IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CIVIL APPEAL NO. 503 OF 2020

LUHUMBO INVESTMENT LIMITED.....APPELLANT

VERSUS

1. **NATIONAL BANK OF COMMERCE LIMITED**
2. **BUNDAA OIL INDUSTRIES LIMITED**
3. **MOUNT MERU MILLERS LIMITED**

.....RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania at Shinyanga)

(Mkwizu, J.)

dated the 10th day of August, 2020
in
Land Case No. 1 of 2020

JUDGMENT OF THE COURT

9th & 23rd November, 2022.

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is the ownership of a parcel of land described as Plot No. 168 Block 'KK' situated at Mhumbu Industrial area, Shinyanga Municipality under Certificate of Title No. 14216 (the suit property).

The material background and essential facts of the matter as obtained from the record of appeal indicate that, on 4th of January 2005 the appellant purchased the suit property from one Sood Oil Mills Limited at a consideration of TZS 500,000,000.00. The said purchase price was

raised from a mortgage between the appellant and CRDB Bank Limited Thereafter, on 19th September 2005, the appellant mortgaged the said suit property to secure an overdraft loan facility from the first respondent.

Subsequently, on 29th June, 2006, the first respondent sold the suit property to the second respondent by way of transfer under power of sale and discharge of mortgage at a consideration of TZS 400,000,000.00. The sale agreement to that effect was signed on 5th July, 2006. Few days later, it came to the appellant's knowledge that the first respondent had exercised its power of sale of the mortgaged property without due notice given to her and contested that the suit property was sold below the market value of TZS 1,665,840,000.00. That, despite several demands by the appellant, the first respondent neglected to compensate the appellant for the loss incurred. As such, on 1st April, 2020, the appellant decided to institute a suit in the High Court of Tanzania at Shinyanga, Land Case No.1 of 2020 against the respondents claiming for the following reliefs; (i) that, the sale agreement between the first and second respondents be nullified; (ii) the first respondent be ordered to compensate the appellant the sum of TZS 1,665,840,000.00; (iii) payment of special damages at the tune of TZS 500,000,000.00; (iv) payment of general damages (v) interest, and (vi) costs of the suit.

It is on record that, upon being served with the plaint, the respondents filed their respective written statements of defence disputing the appellant's claims. In addition, all the respondents raised a notice of preliminary objection on the ground that, the appellant's suit was time barred, as the cause of action accrued on 5th July, 2006 when the suit property was sold to the second respondent and the suit was filed on 1st April 2020 after lapse of twelve (12) years prescribed by the law. Thus, the respondents prayed for the dismissal of the appellant's suit with costs under section 3(1) of the Law of Limitation Act (the LLA). The said objection was ordered to be argued by way of written submissions where all parties filed their respective submissions in support of and in opposition of the objection.

Having considered the parties' submissions, the trial court, sustained the point of objection and, in terms of section 3 (1) of the LLA, dismissed the appellant's suit with costs for being time barred. The decision of the trial court prompted the appellant to lodge the current appeal to express its dissatisfaction. In the memorandum of appeal, the appellant has raised six grounds which can conveniently be paraphrased as follows; **one**, the dismissal of the appellant's suit was based on an issue not raised by the respondents hence deprived the appellant the right to be heard; **two,** that,

the trial court failed to take judicial notice of the documents attached to the appellant's written submission in respect of Land Case No. 10 of 2009 and Land Case No. 18 of 2015 filed in the High Court of Tanzania at Tabora together with Land Case No.16 of 2016 filed in the High Court of Tanzania at Shinyanga regarding the issue of time limitation raised by the respondents and the trial court *suo mottu*; **three,** the issue of time limitation ought to have been raised earlier in the written statement of defence by the respondents to enable the appellant to rejoin accordingly; **four,** that, the trial court failed to consider the overriding principle in arriving at its decision and for the ends of justice; **five,** the trial court erred in dismissing the appellant's suit instead of striking it with leave to refile; and, **six,** the trial court erred in awarding costs to the respondents under the circumstances of the case.

When the appeal was placed before us for hearing, the appellant was represented by Prof. Abdallah Saffari, learned counsel whereas the first respondent was represented by Mr. Silwani Gallati Mwantembe, learned counsel and Messrs. Issa Rajabu Mavura and Pharles Focas Malengo, both learned counsel joined forces to represent the second and third respondents. It is noteworthy that, pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, the learned counsel for the parties had

earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing and thereafter, proceeded to highlight them.

On taking the stage, Prof. Saffari sought and obtained leave to abandon the third ground of appeal and preferred to start with the second ground. On that ground, he referred us to the appellant's written submission before the High Court found at pages 151 and 152 of the record of appeal, where he attached several documents including:

(i) *A copy of the plaint in Land Case No. 10 of 2009 filed on 3rd June, 2020 by the appellant in the High Court of Tanzania at Tabora against the first and second respondents (Annexure A);*

(ii) *A copy of chamber summons filed by the appellant on 18th September, 2014 in the High Court of Tabora seeking restoration of the Land Case No. 10 of 2009 (Annexure 'B');*

(iii) *A copy of the plaint in Land Case No. 15 of 2015 filed on 5th October, 2015 by the appellant in the High Court of Tanzania at Tabora against the first respondent (Annexure 'C');*

(iv) *A copy of the plaint in Land Case No. 6 of 2016 filed on 16th November, 2016 by the appellant in the High Court of Tanzania at Shinyanga against the first respondent (Annexure 'D'); and*

(v) *A copy of the ruling of the High Court of Tanzania at Shinyanga (Mkeha, J.) dated 28th February, 2020 in respect of Land Case No. 6 of 2016 (Annexure 'E') striking out the said suit on account of non-joinder of a necessary party.*

He then, went on to argue that, the learned trial Judge erred in failing to take judicial notice of the above court's documents under section 59 (1) (a) of the Evidence Act (the Evidence Act) and find that, all that time, the appellant was in the court's corridors prosecuting her case. According to the learned counsel, since all documents attached to the appellant's submission were also in the court's record, there was no need for the appellant to specifically plead in the plaint for exemption of the period of the delay in anticipation of the preliminary objection raised by the respondents. To support his proposition, Prof. Saffari cited section 56 of the Indian Evidence Act of 1872 which is in *pari materia* with section 56 of the Evidence Act, where, commenting on it, Sarkar cited the case of ***Craven v. Smith***, 1869 LR 4 Exch 149 in which the following was observed, that:

> *"The court is entitled to look at its own record and proceedings in any matter and take judicial notice of their contents although they may not be formally brought before the court by the parties."*

As such, the learned Prof. urged us to find that it was improper for the learned trial Judge to sustain the preliminary objection raised by the respondents and conclude that the appellant's suit was time barred.

Responding to this ground, Mr. Mwantembe argued that, the trial court was justified to find that the appellant's suit was time barred because, the fact that the appellant was prosecuting different cases in other courts was not pleaded in the plaint and even the documents (A, B, C, D and E) which the appellant invited the trial court to take judicial notice of were not pleaded and/or attached to the plaint but only appended to the appellant's written submission. He clarified that, submissions are meant to reflect and elaborate on the facts and/or evidence already indicated in the pleadings but not a substitute of the same. To support his proposition, he cited the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v. Chairman Bunju Village Government & 11 Others,** Civil Appeal No. 147 of 2006 (unreported). He then emphasized that, since Order VII Rule 6 clearly stipulates that, a ground of exemption of limitation should be stated in the plaint, it was wrong for the appellant to only state the same in the written submission. It was his argument that, the said documents were wrongly attached to the written submission. As such, Mr. Mwantembe urged us to find that the second ground of appeal is devoid of merit.

On his part, Mr. Mavura associated himself with the submission made by Mr. Mwantembe and added that, it is trite law that parties are bound by

their own pleadings and since submissions and their annexures do not form part of pleadings, it was improper for the appellant to invite the learned trial Judge to take judicial notice of the documents attached to her submission as the same, would not, in anyway, be relied upon to substantiate the fact that the appellant was prosecuting different cases in other courts.

In rejoinder, Prof. Saffari, though, he admitted that the plaint did not indicate the grounds upon which an exemption from limitation could have been relied upon to justify the appellant's delay, he insisted that the trial court was required to take judicial notice of the said documents and find that the appellant's suit was not time barred.

Having considered the submissions made by the parties in the light of the record of appeal before us, it is clear to us that both learned counsel for the parties are at one that the appellant's suit was instituted out of the time prescribed by the law. Likewise, there was no dispute that the appellant's plaint is silent on the mandatory requirement under Order VII Rule 6 of the CPC that, for a suit which is instituted out of the prescribed time, its plaint should contain a paragraph indicating grounds upon which an exemption from such delay is claimed. Therefore, the main point of controversy is on the argument by Prof. Saffari that, despite the pointed-

out omission in the plaint, the trial court ought to have taken judicial notice of the documents attached to the appellant's written submission against the objection raised by the respondent and find that, the delay is justified as the appellant was prosecuting different cases in other courts.

With profound respect, we are not persuaded by the argument advanced by Prof. Saffari. As correctly argued by the learned counsel for the respondents, it is trite law that, parties are bound by their own pleadings. At any standard, written submissions and its annexures do not form part of pleadings and the same are not intended to submit new facts or evidence but only to elaborate on the facts and/or evidence already indicated in the pleadings - see for instance the case of the **Attorney General & Another v. Joseph Mwandu Kashindye,** Civil Appeal No. 18 & 8 of 2013 (unreported).

We are increasingly of the view that, even if the trial court would have taken judicial notice of the said court's documents as claimed by Prof. Saffari, the same would not have rescued the appellant's suit, as the appellant was still required to comply with the mandatory requirement of Order VII Rule 6 of the CPC. The said provision provides that:

> *"Where the suit is instituted after the expiration of the period prescribed by the law of limitation,* ***the plaint shall show the ground upon which***

exemption from such law is claimed." *[Emphasis added].*

We thus agree with the submissions by the learned counsel for the respondents that the requirement imposed by the above provision of the law is not optional, as the word used therein is *'shall'* which denote a mandatory compliance consistent with section 53 (2) of the Interpretation of Laws Act, [Cap. 1. R. E. 2019]. In the instant appeal, as intimated above, the appellant, apart from attaching the said documents to show that she was prosecuting different cases in other courts, there was nothing in the plaint supporting that assertion to justify the delay in instituting her suit. In **M/S P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of 2020 (unreported), the Court, when considering an akin situation, it categorially stated that:

> *"To bring into play exemption under Order VII Rule 6 of the CPC,* ***the plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation.*** *With respect, the plaintiff has done neither." [Emphasis added].*

[see also our recent decision in **Fortunatus Lwanyatika Masha & Another v. Claver Motors Limited,** Civil Appeal No. 144 of 2019 (unreported).

Being guided by the above authorities, it is our settled view that, since, in the instant appeal, the appellant did not bring her suit, which was time barred, within the ambit of the above provisions, the suit was time barred before the trial court and there is nothing to fault the decision of the trial court on that aspect. In the event, we find the second ground of appeal devoid of merit.

On the first ground, Prof. Saffari faulted the trial court to find out that the appellant had not complied with Rule 6 Order VII of the Civil Procedure Code (the CPC) while the said provision was only raised *suo mottu* by the trial Judge and the appellant was not given opportunity to be heard contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. To buttress his position, he cited the case of **Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251.

The appellant's complaint was strongly disputed by Mr. Mwantembe who referred us to pages 115, 121 and 139 of the record of appeal and argued that, the issue of time limitation was raised by the respondents, as

a preliminary objection in their respective written statements of defence and all parties were given opportunity to file their respective written submissions in support and opposition of the said objection as reflected at page 234 of the same record. He added that the decision of the trial court was based on the parties' submissions as opposed to the appellant's claim.

He contended further that, in the course of determining the said objection, it was proper for the learned trial Judge to cite Order VII Rule 6 of the CPC, as she was not barred from applying principles, positions and/or provisions of the law governing the issue of time limitation in question. Mr. Mwantembe argued further that, the import of that provision was to show the need of stating ground of exemption in the plaint instead of stating it in the written submission as opted by the appellant. On his part, Mr. Mavura, supported the submission by his learned friend and also urged us to find that the appellant's claim under this ground is baseless.

Having perused the record of appeal, we find that this is a straight forward issue as, it is apparent at pages 115, 121 and 139 of the record of appeal that the issue of limitation was raised by the respondents, as a preliminary objection, in their respective written statements of defence. The said objection at page 234 was ordered to be argued by way of written submissions which all parties complied and accordingly filed their

respective written submissions in support and opposition of the said objection. We therefore, agree with the learned counsel for the respondents that, since the appellant had adequately utilized his right to be heard on the objection raised, her complaint under this ground is unfounded and not supported by the record. With profound respect, we find the submission by Prof. Saffari to be misconceived and we even find the case of **Mbeya Rukwa Autoparts and Transport** (supra), he cited to us, distinguishable and not applicable in the circumstances of this appeal. We equally find the first ground of appeal devoid of merit.

As for the fourth ground, Prof. Safarri also faulted the learned trial Judge for failure to invoke the overriding objective principle to do away with legal technicalities and ensure effective administration of justice. On this, he referred us to the cases of **D.T. Dobie (Tanzania) Limited v. Phantom Modern Transport (1985) Ltd,** Civil Application No. 141 of 2001 and **Shear Illusions Limited v. Christina Ulawe Umiro,** Civil Appeal No. 114 of 2014 (both unreported) and insisted that the appellant should not have been punished for minor errors or mishap at the expenses of her rights.

In his response, Mr. Mwantembe challenged the submission by Prof. Saffari by citing the case of **Erick Raymond Rowberg & 2 Others v.**

Elisa Marcos & Another, Civil Application No. 571 of 2017 (unreported) and argued that, it is now settled that the overriding objective principle cannot be applied blindly to offend a clear provision of the law. That, allowing the appellant's appeal basing on the overriding principle, as claimed by Prof. Safarri will open a pandoras box whereby litigants may be at liberty of instituting cases beyond the statutory period of limitation thus rendering the provisions of the LLA useless.

On his part, Mr. Mavura also challenged the submission by Prof. Saffari by arguing that, since the issue of time limitation goes to the root of the matter, a suit which is time barred cannot be rescued by the overriding objective principle. To support his proposition, he cited the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others,** Civil Appeal No. 66 of 2017 (unreported).

Having considered the submissions by the learned counsel for the parties, we immediately agree with the submissions advanced by the learned counsel for the respondents, as it is without question that, this Court on several occasions had categorically stated that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case. See for instance our previous decisions in **Njake Enterprises**

Limited v. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017 (unreported) and **Mondorosi Village Council and 2 Others** (supra). In the present appeal, we think, we cannot overlook the fact that the appellant's suit before the trial court was instituted beyond twelve (12) years prescribed by the law, hence hopelessly time barred and cannot be resurrected by the above principle. In the event, we find the fourth ground of appeal without merit.

On the fifth ground, Prof. Saffari argued that, the remedy for non-compliance with Order VII Rule 6 of the CPC is rejection of the plaint but not dismissal of the suit. To support his assertion, he referred us to the definition of the word 'rejection' by **'The International Websters Pocket Dictionary of the English Language,** 2002' at page 368 and **Mulla, Code of Civil Procedure, 15th Edition** at pages 842 to 843 and then argued that, since the trial court had a wider discretion, upon finding out that there was non-compliance of that provision, instead of dismissing the suit, could have struck it out with leave to refile or even ordered the appellant to amend the plaint to rectify the said error or omission.

Responding, Mr. Mwantembe referred us to section 3 (1) of the LLA and argued that, the fate of a suit which has been filed out of time is to be dismissed and not struck out or even order amendment of the plaint. He

further argued that, since the above provision is couched in a mandatory term, having concluded that the appellant's suit was filed out of time, the learned trial Judge had no option other than to dismiss it. To support his proposition, he cited the case of **Stephen Masato Wasira v. Joseph Sinde Warioba & the Attorney General** [1999] T.L.R. 334 and urged us to dismiss the fourth ground for lack of merit.

Having considered the submissions advanced by the learned counsel for the parties, we find no difficult to agree with Mr. Mwantembe's submission because, in terms of section 3(1) of the LLA, the High Court is empowered to dismiss all suits instituted after lapse of the period of limitation prescribed by the law. We find solace in our previous decisions in **Backlays Bank Tanzania Limited v. Phylisiah Hussein Mchemi,** Civil Appeal No. 19 of 2016 and **MM World Wide Trading Company Ltd & Another v. National Bank of Commerce**, Civil Appeal No.258 of 2017 (unreported). Specifically, in the former case, when considered the consequences of a suit brought after lapse of the time of limitation prescribed by the law, the Court was inspired by unreported decision of the High Court Dar es Salaam Registry in **John Cornel v. A. Grevo (T) Limited,** Civil Case No. 70 of 1998 where it was stated that:

> *"However, unfortunate it may be for the plaintiff; the law of limitation is on actions knows no*

sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."

In the circumstances, we even find, with respect, the argument by Prof. Saffari that the learned trial Judge was required to order for an amendment of the plaint untenable, as such move, would have pre-empted the preliminary objection already raised by the respondents. This is evident from the decisions of this Court in a number of cases, for instance in **Juma Ibrahim Mtale v. K.G Karmali (1983) TLR 50, Damas Ndaweka v. Ally Saidi Mtera,** Civil Appeal No. 5 of 1999 and **Bahadurali E. Shamji and Another v. The Treasury Registrar and 6 Others**, Civil Appeal No. 4 of 2003 (both unreported), the Court emphasized that, once the notice of preliminary objection had been lodged, it is no longer open to the parties to remedy the deficiency complained of. It is therefore our settled view that, having sustained the respondents' point of objection and concluded that the appellant's suit was time barred, the leaned trial court was justified to dismiss it with costs.

On the last ground, Prof. Saffari faulted the learned trial Judge to have awarded costs to the respondents without taking into account that, the case was only determined at the stage of preliminary objection. He insisted that, since costs depend on the amount of work done by a party in

prosecuting his/her case, there was no justification for awarding costs to the respondents at that stage. To bolster his proposition, he cited the case of **George Mbukuzi v. A.S. Maskini** [1980] T.L.R. 53 and invited us to vacate the order for costs issued by the trial court against the appellant.

In his response, Mr. Mwantembe challenged the argument advanced by Prof. Saffari by citing section 30 (1) of the CPC and the case of **DB Shapriya & Company Limited v. Regional Manager, TANROADS Lindi,** Civil Reference No. 1 of 2018 (unreported) and argued that, since the appellant's suit was dismissed on the basis of the preliminary objection raised by the respondents, the learned trial Judge was justified to award costs to the respondents. On his part, Mr. Mavura associated himself with the submission by Mr. Mwantembe.

On our part, we find this to be a straight forward issue as, it is a cardinal principle of law that in any suit between the parties in a court of law, costs normally follow the events, unless found otherwise for the reasons to be recorded as per the dictates of section 30 (1) of the CPC. In the instant appeal, we agree with Mr. Mwantembe and Mr. Mavura that, since the respondents, before the trial court had conducted some research, filed written statements of defence and raised a notice of the preliminary objection, they were entitled to be compensated for their work. Therefore,

we find no justifiable reasons to fault the trial court to have awarded costs to the respondents.

In the light of what we have endeavoured to discuss above, we find and hold that, the decision of the trial court was in all aspects sound in law and thus cannot be faulted. Consequently, we dismiss the appeal in its entirety with costs.

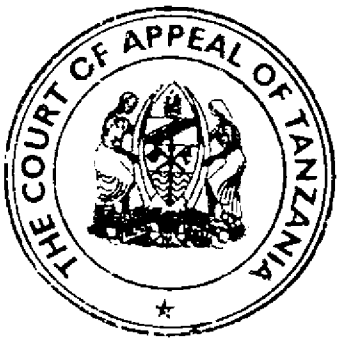
DATED at **SHINYANGA** this 22nd day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of November, 2022 in the presence of the Ms. Marina Mashimba learned counsel for the 1st respondent, Ms. Marina hold brief for Mr. Issa Rajabu Mavura and Mr. Phares Malengo, for the 2nd and 3rd respondents and in the absence of the Appellant, is hereby certified as a true copy of original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL