- Dismissal for being time barred - effect
- Abuse of the court process
- Notice of appeal halts the proceedings in the lower court - pp. 17-18
- After lodging Notice of Appeal → CA, it first ceases to have juris over the matter
- see Aero Helicopter (1990) TLR 142 (15th)
- Ntagazwa vs Bunyogera (1997) TLR 242

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J. A., KIMARO, J. A. And MBAROUK, J. A.)

CIVIL APPEAL NO. 101 OF 2009

EAST AFRICAN DEVELOPMENT BANK .....APPELLANT

VERSUS

BLUELINE ENTERPRISES LIMITED ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam)

(Sheikh, J.)

dated the 26th day of March, 2009
in
Misc. Civil Cause No. 177 of 2007

JUDGMENT OF THE COURT

18 February, & 5th March, 2010

MSOFFE, J.A.

The appeal to this Court is from the judgment of Sheikh, J. in the High Court at Dar-es-Salaam striking out an application for extension of time to set aside the Arbitration Award of Ambwene T. H. Mwakyusa dated 31/8/2005. The learned judge struck out the application in response to a preliminary objection taken at the instance of the respondent that a similar application (Misc. Civil Application No. 85 of 2006) was withdrawn by the applicant (the

appellant herein) without leave to institute a fresh application for the same order. The judge made reference to **Order XXIII** Rules (1) and (3) of the Civil Procedure Code, hereinafter the Code, which read as follows:-

> *1. (1) At any time after the institution of a* ***suit the plaintiff may, as against all or any of the defendants, withdraw his suit*** *or abandon part of his claim.*
>
> *(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2) he shall be liable for such costs as the court may award* ***and shall be precluded from instituting any fresh suit in respect of such subject matter*** *or such part of the claim.*
>
> (Emphasis supplied.)

In her construction of the above sub-rules the learned judge was satisfied that they apply to applications as well by virtue of **section 2** of the Code which provides:-

2. Subject to the express provisions of any written law the provisions of this Code shall apply to all ***proceedings*** *in the High Court of the United Republic, courts of resident magistrates and district courts.*
(Emphasis supplied.)

This matter has had a chequered historical background. For purposes of this appeal the following brief chronology of events will serve the purpose. On 31/8/2005 the Arbitrator, Mr. A. T. H. Mwakyusa, gave an award in favour of the respondent. On 14/9/2006, at the instance of the appellant, an application for extension of time to file a petition for an order to set aside the arbitrator's award was marked withdrawn (Mandia, J. as he then was). On 22/6/2007 a petition by the appellant for an order to set aside the award was dismissed by Mandia, J. for being time barred. On 5/7/2007 the appellant filed a notice of appeal against the decision of Mandia, J. delivered on 22/6/2007. The notice of appeal was filed within the period of fourteen days prescribed under **Rule 76 (2)** of the **Tanzania Court of Appeal Rules, 1979.** On 11/4/2008 an application filed by the appellant for leave to appeal to

the Court of Appeal was struck out by Mwarija, J. On 17/12/2007 the appellant filed an application for extension of time to file a petition to set aside the award dated 31/8/2005. On 26/3/2009 Sheikh, J. struck out the application, hence this appeal. In the meantime, on 8/6/2009 the appellant filed Misc. Civil Application No. 64 of 2009 in this Court seeking extension of time to file an application for stay of execution of the award pending the determination of the intended appeals against the decisions of Sheikh, J. (*supra*) and Shangwa, J. dated 12/5/2009 in Misc. Civil Cause No. 135 of 2005. To the best of our knowledge this application is still pending.

Before us the appellant was represented by Messrs. Michael Sullivan QC, Dilip Kesaria, Lugano Mwandamo and Peter Kabatsi, learned advocates. On the other hand, the respondent had the services of Prof. Gamaliel Mgongo Fimbo, learned advocate. We commend learned counsel for the effort and industry in arguing the parties' respective positions in the matter. Indeed, just to show how much research was put into the matter by learned counsel not less than thirty authorities were cited. We wish to say, however, that we will not address each and everything that was put forth by learned

counsel. We will not do so not out of disrespect or discourtesy to them but because we think we can safely determine the appeal without necessarily referring to everything that was argued before us or cited to us.

In the course of hearing Prof. Fimbo raised a novel point of law. That once Mandia, J. dismissed the petition for an order to set aside the award it was no longer open to the appellant to go back before the same court (Sheikh, J.) with an application for enlargement of time to file the award. The decision by Mandia, J. was binding between the parties. The only remedy available to the appellant was to appeal, Prof. Fimbo stressed.

In response, Mr. Michael Sullivan QC submitted at length on the point raised by Prof. Fimbo. In brief, he was of the general view that the order of dismissal by Mandia, J. did not amount to a final or conclusive determination of the matter – citing **Mulla Code of Civil Procedure**, 16th Edition, at page 29 on the meaning of the expression "conclusively determines". That the effect of the dismissal was to place the parties in the position obtaining before the

dismissal. That a proper construction of **Section 14 (1)** of the **Law of Limitation Act** (CAP 89) supports the proposition that the application before Sheikh, J. was not incompetent merely because Mandia, J. had earlier on dismissed a similar application. That a dismissal does not mean finality, citing **Ngoni-Matengo Cooperative Marketing Union Limited v Alimohamed Osman**, 1959 EA 577 at page 580 that "..... *it is the substance of the matter that must be looked at, rather than the words used .....*"

There is no dispute that the application before Mandia, J. was made under **Section 14 (1)** of the **Limitation Act** which reads:-

> *(1) Notwithstanding the provisions of this Act, the court **may**, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal **or an application**, other than an application for the execution of a decree, and an application for such extension may be made either **before or after** the expiry of the period of limitation prescribed for such appeal or application.*
> (Emphasis supplied.)

It will be observed at once here that the power under **Section 14 (1)** is at the discretion of the Court and can be exercised before or after the expiry of the prescribed period of limitation. In dismissing the petition on 22/6/2007 Mandia, J. relied on this Court's decision in **Tanzania Cotton Marketing Board v Cogecot Cotton Company** that a petition under the Arbitration Ordinance is an application falling under Item 21 of Part III of the First Schedule to the Limitation Act whose period of limitation is 60 days. Although Mandia, J. did not say so in so many words it is clear to us that he made the order for dismissal under **Section 3 (1)** of the Limitation Act which reads:-

> *1. 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 therefor opposite thereto in the second column,* ***shall be dismissed*** *whether or not limitation has been set up as a defence.*
> (Emphasis supplied.)

Harbours Authority, Civil Appeal No. 57 of 2002 (unreported) this Court had occasion to consider the effect of **Section 67 (b)** of the **Tanzania Harbours Act, 1977** which bars the institution of a legal proceeding after the expiration of 12 months of the accruing of the cause of action. The Court stated:-

> *A suit or legal proceeding instituted beyond that period does not lie and in the light of the mandatory provisions of section 3 (1) of the Law of Limitation Act, 1971 "shall be dismissed whether or not limitation has been set up as a defence".....*
>
> *In our considered opinion then,* ***the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court*** *.....*
>
> (Emphasis supplied.)

The decision in **Olam** appears to find support in a case cited to us by the appellant, that is the case of **Moss v Anglo-Egyptian Navigation Company, Chancery Appeals**, L.C. 1865 at page 114 that "..... *a question once adjudicated upon cannot be again brought in question except by a bill of review in the same court, or by appeal to a higher court.....*"

In **Hashim Madongo and two others v Minister for Industry and Trade and two others**, Civil Appeal No. 27 of 2003 (unreported) once an application for leave to file a representative suit was granted, the appellants filed in the High Court **Misc. Civil Application No. 78 of 2001** seeking extension of time to apply for prerogative orders of certiorari and mandamus. Kyando, J. (R.I.P.) dismissed the application on 2/8/2002. On appeal, this Court cited with approval a passage in the ruling of Kyando, J. thus:-

> *Under section 3 (1) of the Law of Limitation Act, a proceeding instituted outside the period of limitation prescribed for it by law must be dismissed. And a proceeding which is dismissed cannot be resurrected in the manner*

in which the applicants adopt in this matter. This is because if I grant this application, I will be granting them an opportunity to bring back an application which Kalegeya, J. dismissed. This cannot lawfully be done. If the applicants were aggrieved by the dismissal of their application by Kalegeya, J. they should take the steps known to law against it, e.g. appealing to the Court of Appeal. If they were not, then the matter lies there.

The Court then went on to say, *inter alia*, as follows:-

..... after the application before Kalegeya, J. was dismissed, as it should have been, it was not open to the appellants to go back to the High Court and file the application subject of this appeal ..... We say so because as far as the High Court was concerned, the issue of time limitation had already been determined by Kalegeya, J.

Applying the principle discerned from the above authorities it follows that once an order of dismissal is made under **section 3 (1)** it is not open to an aggrieved party to go back to the same court and

institute an application for extension of time. The remedy is to seek review before the same court or to lodge an appeal or a revision before a higher court. The rationale is simple. That is, as far as the court is concerned the issue of time limitation has been determined. So, a party cannot go back to the same court on the same issue. It follows that, after the order of dismissal was made by Mandia, J. on 22/6/2007 it was not open to the appellant to go back to the same court and institute the application for extension of time before Sheikh, J. In short, the application before Sheikh, J. was *res judicata*.

In saying so, we are aware of the cases cited to us by Mr. Michael Sullivan, QC, on the principles governing *res judicata*. Indeed, the cases underscore the whole idea behind *res judicata* as provided for under **Section 9** of our Code. However, in our respectful opinion the cases are relevant in the context in which they were decided. In the context of this case *res judicata* applies in the manner in which we have endeavoured to give above.

This brings us to what we think is the proper construction of **Sections 3 (1)** and **14 (1)** of the **Limitation Act** in relation to the matter before us. In construing these provisions we are of the view that they should be given a harmonious interpretation. According to **Mulla** (supra) the harmonious construction of a statute entails that an Act is one continuous whole, the sections being enacted simultaneously. So, in order to ascertain the intention of the legislature the words and phrases are to be read together and construed in the light of the purpose and object of the Act. In this regard, in order to discern the intention of the legislature the above **sections** must be read and construed together. Without much ado we are of the view that in enacting the **Limitation Act**, specifically **Sections 3 (1)** and **14 (1)**, the legislature intended that there must be an end to litigation. Under **Section 14 (1)** an intended applicant may bring an appeal or an application **before** or **after** the expiry of the prescribed period. So, if an appeal or an application is instituted beyond that period it shall be dismissed under **Section 3 (1)**. An applicant who wishes to play it safe must bring an application for enlargement of time **before** or **after** the expiry of the stipulated

award. Instead of pursuing this application, the appellant sought to withdraw it on 14/9/2006 before Mandia, J. Having done so, the appellant went to the same court and filed the petition to set aside the award which was eventually dismissed by Mandia, J. on 22/6/2007 for being time barred. After the dismissal the appellant went back to the same court (Sheikh, J.) and filed an application for extension of time similar to the one which was earlier marked withdrawn! Surely, by the above sequence of events the appellant exhibited what we may safely term as "forum shopping". This was, no doubt, an abuse of court process.

There is yet another aspect of the case which we must address. As already observed, the appellant filed a notice of appeal against the decision of Mandia, J. delivered on 22/6/2007. This information is clearly reflected under **paragraph 25** of the affidavit sworn by Dr. Alex Nguluma in support of the application for extension of time. However, for reasons which are unknown to us, the appellant did not annex a copy of the notice of appeal. In our own research however, we came across a copy of the notice which was lodged on 5/7/2007. As already observed, the notice was lodged within time. Instead of

pursuing the intention to appeal the appellant resorted to filing the application for extension of time that was eventually determined by Sheikh, J. Yet again, this was an abuse of court process. What is more, however, is the fact that as of today the notice is still intact and lying somewhere. We appreciate that Mr. Kesaria submitted that once the subsequent application for leave to appeal was struck out by Mwarija, J. the notice was deemed to have been withdrawn under **Rule 84** of the Court Rules. Mr. Kesaria did not cite any authority in support of this proposition. With respect, Mr. Kesaria is not correct in this assertion. Going by the practice of this Court a notice which is deemed to have been withdrawn under **Rule 84** is usually followed by an order from the Court to that effect. Mr. Kesaria could not produce any such order. So, in the absence of such an order or an order under **Rule 82** *(now Rule 89 (2))* of the Court Rules striking out the notice it follows that, as stated above, the notice is still intact.

Of course the submission of Mr. Kesaria begs the following question. Was it necessary to file the application for leave to appeal in the first place? With respect, our answer to this question is in the negative. We say so in view of the clear provisions of **Section**

5(1)(a) of the **Appellate Jurisdiction Act, 1979**. In our view, the decision of Mandia, J. was a decree, so to speak, because as far as the High Court was concerned it had at that stage conclusively determined the question of time limitation. Indeed, in our reading and understanding of **Cogecot** we did not get the impression that the appellant Board ever applied for leave to appeal before appealing.

This brings us to yet another novel point of law. That is, the effect of subsequent proceedings before the High Court where there is a valid notice of appeal. In dealing with this point, we will cite two relevant authorities by this Court on the point in question.

In **Arcado Ntagazwa v Buyogera Julius Bunyango**, (1997) TLR 242, the judge had proceeded with the determination of an election petition when already there was a notice of appeal against some of his decisions in the matter. On appeal, this Court observed, at page 248, *inter alia*, as follows:-

> ..... *Once the formal notice of intention to appeal was lodged in the Registry the trial*

judge was obliged to halt the proceedings at once and allow for the appeal process to take effect, or until that notice was withdrawn or was deemed to be withdrawn .....

In **Aero Helicopter Limited v F. N. Jansen** (1990) TLR 142, a single judge was dealing with an application for a stay of execution. One of the issues was whether or not the High Court has inherent jurisdiction under **Section 95** of the Code to order a stay of execution once appeal proceedings to this Court have been commenced by filing a notice of appeal. The Court answered the issue in the negative.

Applying **Ntagazwa** and **Aero Helicopter** to the matter at hand it follows that once a notice of appeal was filed against the decision of Mandia, J. the subsequent proceedings before Sheikh, J. and Mwarija, J. were unnecessary and uncalled for. The appeal process ought to have been given the chance to take its normal course.

It follows that in the light of what we have endeavoured to state above on the effect in law of the order of dismissal and the

notice of appeal there is no need for us to address the other aspects of the appeal.

In the upshot, we dismiss the appeal with costs.

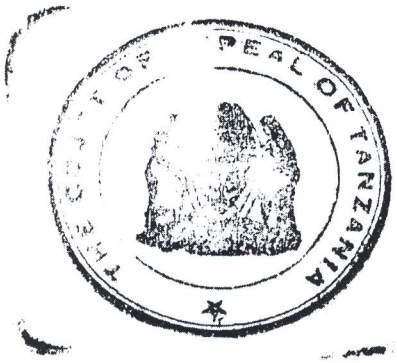
DATED at DAR ES SALAAM this 4th day of March, 2010.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J.S. MGETTA
DEPURY REGISTRAR
COURT OF APPEAL