

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

**(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA J.A.)**

**CIVIL APPEAL NO. 85 OF 2019**

**YUSUFU NYABUNYA NYATURURYA -----APPELLANT**

**VERSUS**

**1. MEGA SPEED LINERS LIMITED----- 1<sup>st</sup> RESPONDENT**

**2. SEPIDEH IN REM -----2<sup>nd</sup> RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Zanzibar at  
Vuga.)**

**(Sepetu, J.)**

**dated the 11<sup>th</sup> day of September, 2018**

**in**

**Civil Case No. 53 of 2013**

**JUDGMENT OF THE COURT**

7<sup>th</sup> & 14<sup>th</sup> December, 2020

**MWANGESI, J.A.:**

The appellant herein, YUSUFU NYABUNYA NYATURURYA, instituted proceedings in the High Court of Zanzibar sitting at Vuga, against the respondents MEGA SPEED LINERS LIMITED and SEPIDEH IN REM, claiming for the following reliefs as reflected on page 10 of the record of appeal, that is;

- (a) "The defendants and each of them be ordered to pay the plaintiff the total sum of United States Dollars (USD) 49,333/=, being salary*

*arrears up to 31<sup>st</sup> December, 2009 in respect of the last contract, security contributions for all period of three years of the contracts at statutory contribution rate of twenty per centum per month (20%) amounting to USD 11,040/=, and leave pay for 36 days USD 4,800/=.*

- (b) The defendant and each of them be ordered to pay the plaintiff all other accrued benefits and unpaid salaries up to the date of judgment.*
- (c) The defendant be ordered to pay compensation equivalent to accrued interest in all pecuniary claims above referred at commercial bank interest rate from the date of accrual until the date of payment in full."*

The basis of the claim as briefly gleaned from the pleadings was that, between 17<sup>th</sup> November, 2008 and 04<sup>th</sup> January, 2010 the appellant and the first respondent, entered into three different employment contracts, whereby, the first respondent engaged the appellant in the service of the second respondent, an ocean moving vessel which he owned, as a captain. The first contract lasted between 17<sup>th</sup> November, 2008 and 31<sup>st</sup> December, 2008, while the second contract was between 01<sup>st</sup> January, 2009 and 30<sup>th</sup> June, 2009. And, the third and last contract lasted between 01<sup>st</sup> July, 2009

and 4<sup>th</sup> January, 2010. The basic salary in all three contracts was USD 4,000 per month, with a provision of leave of three days for every completed month of service.

While in the first contract things appear to have gone smoothly, in the second and third contracts things changed in that, the first respondent breached the terms of employment by failing to pay the appellant fully in the month of October, 2009 whereby he was paid his salary less by USD 650, and for the months of November and December 2009, he was completely not paid. Furthermore, the first respondent failed to remit to the Social Security Fund, the monthly contributions which she was legally obliged to make in favour of the appellant and thereby, leading to accumulation of about USD 11,040/=. As a result, the appellant lodged his claims in Court vide the suit which led to the appeal under scrutiny, claiming for a total amount of about USD 49,000/=, after including other incidental claims.

On her part, the second respondent lodged a written statement of defence on 12<sup>th</sup> November, 2013 as reflected on page 42 of the record of appeal, in which she strongly resisted the claims by the appellant against her arguing that, they had nothing to do with her. It was the argument of

the second respondent that if ever the appellant had any genuine claims, they were against the first respondent and not her.

There was no written statement of defence which was lodged by the first respondent to either admit or resist the claims by the appellant. Much as the record of appeal could reveal, there was no proof if ever service was duly made on the first respondent. This fact further found support from the proceedings of 25<sup>th</sup> August, 2016 as reflected on page 110 of the record of appeal, which reads *verbatim* in part thus: -

***"Advocate Ngole: I pray for the first defendant to be served by publishing in newspaper in order to avoid any misunderstanding as well as mistrial.***

***Court: request of advocate Mashaka Ngole is hereby granted and for them to make own on newspaper as well as through Radio Zanzibar.***

***Advocate Mashaka: No objection, I pray for court to file a date at am convince (sic)."***

Thereafter, the record is silent as to whether there was compliance with the said order of the Court or not. What is apparent from the record, is the fact that on the 6<sup>th</sup> February, 2017 issues were framed and the hearing of the suit started on the same date, whereby, the appellant

paraded two witnesses to establish his claims. On the part of the second respondent, she relied on the testimony of one witness only in defence that is, one Idrisa Shehe Mohamed. There was no defence entered by the first respondent.

In the judgment which was delivered by the learned trial Judge on 7<sup>th</sup> September, 2018 the appellant was held to have managed to establish his claims against the first defendant (respondent) only, who was ordered in her absentia to pay the plaintiff (appellant) the following reliefs: -

- (a) *"To pay the sum of USD 8656/=-, being three months' salaries for October, November and December, 2009;*
- (b) *To pay the sum of USD 1,161/=-, being nine (9) days' leave;*
- (c) *To pay the sum of USD 5,000/=-, being disturbance for the whole period;*
- (d) *To issue a certificate of service to the plaintiff (appellant) in accordance with section 79 of the Employment Act No. 11 of 2005;*
- (e) *As well to pay costs for the suit."*

Aggrieved by the decision of the trial High Court, the appellant through his learned counsel Mr. Mashaka Ngole, preferred the current appeal to the Court, premising his grievance on three grounds namely: -

- (a) *"That, the Honourable trial Judge erred in law and fact for declining to consider that the claims of the appellant against the second respondent was a result of existence of maritime lien as pleaded in the plaint and erroneously excluded the second respondent from liability;*
- (b) *That, the Honourable trial Judge erred in law and fact for excluding the second respondent from joint liability without assigning reasons and justification as required by law and thus occasioning injustice to the appellant;*
- (c) *That, the Honourable trial Judge erred in law and fact for failing to determine that the claimed reliefs by the appellant as pleaded in the plaint were jointly against the first and second respondents and thereby, erroneously arrived at the conclusion that only the first respondent should pay the awarded amount."*

On the 07<sup>th</sup> day of December, 2020 when the appeal was called on for hearing before us, Mr. Mashaka Ngole, learned counsel, entered appearance to represent the appellant, whereas, the second respondent enjoyed the services of Mr. Rajabu Abdallah Rajabu, also learned counsel. On the part of the first respondent, as it was during trial in the High Court, he was nowhere to be traced.

When Mr. Mashaka was asked by the Court to take the floor and address it on the grounds of appeal, he sought leave of the Court which was granted, to adopt the written submissions which was lodged by the appellant in support of the appeal on the 18<sup>th</sup> January, 2019 in terms of rule 106 (1) of the Court of Appeal Rules, 2019 (**the Rules**), with nothing more. It is the submission of the appellant in his written submission that he sued the respondents, claiming against them jointly and severally for the reliefs indicated in the plaint. And, that having been the captain of the second respondent, he had maritime lien against her regardless of whether she was sold to a third party or not. Nonetheless, despite the cogent evidence which he led before the trial Court to establish such position, no findings whatsoever was made by the learned trial Judge against the second respondent.

In the view of the appellant, it was legally improper for the High Court Judge of Zanzibar, to determine the appellant's claims in the suit under scrutiny in the exclusion of the second respondent, in a liability which they jointly shared and that, the second respondent's liability was based on the wording of section 90 of the Maritime Transport Act, 2006 (**the Maritime law**). Making reference to paragraphs 16 of the plaint which was lodged by the appellant in court, Mr. Ngole submitted that the appellant clearly clarified the nature of his claims and tendered evidence to establish on how the provisions under **the Maritime law** were applicable in the circumstances of his suit. This being the first appellate Court, the learned counsel for the appellant, implored us to reevaluate the evidence and come out with a just and fair decision in favour of the appellant. Finally, the learned counsel asked us to condemn the respondents to jointly bear the costs of this appeal.

On his part, Mr. Rajabu informed the Court that the second respondent did not lodge a written submission in reply to the written submission which was lodged by the appellant in compliance with rule 106 (7) of **the Rules**. However, in terms of the provisions of rule 106 (10) (b) of **the Rules**, he sought leave of the Court which was granted, to present



oral submission in opposition to the appeal. He started his oral submission by conceding to the contention by his learned friend that indeed, in the instant appeal, the appellant had a valid claim based on maritime lien against the second respondent. Nevertheless, at the time when he lodged his suit in court, he was already time barred in that, his maritime lien had been extinguished by operation of law. In so submitting, Mr. Rajabu placed reliance on the provisions of section 92 (1) of **the Maritime law**, which sets the limitation period for maritime lien to be one year from when the right to sue accrued.

In amplification of his stance, Mr. Rajabu submitted that the right by the appellant to sue the second respondent under maritime lien, accrued in January, 2010. However, the suit leading to the impugned decision, was instituted by the appellant on 13<sup>th</sup> August, 2013, which by very far was beyond the period of one year stipulated under **the Maritime law**. That being the case, the claim by the appellant against the second respondent, was unmaintainable as it was non-existent by operation of law, concluded Mr. Rajabu. The learned counsel, urged us to dismiss the appeal without pressing for costs.

Rejoining to what was submitted by his learned friend, Mr. Ngole, was at one with him in so far as the issue of limitation period was concerned. He however hastened to argue that, the said period did not apply to the appellant, who was covered by the exception stipulated under sub-section (2) of section 92 of **the Maritime Law**. This was so because the appellant was prevented by circumstances beyond his control, from lodging his claims against the second respondent timeously. He was therefore positive, that the claims by the appellant against both respondents were maintainable and the trial Judge ought to have made a finding against the second respondent as well. He thus, maintained his stance and reiterated the prayers which he made in the submission in chief.

In the light of the grounds of appeal preferred by the appellant and the submissions of the learned counsel from either side above, we think there are basically two issues that stand for our deliberation and determination. The first issue which arises from the first ground of appeal, is whether or not the learned trial Judge erred in law in not granting the reliefs claimed by the appellant against the second respondent, which were based on maritime lien. The second issue which arises from the second and

third grounds of appeal, is whether or not, the trial Judge was legally justified to consider the claims of the appellant against the first respondent in the exclusion of the second respondent. We propose to start with the second issue.

The learned trial Judge, is faulted by the appellant for having granted the reliefs which he sought in his plaint against the first respondent alone in the exclusion of the second respondent, while they were claimed against both of them jointly. On our part, upon revisiting the reliefs which were sought by the appellant which we reproduced at the beginning of this judgment, we have faced some difficulties in appreciating the complaint of the appellant. To be in a better position of assessing the appellant's complaint, we reproduce what we think, are the catch words used by the appellant in his prayers in the plaint which he lodged in Court. They read, **"the defendants and each of them be ordered to pay the plaintiff..."**

In our considered view, the contention by Mr. Ngole, that the grant of the reliefs sought by the appellant ought to have been against the respondents jointly, is faulty. In our understanding, by using the catch words bolded above, the appellant left the chance open to the trial Judge

that, depending on the evidence which would be placed before him, he had the option of either holding the defendants jointly liable, or, each of them individually liable. In that regard, the trial Judge committed no wrong in holding the first respondent liable to the reliefs claimed by the appellant in the exclusion of the second respondent. With such finding, we answer the second issue which we posed above in the affirmative.

The second issue is whether or not the learned trial Judge was correct in denying the appellant's claimed reliefs against the second respondent, which were based on maritime lien. It is not in dispute that the appellant had a valid claim against the second respondent based on lien under **the maritime law**. It was however argued on behalf of the second respondent that the said right was extinguished by the limitation period set under section 92 (1) of **the Marine Law**, which reads thus: -

*"The maritime liens relating to a ship set out in section 86 of this Act, shall be extinguished after a period of one year from the time when the claims secured thereby arose unless, prior to the such period, the ship has been arrested and the arrest has led to a forced sale pursuant to the Order of*

*Court or any other law for the time being in force relating to the property in admiralty proceedings.”*

As earlier alluded to above, Mr. Ngole readily conceded to the fact that the appellant failed to comply with the requirement stipulated under the provisions quoted above. He however raised reasons which prevented the appellant from complying with the law which in his view, squarely fell within the exceptions to the rule that have been provided under subsection (2) of section 92 of **the Maritime Law**, which bears the following wording: -

*"The one year period referred to in subsection (1) of this section shall not be subject to interruption or suspension except that time shall not run during the period the lien holder is legally prevented from arresting the vessel."*

The subsequent sub-issue which arises in view of the contention by Mr. Ngole, is whether the appellant was prevented from lodging his claims on account of circumstances which are envisaged under the provisions of sub-rule (2) of section 92 of **the Maritime law**. In his endeavor to convince us that there were indeed circumstances beyond the appellant's

ability, the learned counsel referred us to paragraph 16 of the plaint which was couched in these words: -

*"That sometimes in 2011, and before the second defendant (respondent) was arrested and sold to a third party, the plaintiff had attempted to use the existing labour dispute settlement machineries to resolve the dispute. However, **while the plaintiff was in the process of filing a labour suit in a court of law, it was realized that the solvency of the first defendant (respondent) was questionable**, and soon thereafter, it became aware that the second defendant (respondent), the only known property of the first defendant (respondent) in Zanzibar, had been arrested and eventually sold to liquidate various claims against the second respondent."*

*[Emphasis supplied]*

Upon dispassionately considering the wording of the paragraph of the plaint quoted above, we are far from being persuaded that what has been pleaded therein, is among the factors envisaged under section 92 (2) of **the Marine Law**. Our interpretation of the provision is that, the interruption or suspension made to the lien holder, which are to be

excluded in computing the limitation period, should have arisen from or been occasioned by a legal process. On the contrary, what was pleaded by the appellant in paragraph 16 of the plaint to which we were referred to, was mere speculation of the appellant in regard to the economic status of the first respondent, and the steps which he was contemplating to take. We are firm in our minds that such ideas in the mind of the appellant, fell short of being termed legal interruption or suspension as envisaged under the provision of section 92 (2) of **the Maritime Law** which was relied upon.

And, as if the foregoing was not enough, the version pleaded by the appellant in his plaint, is in conflict with the sworn testimony which he gave in court on 06<sup>th</sup> February, 2017 as reflected on pages 116 to 117 of the record of appeal, where he testified *verbatim* in part that: -

*"On 06/12/2009 at 18:00 pm I was allowed to go on leave. I was not paid for that leave. After 06/12/2009 I travelled with my family to Tarime and came back on 16/07/2009 (sic). I went to Idrisa to pay me salary for all those months as I had debt. **On 22/01/2010 I issued a demand***

***letter which I gave to Idrisa who asked me to go back to work then he will pay me salary.***

*By then my contract had expired then I wrote a letter to Registrar of ship Zanzibar who wrote to Idrisa in order for Idrisa to pay me. I got to know that because I was sent a copy. Idrisa said I have caused damages to the boat. Because that boat was taken to Mombasa for maintenance as it was so required.*

***On August, 2013 that boat was sold. I saw that boat at sea port today. I heard that it was sold in August, 2013 therefore I came to court to seek for legal remedy...”***

*[Emphasis supplied]*

From the appellant's testimony quoted above, we gather that the cause of action by the appellant against the respondents accrued on 22<sup>nd</sup> January, 2010 when he issued the demand letter. We have as well been made to understand from the said testimony, that the second respondent was sold to a third party in August, 2013. Additionally, in his testimony, the appellant failed to disclose the circumstances under which the second respondent was sold that is, whether the sale was made through any court order, or in the ordinary course of transaction. Whatever might have been



the case, what is apparent, is the fact that the contention by Mr. Ngole that the appellant was prevented from complying with the requirement of law due to circumstances which fell under the exceptional circumstances stipulated under section 92 (2) of **the Maritime Law**, was not supported by the pleadings or cogent evidence from the record.

Since from 22<sup>nd</sup> January, 2010 when the cause of action based on maritime lien by the appellant against the second respondent accrued, to August, 2013 when the second respondent was sold; was a period of about 43 months which is beyond the limitation period of one year (12 months) set by the law under section 92 (1) of **the Maritime law**, we are constrained to side with Mr. Rajabu that, at the time the appellant lodged his suit in court that is, on 13<sup>th</sup> August, 2013, his right of lien against the second respondent had already been extinguished by operation of law. To that end, we answer the second issue posed above in the affirmative that, the learned trial Judge, was justified in considering the reliefs claimed by the appellant against the first respondent alone because they were not maintainable against the second respondent.

Consequently, we find the appeal by the appellant to be devoid in merit. We accordingly dismiss it. Regard being had to the fact that the respondent did not press for costs, we order each party to bear its own.

Order accordingly.

**DATED** at **ZANZIBAR** this 12<sup>th</sup> day of December, 2020.

S. S. MWANGESI  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Judgment delivered this 14<sup>th</sup> day of December, 2020 in the presence of Mr. Rajabu Abdallah Rajabu, learned counsel for the respondent also holding brief of Mr. Mashaka Ngole for the Appellant is hereby certified as a true copy of the original.

