IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 83 OF 2010

LAUSA ATHUMAN SALUM ..... APPELLANT
VERSUS
ATTORNEY GENERAL ..... RESPONDENT

(Appeal from the Ruling of the
High Court of Tanzania at Mwanza

(Masanche, J.)

dated the 5th day of February, 2004
in
Civil Case No. 25 of 2000

JUDGMENT OF THE COURT

20 May & 13 June , 2011

MASSATI, J.A.:

The appellant was, on 29/3/83, arrested, detained and charged under the now repealed Economic Sabotage (Special Provisions) Act No. 9 of 1983. According to the judgment of the National Anti - Economic Sabotage Tribunal (which was attached as part of the appellant's amended plaint), on that same day, the police also seized from her shops and home, several goods and chattels. She was subsequently charged in sabotage case No. 63 of 1983 with two counts, one of being in possession of property reasonably suspected of having been stolen or unlawfully obtained, and in the alternative

the count of hoarding. Six and half months later, and after a full trial, the National Anti - Economic Sabotage Tribunal acquitted her and ordered that all the goods listed in the charge sheet be restored to her. According to the appellant this order was not complied with in full.

So on 29th July, 2000, the appellant filed a suit in the High Court at Mwanza. According to paragraphs 4,5,6,9 of the amended plaint, the appellant's causes of action were founded in the torts of detinue, malicious prosecution, false imprisonment, as well as action on the judgment and breach of her basic constitutional rights to liberty and enjoyment of property.

The respondent raised a preliminary objection to the suit on the ground that it was time barred. In its ruling, the High Court, (Masanche, J.) upheld the preliminary objection and struck out the suit with costs on 5th February, 2009. The present appeal is against that ruling.

At the hearing of the appeal the appellant was advocated for by Mr. Jerome Muna, while Mr. Pius Mboya, Senior State Attorney who had also represented the respondent in the lower court appeared in the appeal.

Mr. Muna, who did not draw the five point memorandum of appeal, nevertheless adopted it, but at the hearing, confined himself to grounds 1,3 and 4. Those grounds are:

1. The Honourable trial judge misdirected himself in not reading and understanding the nature of the dispute between the parties. The honourable trial judge did not take into consideration of the renewal of the causes of action by admissions of the defendant, like the letter dated 31st October 1995 from the defendant to the National Housing Corporation, the letter dated 21st May, 1997 promising the appellant to pay and other letters and correspondences the last one being the one of June 12, 2000 which triggered the filing of the suit.

3. The Honourable trial judge misdirected himself in failing to appreciate that the majority of the causes of action were based on judgment certified on 31st August 2000 and others based on irrevocable promises.

4. The Honourable trial judge erred in law and in fact in striking out the whole suit and thereby failing to grant the sum of TShs 7,301,434/= unequivocaly admitted at paragraphs 10,26 and 27 of the Amended Written Statement of Defence.

Apart from a written submission, Mr. Muna took us through the submission in attempting to elaborate the same. On the first ground, the learned counsel, briefly submitted that since the respondent repeatedly kept on promising to pay, and started by paying Tshs 17,200,000/= in 1996, the appellant's cause of action kept on reviving until the 14/6/2000 when the respondent changed its mind and refused to pay. So, in his view, the suit which was filed on 29/7/2000 was filed well in time. He pleaded that the letter from the Prime Minister dated 21.5.99 also amounted to an acknowledgment of the

debt. As authority, he referred us to the decision of this Court in **LAEMTHONG RICE COMPANY LTD v PRINCIPAL SECRETARY, MINISTRY OF FINANCE** (2002) TLR. 389. Mr. Mboya's response was that, since the appellant's causes of action were founded in the torts of malicious prosecution, wrongful confinement, and detinue, that were committed on 29.3. 1983, and since the prescribed periods of limitation for torts was three years, the suit was definitely time barred when it was instituted in July 2000. As for the Prime Minister's letter the learned counsel submitted that it was not an acknowledgement. Even if it was, then the suit based on it should have been instituted within the prescribed period of limitation, which is to say by 21.5.2000; which was not the case here. He distinguished the **LAENTHONG** case because there, there was an acknowledgment of a debt, but there was no debt to be acknowledged in the present one.

On the third ground Mr. Muna submitted on two fronts. First he argued that the trial court should have held that for the suit based on judgment the cause of action accrued on the date the appellant

obtained the certified copy of the judgment of the National Anti – Economic Sabotage Tribunal, which was certified on 31st August 2000. The second front was that the trial court took a self contradictory and inconsistent view from previous cases arising from similar factual situations, and that was wrong. Mr. Mboya echoed his submission at the High Court, that the alleged judgment could not be relied upon because it was not signed by the chairman, and therefore not a judgment in law, and on the other aspect, Mr. Mboya submitted that the cases were different from the one before the trial Judge.

With regard to the fourth ground of appeal, Mr. Muna was of the view that since the Respondent had admitted liability in the sum of TShs 7,301,434/= in her amended statement of defence the appellant was entitled to judgment on admission under Order XII r. 4 of the Civil Procedure Code (Cap 33 – RE 2002). It was therefore, wrong for the trial Judge to have dismissed the whole suit. The learned Senior State Attorney, had a different view. He argued that since the suit was incompetent for being time barred, there was

learned judge on which to enter judgment on admission. He urged the Court to dismiss the appeal with costs.

The Court then asked Mr. Mboya to address it on whether or not Section 7 of the Law of Limitation Act could apply to any of the causes of action pleaded in the plaint. He was candid enough to admit that he did not address his mind to that provision, and left it to the Court to decide as it deemed fit.

In his reply submission, Mr. Muna reiterated his earlier arguments that the letter dated 21st May, 1997 from the Prime Minister's office had the effect of reviving the appellant's cause of action and therefore the suit was filed in time. He also pleaded with the Court to find fault with the trial judge's approach to the case, which was different from the ones decided earlier on. He urged us to resort to equity if we find that there was no special provision to cover the situation. On the scope of section 7 of the Law of Limitation Act, the learned counsel, implored us to use it to find that the wrongs committed against the appellant were continuous, but he did not

specify which of the various torts were continuous. He wound up by praying that the appeal be allowed with costs.

In the first ground of appeal, the appellant has referred the Court to several correspondences between and from the parties either acknowledging or promising, to pay the appellant's claim and how they affected the accrual of the appellant's causes of action. After hearing the parties and finding that the appellant's action lay in tort and its prescribed period of limitation was three years, and after quoting several passages from two decisions of the High Court in **SAIDI SELEMANI v BILALI MOHAMED KABEZ,** in PC Civil Appeal No. 3 of 1993 (HC) (Unreported) and **YUSUF SAME AND ANOTHER v HADIJA YUSUFU** (HC) Civil Appeal No. 38 of 1996, and **RUSTOMJI ON THE LAW OF LIMITAITON** (5th ed.), Masanche, J. concluded that the suit was time barred and felt that

> *" it was unnecessary ..... to discuss anything further, as limitation is peremptory."*

True to his declaration, the learned trial judge did not go further to discuss, for instance on the effect of the correspondence between the parties, as regards acknowledgement of the debt or liability.

We have not been able to lay our hands on SAIDI SELEMANI'S case, but YUSUF SAME'S case is reported in (1996) TLR. 347 . In that case, the High Court, overruled the subordinate court's decision that the defence of limitation could not be raised at the trial if it was not pleaded. In terms of Section 3(1) of the Law of Limitation Act (Cap 89 RE 2002) that is the correct position of the law. However that case is distinguishable, because in the present case, limitation was specifically pleaded and argued at the trial court . We have not also had the advantage of accessing to RUSTOMJI's 5TH edition of his treatise on the **LAW OF LIMITATION** but we combed through the 3rd edition, and have noted that the substance of the comments such as those quoted by Masanche J, also appear from pages 3 to 31 of that edition. We have no qualms on the stated positions of the law. But the question in this appeal is whether, the learned judge was

right in deciding the question of limitation only on the basis of section 3 of the Law of Limitation Act ?

Section 3 only deals with the consequences of filing a suit, appeal or application after the prescribed period of limitation. There was no dispute on that at the hearing of the preliminary objection. What was in dispute was whether or not on the facts pleaded and the law, the suit was time barred ?

We think that in approaching the question of limitation, a court is bound to consider two principles. First, it has to look at the whole of the suit as framed, including the reliefs, sought. This is because, the suit could combine more than one cause of action and/or claim; and:-

> *".....the combination of several claims would not deprive each claim of its own specific character and description and accordingly, a suit seeking two or more distinct and independent remedies may be*

barred as to one of the remedies and not barred as to the other. When an injured party has a right to either of two remedies, the one he chooses is not barred by limitation because the other is."

(K.J. RUSTOMJI. **THE LAW OF LIMITATION AND ADVERSE POSSESSION:** 3rd ed. p. 30)

We accept this statement of the law as correct. It means that, where, in a suit, there are more than one claim based on different causes of action, and one or some are found to be barred by limitation, but others are not, it is wrong to dismiss the whole suit as time barred.

Another principle is that when the court is called upon to interpret a provision of a statute that provision must be read in its context. According to G. P. SINGH in his PRINCIPLES OF STATUTORY INTERPRETATION (9th ed. (2004) at p. 3.

> *"The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."*

The learned author (pp 32-33) also quotes a paragraph from the judgment of SINHA C J.I in **STATE OF WB V UNION OF INDIA, AIR (1963) SC.** 1241 at p. 1265. that:

> *"The court must ascertain the intention of the legislature by directing its attention, not merely to the clause to be construed but to the entire statute; it must compare the clause with the other part of the law, and the setting in which the clause to be interpreted occurs."*

In the present case, it is plain to us that the trial court did not consider the body of the plaint as a whole and the reliefs pleaded, or all the arguments marshaled by counsel before him.

This is so, because from the ruling, the trial judge appeared to have considered that the appellant's suit was based only on the torts of malicious prosecution, false imprisonment, and that the time of limitation for such torts was three years. Our own perusal of the amended plaint as a whole however, reveals that the suit is not only for malicious prosecution and false imprisonment but also detinue and partly on judgment (paragraphs 4 and 48) There is also a claim for loss of use of the goods unlawfully seized from her, and not covered by the judgment of the National Anti - Economic Sabotage Tribunal (paragraphs 7,8). There is also an allegation of torture (trespass to the person) (Paragraph 11.1). In all the reliefs, the appellant prayed for compensation and a declaration confirming the Tribunal's judgment. None of these wrongs were considered in the ruling of the trial court. And if he had looked at the plaint as a whole, and read the entire Law of Limitation Act, he would have found that

not all the wrongs had the same periods of limitation. While he was right that under item 6 of part I of the Schedule to the Law of Limitation Act; the prescribed period of limitation for a tort, is three years; he would also have noted among others that the prescribed period for a suit founded on judgment was twelve years (item (c).

But also, as pointed out above, it is dangerous to read section 3 or any single provision of the Law of Limitation Act in isolation. Indeed even the wording of that section itself carries a red banner. It starts with "**Subject to the provisions of this Act.**" "There are, for instance, a number of provisions in the Act which qualify the working of sections 4,5, and 6 which relate to accrual of actions while section 27 deals with accrual of right of action on acknowledgment or part payment. One such qualifying provision which we found relevant in the present case is section 7 which provides:-

> *"Where there is a continuing breach of contract, or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every*

moment of the time during which the breach or the wrong as the case may be, continues."

One such continuous wrong, it has been held, is detinue. As Lord Diplock L.J. of the Court of Appeal of England observed in **GENERAL AND FINANCE FACILITIES LTD vs COOKS CARS (ROMFORD) LTD** (1963) 1 WLR 644; at p. 648:

"There are important distinctions between a cause of action in conversion, and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of conversion; the latter is a ***continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. :*** *(emphasis supplied)*

In the present case, there were, before the trial court, not only claims based on malicious prosecution and wrongful imprisonment as the trial judge thought, but also one based on detinue, which is a continuous tort, and was therefore saved under section 7 of the Law of Limitation Act. The trial judge did not also consider the effect of section 27 together with the correspondence between the parties as agitated by the parties. We think this approach was flawed. The High Court was therefore not entitled to strike out the whole suit as it did. The first ground of appeal therefore succeeds but for different reasons.

We shall next consider the fourth ground of appeal that criticizes the trial court's omission to enter judgment on admission for the sum of Tshs 7,301,434/= After considering the rival arguments from counsel, our view is that as a general rule a judgment on admission under Order XII r 4 of the Civil Procedure Code, is not a matter of right, but one of discretion of the trial court and it has been held that where the defendant has raised objections which go to the very root of the case it would not be proper to exercise that discretion (See

SARKAR ON CODE OF CIVIL PROCEDURE, 10th ed. Vol. 1, at p 1174). In the present case, the defendant did raise a preliminary objection in his amended statement of defence, which raised the issue of limitation of the suit itself.

However, in the circumstances of this case, we are inclined to find that had the trial judge properly directed his mind to the pleadings, and the law, he would have found as we did in the first ground of appeal in this judgment, that not all the causes of action in the suit before him were time barred, and so should not have struck out the whole suit. Since entering a judgment on admission was a matter of judicial discretion, and since as demonstrated, the objection could not have been wholly sustained he was bound to consider entering judgment on admission as urged by the appellant. This is because the admission made by the respondent in its paragraphs 26 and 27 of the amended statement of defence in response to paragraphs 11 and 12 of the amended plaint which was a summary of all the claims made by the appellant, the trial court should have entered judgment upon admission on a claim of Tshs 7,301,453/= being part of Tshs 117,883,990/= pleaded in paragraph 7 of the plaint as damages:-

"in respect to other goods admitted to have been unlawfully seized other than the goods with which the plaintiff was charged in a Criminal Tribunal."

This sum was therefore admitted in respect of the tort of detinue, which should not have been struck out. We therefore allow this ground of appeal too.

The third ground of appeal on which Mr. Muna addressed us, reads that the trial court did not appreciate that the majority of the causes of action were based on judgment certified on 31st August, 2000 and others based on irrevocable promises. But in his written and oral submissions the learned counsel also argued that the learned judge wrongly departed from his previous decision of **GEORGE MINJA v ATTORNEY GENERAL** (Civil Case No. 26 of 2000) and that of the same court in **SHABIR PANJWANI vs. ATTORNEY GENERAL** Civil Case No. 13 of 2001) decided by Mchome J. His view was that since the cases arose from the same factual background, the present matter should also have been

decided in the same way. Mr. Mboya disagreed and attempted to distinguish the three cases. Our reaction on the first part of the argument is that it was implausible (if not illogical), in our view, for the plaintiff to have relied on the judgment of the Anti – Economic Sabotage Tribunal whose copy she obtained on 31st August, 2000, in a suit which she filed in July 2000, bearing in mind that an amended plaint relates back to when it was originally filed. (See **SOUTH BRITISH INSURANCE CO LTD v SAMIULLAH** (1967) EA. 659. But secondly, according to section 6 (c) of the Law of Limitation Act;

> *"In the case of a suit upon judgment, the right of action shall be deemed to have accrued on the date on which the judgment was delivered."*

There is nothing to suggest that the period for waiting for a copy of the judgment can be excluded in law in such cases. So there is no merit in this part of the ground

The answer to the second part of that ground, lies in Rule 113(1) of the Tanzania Court of Appeal Rules 2009 which reads as follows:-

> *"No party shall, without the leave of the Court argue that the decision of the High Court or tribunal, should be reversed or varied except on a ground specified on the memorandum of appeal or in a notice of cross appeal, or in support of the decision of the High Court or tribunal on any ground not relied on by that court or specified in a notice given under Rule 94 or Rule 100."*

Rule 94 governs Notices of Cross Appeals, while Rule 100 governs Notices of Grounds for affirming decisions. The two situations do not obtain in the present case; so they are not applicable. Mr. Muna did not seek and obtain prior leave to argue the novel point. (of the court having departed from its previous decisions) nor was it one of the grounds listed in the memorandum of appeal. But the worst part of it is that, it was neither raised nor

argued, and decided upon by the trial court. The position of the law is and has always been, that as a matter of principle, this Court cannot sit and decide on a matter which was not decided upon by the lower court. (See KENNEDY OWINO ONYACHI & OTHERS VR (Criminal Appeal No. 48 of 2006 (unreported) and **GANDY v CASPAIR AIR CHARTERS LTD (1956) 23 EACA 139).** So, for the reason that the matter raised at the hearing was neither a ground of appeal, nor argued or decided by the court below, this part of the ground of appeal collapses under the weight of the law. The third ground is accordingly also dismissed in its entirety.

In the upshot, since the suit included the tort of detinue, which is a continuous wrong under section 7 of the Law of Limitation Act, the High Court erred in law in striking out the whole suit. Upon our reading of the whole plaint and the relevant law, we think that the High Court was right in holding that the actions for the torts of malicious prosecution and wrongful imprisonment were time barred. But it was wrong in holding that the entire suit was time barred, certainly not for the tort of detinue. The appeal is therefore allowed.

The ruling and order of the High Court are set aside. It is ordered that the suit be remanded back to the trial court for it to enter judgment on admission in the sum of Tshs 7,301,434/= and to proceed with the trial of among others, the tort of detinue. The appellant shall have her costs.

It is so ordered.

DATED at DAR ES SALAAM this 8th day of June, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL