

TANZANIA / JUDGMENT

Lutusyo mbeleka vs rungwe district council

another 2023 tzhc 23760 15 december 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA (MBEYA SUB-REGISTRY) AT MBEYA CIVIL CASE NO. 08 OF 2022 LUTUSYO MBELEKA..... PLAINTIFF VERSUS RUNGWE DISTRICT COUNCIL..... 1st DEFFENDANT THE ATTORNEY GENERAL..... 2nd DEFFENDANT

RULING

Date of Last order: 31/07/2023 Date of Ruling: 15/12/2023 D. B. NDUNGURU, J The plaintiff, LUTUSYO MBELEKA is a retired employee of Rungwe District Council (the 1st defendant) as a technician IV since 1992. He retired from the employment having serviced for the 1st defendant from 1987 to 1992. The plaintiff has now filed this suit against 1st defendant and the honourable Attorney General (2nd defendant) as a necessary party, claiming Tshs. 70,000,000/- alleging to be accrued from unpaid retirement benefits. i The plaintiff is also alleging in the plaint that he has been all long following up of the payment of his retirement benefits but the 1st defendant ended up paying him only Tshs. 400,000/= the amount which is less of the entitlement. The plaintiff's claim was opposed by the defendants through their written statement of defence. The defendants have maintained that the plaintiff had been paid all his dues. Alongside, the defendants raised preliminary objection on two points thus:

- i. That, this honourable court lacks jurisdiction to entertain this suit. ii. That, this suit is hopeiess/y time barred. At the hearing of the preliminary objection which proceeded orally, Mr. Ayoub Sanga assisted by Ms. Edina Mwamlima, both learned State Attorneys represented the respondent whereas Mr. Philip Mwakilima, learned advocate represented the plaintiff. Submitting in support of the first limb of the preliminary objection, Mr. Sanga argued that, the pleadings filed by the plaintiff particularly paragraph 7, 8, 9, 10, and 11 of the plaint together with the reliefs sought 2 are based on terminal benefit of the employment. He thus wondered whether this court has power to entertain terminal benefits claimed by way of a plaint as a normal suit. Mr Sanga argued that since jurisdiction of the court is creature of statutes, then this court has no jurisdiction to entertain matter arising

from claims on terminal benefits relating to a person who was a public servant. According to him, the claim was to be in accordance with section 3 and 32(A) of the Public Service Act read together with section 2 of the Employment and Labour Relations Act which all provides that a public servant before filing his request to other law must resort to the remedies provided by Public Service Act. To reinforce his argument, he cited the CAT case in Tanzania Ports Coporation v. Jeremiah Mwandu, Civil Appeal No. 474 of 2020, CAT at Kigoma (unreported) Mr. Sanga went on that he is aware that the cause of action of the instant matter arose before the enactment of the provision of section 32(A), that is in 2016, however, the way forward was resolved by the CAT in the case of Joseph Khenani vs. Nkasi Dtheistrict Council Civil Appeal No. 12 of 2019 (unreported), thus, that this court has no jurisdiction to entertain the suit. 3 Regarding the very limb of the preliminary objection, Mr. Mwakilima replied that the preliminary objection is not a pure point of law since it is mixed up of facts and law in which the principle in Mukisa Biscuits' case and the criteria set in the case of Karata Ernest & Others vs. Attorney General, Civil Revision No. 10 of 2010 (unreported) does not apply. He was insistent that, according to paragraph 10 of the plaint, the plaintiff has averred that he has exhausted all internal remedies of which ascertaining it needs evidence. Thus, that the first limb of the preliminary objection be overruled. On my part, I should hastily state at the outset that Mr. Sanga missed a point about the claim of the plaintiff. May be, Mr. Sanga construed the statement "terminal benefit" used by the plaintiff in the plaint as benefits for being terminated from employment. However, considering the claims made by the plaintiff the said statement is used interchangeably with retirement benefits as it used under paragraph 4 and 7 of the plaint that "the plaintiff's claim against the 1st and 2nd defendants jointly and severally is for claim of a total Tsh. 70,000,000/= of the unpaid retirement benefits" 4 That being the case, the issue now is whether a retired public servant can apply the Public Service Act, specifically section 32A in claiming his retirement benefits as contended by Mr. Sanga. When the Court of Appeal of Tanzania (CAT) faced with the akin issue in the case of Michael Mwinuka and 428 Others vs Tanzania Zambia Railways Authority and 2 Others, Civil Appeal No. 84 of 2018 CAT at Dar es Salaam (unreported) held that: "...given the undisputed fact that the appellants had already retired from employment when this dispute arose, it is crystal dear that they were no longer in the relationship of employer-employee with the first respondent as to be governed by the ELRA. "(Emphasis is mine). In light of the above position, the claim by Mr. Sanga that the plaintiff should have applied the Public Service Act is the misconception. This is because the plaintiff is neither a public servant after having retired since 1992 nor he claims termination of the employment. In the 5 circumstances, the 1st limb of the preliminary objection that this Court has no jurisdiction is overruled. As to the second limb of the preliminary objection that the matter is time barred, Mr. Sanga submitted that, time limitation is another legal issue touching the jurisdiction of the court. According to him since the plaintiff pleads in the plaint that the event happened in 1992 where the plaintiff was entitled to his terminal benefits then section 5 of the Law of Limitation Act, Cap 89 R.E 2019 and Item 24 of the First Schedule to the Law of Limitation Act applies in which the prescribed time to lodge matter of this nature is 6 years. Mr. Sanga added that, though it seems there was communication between the plaintiff

and the defendant/the Government about the claim, the same did not stop the running of time. To buttress his contention, he referred this court to the case of *Fortunates Lwanyantika Masha vs. Claver Motors Ltd*, Civil Appeal No. 144 of 2019 CAT (unreported). He concluded that since section 3 of the Law of Limitations Act provides for the remedy of dismissal of the time barred cases, this court should dismiss this case with costs, he prayed.

6 In reply, on the same point of preliminary objection, Mr. Mwakilima submitted that, the provisions cited by Mr. Sanga, being sections 3 and 5, and Item 24 of the First Schedule to the Law Limitation Act do not apply in the matter at hand. That the circumstance of this case is founded under section 7 of the Law of Limitation Act. He argued that paragraph 7 of the plaint is clear that the plaintiff had been lamenting about the claim but the defendant had kept on changing the promises. And that the cause of action has accrued in 2021 when the 1st defendant paid Tsh. 400,000/- from the agreed amount of Tshs. 70,000,000/-. He went on that what happened between the plaintiff and the 1st respondent not communication but promises to pay thus, that the cited case of *Fortunates Lwanyantika Masha* (supra) is quite distinguishable. Mr Mwakilima beseeched this court to overrule the preliminary objection with costs. In rejoinder Mr. Sanga reiterated his submission in chief. He added that, section 7 of the Law of Limitation Act provides for continuing breach of contract which is not the case in this matter. Indeed, as correctly argued by Mr. Sanga issue of time limitation touches the jurisdiction of the court. This means that court has no power to entertain a matter which has been instituted out of the described time. 7 And the objective of the law of limitation is for the matter to come to finality. See the decision in the case of *Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni*, Civil Appeal No. 19 of 2016 at Dar es Salaam (unreported) In the matter at hand, it is undisputed that the claim is the retirement benefits which the plaintiff claims that he was supposed to be paid after his retirement in 1992. This means that the cause of action arose since that year in which until this case was lodged in this Court there is a lapse of about 30 years. The question arises, what is the prescribed time to file a suit of this nature. In essence, the nature of this case which is the claim of unpaid retirement benefits its time limit to institute it is not specifically provided. This makes it to follow under the suits which its time limitation is not provided for as per item 24 of the Schedule to the Law of Limitation Act for under the Law of Limitation Act, the time limitation being six (6) years. That being the law, the plaintiff ought to have instituted a suit within 6 years from 1992 when the cause of action arose. Nonetheless, according to paragraph 11 of the plaint, the plaintiff states that he had been making 8 follow up of the payment but in vain. Then, another issue arises as to whether the action which the plaintiff had been taking from 1992 to 2021 when he purports the cause of action to have arose, the time limitation has been stopped. According to Mr. Sanga relying to the case of *Fortunatus Lwanyantika Masha* (supra), communication of parties concerning a claim does not stop running of time limit. On his side, Mr. Mwakilima was emphatic that the 1st defendant has been kept changing the promise to pay the plaintiff until 2021 when she paid a lesser amount. However, Mr. Mwakilima did not state what made the 1st defendant to keep changing the promise to pay if not communication, discussion or negotiations between the parties. Now, if that is the case, the law of limitation is merciless. It does not provide for

exclusion of the time used in communications, follow ups, or negotiations. This position was well illustrated by the Court of Appeal of Tanzania in its various decisions including, the Fortunatus Masha (supra) Ali Shabani and 48 Others vs Tanzania National Roads Agency (TANROADS) and Another, Civil Appeal No. 261 of 2020, where it relied on its earlier decision in the case of Consolidated Holding Corporation 9 vs Rajani Industries and Another, Civil Appeal No. 2 of 2003, M/S. P & O International Ltd vs The Trustees Of Tanzania National Parks (TANAPA), Civil Appeal No. 265 of 2020. In the latter case for example, the CAT observed in the following words: 'We draw a similar inspiration from a decision of the High Court at Dar es salaam in Makamba Kigome & Another v. Ubungo Farm Implements Limited & PRSC, Civil Case No. 109 of 2005 (unreported) whereby Kaiegeya, J (as he then was) made the following pertinent statement: "Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time,"' io Flowing from the above position of the law, and in the absence of the explanation by the plaintiff in his plaint on if the follow ups he was pursuing are condoned by the law of limitation, I find the suit instituted after lapse of about 30 years to be hopelessly time barred. That being said and done, I sustain the 2nd limb of the preliminary objection and dismiss the suit under section 3 of the Law of Limitation Act. Considering the circumstances and the nature of the suit, I make no order as to costs. It is order accordingly. 'Am B. D. NDUNGURU JUDGE 15/12/2023 ii

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