IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MUGASHA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 119 OF 2019

COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY .... APPELLANT

VERSUS

NEW MUSOMA TEXTILES LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Twaib, J. – Chairman)

dated the 22nd day of September, 2015
in
Income Tax Appeal No. 26 of 2012

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JUDGMENT OF THE COURT

2nd & 9th June, 2020

NDIKA, J.A.:

The respondent, New Musoma Textiles Limited, was granted an extension of time by the Tax Revenue Appeals Tribunal ("the Tribunal") to lodge a notice of appeal and appeal to the Tax Revenue Appeals Board ("the Board"). The intended appeal is against the refusal by Commissioner General – Tanzania Revenue Authority, the appellant herein, to pay TZS. 2,738,397,579.00 claimed as compensation for the loss or damage of the respondent's goods at the hands of the appellant and/or his agents pursuant to a warrant of distress. In deciding in favour of the respondent, the Tribunal reversed the initial refusal of extension by the Board. Being

aggrieved, the appellant now challenges the aforesaid grant of extension of time.

The background to the present dispute as succinctly summarized in the Tribunal's decision is as follows: in early 2001, the appellant demanded from the respondent, an owner of a textile manufacturing factory at Musoma, Mara Region, payment of TZS. 411,160,694.00 as taxes of which TZS. 202,394,342.00 was assessed as excise duty and TZS. 208,766,552.00 being Value Added Tax ("VAT"). The respondent disputed both assessments except TZS. 108,255,403.00 as VAT which it duly paid. Following some discussions, the appellant reviewed the outstanding VAT payable down to TZS. 47,471,373.00 but the respondent gave a counter assessment of TZS. 7,472,346.00. Then, the parties agreed to review the assessment thoroughly pending which the respondent would make monthly instalments to the appellant. Depending on the outcome of the review, the payments would subsequently be refunded or treated as tax deposits.

Despite the above understanding, the appellant issued a warrant of distress on 25th May, 2001 and commissioned his agent, Messrs. Spider Auction Mart and Court Brokers based in Mwanza, to execute it. The agent executed the warrant on 25th June, 2001 by confiscating from the

respondent's factory and moving to its premises goods estimated to be worth TZS. 3,360,868,739.00. The respondent's effort to have the warrant lifted bore no fruit until 20th September, 2004 when the parties signed a Memorandum of Understanding to the effect that the appellant would release and restore the goods against the respondent depositing as security its Certificate of Title No. 033032/1 over its landed property in Mwanza.

The respondent claimed that pursuant to the said Memorandum of Understanding, the appellant only returned goods, mostly damaged, estimated to be worth TZS. 63,148,507.00. Upon demand by the respondent, the appellant, it seems, accepted responsibility for compensation in principle and thus, a joint probe committee, formed to assess and determine the exact extent of liability, set the liability at TZS. 2,738,397,579.00, down from the claimed TZS. 3,360,868,739.00. The committee's report was signed in December, 2005. As it turned out, the appellant disputed the committee's findings and conclusions, and only paid the respondent TZS. 49,724,024.00.

Being dissatisfied by the appellant's recalcitrance, on 1st December, 2006 the respondent instituted Civil Case No. 22 of 2006 in the High Court of Tanzania at Mwanza for payment of the money as set forth by the joint

probe committee. On 27th March, 2007, the High Court (Sumari, J.) entered judgment in favour of the respondent for the sum of TZS. 2,738,297,579.00. The matter did not end there as the appellant contested the judgment by way of an appeal to the Court of Appeal (Civil Appeal No. 93 of 2009). In a judgment delivered on 9th June, 2011, this Court held that since the proceeding before the High Court was of civil nature in respect of a dispute arising from a revenue law, to wit, the Value Added Tax Act, Cap. 148 RE 2002 and since the law is one of those administered by the appellant and on which the Board had sole jurisdiction to determine disputes arising therefrom, the High Court had no jurisdiction to hear and determine the suit. Accordingly, the Court quashed the aberrant proceedings before the High Court and the resulting judgment as they were fruits of a nullity.

In its further pursuit for justice, the respondent approached the Board, vide VAT Application No. 8 of 2011 lodged on 28th September, 2011, seeking extension of time under section 16 (5) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2009 ("the TRAA") to lodge a notice of appeal and institute an appeal against the appellant's refusal to pay compensation. The Board dismissed the application with costs mainly on the ground that it failed to disclose any reasonable case; that the respondent's failure to lodge

the suit in time was as much a result of forum shopping by disingenuously turning a tax dispute into an ordinary suit as it was due to a lack of diligence. As hinted earlier, the Tribunal, on appeal, reversed the Board's decision and granted the respondent thirty days from the date thereof to institute the intended appeal at the Board. Being aggrieved, the appellant challenges the Tribunal's decision on four grounds as follows:

> *"1. The Honourable Tax Revenue Appeals Tribunal erred in law in its finding that the dispute between the parties ceased to be a tax dispute but one for recovery of loss and damage;*
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> *2. The Honourable Tax Revenue Appeals Tribunal erred in law basing his (sic) decision by invoking the provisions of section 21 (1) of the Law of Limitation Act [Cap. 89 R.E. 2002] as the applicable provisions for extension of time in tax proceedings;*
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> *3. The Honourable Tax Revenue Appeals Tribunal erred in law in holding that litigating in wrong fora constitutes a reasonable cause for extension of time under the provisions of section 16 (5) of the Tax Revenue Appeals Act [Cap. 408 R.E. 2009]; and*
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> *4. The Honourable Tax Revenue Appeals Tribunal erred in issuing a blanket exclusion of the period within which the respondent was litigating in the wrong fora and in granting extension of time to the respondent without considering the period under which the respondent was not litigating in any forum."*

At the hearing of the appeal before us, Messrs. Sylvanus Mayenga and Thompson M. Luhanga, learned advocates, joined forces to represent the appellant whereas Mr. Joseph K. Sungwa, learned counsel, appeared for the respondent.

Mr. Mayenga began his oral argument by adopting the contents of the written submissions he had filed in support of the appeal. In highlighting the submissions, Mr. Mayenga started with the fourth ground of appeal positing that the respondent failed to account for a delay of 117 days from 1st June, 2011 when this Court had nullified the High Court's proceedings and judgment and 28th September, 2011 when the respondent approached the Board seeking extension of time. Citing the decisions of the Court in **Karibu Textile Mills Limited v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 and **Vodacom Foundation v. Commissioner General (TRA),** Civil Application No. 107/20 of 2017 (both unreported) for the principle that each day of delay must be accounted for, counsel criticized the Tribunal for granting the extension sought despite the respondent failing to explain away the delay of 117 days.

Coming to the first ground, Mr. Mayenga faulted the Tribunal's reasoning in its judgment, shown at page 588 of the record of appeal, that

the dispute between the parties was no longer a tax dispute but a claim by a taxpayer for recovery of compensation for loss and damage due to the mishandling of the distrained goods. By this reasoning, he contended, the Tribunal circumvented the decision of this Court in Civil Appeal No. 93 of 2009 holding clearly that the dispute was a tax dispute, not an ordinary civil action.

Mr. Mayenga canvassed the second and third grounds of appeal conjointly. In essence, his contention was that the enlargement time sought was restricted to the grounds stipulated by section 16 (5) of the TRAA and that the Tribunal wrongly invoked the provisions of section 21 (1) of the Law of Limitation Act, Cap. 89 RE 2002 ("the LMA"), which were plainly disapplied, to decide the matter in the respondent's favour. He went on to criticize the respondent for forum shopping by disingenuously drafting its claim and filing it in the High Court to evade the exclusive jurisdiction of the Board. It was his submission that the respondent could not plausibly attribute the delay to the fact that it litigated in a wrong forum in good faith to warrant enlargement of time. Relying on five unreported decisions of the Court in **Tanzania Revenue Authority v. Musoma Textiles Limited**, Civil Appeal No. 93 of 2009; **Tanzania Revenue Authority v. Kotra Company Limited**, Civil Appeal No. 12 of 2009; **Allison Xerox Sila v.**

Tanzania Harbours Authority, Civil Reference No. 14 of 1998; and **Phiri M.K. Mandari and 11 Others v. Tanzania Ports Authority**, Civil Application No. 84 of 2013, Mr. Mayenga characterized the delay as a result of tardiness, ineptitude and negligence on the part of the respondent. Accordingly, he urged us to allow the appeal and, as a result, vacate the Tribunal's grant of extension of time.

Taking cue from his learned friend, Mr. Sungwa addressed the fourth ground of appeal first, having adopted his written submissions. It was his contention that the delay was fully accounted for in Paragraph 19 of the affidavit of Abdul Hilal, the Managing Director of the respondent, which was lodged in support of the application before the Board. In that paragraph, the delay is attributed to two factors: first, the respondent's mistake of prosecuting the civil proceeding, with diligence and good faith, in the High Court which turned out to be a wrong forum; and secondly, that the respondent spent some time to find and engage an advocate conversant with tax litigation to handle the matter and that after the advocate was engaged he spent time to examine and study a maze of voluminous documents on the matter.

As regards the first ground of appeal, Mr. Sungwa disagreed that the Tribunal attempted to elude this Court's decision in Civil Appeal No. 93 of 2009 as contended by the appellant. He submitted that the Tribunal's statement alluded to earlier did not form the basis of its reasoning and decision. Coming to the second and third grounds, Counsel postulated that the Tribunal did not anchor its decision upon section 21 (1) of the LMA but that it drew inspiration from the principle that litigating with diligence and good faith in a wrong forum would constitute a reasonable cause in terms of section 16 (5) of the TRAA. He added that, on the authority of **Henry Munyaga v. Tanzania Telecommunication Company Limited**, Civil Application No. 8 of 2011 (unreported), it was significant that there was no proof that the enlargement of time granted by the Tribunal would cause any prejudice to the appellant.

In a brief rejoinder, Mr. Mayenga maintained that the respondent failed to account for the 117 days' delay referred to earlier and that the Tribunal heavily but erroneously relied upon section 21 (1) of the LMA. He insisted that the Tribunal did not merely seek inspiration from those provisions; it wrongly imported them into the dispute and relied upon them heavily.

We have examined the record of appeal and dispassionately considered the oral and written submissions of the counsel from either side as well as the authorities cited. In determining the appeal, we propose to deal with the first ground of appeal and then tackle the second and third grounds together. We shall finish with the fourth ground of appeal.

Ahead of our determination of the grounds of appeal, we find it apposite to reproduce the provisions of section 16 (5) of the TRAA empowering the Board to enlarge time prescribed by section 16 (3) for lodging a notice of appeal or instituting appeal in the Board thus:

> *"The Board or Tribunal, may extend the limit of time set under subsection (3) or subsection (4) of this section if it is satisfied that the failure by a party to give notice of appeal, lodge an appeal or to effect service to the opposite party party was occasioned by* ***absence from the United Republic, sickness or other reasonable cause****, subject so such terms and conditions as to costs as it may consider just and appropriate."* [Emphasis added]

We would observe that while the above provisions vest in the Board the power to enlarge time on the ground of the applicant's absence from the United Republic or his sickness, delay may also be condoned on account

of any "other reasonable cause." It seems to us that while the first two grounds are somewhat invariable, the phrase "other reasonable cause" is broad and flexible to accommodate a myriad of considerations. As is always the case with discretion, the power under section 16 (5) of the TRAA must be exercised judiciously, but not capriciously or whimsically. Settled also is the principle that a superior court or tribunal cannot interfere with the exercise of discretion by an inferior court or tribunal unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account. That principle was stated in **Mbogo and Another v. Shah** [1968] 1 EA 93 by the erstwhile Court of Appeal for East Africa, which has been cited and applied in numerous decisions of this Court. The relevant passage is as per Sir Clement de Lestang VP, at page 94, thus:

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision* ***is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration***

and in doing so arrived at a wrong conclusion."[Emphasis added]

Having made the above remarks, we now deal with the first ground of appeal. The complaint that the Tribunal erred in finding that the dispute between the parties ceased to be a tax dispute but a claim for recovery of loss and damage assails an observation made by the Tribunal in its judgment, as shown at page 588 of the record, to which Mr. Mayenga referred to. The relevant passage reads thus:

> *"Furthermore,* ***the dispute has, indeed, ceased to be one on a disputed tax – an issue that the parties have themselves already resolved – and is now one concerning recovery of loss and damage resulting from wrongful seizure and mishandling of the taxpayer's property****. In addition, even if one assumes that this matter still involves a dispute on forfeiture under the two exempted laws, we think that the generality of section 16 (5) of the Tax Revenue Appeals Act should wide enough to allow the Board to invoke the inspiration* ***provided by the principle under section 21 (1) of the Law of Limitation Act, at least with regard to the grounds for extension of time.***"[Emphasis added]

Admittedly, the above observation, in our view, may seem somewhat inadvertent. Nonetheless, we understood it as an opinion that the dispute between the parties was no longer a contest on the magnitude of tax payable by the respondent but a claim for recovery of loss and damage suffered due to the mishandling of the distrained property. We see nothing suggesting that the Tribunal perceived the dispute as an ordinary civil claim to which the provisions of the LMA would have fully applied. To be sure, the Tribunal was conscious that the Board had the sole original jurisdiction over the intended proceeding, it being one of a civil nature in respect of a revenue law administered by the Tanzania Revenue Authority, in terms of section 7 of the TRAA and that an appeal from the Board lay to it in terms of section 11 (1) of the same law. In this sense, the complaint in the first ground is but an attempt to make a mountain out of a molehill. We dismiss it.

We hasten to say that the complaints in the second and third grounds of appeal are equally unmerited. To begin with, we agree with Mr. Sungwa that the Tribunal **did not invoke or apply** the provisions of section 21 (1) of the LMA to determine the appeal before it; for, it was clearly cognizant that the LMA was inapplicable to that dispute because section 43 (d) of that law disapplied it from forfeiture proceedings under the Customs

(Management and Tariff) Act or the Excise (Management and Tariff) Act. The Tribunal noted that while the dispute involved liability for payment of VAT, it was also partly related to customs and excise.

As shown in the above excerpted passage, the Tribunal clearly stated that the Board should have invoked "the inspiration provided by the principle under section 21 (1) of the Law of Limitation Act, at least with regard to the grounds for extension of time." In view of the apparent fluidity and flexibility of the phrase "other reasonable cause", the Tribunal was justified to hold that the Board should have **invoked the spirit of the principle under section 21 (1) of the LMA** that the time during which the respondent was prosecuting a civil proceeding in a wrong forum with due diligence and in good faith ought to be excluded, which effectively constituted a reasonable cause for the delay. We go along with the Tribunal's view that there was no indication that the respondent's recourse to the High Court at Mwanza, then followed up by an appeal to this Court, was done without due diligence or without good faith. Indeed, as rightly observed in the Tribunal's judgment (page 589 of the record), it was inconceivable that, as a supposedly rational investor, the respondent:

"would put at stake TZS. 2,738,397,579.00 in the full knowledge that the course he had taken was dead-ended ...."

Thus, the Tribunal's interference with the Board's decision is fully justified in view of the latter's misdirection on a vital consideration – see **Mbogo** (supra). Accordingly, we hold that the second and third grounds of appeal are without merit and we dismiss them both.

Finally, we determine the fourth ground of appeal. The complaint here is that the Tribunal erroneously issued a blanket exclusion of the period within which the respondent was litigating in the wrong fora without considering the period under which the respondent was not litigating in any forum. In essence, Mr. Mayenga contended that the Tribunal ignored a period of 117 days from 1st June, 2011 when the Court of appeal issued its decision in Civil Appeal No. 93 of 2009 and 28th September, 2011 when the respondent applied to the Board for an extension. We interpose here to remark that although the judgment of this Court referred to by the appellant was dated 1st September, 2011, it is clearly shown on the top page that it was handed down on 9th June, 2011. That means the delay involved spanned over 111 days.

Admittedly, the Tribunal did not specifically refer to the 111 days' delay. Yet, it took the view that the reasons for the respondent's delay in lodging the case in the Board justified an extension under section 16 (5) of the TRAA. With respect, we do not agree with Mr. Mayenga that the course taken by the Tribunal amounted to granting the respondent a wholesale exemption.

By way of emphasis, we wish to state that the impugned extension of time is particularly justified by the peculiar circumstances of this matter. As hinted earlier, this protracted dispute started in early 2001. The parties made an effort to settle it out of court, which culminated with the establishment of a joint probe committee whose report was signed in December, 2005. Between 2006 and 2011, the matter was pursued in the High Court, and later in this Court, but this quest was in vain as the High Court had no jurisdiction over the matter. All along the respondent did not sit idly by; it has pursued its rights relentlessly. As matters stand, the Board is the only forum where the matter can be litigated and both parties heard on it. No doubt that the point involved being the determination of the liability of the appellant as the revenue collection agent of the government for alleged wrongful seizure and mishandling of a taxpayer's property is of enormous legal significance, on the face of it. In addition, it seems to us

that the appellant will suffer no discernible prejudice from the extension of time granted by the Tribunal. Accordingly, the fourth ground of appeal fails.

The upshot of the matter is that the appeal is without merit. It stands dismissed with costs.

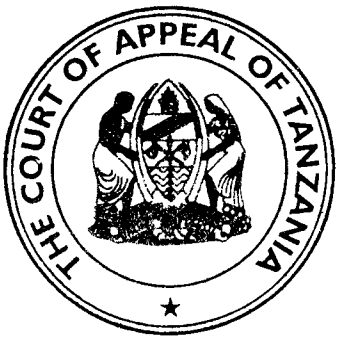
DATED at **DODOMA** this 9th day of June, 2020

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

This Judgment delivered on 9th day of June, 2020 in the presence of Mr. Hospis Maswanyia and Juliana Ezekiel, learned State Attorneys for the Appellant and Mr. William Mang'ena holding brief for Mr. Joseph Sungwa, learned counsels for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL