

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUGASHA, J.A., GALEBA, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 312 OF 2019

COSMAS MWAIFWANI APPELLANT

VERSUS

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| <p>1. THE MINISTER FOR HEALTH,
COMMUNITY DEVELOPMENT, GENDER,
THE ELDERLY AND CHILDREN</p> <p>2. THE MEDICAL STORE DEPARTMENT
BOARD OF TRUSTEES</p> <p>3. THE ATTORNEY GENERAL</p> | } | <p>..... RESPONDENTS</p> |
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**(Appeal from the decision of the High Court of Tanzania, Main Registry
at Dar Es Salaam)**

(Munisi, J.)

Dated the 6th day of September, 2018

in

Miscellaneous Civil Application No. 32 of 2018

JUDGMENT OF THE COURT

7th & 15th June, 2022

MAIGE, J.A.

This appeal arises from the decision of the High Court of Tanzania, Main Registry (the trial court) dismissing an application, by the appellant herein, for leave to apply for prerogative orders of *certiorari*, *mandamus* and *prohibition* for being time barred. In the

memorandum of appeal, the appellant has raised five grounds which in essence raise two main complaints namely; the trial court was wrong in holding that, the application was time barred and in determining the application after expiry of the statutory period.

The material facts giving rise to the instant appeal are simple and straight forward. Until 2015 when the dispute culminating in this appeal erupted, the appellant was in the service of the second respondent. He was assuming the position of Acting Director General. On 15th February, 2016, the appellant received a letter from the second respondent's chairman signifying that the latter had been directed by the first respondent to suspend him from service pending investigation into some alleged financial irregularities levelled against him.

Eventually, disciplinary proceedings were commenced against the appellant with the end result of his service being terminated, on 8th July, 2016, for the reason of misconduct. Aggrieved, the appellant preferred an appeal to the first respondent on 29th day of July, 2016. Despite several reminders, he did not receive any

response from the first respondent as to the outcome of his appeal. It was not until 24th May, 2018, when he received a letter from the Chief Secretary dated 18th May, 2018 informing him that, his appeal before the first respondent had been determined on 10th October, 2016 and the outcome communicated to him, on the same day by way of post. A letter constituting the outcome of the appeal was also attached. That was after the first respondent had been directed in writing by the Chief Secretary so to do.

On 11th June, 2018,

being 18 days from the date when he received the decision, the appellant, being aggrieved by the same, applied to the trial court for leave to apply for prerogative orders of *certiorari*, *mandamus* and prohibition. At paragraph 34 (iv) of the statement in support of the application, the appellant deposed as follows:

"iv. THAT, not only was the Applicant victim of the obvious bias from the 1st Respondent, he was also the victim of the 1st Respondent's bad faith and improper motive following the 1st Respondent's unreasonable and unjustifiable failure to answer the

Applicant's appeal despite several reminders contrary to fair administrative justice. Further, contrary to the Applicant's expectation, the impugned 1st Respondent's letter dated 10/10/2016 purporting to uphold the 2nd Respondent's decision was served to the Applicant by the Chief Secretary on 24/05/2018".

Aside from opposing the factuality of the application by way of counter affidavit, the respondents lodged a notice of preliminary objection to the effect that, the application was time barred.

In its decision, the trial court having heard the submissions for and against the preliminary objection, was of the considered opinion that, the application in so far as it was brought after expiry of 6 months statutory period set out in rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Rules, 2014 was time barred. It did not agree with the counsel for the appellant that, time should have, in terms of section 26 of the Law of Limitation Act Cap. 89 R.E. 2019 (the LLA) started to run on 24th day of May, 2018 when the appellant became aware of the outcome of the decision because neither fraud nor mistake was involved in the process.

Once again aggrieved, the appellant having sought and procured leave to appeal, has brought the instant appeal challenging the decision of the trial court on the grounds that have been exposed elsewhere in this Judgment.

At the hearing, the appellant was represented by Mr. Mohamed Tibanyendera, learned advocate. The respondents were represented by a team of three counsel namely, Ms. Selina Kapange, learned Senior State Attorney, Mr. Daniel Nyakiha, learned State Attorney and Ms. Joyce Yonaz, also learned State Attorney.

In his brief oral submissions, Mr. Tibanyendera for the appellant just as it was Mr. Nyakiha who made the oral submissions for the respondents, fully adopted the substances of the written submissions filed earlier on with some clarifications and additions. We have given the relevant rival submissions due consideration in our judgment.

The central issue which we have to determine in this appeal is whether the trial court was right in holding that, the appeal was time barred.

In the humble submissions of Mr. Tibanyendera, since the first respondent deliberately concealed the outcome of the decision until on 24th May, 2018 when the same was made available to the appellant through the Chief Secretary, time should, in terms of section 26 of the LLA, be deemed to have started to run on the said date.

In the counter affidavit in opposition of the application at the trial court, much as it is in the submissions before us, it would appear, the respondents, though did not deny that the appellant was supplied with the letter constituting the outcome of the decision on 24th May, 2018, through the Chief Secretary, after several follows up, claimed that the appellant was notified of the same immediately. No evidence of service of the said decision was produced however.

Section 26 of the LLA upon which the appellant justified propriety of her application at the trial court provides as follows:

"26. Where in the case of any proceedings for which a period of limitation is prescribed-

- (a) *the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;*
- (b) *the right of action is concealed by the fraud of any such person as afore said; or*
- (c) *the proceeding is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff had discovered the fraud or the mistake, or could, with reasonable diligence, have discovered”.*

In the affidavit in support of the application at the trial court, it would appear to us, there was an express deposition by the appellant that, his right to challenge the decision of the first respondent was blocked by the reason of the first respondent deliberately concealing the outcome of the decision. It was Mr. Tibanyendera's submission that, as the first respondent had interest to serve, the omission to avail him with the outcome of the decision amounted to a calculated and deliberate impairment of his right to challenge the decision hence fraudulent within the meaning of the provision just referred. In

the alternative, it was his submission that, the same amounted to a mistake in terms of the same provision. In his view, therefore, time should have started to run on 24th May, 2018 when he became aware of the decision on his appeal.

Mr. Tibanyendera submitted further that, since the issue of fraud and or mistake as the basis of computation of time was pleaded in the affidavit and refuted in the counter affidavit, it was a factual issue which could not, as it was done, be decided as a point preliminary objection. The counsel placed heavy reliance on the authority in **Mukisa Biscuits Co. v. West End Distributors** (1969) E.A. 696 to the effect that, a preliminary objection should raise a pure point of law which is to be argued on the assumption that all facts pleaded by other side are correct. He prayed therefore, that the appeal be allowed with costs.

For the respondents, it was submitted, the provision of section 26 of the LLA could not apply as there was no evidence of fraud. The appellant, it was further submitted, was negligent in spending time to appeal to the Public Service Commission and the President

while no appeal lies to them. We were thus urged to dismiss the appeal.

We have duly considered the rival submissions and taken time to carefully read the record. We are in agreement with Mr. Tibanyendera that, the trial court wrongly dealt with the preliminary objection under discussion. The reason being that, in accordance with the affidavit and counter affidavit on the record, whether the appellant was availed with the outcome of the decision after expiry of more than a year and whether the delay was calculated so as to deny the appellant his right to seek remedies against the decision of the first respondent was seriously contentious. Therefore, if the principle in **Mukisa Biscuits Co. v. West End Distributors** (supra) had been followed by the trial court, the factual depositions in the affidavit would have been presumed to be true. As a result, the purported preliminary objection should have been overruled for being premature and the application heard on merit.

In the upshot and for the reasons as afore stated, we find the appeal with merit. It is accordingly allowed. The ruling of the High

Court dismissing the appeal for being time barred is set aside. The original record is hereby remitted to the High Court for determination of the application on merit. We see no reasons to consider the second complaint in the circumstances.

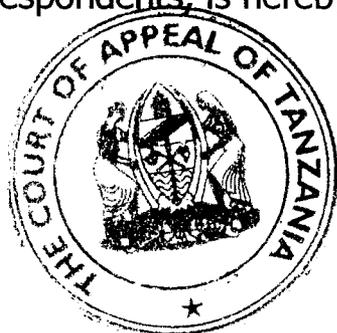
DATED at DAR ES SALAAM this 14th day of June, 2022.

S.E. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered on 15th day of June, 2022 in presence of Mr. Mohammed Tibanyendera, learned counsel for the appellant and Ms. Joyce Yonaz, Learned Senior State Attorney for the 1st, 2nd and 3rd respondents, is hereby certified as true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL