

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

(CORAM: MWARIJA, J.A., KENTE, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 223 OF 2020

HUSSEIN ALLY KANDORO APPELLANT

VERSUS

KISMA TRANSPORT COMPANY LIMITED RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dare es
Salaam Registry at Dar es salaam)

(Mugeta, J.)

dated the 7th day of February, 2019

in

Civil Case No. 60 of 2017

RULING OF THE COURT

9th June & 22nd June, 2023

KENTE, J.A.:

Until 19th March, 2014 (otherwise hereinafter referred to as the date of the accident), the appellant Hussein Ally Kandoro was employed as a truck-driver by the respondent Kisma Transport Company Limited. On an unspecified date in February, 2014 he was assigned by his employer to take a certain cargo to Lusaka in the Republic of Zambia. On the way back to Dar es Salaam, at a place called "Mlima Nyoka" in

Mbeya Region, he was involved in a fatal road accident which caused him to suffer serious bodily injuries for which he was admitted to hospital both in Mbeya and Dar es Salaam where he underwent several surgeries and treatments.

Believing that the road accident leading to his injury was occasioned by the respondent's commissioning him to drive a truck which was unroadworthy, on 29th March, 2017, he filed a suit in the High Court of Tanzania at Dar es Salaam complaining that the respondent was negligent. In that suit he prayed for the following reliefs:

- i). TZS. 5,000,000.00 as special damages;*
- ii). TZS. 500,000.00 being compensation for injuries and incapacities suffered; and*
- iii). General damages, costs and any other reliefs as the court would deem fit to grant.*

After hearing the appellant's case (ex-parte), the High Court (Mugeta,J), was not convinced that he had managed to substantiate his claim. He found that, on the evidence as a whole, it was not established that the accident leading to the appellant's injury was solely caused by

the truck's mechanical defects or the respondent's negligence. With the above finding, the learned trial Judge went on dismissing the appellant's claim for lack of merit.

The appellant was aggrieved by that decision, hence this appeal in which he has raised eight grounds alleging both misdirections and non-directions by the trial judge on several material aspects. He also contended that the trial judge failed to appreciate the evidence led before him which, in the appellant's view, established on a balance of probabilities that, the said road accident was a result of the truck's mechanical defects and by extension, the respondent's negligence.

When this appeal was called on for hearing, we invited Mr. Karoli Tarimo, learned counsel appearing for the respondent Kisma Transport Company Limited and Mr. Gabriel Mnyele learned counsel for the appellant to address, in the first place, the preliminary point of objection, the notice of which Mr. Tarimo had earlier on filed in terms of Rule 107 (1) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In that objection, on behalf of the respondent, Mr. Tarimo

contends that the appellant's suit before the High Court which gave rise to the present appeal, was time barred.

Submitting in support of the objection, Mr. Tarimo was relatively very brief. Since the accident forming the basis of the appellant's claim occurred on 19th March, 2014 and as such, the appellant's claim was founded on the tort of negligence, Mr. Tarimo contended that in terms of section 5 of the Law of Limitation Act, Chapter 89 of the Revised Laws (hereinafter the Law of Limitation Act), as at 29th March, 2017 when the suit was lodged in the High Court, the period of three years within which it ought to have been lodged, had already elapsed. Relying on section 3 (1) of the same Act, the learned counsel implored us to sustain the preliminary objection and dismiss the appeal for being founded on a suit which was time barred. In support of his line of argument, Mr. Tarimo relied on our decision in the case of **Mbezi Mgaza Mkomwa v. Permanent Secretary, Prime Minister's Office and Another**, Civil Appeal No. 27 of 2017(unreported).

Opposing the preliminary objection, Mr. Mnyele submitted that the suit before the High Court was filed within the timeline prescribed by

law. As regards the period of three years which had clearly elapsed by the time the appellant lodged the suit in the High Court, Mr. Mnyele submitted that, after occurrence of the accident, there was a period when the appellant was in a state of legal disability which, in terms of section 16 of the Law of Limitation Act, ought to be excluded in computing the period within which the appellant was required to lodge his suit. Regarding what is meant by legal disability, the learned counsel referred to our earlier decision in the unreported case of **Stanbic Bank Tanzania Limited V. M/S Tradexim Company Limited**, Civil Appeal No. 75 of 2019 in which we took the view that, it is an incapacity that would hinder a person from performing a required act. In view of the fact that after the accident, the appellant is irrefutably said to have gone into a state of total disability for 37 days, Mr. Mnyele urged us to exclude that period from the three years period within which the appellant was required to institute his suit.

Faced with Mr. Tarimo's erroneous contention that the appellant's disability was not specifically pleaded in the plaint and, assuming that the question of disability required to be proved by evidence, Mr. Mnyele invited us to invoke the provisions of Rule 36(1) of the Rules, and re-

appraise the evidence, led by the appellant before the trial court with the view to drawing our own inferences of fact.

Specifically, the learned counsel referred us to exhibit P4 which among other things, shows that, for 37 days after the accident, the appellant was in a state of total disability. It is needless to say that the appellant's suit would be in time upon deduction of the said 37 days from the three years period within which he was by law enjoined to institute his suit.

As an alternative, the learned counsel submitted that, the appellant's suit did not fall under paragraph 6 of the Schedule to the Law of Limitation Act. The attractive but obviously not persuasive argument by Mr. Mnyele was that, the appellant's suit was based on multiple causes of action, including breach of contract for which the period of limitation is six years.

In determining this preliminary objection, we will only deal with the compelling argument by Mr. Mnyele that essentially, the three years limitation period within which the appellant was supposed to lodge his claim started running not immediately after the accident but rather after

the appellant regained some ability. To this argument by Mr. Mnyele with whom we are in agreement and which, in view of the clear provisions of sections 15 and 16 of the Law of Limitation Act, puts the appellant into an unassailable position, Mr. Tarimo had no qualms. However, as would have been expected of a lawyer, he had more than one string to his bow. In an effort to breath life into his argument, he submitted correctly so in our view, that in terms of Order 7 Rule 6 of the Civil Procedure Code, 1966 (the CPC), in computing the period of limitation prescribed for institution of a particular suit, disability must be pleaded in order to form the basis for exclusion of the time during which, on account of such disability, the plaintiff was unable to take the necessary steps. According to Mr. Tarimo, the above requirement was not met as disability was not pleaded by the appellant in his plaint.

With due respect, we do not subscribe to Mr. Tarimo's alternative argument. As will be noted, a look at paragraph 8 of the plaint will provide the answer. It says:

"Thereafter the plaintiff attended hospitals in Mbeya and Dar es Salaam to wit Mbeya Referral Hospital and Muhimbili Orthopaedic Institute

where he underwent various surgeries and treatment. Copies of the medical chits and the doctors reports are annexed herewith and are marked C and forms part of this plaint. As per the said report, the plaintiff's incapacities caused by the said accident are as follows:

- *Total temporary incapacity of 100% for 37 days.*
- *Partial temporary incapacity of 50% for 164 days; and*
- *Total permanent incapacity of 25% for the whole life*

On reading the above-reproduced paragraph, it becomes immediately clear even to the cynic that, indeed disability was pleaded by the appellant and therefore, the condition laid down by Order 7 Rule 6 of the CPC was satisfied. In those circumstances, we think that the alternative argument by Mr. Tarimo that disability was not specifically pleaded by the appellant does not appear to be valid. It follows therefore in our judgment that, the suit before the High Court was filed within time as required by law.

Upon the foregoing considerations, we find the preliminary objection raised by Mr. Tarimo to have no merit. We accordingly dismiss it so as to pave the way for the appeal to be heard and determined on merit on a date to be fixed by the Registrar.

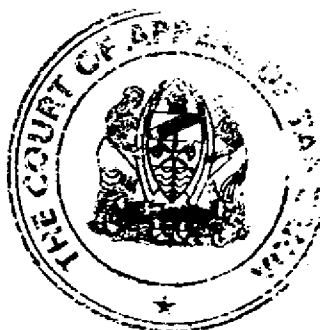
DATED at DAR ES SALAAM this 19th day of June, 2023.

A.G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of June, 2023 in the presence of Mr. Karoli Tarimo learned counsel for the Appellant, also holding brief for Mr. Gabriel Mnyele, learned counsel for the Respondent, is hereby certified as a true copy of the original.




S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL