**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 71 OF 2018**

**ALLY RASHID AND 534 OTHERS .....APPELLANTS**

**VERSUS**

**PERMANENT SECRETARY, MINISTRY**
**OF INDUSTRY AND TRADE ..... 1st RESPONDENT**

**THE ATTORNEY GENERAL ..... 2nd RESPONDENT**

**[Appeal from the Judgment and Decree of the High Court of Tanzania (Dar es salaam District Registry) at Dar es salaam]**

**(Mihayo, J.)**

**dated the 31st day of August, 2009**
**in**
**Civil Case No. 151 of 2005**

.....

## JUDGMENT OF THE COURT

*18th August & 6th September, 2021*

**GALEBA, J.A.:**

The appellants, Ally Rashid and 534 others, were employees of Sungura Textile Mills Limited in various capacities up to 1990 and 1991 when they were terminated. Being aggrieved by the lay off from their respective employments, they preferred Trade Dispute No. 7 of 1991 before the Industrial Court of Tanzania (the ICT) claiming a total of TZS. 325,560,400.60 in 1992. According to them, they obtained a decree in their

favour for that amount. It is not clear why that judgment was not executed soon after it was pronounced, but nonetheless thirteen (13) years later, that is in the year 2005, the appellants filed Civil Case No. 151 of 2005 in the High Court of Tanzania at Dar es Salaam claiming the same amount of TZS. 325,560,400.60, together with interests and costs of the suit from the same defendants, the present respondents. Three preliminary objections were raised against the suit, but two of them were dropped except the one based on time limitation.

After considering written submissions of parties on the retained objection, relying on the proviso to rule 11(c) of Order VII of the Civil Procedure Code, Act No. 49 of 1966 (now Cap 33 R.E. 2019) (the CPC), in a ruling dated 12th December 2005, the High Court, Kalegeya J (as he then was) allowed the appellants to amend the plaint by pleading particulars showing clearly that their case was not time barred. To comply with the ruling, the appellants then filed an amended plaint including clause 8 pleading that the case was filed in time because the case was based on the judgment of the ICT and that the first respondent had on 21st June 1996 acknowledged existence of the said judgement. In reply, the respondents filed a written statement of defence disputing the contents of paragraph 8

of the amended plaint at paragraph 5 of the said written statement of defence. In other words, the respondents' pleading was that the suit was time barred.

On 28th June 2006 the case was assigned to Mihayo J. (as he then was). It followed that mediation failed and before hearing could take off, four (4) issues of fact were framed followed by very brief evidence of Ally Rashid Amiri (PW1) and Joachim Mhona (PW2), the plaintiffs' witnesses who testified on the same day on which the issues were framed, that is on 4th May 2017. At that point, although the issue of law had been raised at paragraph 8 of the amended plaint and disputed at paragraph 5 of the written statement of defence, that issue was not heard or determined before framing the issues of fact.

About 10 months later, on 6th March 2008, to be particular, the defence case opened and one Elly Pallangyo (DW1), an employee of the first respondent, testified followed by Charles Rwechungura (DW2) who was the liquidator of Sungura Textile Mills Limited. The latter testified on 18th June 2008 and the defence case was marked closed with orders that final or closing submissions be presented in writing. In their respective closing submissions counsel for both parties argued the preliminary

objection, the subject of paragraphs 8 and 5 of the amended plaint and the written statement of defence respectively. In their respective submissions, counsel argued the point of law first, before they could proceed to submit on the issues of fact that were framed.

In its judgment dated 31st August 2009, the High Court, Mihayo J, after navigating through the evidence adduced but before applying it on the issues framed, he reasoned that where an issue of law is raised, it must be resolved first. He therefore considered submissions of counsel on that issue and made a finding that, as PW1 and PW2 were terminated in 1996 and the case before him filed in 2005, it was filed out of time because the matter was based on contract, whose period of limitation is six (6) years counting from when the cause of action arose. After satisfying himself in the above terms, the High Court judge dismissed the case with costs. The High Court however, did not resolve any of the four (4) issues of fact that had earlier been framed.

That decision aggrieved the 535 appellants hence the present appeal, in which they raised three (3) grounds of appeal. The grounds are as follows:

*"1. The learned High Court Judge erred in law in failing to invite the parties to address him on the question of limitation which had been raised by the judge suo motu.*

*2. The learned Judge erred in law in entertaining the question of limitation which had been canvassed and decided previously by his fellow judge in the same proceedings.*

*3. The learned Judge erred in law in failing to determine the matter in accordance with the framed issues."*

At the hearing of the appeal, the appellants were represented by Mr. Julius Kalolo Bundala learned advocate and for the respondents was Mr. Mark Mulwambo learned Principal State Attorney teaming up with Mr. George Kalenda and Ms. Joyce Yonaz, both learned State Attorneys.

In support of the appeal, without elaborating the appellants' submission lodged on 3rd July 2018 or adding any oral arguments, Mr. Bundala, adopted it and invited us to allow the appeal with costs. As for costs, he insisted that his clients are entitled to costs because the labour statutes that are currently providing for waiver of costs in labour disputes, were not in force at the time the cause of action arose between the parties.

According to the appellants' written submissions, the issue of limitation was raised *sou motu* by the High Court and it was determined without inviting parties to address the court before it could make a decision on that aspect of their case. In support of that submission, counsel cited Article 13(6)(a) of the Constitution together with numerous authorities including, **VIP Engineering and Marketing Limited v. Citibank Tanzania Ltd,** Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported); **EARL v. Slatter and Wheeler (Aerlyne) Ltd,** (1973) 1 WLR 51; **A. G. v. Ryan,** (1980) A.C. 718, **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (unreported) and **Bank of Tanzania v. Said A. Marinda and Others**, Civil Application No. 74 of 1998 (unreported). Counsel quoting from **Abbas Sherally** (supra) and the **Bank of Tanzania** cases (supra), submitted that a decision arrived at without affording parties a right to address the court on the points considered in the cause of reaching at the decision, is unlawful, even if the same decision would have been reached, had the parties been heard. Based on that submission counsel urged us to allow the appeal.

Prior to rendering a reply orally to the first ground of appeal, Mr. Mulwambo adopted the submissions lodged on behalf of the respondents

and went on to submit orally on that ground. Although in the written submission, the respondents agree that the judge raised the issue of time limitation *suo motu,* which according to them was right, during oral hearing Mr. Mulwambo was of a different view. He submitted that the matter was not at all raised by the court. He contended that the issue of limitation was raised by the plaintiffs (appellants) at paragraph 8 of the amended plaint and the same fact was disputed by the respondents at paragraph 5 of the written statement of defence. He added that the same issue was thoroughly addressed by parties in their final submissions that is why, he reasoned, the judge made a decision on it. He moved the Court to dismiss that ground of appeal.

In rejoinder, Mr. Bundala insisted that parties were supposed to be summoned to address the court on the issue and that there is nothing in the proceedings before the court showing that parties were summoned to argue any point of law.

In determining this ground, the issue that we will seek to resolve is divided in two parts, **one** is whether the issue of time limitation was raised by the court *suo motu* and, **two**, is, whether the court decided the matter without parties having addressed the trial judge on it.

We will start with the first limb. Whether the issue of time limitation was raised by the court or it was raised by the parties. Determination of this point is somewhat straight forward. It is not difficult to resolve it because it is pretty easy to detect whether the issue of time limitation was raised by parties or it was raised by the court on its own motion. The issue is not a legal issue, it is a matter of fact and we will tackle it by navigating through the record of appeal, paying particular attention the parties' pleadings.

On 19th December 2005, the appellants filed an amended plaint pleading among other facts, the fact that their suit was not time barred. That was pleaded at paragraphs 7 and 8 of the amended plaint. Those paragraphs are as follows:

> *"7. The Plaintiffs and 535 others were aggrieved and accordingly took up the matter with the Industrial Court as Trade Dispute No. 7 of 1991 which Court finally pronounced judgment in favour of the Plaintiffs in 1992.*
>
> *8. That the suit is not time barred in that the Plaintiffs mounted their claim against the 1st Defendant based on the said judgement and on June 21, 1996 the 1st Defendant acknowledged the claim within the meaning of section 27(3) of the Law of Limitation Act, 1971 which acknowledgement marked fresh accrual of the right of*

*action founded on the said judgement whose life span expires on June 20, 2008."*

In response to the above paragraphs of the amended plaint, the respondents in their paragraph 5 of the written statement of defence reacted as follows:

*"5. The contents of paragraphs 7 and 8 of the amended plaint are disputed and the plaintiffs are put to strict proof thereof."*

As the above points were raised in the pleadings and not in the judgment or some other document authored by the court, we can comfortably state that the issue of limitation was not raised *suo motu* by the court, rather it was raised by the parties. So, we are unable to agree with Mr. Bundala that the trial court raised the issue of limitation *suo motu*, the issue was, for the first time, raised by his clients at paragraphs 7 and 8 of the amended plaint which paragraphs attracted a reaction of the respondent at paragraph 5 of the written statement of defence to that plaint.

Mr. Bundala also argued that the point of time bar was not properly raised in the written statement of defence, because to him paragraph 5 of the written statement of defence was a general denial which, would not be

sufficient to raise a point law worthy consideration by the court. With respect, we do not agree with senior counsel because the point under consideration being the one on the issue of limitation, according to section 3(1) of the Law of Limitation Act, [Cap 89 R.E. 2019] (the LLA), such a point does not need to be raised by parties. That section provides that:

> *"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."***

Briefly, to conclude the first corollary of the first ground of appeal, we hold that the matter was not raised *suo motu* by the court, it was raised by the parties, but even if it had not been raised by any of the parties, still the court had a duty placed on it by statute to raise and resolve the issue of limitation.

Next, we will consider the complaint of the appellants that the court did not invite parties to address it on the issue of whether their case was time barred. In that respect, we have carefully examined the record of appeal in this matter and although there is no direct order summoning

parties to argue the point of law orally, we have however, noted that at page 182 of the record of appeal the court ordered parties to file their closing submissions. In compliance with that order on 1st July 2008 the respondents filed final submission in the High Court and on 22nd July 2008, the appellants filed theirs in reply to that of the respondents. In the respondents' submission from page 149 up to page 151 of the record of appeal, the respondents' counsel submitted at length arguing that the suit was time barred. They submitted also on other factual issues of the case.

In response to the final submission of the respondents, Mr. K. M. Fungamtama learned advocate who was appearing for the appellants who are now represented by Mr. Bundala, responded to the respondents' final submission with equal, if not much more, force. He refuted the allegations of the respondents that the suit was time barred. The submissions on this aspect run from page 153 of the record of appeal through page 156. In our view, as the court ordered the parties to file final submissions in order to address it generally on all issues that arose in the case, and both parties having adequately addressed the court on the issue of time limitation, we agree with Mr. Mulwambo that indeed, the court was fully addressed on the matter. We are thus, respectfully, unable to share Mr. Bundala's

proposition that parties were not afforded adequate opportunity to address the court before it could decide on the issue of time bar.

As for the authorities cited by Mr. Bundala the same are relevant where the court decides a matter without affording parties a right to address it, which is not the case in this matter as abundantly demonstrated above.

Having observed as above, the first ground of appeal with a complaint that the court raised the issue of time limit *suo motu* and decided on it without parties addressing it, has no merit and we dismiss it.

The complaint in the second ground of appeal is that the High Court erred for entertaining a matter that had been heard and decided by Honourable Kalegeya J. because the court became *functus officio* citing the case of **Kamundi v. R** [1973] EA 540 where it was held that a court becomes *functus officio* when it disposes of a case by a verdict of guilty or passing a sentence or making some orders finally disposing of the case. Other cases referred to were, **James Kabalo Mapalala v. British Broadcasting Corporation** [2004] TLR 143 and **Scolastica Benedict v. Martin Benedict** [1993] TLR 1. With that understanding Mr. Bundala urged us to allow the appeal.

In reply to that ground, Mr. Mulwambo submitted in disagreement that Kalegeya J. (as he then was), did not deal with the issue of limitation and finally determine it. He submitted that the case did not become *functus officio* as submitted by his counterpart, because a court becomes *functus officio* when it disposes of a matter first and then reopens it. He contended that in this case the issue of limitation was not any time earlier disposed of so there was no question of reopening the subject anew.

In rejoinder Mr. Bundala submitted that Mihayo J. was precluded from reopening the matter, the same having been decided by Kalegeya J.

We will discuss this ground under two limbs or sub issues. **One** will be whether Kalegeya J. determined the issue whether the suit was time barred, and **two** the duty that the courts have in terms of issues presented before them.

In order to resolve the first limb fairly, we had to scrupulously and thoroughly study the matter before Kalegeya J. At the end we noted that two issues of law were raised before the Judge, one was dropped, thereby retaining one issue of limitation, where the respondents were arguing that the suit was time barred. The court ordered the parties to argue that objection by way of written submissions. As this point has a bearing on the

manner we will dispose of this ground, we propose to quote what counsel for the respondents submitted in their written submission is support of the preliminary objection before Kalegeya J. At page 100 of the record of appeal the respondent submitted:

> *"My Lord, the plaint filed by the plaintiffs, on its own, does not demonstrate as to when was/is the actual date when the alleged lay off of the plaintiffs occurred.*
>
> *My Lord, specifying dates is a legal requirement failure of which renders the whole pleading incompetent. The usefulness of specification of dates is, inter alia, to enable the court or other parties to know whether the court can adjudicate the matter or rather if the suit is within time taking into account the laws governing limitation of time. The Plaintiffs, for reasons known to themselves have not pleaded this important legal requirement and thus have violated the provisions of* ***Order VII rule 1(e) of the Civil Procedure Code Act 49/1966*** *which goes:*

1. *The plaint shall contain the following particulars*

*(a)*

*(b)*

*(c)*

*(d)*

*(e) the facts constituting the cause of action and when it arose (emphasis ours)."*

In other words, one head of complaint in the arguments presented before Kalegeya J. was that the plaint did not disclose particulars as to when the cause of action arose in order to determine whether the matter was or was not filed in time. According to the respondents, that omission to specify the date, offended Order VII rule 1(e) of the CPC. The other point argued was, of course, that the suit was time barred. In reply, the appellants concentrated their arguments on the issue that the matter was not time barred.

However, Kalegeya J never made a decision on whether or not the suit was barred by limitation, necessarily so because, at that point in time it was not clear from the pleadings that the case was time barred or not. Because of the uncertainty as to the time when the cause of action arose, under the powers conferred on the court by the proviso to rule 11(c) of Order VII of the CPC, the court ordered the appellants to amend the plaint in order to specifically plead that the suit was not time barred. At page 110 of the record of appeal, the judge stated:

*"I hereby allow the Plaintiffs to amend their plaint so as to clearly show that it is not barred by law."*

There is no gainsaying that Kalegeya J did not resolve the issue of whether the suit was time barred. That is so because determining that issue was simply impossible as there were no clear particulars on when the cause of action arose in the original plaint as required by Order VII rule 1(e) of the CPC.

In respect of the second limb of that ground (the duty of a judge has to determine issues present to him in the pleadings), we firmly hold that as long as the appellants included in clause 8 of their pleadings which was respondent to by the respondents, Mihayo J was duty bound and legally justified to resolve the issue, because the point was raised by one party and it was disputed by the other, which means an issue necessary for resolution arose at that point in time. Order XIII Rule 1(1) of the CPC provides that:

*"Issues arise when a material proposition of fact* ***or law is affirmed by one party and denied by the other."***

In our view as the appellants themselves pleaded issues of limitation and the respondents disputed, Mihayo J, cannot be faulted for having resolved it especially after the parties had argued it in their final

submissions. A court of law has a legal obligation to resolve all issues arising out of pleadings, and failure to do so constitutes abdication of duty to procedurally adjudicate disputes presented to court - see **Kukal Properties Development Ltd v. Maloo and Others,** (1990-1994) EA 281.

Based on the above discussion, we are satisfied that the issue of time limitation was never decided upon by Kalegeya J, and Mihayo J, was justified to determine it because it was raised in the pleadings and parties argued it.

To conclude the second ground, the issue of the court being *functus officio* did not arise and all authorities cited by Mr. Bundala on the issue of *functus officio* would only be of considerable relevance and usefulness to us, had Kalegeya J. decided the issue of limitation. That said, we find no merit in the second ground of appeal and we hereby dismiss it.

The complaint in the third ground of appeal was that the learned judge erred in law for failure to determine the framed issues. In support of this ground the appellant quoted Order XIV Rule 5 (1) of the CPC and various decision of this Court and others from other jurisdictions to support the point that, the court must determine issues framed. Among the

decisions cited is that of **Kukal Properties Development Ltd** (supra) where the Court of Appeal of Kenya held that a judge is obliged to decide on every issue framed and that failure to do so constitutes serious breach of procedure. Other cases counsel relied on included, **Bhag Bhari v. Mehdi Khan** [1965] EA 94, **National Insurance Corporation and Another v. Sekulu Construction Co.** [1986] TLR 157; and **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Application No. 25 of 2006 (unreported), just to mention only a few of them.

The respondents in their written submissions, argued that the court having heard the issue of law and having found out that the suit was time barred and dismissed it, there was no point in determining the issues of fact.

Determination of this ground will not take much of our time, because resolution of it, one way or the other, is based on statute. Under Order XIV Rule 1(4) of the CPC, there are two types of issues, there are issues of law and issues of fact. These issues are not determinable at random. According to law they must be determined in sequence, the issues of law start and if they are overruled, those of fact follow. Let us hasten to state right here that if the issues of law are upheld, the court is precluded from

entertaining issues of fact. As to the sequence of determining issues in courts, Order XIV Rule 2 of the CPC provides that:

> *"Where issues both of law and of fact arise in the same suit, and* ***the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first,*** *and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."*
>
> [Emphasis added]

In civil trials and even in criminal proceedings, trial courts are required by rules of procedure to try and determine issues of law first if such issues arise before getting to determining issues of fact- see **R.S.A. Limited v. Hans Paul Automechs Limited and Govinderajan Senthil Kumal;** Civil Appeal No. 179 of 2016 and **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999 (both unreported). We must observe here that the allegation that a particular action is barred by limitation based on statute, is an issue of jurisdiction, and section 3(1) of the LLA (quoted above) provides that where an issue of limitation is raised, determined and upheld, the matter must, in all cases be dismissed.

In the present appeal, when the issue of law was heard, it was found to be meritorious and the case was dismissed because it had been filed out of time. That way, it was rendered impossible for the trial court to embark on determining issues of fact in a case which had just been dismissed. In the circumstances, the third ground of appeal is misconceived and we dismiss it.

In light of the foregoing, this appeal has no merit and the same is hereby dismissed in its entirety, with costs.

**DATED** at **DAR ES SALAAM**, this 2nd day of September, 2021

G. A. M. NDIKA
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

The Judgment delivered this 6TH day of September, 2021 in the presence of Mr. Richard Madibi, learned counsel holding brief for Mr. Bundala Kalolo, learned counsel for the Appellants and Ms. Joyce Yonazi, learned State Attorney for the Respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. NDESAMBURO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**