort Limited Vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018 (all CAT-unreported). Gathered from the submissions by both parties, this court entertains no doubts that, parties are not at dispute on certain factual and legal facts. **One**, that time limitation for filing a suit founded on tort like the present one is three (3) years as per item 6 Part I of the schedule to the LLA. **Second**, the accident in which the cause of action is premised occurred on 20/02/2013 and the plaintiff on the same day attend at Kibena hospital on the fateful day. **Third**, the Minister under section 44(1) of the LLA, has discretionary powers to extend time for the party seeking to sue out of time for a period not exceeding one-half of the period of limitation prescribed by this Act for such suit, immediately after expiry of the period prescribed under the Act. **Fourth**, the action against the person to whom time accrues while under disability may be brought at any time before the expiry of the

prescribed time limitation for such action computed from the date when that person ceased to be under disability or dies, whichever occurs first. **Fifth**, time was extended by the Minister to the plaintiff commencing from 26/02/2016 to 26/08/2017. **Sixth**, an action brought in court outside the time limitation prescribed by the LLA is liable to suffer dismissal under section 3(1) of the Act. What brings them into head-to-head collision is the fact as to when the time for extension accrues and whether the suit is time barred or not.

Mr. Sanga is of the submission that, since the accident occurred on 20/02/2013 in which three (3) years lasted on 19/02/2016, the date which according to him was the commencement date for the period of one-half of the time extended by the Minister to plaintiff, and since the Minister extended the commencement date for seven (7) days to 26/02/2016, hence extending the period up to 26/08/2017, mandating the plaintiff to file his suit on 25/08/2017, then the suit was time barred for seven (7) days.

As alluded to above in the submission by parties, Ms. Sojo is resisting the submission by Mr. Sanga terming it misconceived and misleading on three grounds, the grounds which I am prepared to discuss and determine soon. On the first ground, she submitted that, the 37 days spent by the plaintiff

from the date of accident on 20/02/2013, while disabled and attending medical care in two hospitals should be excluded from computation under section 15 of the LLA. She also relied on the case of **Sisti Marishay** (supra). Ms. Kilonzo for the defendants attacked the submission on the ground that, disability was not pleaded by the plaintiff in his plaint and if he so wanted to rely on it should have done so and refrained from applying for extension to the Minister. Glancing at the plaintiff's plaint, I tend to agree with Ms. Kilonzo that, it is true the plaintiff did not plead in the plaint the days he spent while under disability for him to be entitled to rely on it. I so do basing on the trite principle of the law that parties are bound by their own pleadings. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012, **Astepro Investment Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (all CAT-unreported) and **Yara Tanzania Limited VS. Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013 (HC-unreported). In **Yara Tanzania Limited** (supra) this Court on the principle of parties to be bound their own pleadings had this to say:

"It is trite principle of law that the parties are bound by their pleadings and that any evidence led by any of the parties which

does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court.”

I subscribe to the views in the above principle. In this matter since the plaintiff failed to plead disability in his plaint, I am of the firm opinion that he is restricted from relying on it hence the provision of section 15 of the LLA is inapplicable under the situation of this case. So is the case of **Sisti Marishay** (supra) relied on by him as in that case this Court when reaching the decision that the plaintiff successfully relied on ground of disability in exclusion of time in which he was under physical and mental disability the Court relied on the facts pleaded in the plaint, unlike in this case where the plaintiff has failed to so plead. I therefore disregard the ground on the reasons that, **one**, it was not pleaded by the plaintiff in his plaint and **second**, disability cannot be pleaded at this stage where extension of time to the Minister is already sought and granted for constituting one of grounds for extension of time before the Minister.

Next for determination is the second ground by the Plaintiff on the commencement date of extension of time by the Minister in which parties contest on interpretation of the term '**immediately**' upon the expiry of the

period prescribed by the Act as provided under section 44(2) of LLA. The said section reads:

*(2) Where an order under subsection (1) is made in relation to any suit, the provisions of this Act shall apply to such suit as if references herein to the period of limitation were references to the aggregate of the period of limitation prescribed for such suit by this Act and the period specified in such order, such later period **commencing to run immediately upon the expiry of the period prescribed by this Act.***

Ms. Sojo is contending that, going by the definition of the word immediately as defined in the dictionaries she cited, the same means without delay or the nearest time, hence extension of time by the Minister commenced not on 19/02/2016 as alleged by Mr. Sanga but thereafter. Thus, the gap of five (5) days between 19/02/2016 and 26/02/2016 was within the meaning of without delay or the nearest time for the Minister to exercise his powers under section 44(2) of the LLA. It is true and I agree with Ms. Sojo that time could not have reckoned from 19/02/2016, the date when the three (3) years expired but rather thereafter, hence time started to count from 20/02/2016 in which the gap of days between 19/02/2016 and 26/02/2016 is six (6) days and not five as Ms. Sojo would like this Court to believe. Nevertheless, I

distance myself from her proposition that, the commencement date of extension of period by the Minister on 26/02/2016 was within the meaning of **immediately upon the expiry of the period prescribed by this Act** as provided under section 44(2) of the LLA. The Court of Appeal in **Rajabu Hassan Mfaume** (supra) when deliberating on the issue akin to the situation at hand, on extension of period of time by the Minister in excess of the period prescribed by the law under section 44(1) and (2) of the LLA, reckoned the days from the period in which one and a half years deemed to have commenced upon expiry of the period of three (3) years prescribed by the Act, to be 6th March, 2015 having accrued on 7th March, 2012 upon the deceased's demise, hence ending on 05/09/2016. The Court roared that:

"... Applying the above position to the instant case, we are of the settled mind that the learned High Court's finding that the suit was caught by the web of limitation is unassailable. He correctly held that the Minister's extension of the limitation period by one and a half years must be deemed to have commenced on 6th March, 2015 upon expiry of the period of three years prescribed by the Act, the cause of action having accrued on 7th March, 2012 upon the deceased's demise. We also uphold his finding that the Minister's order dated 8th May, 2017, purporting to extend the prescribed period of three years

with effect from 20th May, 2017, was evidently ultra vires and ineffectual. Thus, the appellant's action instituted on 19th November, 2018, well after the aggregate period of limitation of four and a half years had elapsed on 5th September, 2016, was miserably time-barred."

In light of the above authority this Court remains without a single grain of doubt that, the date of commencement of Minister's order is the day following the date in which the three (3) years period ended, which in our case is 20/02/2016 and not 19/02/2016 as alleged by Mr. Sanga, hence the gap of six (6) days counted from 20/02/2016 up to 26/02/2016, when the Minister's order purportedly commenced. It is from that computation I hold that, by extending that date of commencement to 26/02/2016, the Minister acted in excess of his powers set by the law, hence his extension order is ultra vires and ineffectual in law as was also held in **Rajabu Hassan Mfaume** (supra).

Similarly in the case of **Apolo Lusato Bhiseko** (supra), this Court speaking through my brother Ismail J, observed that:

"...the Minister's extension in excess of the allowable time and shifting of the commencement date of extension were profoundly an erroneous action and out of bounds. They were,

as held in the cited decision, ultra vires and ineffectual. The net effect of all this is to render the suit, whose timeliness in filing was dependent on the extension, time barred and unmaintainable.”

With the above discussion and conclusion as well as the authorities based on the second reason by the plaintiff also fails.

The last reason as advanced by Ms. Sojo is that, since the 5th Defendant under section 44(1) of the LLA, took part in the process of issue of extension order by the Minister to the plaintiff, he should not be allowed to benefit from his own wrong for advising the Minister to shift the commencement date of the order. This submission was retorted by Ms. Kilonzo who maintained that, the 5th defendant (Attorney General) had advisory role only to the Minister, hence cannot be condemned for that as grant of extension of time was totally in the discretion of the Minister. I think this ground need not detain this Court much, it is not in dispute that the Attorney General's role in the process of granting of extension orders by the Minister is restricted to rendering advice only. The discretion to either grant or not is vested on the Minister who is not bound by the 5th defendant's advice. In absence of any evidence that, he advised the Attorney General to shift the commencement date from 20/02/2016 to 26/02/2016, six (6) days later on,

this Court is not in a position to accept the proposition that, the 5th defendant is reaping from his own wrong. Hence I find the third reason to be unmerited.

In the final analysis, since the shifting of commencement by six (6) days erroneously extended the period of one-half of three (3) years up to 26/08/2017 instead of 19/08/2017 and since this suit was filed by the plaintiff on 25/08/2017, I hold the same was filed outside the time limitation as prescribed under section 44(2) of the LLA. Now what is the effect of such act by the plaintiff? The answer is found in section 3(1) of the LLA, that it has to be dismissed mercilessly as it cuts on both sides like a sword. The Court of Appeal also in the case of **Backlays Bank Tanzania Limited Vs. Phylisiah Hussein Mchemi**, Civil Appeal No.19 of 2016 (CAT-unreported) when discussing the consequences of filing the suit or application outside prescribed time limitation took inspiration of the decision of this Court in **John Cornel Vs. A.Grevo (T) Limited**, Civil Case No.70 of 1998 (HC-unreported) where it was stated that:

"However, unfortunate it may be for the plaintiff, the law of limitation is 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."

This Court in the case of **Apolo Lusato Bhiseko** (supra) having found that, the case before it was time barred having relied on the order of extension of time limitation by the Minister whose commencement date was erroneously shifted forward held the suit was unmaintainable hence proceeded to dismiss it under section 3(1) of the LLA.

From the above findings and having found the suit was time barred, I uphold the raised preliminary objection and proceed to dismiss the suit as I hereby do. Having considered the nature of this case, I order each part to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 07th day of October, 2022.



E. E. KAKOLAKI

JUDGE

07/10/2022.

The Ruling has been delivered at Dar es Salaam today 07th day of October, 2022 in the presence of Ms. Janeth Shayo, advocate for the plaintiff, who is also holding brief for Mr. Mudhihiri Magii for the 4th defendant, Ms. Kause Kilonzo and Mr. Abel Sengerema, State Attorneys for

the 2nd,3rd and 5th defendants and Ms. Asha Livanga, Court clerk and in the absence of the 1st defendant.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE

07/10/2022.

