

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL CASE No. 14 OF 2020

GODFREY DEOGRATIUS NKONGO PLAINTIFF

Vs

KHALID SWALEHE HELLA.....

TANZANIA ELECTRIC SUPPLY CO. LTD

ATTORNEY GENERAL

DEFENDANTS

RULING

19/9/2022 & 7/10/2022

ROBERT, J:-

The plaintiff, Godfrey Deogratius Nkongo, sued the three defendants named above jointly and severally alleging that, on 3/2/2017 along Mwanza-Musoma Road, at Kandawe Village within the District of Magu he was knocked down by a Motor vehicle make Toyota Hilux with registration No. SU 46646, the property of Tanzania Electric Supply Co. Ltd (the 2nd defendant), which at the material time was allegedly being negligently driven by Khalid Swaleh Hella (the 1st defendant).

As a result of the alleged negligent driving the Plaintiff sustained serious injuries to which he claims against the Defendants jointly and

severally, general damages for negligence and subsequent injury the quantum whereof to be determined by the Court, special damages in the sum of TZS 4,000,000/=, interest at commercial rate, costs of the suit and any other reliefs this Court deems just to award.

The Defendants filed their Written Statement of Defence resisting the Plaintiff's claims and the 2nd Defendant filed a Notice of Preliminary Objection on the point of law to the effect that, *the suit is time-barred*.

As a matter of practice, the Court invited parties to address the Court on the point of objection raised by the second Defendant. At the hearing of the preliminary objection, the Plaintiff was represented by Mr. A.K. Nasimire, learned counsel whereas the first and second Defendants were represented by Ms. Juliana William, learned counsel and the 3rd Defendant was represented by Ms. Sabina Yongo, State Attorney.

Highlighting on the point of objection, Ms. William submitted that, the present suit is time barred having been filed outside the prescribed period of three years from the date when the cause of action arose according to item VI of part I of the Schedule to the Law of Limitation Act. He expounded that, according to paragraph 6 of the plaint, this suit is founded on tort and the cause of action arose on 3/12/2017 while the Plaintiff filed this suit on 21/10/2020 which is three years and seven

months from the date when the cause of action arose and therefore outside the prescribed time of three years.

He argued that, under section 3(1) of the Law of Limitation Act, the only remedy for a suit which is filed outside the prescribed time is dismissal. Consequently, he prayed that this suit be dismissed with costs.

In reply, Mr Nasimire observed that he could have conceded to the point of objection raised but noted that he wouldn't concede for two main reasons. First, the objection raised is against Order VIII Rule 2 of the CPC which requires a defendant to raise the preliminary point of objection at the time of filing her Written Statement of Defence (WSD) which the second Defendant did not comply with.

Secondly, he argued that the Plaintiff filed his claims first on 14/1/2020 at the Resident Magistrates' Court of Mwanza (RMs' Civil Case No. 5/2020) against the 1st and 2nd defendants only. However, after the amendment of the law which required the Attorney General to be joined as a necessary party in suits of this nature, the Plaintiff was necessitated to withdraw his suit from the RMs' Court and file another suit at the High Court joining the Attorney General as a necessary party. He maintained that, it is a trite law that where a party files a suit in a wrong Court but

he does so bonafidely, the period lost in a wrong Court needs to be excluded in computing the period of limitation.

He maintained that, had it not been due to the changes in the law which required joining of the Attorney General as a necessary party, the Plaintiff was within the prescribed time when he filed the matter in Court. He argued that said changes were procedural and are functioning retrospectively as decided in the case of **Lala Wilo Vs Karatu District Council** Civil Application No. 132/02/2018 (unreported) also in the case of **Shear Illusions Ltd Vs Christina Urawe Umiro** Civil Appeal No. 114/2014 CAT (unreported).

On the issue of costs, he implored the Court that if the preliminary objection is sustained the Plaintiff be exempted from paying costs. He argued that, in the circumstances of this case, the Defendants do not require costs from the plaintiff but ordering costs to the Plaintiff would be adding pain to the injury. Hence, he prayed for the preliminary objection to be overruled.

In rejoinder submissions, Ms William resisted the argument that Order VIII Rule 2 of the Civil Procedure Code requires the preliminary point of objection to be raised when the defendant files his WSD. She remarked that the said requirement is not provided for in the cited

provision. She submitted further that, the raised objection touches on the question of jurisdiction of the Court and therefore it could be raised at any stage of the proceedings.

On the argument that the Plaintiff had first filed RMs' Civil Case No. 5/2020 then withdrew it in order to join the Attorney General, she maintained that the said facts were not pleaded by the plaintiff and therefore it is difficult to establish the existence of such a case and the reasons for the said withdrawal. She referred the Court to the case of **Elias Mwita Mrimi vs North Mara Gold Mining**, Civil Case No. 8/2020 (unreported) at page 6 where the Court dismissed the argument that the Plaintiff was prosecuting another case in a different Court on grounds that the said argument was not pleaded by the Plaintiff. In that case, the Court made reference to the Court of Appeal decision in the case of **Tanzania Roads Agency & Attorney General vs Jonas Kinyangula**, Civil Appeal No. 471 of 2020 where the Court of Appeal decided that:

"where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show the ground upon which exemption from such law is claimed"

She insisted that if the Plaintiff wanted to justify why he filed his suit outside the prescribed time he should have stated so in the plaint.

On the issue of costs, she submitted that, although Defendants are public corporations, they have used costs and they are entitled to be paid if the case is decided in their favour.

Having heard submissions from both parties, I will now pose here and deliberate on the merit of the raised point of objection.

To start with, it is not disputed that this suit is founded on tort and it was filed in this Court after three years and seven months from the time the cause of action took place which makes it time barred under item 6, part I of the Schedule to the Law of Limitation Act which prescribes time limit of three years for suits founded on tort.

However, counsel for the plaintiff resisted the objection raised by the second Defendant on two main reasons. First, he maintained that the objection was not raised at the time of filing the Written Statement of Defence as required under Order VIII Rule 2 of the Civil Procedure Code.

It is true that Order VIII Rule 2 of the Civil Procedure Code, Cap. 33 (R.E. 2019) requires a defendant wishing to rely on points of law as a preliminary issue to set out such points of law in the Written Statement of Defence. Some of the matters that must be specifically pleaded are mentioned in the cited provision. These matters if not pleaded are

considered as potentially likely to take the opposite party by surprise or raise issues of fact not arising out of the preceding pleadings.

It is obvious that a defendant who alleges that a suit is time barred by the law of limitation raises a defence of the statute of limitation. Hence, under Order VIII Rule 2 of CPC, such a defendant must specifically plead that defence so as to avoid ambush and prejudice to the opposing party. If not pleaded, the Court may not grant the protection of that law contrary to the rules of pleading and the principle of avoidance of surprise. However, an objection based on a point of law, such as the one in the present case, can be raised at any time under the inherent jurisdiction of the Court and the Court has jurisdiction to dispose of the preliminary objection raised.

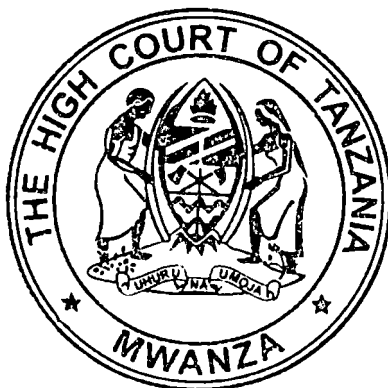
The Notice of Preliminary objection in respect of this matter was filed on 19/9/2022 and hearing of the preliminary objection proceeded as both parties were ready and willing to. In the circumstances, this Court finds and holds that the provisions relating to pleadings cannot be construed and applied with undue rigidity and strictness as no prejudice towards a fair hearing of the case was caused.


The learned counsel for the Plaintiff alleged further that, the suit is not time barred as it was first filed in time at the Resident Magistrates'

Court but the Plaintiff was forced to withdraw the case due to changes in the law which necessitated the Plaintiff to join the Attorney General as a necessary party and file a fresh suit in this Court. I find this argument to be misplaced and not supported by the pleadings. As rightly argued by the learned counsel for the second Defendant, the said facts were not pleaded by the plaintiff and therefore they are mere arguments from the bar. If the Plaintiff wanted the Court to exclude the period of time spent in filing the case in a wrong Court he should have indicated such facts in the relevant pleadings were this Court would consider if that was a good cause for the delay. In the absence of that, there will be no reason for this Court to waste much time on this argument.

On the foregoing, I join hands with the learned counsel for the 2nd defendant and find that this suit is time barred having filed outside the prescribed time of three years. That said, I hereby sustain the preliminary objection raised and dismiss this case. I give no order for costs.

It is so ordered.




K.N. ROBERT
JUDGE
7/10/2022