

TANZANIA / JUDGMENT

20090917 TZHC Dar es Salaam

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TZHCDECIDED
17 September 2009

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM (CORAM: ORIYO, SHANGWA, MIHAYO, JJJ) MISCELLANEOUS CIVIL CAUSE NO. 5 OF 1995 BETWEEN JOHHO MBWANA AND 7 OTHERS APPLICANTS AND

1. THE ATTORNEY GENERAL }
2. THE TANZANIA .COASTAL RESPONDENTS SHIPPING LINE COMPANY

RULING

ORIYO, J.: The late Johho Mbwana and 7 others were declared redundant . by the defunct Tanzania Coastal Shipping Line Company (hereinafter referred to as "TACOSHILI"), their former employer. Being aggrieved by the redundancy they challenged it before the Industrial Court of Tanzania. The decision of the Industrial Court was not in their favour. Their attempt to invoke the revisionary powers of the same court was unsuccessful. They were still dissatisfied and sought to challenge the decision of the Industrial Court in this court through the prerogative orders of certiorari and mandamus. The applicants application for leave to apply for the prerogative orders against TACOSHILI was filed on 25/1/1995 and leave was granted on 11/7/1995. They proceeded and filed the substantive application for the orders of certiorari and mandamus against TACOSHILI on 24/8/1995. However, it appears that there was a second reflection on the matter on the part of the applicants and on 2/7/1998, they filed an application for leave to amend the application for leave to apply for the prerogative orders against TACOSHILI so that the Attorney General is made a party in the proceedings. Leave was duly granted on 27/5/1999 and an Amended Chamber Summons for the grant of the orders of certiorari and mandamus against the Attorney General was filed on 28/5/1999. It is to be noted here that the Attorney General was the sole respondent this time; the name of TACOSHILI was left out. On being served with the amended application, the learned Attorney General raised a number of preliminary objections against the amended application. One of the objections was whether the applicants had obtained prior leave of the court to apply for the prerogative orders against the Attorney General as contained in the 2 Amended application. In its ruling delivered on 15/5/2002, this court, (Chipeta, Bubeshi, Kimaro, JJJ; as they then were) held that it was mandatory in law that the Attorney General has to be heard from the stage of application for leave to apply for the prerogative

orders.

In the interim period between 15/5/02 when the ruling was delivered and 26/2/2004 there were various other intervening proceedings including multiple dismissals of the applicants' suit for their default and restoration of the same, e.t.c. As matters were, the applicants started afresh on 26/2/2004 by applying for leave to apply for the prerogative orders of certiorari and mandamus against the Attorney General. This time the name of TACOSHILI was restored in the proceedings such that the respondents were the Attorney General and TACOSHILI. But as it will be observed in the subsequent proceedings, TACOSHILI did not make any further appearances thereafter. 3 .. Alongside the counter affidavit, the Attorney General filed a Notice of Preliminary Objections containing eight objections as hereunder:-

- (i) The application is res Judicata. (ii) The application is time barred. (iii) The application is vexatious in that it contains no triable

issues.

(iv) The application is misconceived and offends Order I rule 8 of the Civil Procedure Act.

- (v) The application is misconceived and bad in law in for being supported by an affidavit of a non party to the application. (vi) The affidavit in support of the application is bad in law in that it contains legal arguments. (vii) The application is misconceived and portrays confusing matters because the same was made in 1995 but filed in court in February 2004. 4 When we were assigned to take over this matter sometime in June 2006, the learned State Attorney who appeared for the Attorney General inquired on the status of the court's decision on the preliminary objections above raised in 2004. It was not easy on our part to determine the status because the record is old and had been reconstituted .. The reconstituted record was incomplete and some of the proceedings and documents were missing. After some search it was discovered that actually the said objections had been argued in writing with leave of the court (previous panel); but copies of the written submissions were missing from the record. The parties were asked to supply copies for the record to enable us determine the objections. It took quite a considerable amount of time before copies of the written submissions were made available to us. It appears from the copies supplied that the written submissions were complete way back by 23/12/2004; that is a period of over 18 months before this panel was constituted. Let it be as it may; we will proceed to determine the preliminary objections fronted by the learned Attorney General against the fresh application filed on 26/2/2004 for leave to ' apply for prerogative orders against the Attorney General. 5 We shall begin with the second objection which relates to limitation of time. The objection is a matter of law which, if upheld, goes to the root of the matter and a challenge on our jurisdiction. In support of the second objection, it was the learned Attorney General's argument that the prescribed period for leave to apply for the prerogative orders is six (6) months in terms of Section 19(3) [old Section 18(3)] of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act. It was stated that the decision of the Industrial Court being challenged was made on 19/1/1994 and the application for leave

was made on 26/12/2004. The learned Attorney General concluded that since the application was not been brought within the prescribed time, then the same was incompetent for being filed without obtaining the requisite extension of time. He prayed for the dismissal of the application. On the other side, the applicants denied that the application was time barred .. They argued that the application was timely filed and what they had done in the application filed on 26/2/2004 was merely in compliance with the court order of 15/5/2002 to bring the Attorney General into the proceedings initially lodged in

1995. They stated that the only difference was that the learned Attorney General was not served until after lodging the amended application in 2004. They submitted that in the circumstances the issue of the matter being time barred does not arise. That is the summary of the rival arguments before us on the question of limitation of time. Section 18 (1) [Old Section 17A] of the Law Reform (Fatal Accidents and Miscellaneous Provisions Act, Cap 310, [R.E. 2002], makes it mandatory that the Attorney General be made a party, in all such proceedings against the Government from the stage when leave to apply for the prerogative orders is sought. It provides:- "18. - (i) Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government, the court shall order that the Attorney General be summoned to appear as a party to those proceedings ... " (emphasis added) 7 In the instant case, it is not in dispute that the Attorney General was not a party in the application for leave that was lodged in 1995. The applicant's first attempt to join the Attorney General was on . 28/5/1999 through the Amended Chamber Summons for the grant of the orders of certiorari and mandamus. In the Amended Chamber Summons, the name of TACOSHILI as a respondent was removed and replaced by that of the Attorney General. When the Attorney General complained by way of a preliminary objection on the failure to be given an opportunity to be heard at the leave stage; the court upheld the objection and stated the following:- "It is clear that when leave was being sought and granted, the Attorney General was then not a party. But now that he has been joined in these proceedings and in view of the mandatory nature of the provisions - S. 17A
- (1) quoted above, we are of the strong opinion that the Attorney General be heard during the application for leave. It means therefore that the applicant has to rewind the clock, as it were and ask the court to rehear the application for leave again." 8 The application lodged on 26/2/2004 was, as it were, the applicant's response to the court's ruling of 15/5/2002; to rewind the clock. On whether, the application of 26/2/2004 was time barred or not; Section 19 (3) [old Section 18 (3)] of the Law Reform Act (supra) states the following:- "In the case of an application for an order to remove any judgment, order, decree, . i conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as II may be prescribed under any Act (emphasis supplied). The fundamental issue here is whether the application filed on 26/2/2004 made it a fresh matter altogether as argued by the learned Attorney General or remained the same application filed in 1995, only that another respondent was joined as maintained by the applicants. Order I

rule 10 of the Civil Procedure Act, [Cap. 33 R.E. 2002] gives the court a discretion to order names of parties to a suit to be struck out, substituted or added at any time of the proceedings to enable the court determine all issues involved in a suit. We ask ourselves the question on what was the effect of the court order of 15/5/2002? It is our view that although the order did not categorically state so; the application lodged in 1995 was incompetent for failure to include the Attorney General at the leave stage. The application failed to comply with the mandatory requirements of Section 18 (1) of the Law Reform Act above. The court order was for the applicants to start the proceedings afresh from the leave stage and join the Attorney General as a respondent. In terms of Section 19 (3) of the Law Reform Act, the application for leave had to be filed within 6 months from the date of the order complained of which was dated 19/1/1994. Our other question arises whether the order of 15.5.2002 automatically enlarged the time to file the application for leave afresh on 26/2/2004? With due respect we do not think so as we shall demonstrate hereunder. Order I rule, 10 subrule (5) of the Civil Procedure Act caters for the situation here in the following words:- "(5) Subject to the provisions of section 22 of the Law of Limitation Act, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons." (emphasis supplied) Commenting on the applicability of the above provision, the learned authors of MULLA on the Indian Code of Civil Procedure, 15th Edition, Vol II at page 1031, state that the subrule is applicable when, after institution of a suit, a party is added as a plaintiff or defendant. The date the name is added is considered as the date of the institution of the suit as regards that party. The date of the addition is the date of the application to implead the new party and the date of the order thereon. The learned authors go further to state that where a necessary party is not joined within the period of limitation, the suit, must be dismissed. And to emphasize the point the learned authors state that the mere fact that a court orders the name of any person to be added as a party to the suit does not render the provisions of the law of limitation inapplicable to the case. 11 In terms of the provisions of Order I rule 10 subrule (5) above the proceedings against the Attorney General began only when service of summons was effected. It is not easy to get the exact date of service due to the reason that a number of documents and some proceedings are missing from the reconstituted file; but the Attorney General was served after the Amended Chamber Summons for the grant of the prerogative orders of Certiorari and Mandamus was filed on 28/5/99. We say so because that is when the Attorney General raised the objection which was upheld on 15/5/2002 and the applicants were ordered to start afresh and join the Attorney General, in the application for leave. As we stated above, the order of 15/5/2002 had the effect of declaring the applicants' pleadings as incompetent for failure to comply with the mandatory provisions of Section 18 (1) of the Law Reform Act. So, the relevant date, for the purposes of computing the limitation period is after filing the application afresh on 26/2/2004. Computing the period between 1994 when the order of the Industrial Court was made and the date of the fresh application, it is well beyond 6 months; it is a period of ten (10) years. 12 It is common knowledge that where the time within which rights may be enforced is fixed by statute, it must be honoured and complied with. We need not be delayed here because the legal position is quite clear. The period of limitation in this case is six (6)

months. The court order of 15/5/2002 did not extend the limitation period; and the consequences of non compliance with the limitation period are as provided under Section 3 (1) of the Law of Limitation Act, [Cap 89 R.E. 2002] which provides:- "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." , , -, It is the law that once an objection on limitation of time is raised, the suit must be dismissed unless otherwise saved by extension of time by the Minister or the court where applicable or where it can be saved through one of the exclusion clauses of the Limitation Act which excludes certain periods in computing the limitation period; 13 such as the time spent litigating in another court; etc. None of the exclusion clauses were pleaded here by the applicants to show the ground upon which exemption from the law is claimed. We do not think that any of the exclusion clauses can save the situation here where the delay was caused by inadvertence or mistake by counsel. In view of what we have stated above, we are constrained to ,;-~, uphold the second point of preliminary objection by the Attorney General that the application is time barred. We therefore dismiss the suit. We make no order for costs in view of the circumstances. As the second objection has disposed of the matter it becomes unnecessary for us to deal with the remaining objections. \ 14 Order: Ruling has been delivered in open Court this 14th day of September, 2009 in the presence of three Applicants and Mr. Mutasi State Attorney for the 1 Respondent. 1r! - A. Shangwa JUDGE 17/9/2009 15

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Prepared on 27 October 2026 · Esheria