

TANZANIA / JUDGMENT

assa a kayange vs nic another 2005 tzhc 88 2 december 2005

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2 December 2005

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL CASE NO. 143 OF 2004 ASSA A. KAYANGE PLAINTIFF VERSU S 1) THE N.I.C 1
DEFENDANTS 2) THE PSRC R U L I N G A. Shangwa, J. Both the 1st and 2nd defendants in this case have raised points of preliminary objection in their respective written statements of defence against the plaintiff's suit which is founded on his motor vehicle insurance policy No. OIVC 281793 and No. ICN 117191 recorded in 1998 and 2000 respectively. The 1st defendant raised two points of preliminary objection. First, that the suit is bad in law for non compliance with S.9 of the bankruptcy Ordinance . Second, that the suit is incompetent for being statutory time barred. The 2nd defendant raised three points of preliminary objection. First, that the High Court has no jurisdiction to hear and determine this suit . Second, that the suit is time barred. Third, that the plaintiff has not complied with the requirement of the provision of S.35(3) of the Bankruptcy Ordinance Cap. 25 in order to join the 2nd defendant as a party to the suit. In their respective written submissions, the 1st defendant abandoned its second point of objection and the 2nd defendant abandoned its first point of objection. As matters stand, I must say at once that the 1st defendant's point of objection that the suit is bad in law for non compliance with S.9 of the Bankruptcy Ordinance is short of merit and for the reason that I will soon give, it must be dismissed. Section 9 of the Bankruptcy Ordinance requires that before any creditor such as the plaintiff commences any action which is provable in bankruptcy against the debtor who is under the official receivership such as the 1st defendant happens to be under the official receivership of the 2nd defendant, leave of the High Court has to be sought and granted. In this case, before filing the suit on 22.9.2004, the plaintiff applied for leave to do so and leave was granted on 23.6.2004 by Madame Oriyo, 3. That was in High Court Misc. Civil Application No. 257 of 2003 . I have gone through the plaint and found that as a whole there is nothing vexatious or confusing to the extent of not being able to understand the material contents of any of its paragraphs. I therefore dismiss the 1st defendant's point of objection which 4 was argued on its behalf by MS Mbamba &. Company, Advocates. I now proceed to deal with the 2nd defendant's points of objection . I will start with its second point of objection. This point is on whether or not the suit is time barred. Learned counsel for the 2nd defendant MS C & M, Advocates submitted that the limitation period prescribed for institution of a suit founded on an insurance contract is six years. In support of their submission, they relied on item 7 of the first schedule to the Law of

Limitation Act, 1971. They further submitted that the cause of action started to run from 9th January, 1998 and 26th August, 1998 and that from those dates the plaintiff was entitled to claim for indemnification against the loss suffered by him as a result of damage caused to his relevant motor vehicle (s) under policy No OIVC 281793 and ICN 117191. They contended that in order to be within the statutory time limit, the 5 plaintiff had to file his claim latest by January, 2004 for Policy No. OIVC 281793 and by August, 2004 for Policy No. ICN 117191. In reply, learned counsel for the plaintiff MS Mashiku & Co. Advocates conceded to the fact that under the Law of Limitation Act, 1971 the period of Limitation within which to file a suit on an insurance contract is six years. They also conceded to the fact that the cause of action on an insurance contract starts to run from the date when the loss occurs. However, they submitted that the plaintiff's suit was timely filed. They gave two reasons in support of their submission which are as follows First, that before filing the suit, the plaintiff had to apply for leave to sue the defendants which he did on 10.9.2003. Second, that the 1st defendant made part payment of the claim to the plaintiff on 13.10.2003. 6 They contended that the suit commenced with an application for leave to sue the defendants, and that under S. 27 (3) of the Law of Limitation Act, 1971, the right of action is deemed to have accrued on the date of the last payment. I agree with learned counsel for the defendants that what was filed on 10.9.2003 is not a suit but an application and that an application cannot be equated to a suit which is normally instituted by presentation of a plaint. On the other hand, I agree with learned counsel for the plaintiff that under S.27(3) of the Law of Limitation Act, 1971, the right of action in this case is deemed to have accrued on the date of the last payment . The last payment in this case was made by the 1st defendant to the plaintiff on 13.10.2003 by cheque of shs 3,000,000/=. This is one of the reasons which supports the fact that this suit is not time barred. Another reason which supports this fact is that the plaintiff could not 7 have filed his suit against the defendants without leave of this Court which he applied for and obtained on 23.6.2004. I am tempted to think that the plaintiff obtained a typed copy of the ruling on an application for leave to sue the defendants in September, 2004 when he filed his suit. I am tempted to think so because the record shows that even the drawn order which was extracted from that ruling was sealed and signed by the District Registrar on 4.5.2005 . Basing on the said reasons, I firmly hold that the plaintiff's suit is not time barred. I now turn to the 2nd defendant's third point of objection. On this point, the Court is called upon to dismiss the plaintiff's suit on ground that he joined the 2nd defendant in the suit without complying with the provisions of S.35 (3) of the Bankruptcy Ordinance, Cap .25. First of all, I wish to point out that S.35 (3) of the Bankruptcy Ordinance, Cap. 25 does not impose any condition that a creditor has to follow before filing a suit on a debt which is provable in bankruptcy or before joining the Official receiver in such a suit . It simply provides for the type of debts which should be considered to be debts provable in bankruptcy at the date of the receiving order of the debtor company. Under Rule 212 of the bankruptcy Rules, 1931, such debts have to be proved by affidavit. I do not see anything in this provision on which I can hold that before joining the 2nd defendant in the suit, It was necessary for the plaintiff to swear an affidavit that he has a debt against the 1st defendant which is provable in bankruptcy. For the reasons I have given, I also dismiss the 2nd defendant's points of objection which were argued in full. As the plaintiff did not attach to his plaint a copy of the ruling in which he was granted leave to sue the defendants which prompted the 1st defendant to

raise a preliminary objection against his suit, and as the 2nd defendant was prompted to raise a preliminary objection against the plaintiff's suit because of the bona fide belief that the suit was time barred at the time of its filing, I order that each party should bear its own costs. ^ A.

Shangwa, J. JUDGE 2/12/2005. Delivered in Court this 2nd day of December, 2005. — ^- 5)----- 6^ A.Shangwa, J. JUDGE 2/12/2005.

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