

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC CIVIL APPEAL NO. 12 OF 2022

(Originating from Civil Case No. 7/2020 of the Resident Magistrate's Court of Singida at Singida)

BONIFACE BARNABA KASILALEI.....APPELLANT

VERSUS

**THE REGISTERED TRUSTEES
OF CATHOLIC DIOCESE OF SINGIDA.....1ST RESPONDENT**

MAKIUNGU DESIGNATED HOSPITAL.....2ND RESPONDENT

DR. CHRISTOPHER CHAMWELLA.....3RD RESPONDENT

JUDGMENT

05/09/2022 & 07/11/2022

KAGOMBA, J

The appellant, BONIFACE BARNABA KASILALEI has filed this appeal challenging the decision of the Resident Magistrate's Court of Singida at Singida ("the trial court") which dismissed his suit for being time barred. The 1st respondent is the owner of the 2nd respondent hospital which employed the 3rd respondent as the doctor.

The background of this case as gathered from the records of the trial court is that on 26/8/2021 the appellant filed a suit in the trial court claiming payment of Tsh. 100,000,000/= as specific damage following alleged tortious liability of the respondents. The appellant's claims were based on the negligent act of the 3rd respondent allegedly committed while treating

the appellant's leg after having encountered a road accident on 30/10/2014. That, following the alleged negligence in his treatment, the appellant shifted himself to another hospital namely; Selian Hospital, for further treatment. That, at Selian Hospital, it was discovered that the limb sustained infections caused by the act of covering the untreated injury with POP, as a result, the appellant's leg was amputated.

On the other hand, it was alleged that the 2nd and the 3rd respondents, maliciously refused to fill in and sign a PF3 to show the treatment they gave to the appellant. That, as a result, the appellant was hindered to sue the insurer of a motorcycle which caused the accident.

The respondents' Written Statement of Defence was accompanied with a notice of preliminary objection, raising two points of law, thus; **One**, the suit was bad in law for contravening the provision of section 3(1) and (2)(a) together with item No. 6 of the Column one, part 1 of the Schedule to the Law of Limitation Act, [Cap 89 R.E 2019] (henceforth "**LLA**"). **Two**, the trial court had no pecuniary jurisdiction.

Therefore, on 11/11/2021 the trial court heard the preliminary objection first, sustaining the first ground of objection and proceeded to dismiss the case for being time barred. It was found that the case was instituted beyond three (3) years from 18/8/2014 when the cause of action arose. Further, the trial court held that, despite the appellant having stated that he lost his limb, he was not precluded from the requirement of the provision of Order VII rule 6 of the Civil Procedure Code, [Cap 33 R.E 2019]

(henceforth “**CPC**”) to state grounds for his exemption. Having so found, the trial court didn’t discuss the second point of objection.

Being dissatisfied with the decision of the trial court, the appellant initially raised two grounds of appeal before this court, thus;

1. That the trial court erred in both law and facts for holding that the appellant didn’t show the ground for exemption of extension of time in pleadings.
2. That, the trial court erred in both law and facts by dismissing the plaint which can be cured by way of amendment.

On 28/07/2022 when this matter was due for hearing, the court ordered the hearing to proceed by way of written submissions. Both parties observed the scheduling orders. However, the appellant opted not to file a rejoinder.

The appellant’s written submissions were drawn and filed by Peter Bonus Ndimbo, learned Advocate, while the reply submissions for the respondents were drawn and filed by Tadey Lister, also a learned Advocate.

Mr. Ndimbo started by abandoning the 1st ground of appeal. He therefore submitted on the remaining ground, where he alleged that the trial court erred in its decision to dismiss the plaint which, in his opinion, could be cured by way of amendment. It was Mr. Ndimbo’s contention that since the appellant was exempted from time limitation to institute his suit as he

was suffering from a disability, the trial court wrongly dismissed the plaint, on ground that the appellant failed to show the reason for the said exemption in his pleadings.

Mr. Ndimbo contended further that the proper remedy that was available to the trial court was not to dismiss the Plaint but to strike it out and order its amendment so as to enable the matter to be heard on merit. He made reference to the provision of 97 and Order VI Rule 16 & 17 of the **CPC** to support his contention.

He also argued that the dismissal of plaint was contrary to the provision of Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, 1977 which requires courts to dispense justice without being tied up with technicalities which may obstruct dispensation of justice. To this end he cited the case of **Francis B. Mndolwa vs Bank of Africa Tanzania Limited and Another**, Civil Appeal No. 71 of 2021, High Court, DSM as well as the case of **Cyprian Mamboleo Hizza vs Eva Kioso and Another**, Civil Application No. 3 of 2010, CAT at Tanga.

In reply, Mr. Lister started by clarifying that the trial court didn't dismiss the plaint but the suit, as the plaint was not found to be defective. He contended that the requirement under section 3(1) & (2) of the **LLA** and Order VII Rule 6 of the **CPC** cannot be termed as technicalities in the eyes of Article 107A (1) of the Constitution. He argued that, if the appellant had the intention to rely on any exemption, he had to state such exemption in the plaint.

Mr. Lister contended further that the plaint was also not to be amended because nowhere in record of the trial court the appellant prayed for amendment. He cited the provision of section 3(1) of the **LLA** to the effect that a suit filed after expiry of the prescribed time limit had to be dismissed.

Regarding the invocation of the overriding objective principle, Mr. Lister submitted that the said principle could not cover the circumstance of the case in hand, adding that, the intention of section 3A and 3B of the **CPC** was not to disregard procedural law. To cement his contention, he cited the case of **Kellen Rose Rwakatare Kuntu and 4 Others vs Zithay Kabuga**, Civil Appeal No. 406 of 2020, CAT at DSM. Mr. Lister therefore prayed the court to dismiss the appeal with costs.

Having carefully read the submissions of both parties, this court has to determine if this appeal has merit.

It is evident from the trial court's records that, after having determined that the suit was time barred, the trial court proceeded to dismiss it. As rightly argued by Mr. Lister, it was the suit, and not the plaint that was dismissed.

In this appeal, Mr. Ndimbo challenges the remedy of dismissal of the plaint, or suit as it should rightly be stated. His contention is that since section 16 of the **LLA** exempted the appellant from the time limit to file his suit on account of disability, it was for the interest of justice that the trial court ought to allow the appellant to amend the plaint by merely striking it out and not to dismiss it. Apparently, Mr. Ndimbo also relies on what was

stated by the Court of Appeal in **Cyprian Mamboleo Hizza vs Eva Kioso and Another (supra)**.

Since Mr. Ndimbo has been travelling on the argument that the appellant was exempted by section 16 of **LLA** to abide by the time limitation, I should first address this argument. Section 16 of **LLA** provides that:

*"16. Where, after the right of action for a suit or an application for the execution of a decree has accrued and before the period of limitation prescribed for such suit or application expires, the person to whom such right has accrued suffers a disability, in computing the period of limitation prescribed for such suit or application, **the time during which such person is under disability shall be excluded**"*

What is intended by the word "disability" in the last line of the cited provision of the law, is inability by such a plaintiff to take legal action, by reasons such as illness, hospitalization, incarceration or any impediment that could prevent the plaintiff to move to or access the court for filing his suit. It does not directly refer to the amputation of the appellant's limb, as the learned advocate appear to interpret it.

It is therefore my considered view that for the appellant to successfully invoke the exclusion of time limitation under disability ground in the cited provision of the law, he should have established that he was unable to file his suit since 18/8/2014, when the course of action was determined to have arisen, up to 26/8/2021 when he finally filed the suit, for reasons such as

long hospitalization, which appears not to be the case in this matter. An illness that does not prevent a person to access the court cannot fall under the cited exclusion.

The key argument in this appeal is on the appropriate remedy the trial court was to give under the circumstances of the case. The contention by Mr. Ndimbo that the trial Magistrate ought to have struck out the suit or order amendment of the plaint, unfortunately, cannot constitute the legal basis for challenging the trial court's decision for the following reasons:

Firstly; the only available remedy when a suit is determined to be time-barred in accordance with the provision of section 3(1) of the LLA is dismissal. The cited provision states:

*"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".*

The cited provision is coined in mandatory terms regarding the remedy to be rendered by the court once a suit is time-barred. There a plethora of authorities emphasizing that once a matter is determined to be time-barred under section 3(1) of LLA, its remedy is to dismiss the suit. See **Olam Uganda Limited suing through its Attorney United Youth Shipping Company Limited vs Tanzania Habours Authority**, Civil Appeal No. 57

of 2002 (unreported) and **Mm Worldwide Trading Company Limited & Others vs. National Bank of Commerce Limited** (Civil Appeal 258 of 2017) [2021] TZCA 192 (10 May 2021). In the latter case, which has close similarity with the purpose of the appeal at hand, in that the High Court had struck out a suit for being time-barred instead of dismissing it, which is the exact prayer by the appellant herein, the Court of Appeal held to the effect that even when a court orders a suit to be struck out for being time-barred under section 3(1) of LLA, the such an order would still be interpreted as dismissal, as mandatorily required by the law.

Secondly; as correctly submitted by Mr. Lister, nowhere in record the appellant prayed for amendment of the plaint. The appellant would have been expecting too much from the trial court if he expected the trial court to order amendment of the plaint *suo motu*. It should be remembered that there was still one more point of preliminary objection challenging the pecuniary jurisdiction of the court, a point that was not determined merely because the first ground of preliminary objection sufficiently disposed of the suit.

It is for the above reasons that the provisions of Order VI rule 16 and section 97 of the CPC could not be invoked by the trial court to order amendment. The order for dismissal of the suit came as a result of determination that the suit was time-barred. As already stated, once a suit is determined to be time barred, the only remedy known to the law is to dismiss the same. There was therefor no room for other machination, especially where the trial court was not moved to consider such prayers. The court of Appeal in **Mm Worldwide Trading Company Limited & Others**

vs. National Bank of Commerce Limited (supra) at page 11 of it typed Judgment, had this to say:

"As rightly submitted by Mr. Mwalongo, pleading exemption from limitation on a matter which was already held to be barred by limitation did not have the effect of reviving it".

Lastly, on invocation of the overriding objective principle, it has been held by the Court of Appeal in a handful of its decisions that the highly fancied principle cannot be invoked to circumvent a mandatory provision of the law. (see **Kellen Rose Rwakatare Kuntu and 4 Others vs Zithay Kabuga (supra)**, and **Martin D. Kumaliya & Others vs Iron And Steel Ltd** (Civil Application 70 of 2018) [2019] TZCA 542 (27 February 2019))

It was, therefore, correctly premised by the trial court in its impugned Ruling that for the appellant to rely on the exclusion of time limitation under Order VII rule 6 of the **CPC**, he had to plead such ground in the plaint. This provision of Order 16 rule 6 of the **CPC** is couched in mandatory terms, thus:

*"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, **the plaint shall show** the ground upon which exemption from such law is claimed".*

[Emphasis added]

I have read the plaint. The grounds upon which the appellant relies were not shown. For the above reasons I find no merit in the appeal and the same is dismissed. No order to costs.

Ordered accordingly.

Dated at **Dodoma** this 7th day of November, 2022.




ABDI S. KAGOMBA
JUDGE