

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 76 OF 2023**

**MARTINAIR HOLLAND N.V.....1<sup>ST</sup> APPLICANT**

**KONINKLIJKE LUCHVAART MAATSSCHAPPIJ N.V..... 2<sup>ND</sup> APPLICANT**

**VS**

**TANZANIA CIVIL AVIATION AUTHORITY..... 1<sup>ST</sup> RESPONDENT**

**TANZANIA AIRPORT AUTHORITY..... 2<sup>ND</sup> RESPONDENT**

**ETHIOPIAN AIRWAYS..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL OF TANZANIA..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**S. M. MAGHIMBI, J:**

The plaintiffs herein lodged the current suit against the defendants praying for judgment and decree against the four defendants jointly and severally as follows:

- (a) That, this Honourable Court be pleased to hold that the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants negligently failed to perform their obligations thus resulting to the loss suffered by the plaintiffs.
- (b) An order for payment of the sum of United States Dollars One Hundred and Eighty nine Thousand One Hundred and Forty Three (189,143) being costs incurred by the 2<sup>nd</sup> plaintiff to repair damages to aircraft PH-CKA.

- (c) An order for payment of United States Dollars Eighteen thousand (18,000) being costs incurred by the 1<sup>st</sup> plaintiff to re-scheduled scheduled maintenance to the aircraft PH-CKA.
- (d) An order for payment of United States Dollars One Hundred and Fifty Four Thousand Three Hundred and Seventy Six (154,376) being costs incurred by the 1<sup>st</sup> Plaintiff to wet lease a substitute aircraft during the period of PH-CKA repair.
- (e) An order for payment of Euros Eight Thousand Eight Hundred and Thirty Four (8,834) being costs incurred by the 1<sup>st</sup> Plaintiff for transporting and positioning crew.
- (f) An order for payment of Euros One Thousand Two Hundred and Seventy Eight (1,278) being costs incurred by the 1<sup>st</sup> Plaintiff for hotel accommodation of positioned crew.
- (g) An order for payment of Kenya Shillings Thirty Seven Thousand Four Hundred and Sixty Four (37,464) being security costs incurred by the 1<sup>st</sup> Plaintiff for late flight cancellations due unavailability of aircraft PH-CKA.
- (h) An order for payment of Euros Four Hundred and Forty Five Thousand and Seventy Eight (445,078) in economic losses occasioned to the 1<sup>st</sup> Plaintiff.
- (i) Interest on the decretal amount in (b), (c), (d), (e), (f), (g) and (h) above at the commercial rate of 12% per annum from the

date of institution of this suit to the date of judgment.

- (j) Interest on the decretal amount in (b), (c), (d), (e), (f), (g), (h) and (i) above at the Court rate of 7% per annum from the date of judgment to the date of final payment and satisfaction in full; and
- (k) Costs of this suit.
- (l) Any other relief this Honourable Court may deem fit to grant.

Having had the plaint instituted before this Court and in cause of filing their Written Statement of Defence, on the 02<sup>nd</sup> day of June, 2023, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant's together and the 3<sup>rd</sup> Defendant acting alone, raised a similar preliminary objection on point of law that the suit before this honourable Court is gravely time barred.

Before this court, the plaintiffs were represented by Mr. Tumaini Sekwa Shija, learned Advocate while the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants were represented by Eligi Rumisha, learned State Attorney and the 3<sup>rd</sup> Defendant was represented by Mr. Rwekama Rweikiza learned Advocate. By a consensus communicated by Mr. Rumisha, the Court ordered that this preliminary objection raised be heard by way of written submission. The parties complied with the schedule of submission hence this ruling.

On his part, Mr. Rumisha submitted that the suit before this Court is time barred since the same is founded on tort. That a claim of Tort is

listed under item 6 on the First Column of Part 1 to the Schedule of the Law of Limitation Act [Cap. 89 R. E. 2019] (The Act). The time limitation prescribed under the above schedule is 3 years from when the cause of action accrued. That a tortious case instituted after the lapse of 3 years from when the cause of action accrued is incompetent before the Court and needs to be dismissed. He supported his submissions by citing the case of **Stanbic (T) Limited vs M/S Trademix Company Limited, CAT DSM, Civil Appeal No. 75 of 2019** to support his submissions.

Mr. Rumisha then elaborated that on 21<sup>st</sup> October, 2022 this Court struck out the plaintiffs case with leave to refile their suit pointing out that the ruling was silent on time within which to file the same. His argument was that the granted leave was not open ended. He went on submitting that the aim of the Court in granting the leave was to afford the plaintiff time to serve mandatory notices as a requirement of law. That after being granted leave to refile their suit, the plaintiffs were required to do so immediately after the lapse of 90 days of service of the notices to the necessary parties. That the 90 days lapsed on Saturday 4<sup>th</sup> February, 2023 and being a weekend, the plaintiffs then were required to file their plaint on 6<sup>th</sup> February 2023. Unfortunately, he submitted the Plaintiffs refiled their case on 2<sup>nd</sup> May 2023 after a lapse of 86 days and without seeking extension of time.

Referring to Section 21 of the Act, where computation of time has been enshrined, Mr. Rumisha also averred that if the same is to be applied in computing the time from which the plaintiffs have been prosecuting the matter on due diligence and in good faith, the plaintiffs' last day for re-filing the case without seeking an extension of time would have been 13<sup>th</sup> February, 2023. He pointed out that in this case, the Plaintiffs re-filed the suit on 02<sup>nd</sup> May, 2023 which was 79 days late.

He also referred to this Court's where it was stated that "if he wishes, the plaintiff would re-file the suit", arguing that this was not an automatic extension of time. He cited the case of **Emmanuel Eliazary vs Eziron K. Nyabakari, HC (Land Division), Land Appeal No. 56 of 2018** where the same position was held. Re-filing a suit when ordered by Court is subjected to the law of limitation hence the suit being filed on 2<sup>nd</sup> May, 2023 was time barred and the plaintiffs ought to have sought an extension of time before re-filing their suit. Failure to do so, he argued, the matter was filed out of time. His prayer was for the dismissal of the suit with costs.

On his part, Mr. Rwekiza submitted that under paragraph 7 of the plaint, the cause of action accrued on 16<sup>th</sup> June, 2019. He then pointed to the time limit for tortious claims as prescribed under item 6 of the Schedule to the Law Limitation Act which is three years hence the suit

was time barred. He also cited the case of **Stanbic Bank (T) Limited Vs M/S Tradexim Company Limited** to support his submissions.

Mr. Rwekiza went on submitting that the plaintiffs' last date to institute the case without seeking for extension of time from the Minister was on 15<sup>th</sup> June, 2022 while this case was filed on 10<sup>th</sup> June, 2022 just five days before the lapse of time limit prescribed in law for tortious claims. He argued that the first suit was time barred for 128 days but the ruling striking out the first suit had granted the plaintiffs leave to refile their suit if they so wished after serving notices as directed by law. That the plaintiffs re-filing their suit after expiration of time ought to have known the phrase "if he wishes, the plaintiff would refile the suit" does not act as an automatic extension of time. That the plaintiffs would have re- filed the suit only if the suit was still within time limitation and that an extension of time was necessary before filing the suit on 5<sup>th</sup> May, 2023. He also cited the case of **Emmanuel Eliazary vs Ezironk K. Nyabakari** (supra) and **Flomi Hotel Limited vs Equity Bank (T) Limited** (supra) to support his submissions. He concluded his submission by urging this Court to take the holding of its decision in Emmanuel Eliazary and dismiss the suit with costs.

In reply to Mr. Rumisha's submissions, Mr. Shija submitted that the defendants the requirements of section 3 (1) of the Act is not applicable to the circumstances of the matter before this honourable Court. He

submitted further that Section 21 of the Act provides for exclusion of time during which the Plaintiff has been prosecuting with due diligence, another civil proceeding against the defendant where the proceeding is founded upon the same cause of action and is prosecuted in good faith. His argument was that the exclusion is provided in mandatory terms as the word used in the context is "shall". The case of **Geita Gold Mining Limited vs Anthony Karangwa, Civil Appeal No. 42 of 2020 (unreported)** was cited. In the cited case, the court provided the manner of application of section 21(1) of the Law of Limitation Act. That the court held further that a party intending to rely on Section 21 (1) of the Act is not required to seek extension of time and secondly the Court demonstrated the manner in which the time to be excluded is calculated.

Mr. Shija also pondered on the requirement of serving notice of intension to sue to the 4<sup>th</sup> respondent arguing that since the suit was once in Court and later struck out with leave to refile, the law directs that an exclusion of the days that the matter was pending in Court have to be considered. He further argued that from the calculations of the plaintiffs a total of 222 were taken by the plaintiff from the date Civil Case No. 89 of 2022 which was struck out to the date of institution of Civil Case No. 76 of 2023. That from the 20<sup>th</sup> October, 2022 to 13<sup>th</sup> April 2023 is one hundred and seventy-five days meaning that Civil Case No. 76 of 2023 was filed 47 clear days before the expiry of time limitation.

Mr. Shija went on submitting that upon striking out of Civil Suit No. 89 of 202, it was not practical for the plaintiffs to immediately re-serve the 90 days statutory notice. That the Plaintiffs needed to consult lawyers on available options which required due diligence so as to avoid mishaps. He also pointed out that the suit involved two plaintiffs who are based in the Netherlands therefore communications and coordination and decision making took some time. He also argued that also in their submissions, the defendants did not show how the plaintiffs are precluded from claiming the exclusion provided for under Section 21 (1) of the Act. He prayed that the preliminary objection be overruled.

On my part, having dispassionately gone through the records and considered the submissions of the parties, the question for my determination is whether the court granting leave to refile resulted in automatic extension of time and whether the present suit was filed within the limitation period.

In the suit at hand, it is undisputed by all parties that on 21<sup>st</sup> October, 2022 this Court struck out the plaintiffs' case with leave to refile. The starting point here is in defining the effect of striking out the suit. In the case of Ngoni **Matengo Cooperative Marketing Union Ltd. Vs. Ali Mohamed Osman (1959) E.A. 577** while defining the difference between striking out a suit and withdrawal of a suit, the court had this to say:



*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case **was to "strike out" the appeal as being incompetent;** rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, **while the former phrase implies that there was no proper appeal capable of being disposed of.**"*

It is undisputed between the parties that the previous suit was struck out for being incompetent and as the holding above demands, there was no proper suit before the court capable of being disposed of. The result thereof was as if there was no suit ever filed in court. The parties' position goes back to where they were before the said suit was filed. The court granting leave to refile was to enable the plaintiffs to file a fresh suit if they so wished. However, the position would have been the same even if there were no such utterances made by the court in its order. This is because a struck out suit erases any record ever filed as opposed to disposing off the case in case of a withdrawal. In the former, a party is at liberty to bring a fresh suit with or without leave being granted. As held in the cited case of **Emmanuel Eliazary vs Ezironk K. Nyabakari** (supra) leave, did not mean an automatic extension of time for if that was the intention of the court, then a time frame would have been prescribed

therein. Since the court did not grant extension, the position of the parties as of 21<sup>st</sup> October, 2022 when the suit was struck out, was that of no litigation was ever filed in court on the same subject matter between the same parties. This takes me to the substance of the objection and the second issue, whether the present application was filed within the limitation period.

It was Mr. Rumisha's argument that the ruling was silent on time within which to file the same. That the granted leave was not open ended as the aim of the Court in granting the leave was to afford the plaintiff time to serve mandatory notices as a requirement of law. That counting the date the suit was filed, the same is time barred. On his part, Mr. Rwekiza argued that under paragraph 7 of the plaint, the cause of action accrued on 16<sup>th</sup> June, 2019. He then pointed to the time limit for tortious claims as prescribed under item 6 of the Schedule to the Law Limitation Act which is three years hence the suit was time barred.

Mr. Shija's argument was that the requirements of section 3 (1) of the Act is not applicable to the circumstances of the matter before this honourable Court. That Section 21 of the Act provides for exclusion of time during which the Plaintiff has been prosecuting with due diligence, another civil proceeding against the defendant where the proceeding is founded upon the same cause of action and is prosecuted in good faith.

His argument was that the exclusion is provided in mandatory terms as the word used in the context is "shall".

On this point, I am in one with the arguments raised by Mr. Rumisha and Mr. Rwekiza on time limitation. Having described the effect of striking out a suit to be as if no suit was ever filed, the next question is when the right of action accrued. Section 4 & 5 prescribe the time upon which the period of limitation commences and the right of action accrues. The two Sections provide:

*"4. The period of limitation prescribed by this Act in relation to any proceeding shall, subject to the provisions of this Act hereinafter contained, commence from the date on which the right of action for such proceeding accrues.*

*5. Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises."*

Indeed, Section 5 of the Act prescribes that the right of action in respect of any proceedings shall accrue on the date upon which the cause of action arose while for computation of that period, Section 4 commands to begin from the date which the time so accrued. Therefore, in this case, the computation of time for the purpose of time limitation should commence on the date when the cause of action accrued on the 16<sup>th</sup> June,

2019. As for Mr. Shija's arguments that under Section 21 of the Act, the time spent in prosecuting a case with due diligence against the same parties for the same relief to be excluded when computing the period for limitation is off the context. The cited case of Fortunatus Masha Vs. William is inapplicable in our case.

In the cited case of Fortunatus Masha, the appellant was seeking an extension of time to lodge an appeal and the position of the Court was that in analysing the period of delay, time spent in delay, the fact that the appellant was in court corridors pursuing his rights should be taken into consideration. However, in our case, having had the suit struck out, the position of the parties went back to the 16<sup>th</sup> June, 2019 when the cause of action arose. Since the matter at hand is an original suit, extension of time is not within the ambit of the Courts but rather is on the Minister responsible for Justice.

As for the court, the time limit is the one prescribed under item 6 of Part I of Schedule to the Law of Limitation Act relating to the time within which to file a law suit. Under the item, the limitation period is three years. Looking at the time when the cause of action arose on 16<sup>th</sup> June, 2019 to the 02<sup>nd</sup> May, 2023 when this case was filed, a period of three years had longed lapsed on the 15<sup>th</sup> June 2022. The suit was therefore filed almost one year after the expiration of limitation period hence it is time barred.

The fate of the suit which is time barred is prescribed under Section 3(1) which provides:

*"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."*

From the cited provision, since this suit is found to be time barred, it is hereby dismissed with costs.

Dated at Dar es Salaam this 25<sup>th</sup> day of October, 2023.



*[Handwritten signature]*  
**S. M. MAGHIMBI**  
**JUDGE**