IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 79 OF 2001

HEZRON M. NYACHIYA.....
APPELLANT

VERSUS

1. TANZANIA UNION OF INDUSTRIAL AND]
COMMERCIAL WORKERS]
2. ORGANIZATION OF TANZANIA].....
RESPONDENTS
WORKERS UNION]

(Appeal from the ruling and order of the High Court of Tanzania at Dar es Salaam)

(Katiti, J.)

dated the 4th day of April, 2001
in
Civil Case No. 30 of 2000

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant, Hezron M. Nyachiya, was employed by the 1st respondent, Tanzania Union of Industrial and Commercial Workers (TUICO) a Union of the 2nd respondent, the Organization of Tanzania Workers Union (OTTU) as a Regional Secretary, until on 27.4.1999 when his employment was terminated on allegation that he caused his employer, the respondents to lose members, and for absenting himself from duty from 16.3.1998. The appellant was aggrieved by

the termination.

On 5th April, 2000 the appellant filed an application in the High Court under Section 2 (2) of the Judicature and Application of Laws Ordinance Cap 453, Section 95 of the Civil Procedure Code, 1966, Sections 17 (2) and 17 A of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance as amended by Act No. 55 of 1968, praying for orders of Certiorari and Mandamus.

When the matter was called on for hearing, the respondents, through their advocate Mr. Kalolo from M/S M.A. Ismail & Co. (Advocates), raised the following preliminary objections:-

1. That the proceedings are unmaintanable as the decision sought to be challenged is alleged to have been made on 27.4.1999 and the proceedings were instituted on 4.4.2000 and therefore out of time without leave of the court, and so time barred.
2. That the proceedings relate to a challenge of termination which is

based on a contract of employment and the legal remedies for breach of contract have not been exhausted, and also, the first respondent is not a statutory body.

3. That the second respondent is wrongly or irregularly joined in the proceedings as the applicant claims no relief against it.

The preliminary objection was argued by way of written submissions. The learned trial judge, the late Katiti, J., sustained all three points of objections.

Sustaining the first ground of objection, the learned trial judge held that, since the termination complained of was made on 27.4.1999, when the appellant filed the application on 5/4/2000, it was more than the prescribed period of six months, and therefore was time barred. The learned trial judge went further and considered the other two grounds and the application on merit and held that, the application had no merit. He therefore dismissed it with costs.

The appellant was dissatisfied with the decision on merits. Hence this appeal.

Before us the appellant is represented by Mr. Magesa learned counsel, who had also represented him in the High Court. The respondents are advocated for by Mr. Kalolo who had also advocated for them in the High Court.

Mr. Magesa preferred the following grounds of appeal:-

1. That the trial judge erred in law and in fact to decide the matter on merits in the preliminary objection before the main application was heard,

2. That the trial judge erred in law and in fact in holding that the matter was time barred,

3. In the alternative to ground No. 2 above, the trial judge erred in law and in fact to fail to grant leave to the appellant to amend the chamber summons to show therein the correct date when the appellant was terminated from service.

When the appeal was called on for hearing, Mr. Magesa

abandoned grounds Nos. 2 and 3, and argued ground No.1 only.

Mr. Magesa contended that, after the learned trial judge had held that the application was time barred, that was enough. He should have stopped there. There was no need to consider the other grounds of objection which strayed the learned trial judge into deciding the main application on merit, contended the counsel. Mr. Magesa further contended that, since at that stage the matter at issue was a preliminary objection, and their submissions were confined to that aspect alone, it was wrong for the learned trial judge to decide the whole application on merit. It is the learned counsel's submission that, had the learned trial judge restricted himself to the preliminary objection where he had held the application to be time barred, he would have struck out the application instead of dismissing it.

On his part, Mr. Kalolo, learned counsel for the respondents, contended that, in the course of submitting on the preliminary objection, learned counsel for both parties submitted also on the main application, since the main application was based on evidence contained in the affidavits. The learned counsel further contended that, since the application was time barred, it was rightly

dismissed under section 3 of the Law of Limitation Act, 1971. The learned counsel contended that, the proper course for an application which is time barred is to be dismissed and not to be struck out.

In reply, Mr. Magesa, contended that, the Law of Limitation Act 1971, does not appear to be applicable in applications filed under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap 453; and that it has been the practice of the court to strike out an application which is time barred.

We have carefully considered the rival submissions by learned counsel for both parties.

For the interest of justice, we think, it is pertinent to say a few words on what is a preliminary objection, and the purpose it serves when it is raised in a case. In the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.** (1969) EA 696, Sir Charles Newbod P. had this to say at page 701:-

> “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts

> pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."

In the same case, Law JA, at page 700 had this to say:-

> "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."

Recently, this Court, in **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji** – Civil Application No. 42 of 1999 (unreported), expressed its view on the point in similar terms when it said:-

> "The aim of a preliminary objection is to

> save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."

In the light of these observations, we ask ourselves: in the instant case, were all the three points of objection raised at the trial, preliminary objections? With due respect to the learned counsel who raised them, we think, it was only the first point of objection which was a preliminary objection worth its name. Time limitation is a point of law. The second and third points were not purely points of law. They were of mixed points of law and facts. The facts required proof by evidence. In that respect, we think, the learned trial judge should have struck them out and proceed with the first objection only.

As far as the first objection is concerned, there is nothing much we can say about it because Mr. Magesa has conceded that the application was time barred. We accept Mr. Magesa's submission that the learned trial judge erred when he determined the appeal on merit when he was required to determine only the preliminary objection raised. The only crucial issue is as to what is the effect of an application which is time barred. According to Mr. Magesa,

such an application is to be struck out. But according to Mr. Kalolo, it is to be dismissed under Section 3 of the Law of Limitation Act, 1971. We ask ourselves: is the Law of Limitation Act 1971 applicable to applications filed under the Law Reform (Fatal and Accidents Miscellaneous Provisions) Ordinance Cap 360 (now Cap 310).

Generally speaking, the Law of Limitation plays many roles including the following: One, to set time limit within which to institute proceedings in a Court of Law. Two, to prescribe the consequences where proceedings are instituted out of time without leave of the court. Where a period of limitation for any proceeding is prescribed by any other written law, the provisions of the Law of Limitation apply as if such period of limitation had been prescribed by the Law of Limitation Act.

This is provided for under Section 46 of the Law of Limitation which states:-

> 46: Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of Section 43, the

> provisions of this Act shall apply as if such period of limitation had been prescribed by this Act.

In the instant case, the time limit for instituting proceedings under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance is six months as provided for under Section 17 A (3) of the Ordinance.

But the Ordinance does not prescribe the consequence when such proceedings are instituted out of time without leave of the court. The Law of Limitation has a provision for the consequence where a proceeding is instituted out of time without leave of the Court. It is Section 3. Under that provision, that is, Section 3, the consequence is that, such proceeding shall be dismissed whether or not limitation has been set up as a defence. Since under Section 46 where a period of limitation for any proceeding is prescribed by any other written law the provisions of this Act shall apply, it is our considered view that, Section 3 of the Law of Limitation applies also in respect of proceedings instituted under the (Fatal Accidents and Miscellaneous Provisions) Ordinance. Thus, the appellant's application which was instituted out of time without leave of the Court, deserved to be dismissed.

We were impressed by Mr. Magesa's observation that, it

has been a practice by courts to strike out such proceedings. But, with due respect to the learned counsel, we think he had in mind this Court. If that is what he had in mind, then he was right. This is so because the Law of Limitation Act does not apply in respect of proceedings instituted in this Court as provided for under Section 43 (b) of the said Act. We have already held that the learned trial judge erred in deciding the main application on merit in the preliminary objection. We have also held that, since the appellant's application was time barred, it deserved to be dismissed.

In the end result, and for the reasons stated, we allow the appeal to that extent and quash the learned trial judge's finding on the main application on merit. The appellant who has failed in this appeal to have the dismissal order substituted with that of striking out, is awarded ¾ of his costs.

DATED at DAR ES SALAAM this 19th day of October, 2005.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE

JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S. M. RUMANYIKA)
DEPUTY REGISTRAR