

**IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM**

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**CIVIL CASE NO. 450 OF 1999**

**P.1283 COL CMA MSALILWA**

**ENG. OTHERS ..... PLAINTIFFS**

**VERSUS**

**CHIEF OF T.P.D.F AND**

**ATTORNEY GENERAL ..... DEFENDANTS**

***Date of last Order: 04/12/2008***

***Date of Judgment : 03/06/2008.***

**JUDGMENT.**

Ten Plaintiffs, who are P1489 LT.COL. JACKSON MBWILE, P.1495 LT COL. FAUSTINE ITANGAJA, P.1645 MAJOR H. MLONGWA, P.3661 CAPT. J. S. MALLYA, P.6840 LT. A.K BAHEBE, P.6628 LT. SIWA, P.4747 LT.SS MHERUKA, P.5180LT. MR. MWINYI, P.7515 LT. I. H ISMAIL and MT.13309 S.SGT ROBERT FESTO KAGUBE filed a suit in this court on 08/12/99, against their employer the CHIEF OF DEFENCE FORCES, who is the 1<sup>st</sup> Defendant and the ATTORNEY GENERAL as the 2<sup>nd</sup> Defendant.

The Plaintiffs claim is based on alleged “*illegal release*” from service of the Defence Forces, “**contrary to the provisions of the National Defence Forces Regulation and the National Defence Act**”, late payment of terminal benefits, underpayment of salaries and terminal benefits and claim of special and general damages plus costs of this suit. All the Plaintiffs were represented by Mr. Kugesha, learned advocate, while the Defendants were on different occasions, represent by Ms SAHEL and Mr. Mboya, learned State Attorneys, assisted by Capt. IHALUKA. All the ten plaintiffs gave evidence in support of the claims including the production of documents. The Defendants called two witnesses.

At the close the both the Plaintiffs, and the Defendants case, their counsels were allowed to file find written submissions. The advocate were also directed to address this court in their submissions, on the provisions of section 63 of the National Defence Forces Act, Cap 192, which relates to limitation of suits under that Act.

Counsels for both parties filed their written submissions both on the merits of the suit based on the evidence adduced, as well as on the question of limitation as directed by this court. As the question of limitation goes to the root of the authority of this court to determine the suit on its merits, I

duty bound to dispose of in first, before the suit can be considered on its merits.

Section 63 of the National Defence Forces Act. Cap 192 RE 2002, which is the revised version of section 62 of Act 24 of 1966, provides as follows:

*“63. No suit or other Civil proceeding shall be against any person for an act done in pursuance of execution of this Act or any Defence Forces Regulations, or of any service or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, Defence Forces Regulations or such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or in the case of any continuing injury or damage, within six months after it ceases”.*

On the issue is whether this suit which was filed on 08/12/1999, was not caught out by the limitation under section 63 of Cap 192 RE 2002, or its predecessor, section 62 of Act 24 of 1966.

Mr. Kugesha the Plaintiffs advocate has submitted that, and I quote from this written submissions from at page 26:

*“The above quoted provision only set a limit within which an authority is allowed to institute a Civil proceeding against any person for an act done in execution of the NDA act.*

*The contents of that provision instruct an authority to take quick action against any person with reference to an act or omission of a statutory duty or an obligation vested to that person under NDA. However, further guidance related to the limitation of proceedings against the code of service discipline. That guidance is provided under S.63 of the NDA as follows”.*

Mr. Kugesha then proceeded to quote the provisions of section 63 of Act No. 24 of 1996, which are the same as the provisions of section 64 of Cap 192 RE 2002.

*“64. No suit or other civil or criminal proceeding shall lie against any officer or man in respect of anything done or omitted*

*to act maliciously and without reasonable and probable cause”.*

Mr. Kugesha contends that;

*“the two provisions are intended to prohibit delayed or uncalled for suits against men and therefore instruct employer to act in fairness and on reasonable cause.....*

*The two provisions do not prohibit men and other persons from taking action or instituting a civil suit or proceeding against their employer or even seek remedy from a civil court in order to demand a right or privilege that has not been provided by the employer. Further to that the said provisions do not set a limit within which a man or any person should bring an action or a civil suit or proceeding related to any claim against their employer”.*

Mr. Kugesha went on to argue that the 1<sup>st</sup> Defendant being aware of the two provisions first acted on the allegations against the plaintiffs but failed to comply with the provisions

of section 63 (S.64) which directs that proceedings must not be taken against man or persons unless they acted maliciously and without probable cause. For these reasons Mr. Kagesha submitted that the Plaintiffs had instituted the suit against the Defendants within the time prescribed by the law. He further submitted that:

*“The Plaintiffs claims against the Defendants are based on their contractual arrangement that is why there are on specific items. All claims are on items and services that the 1<sup>st</sup> Defendant was, is bound to provide services. The Plaintiffs claims arose in year 1996 and their suit was filed in the year 1999, three years later and therefore within a statutory period authorized by law of limitation to bring suits based on contractual arrangement”.*

Mr. Kugesha ended by citing what he cased, rule 7 of Part 1 of the First Schedule to the Law of Limitation Act, 1971.

In their written submissions on this issue filed by Mr. Rus Mboya, learned State Attorney, he contends that, the release of the Plaintiffs from the TPDF was in accordance with

the Defence Act and the Defence Forces Regulations. He submitted that section 63 of Cap 192 RE 2002, provides to the effect that no suit or other proceeding shall lie against any person for an act done in accordance to the two mentioned laws. He argued that the word “person” as defined in Cap 1 RE 2002:

*“means any word or expression descriptive of a person and includes a public body, company or association or body of persons, corporate or unincorporated”.*

Mr. Mboya argued that the term “*person*” in section 63, includes the TPDF. He contended that the Plaintiffs case is that they were on different dates between 1987 and 1996, issued with letters of illegal release from the service of TPDF. He argued that the Plaintiffs did not dispute their release until on 8<sup>th</sup> December, 1999 when they initiated legal proceedings. He submitted that the Plaintiffs case was filed about four years had passed, which is in contravention of section 63 of the Defence Forces Act. He argued that the law requires that any dissatisfaction arising from the implementation of the Defence Act on the Defence Regulations, be instituted in court within a period of six months. He contended that since the Plaintiffs were released under the Act and the Regulations in June 1996, the suit was supposed to have been filed by the

end of the year 1996. He cited the case of SHAHIDA ABDUL HASSANALI KASSAM Versus MAHEDI MOHAMED GULAMALI KANJI, CIVIL APPLICATION NO.42 of 1999 (CA unreported), to the effect that matters filed out of time have to be dismissed without going to merits. He further submitted that limitation can be raised at any stage reached in the suit and the court is capable of considering the issue of limitation even if it was not raised by the parties in their pleadings. He cited the case of MUKISA BISCUIT MANUFACTURING CO. LTD Versus WESTEND DISTRIBUTORS LTD [1969] EA 696. He concluded that the Plaintiffs should have applied for extension of time before engaging the court and since this was not done, the suit should be dismissed with costs for being time barred.

As stated earlier on, the issue for determination is whether the Plaintiffs suit is time barred by reason of section 62 of Act 24 of 1966, which is now section 63 of Cap 192 RE 2002. Mr. Kugisha, If I understood his submissions correctly, made two arguments to show that the suit is properly before this court.

The first argument is to the effect that, the provisions of sections 62 and 63 of Act 24 of 1996 or the present sections 63 and 64 of Cap 192 RE 2002, are mere directives to the authorities, which authorities Mr. Kugesha did not specify, to take prompt action against men and officers of the Tanzania



Peoples Defence Forces. He contended that the provisions do not set a limitation or prevent officers and men from instituting a suit against their employer. The second argument, is that the suit is based on contract and in terms of item 7 of Part 1 of the Schedule to the Law of Limitation Act 1971, the limitation period is six years. In effect, Mr. Kugesha argues that since the Plaintiffs were released in 1996, the suit which was filed on 8/12/1999, is in time.

With regard to the first argument put forward by Mr. Kugesha, it must be stated with unfeigned respect, that Mr. Kugesha misconstrued the import of section 63 of Act 24 of 1966, which is section 64 of Cap. 192 RE 2002. It is clear to my mind that the said provision which has been quoted by Mr. Kugesha and reproduced earlier or in this judgment, limits the period during which criminal or civil proceedings may be instituted against an officer or man for breach of the code of Service Discipline. It is therefore irrelevant to the present proceedings, which are a suit instituted by officers and man against the Chief of Defence Forces and the Attorney General. The relevant provisions have set out in section 62 of Act 24 of 1966, which are now section 63 of Cap 192 RE 2002.

The section states that:

*“No suit other Civil proceeding shall  
lie against any person for an act done in*

*pursuance or execution on intended execution of this Act or any of Defence Forces Regulation..... unless it is commenced within six months next after.....”.*

The proceedings before this court are a “*suit*” brought by the Plaintiffs against the Chief of Defence Forces and the Government in the name of the Attorney General. The Chief of Defence Forces and the Attorney General are “person” within the meaning of section 63 Cap 192 RE 2002, or section 62 Act 24 of 96 and if they were not, the Plaintiffs would not have joined them as parties in the suit. In terms of Order I rule 3, of the Civil Procedure Code, it is provided that:

*“All persons may be joined as defendants against whom any right to relief in respect of an arising out of the same act or transaction or ..... is alleged to exist .....”* (emphasis supplied)

The remaining issue is whether the suit is in respect of **“an act done in pursuance or execution intended execution” of the national Defence Forces Act or any**

***alleged neglect on default in the execution***” of this Act or the Defence Forces regulations.

In their Complaint filed on 8/12/99, the Plaintiffs have averred that, they were issued with “***letters of release which were issued to the Plaintiffs without the opportunity to be heard contrary to the provisions of the National Defence Forces regulations and the National Defence Act***” (see paragraph 4). In paragraph 7 thereof they have averred in part, “***that the purported plaintiffs illegal release from the Defence Forces service is with respective effect which is contrary to the provisions of Article 1. 24 (3) (b) of the Defence Force Volume 1 (Administrative) Regulations 1966.....***” and in Paragraph 8 they have averred, “***that in the alternative, given the fact that the plaintiffs were illegally released under Article 8.01 item 5 9d) of the National Defence Forces Regulations Vol 1, in which case they were supposed to get the notation “Honourably Released” as it is required by the said provisions, to the contrary, the Plaintiffs were released under the above article and item, they got the notation, “kutofaa kuendelea na utumishi.....***”.

It is clear that, on the face of their pleadings, the Plaintiffs suit is based on an act done in pursuance or execution or intended execution of the National Defence Act

and the Defence Forces Regulations. The “release” of men or officers of the Defence Forces, is an act done in execution of the Act and the Regulations and the act is governed by the provisions of Part III section (b) of the Act. The suit is therefore squarely governed by the provisions of section 62 of Act 24 of 1996 or the provisions section 63 of the current Cap 192 RE 2002. In terms of the said provisions, such a suit “**shall not lie against only person..... unless it is commenced within six months next after the act, neglect or default.....**”. In other words , such a suit would be time barred if it has not been brought within six months of the act complained of .

The question now is when did the cause of action accrue?. In other words, from when did the period of six months start to run against the Plaintiffs?. I paragraph 4 of the Plaint the Plaintiffs have avered in part, as follows:

*“4. That the first Defendant is the Chief of Defence Forces in the United Republic of Tanzania and on diverse dates in 1987 and 1996 issued letters of illegal release from the services, to the Plaintiffs who were holding different offices.....”*

On the basis of what has been pleaded in paragraph 4 above, the cause of action for each plaintiff, arose on the date the letter of release was issued to each plaintiff.

If the date is in any month of the year 1987, this suit which was filed on 8/12/1999 would be time barred by nearly twelve (12) years. If the letter of release was issued to any of the Plaintiffs on any date in any month of the year 1996, this suit which was filed on 8/12/1999, would be time barred by nearly three (3) years. In any event, which ever date is taken as the date of release, whether in the year 1987 or 1996 or in any other year in between, this suit filed on 8/12/1999, was filed hopelessly out of time, and liable to be dismissed.

Mr. Kugesha's second argument that the suit is based on contract for which the period of limitation is six years, is a mere afterthought which is not based on the pleadings filed by the Plaintiffs.

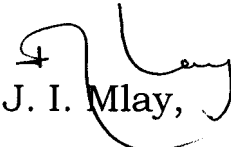
There is nowhere in the Plaint filed on 08/12/1999 it has been avared that the Defendants acted in breach of contract. The claims are wholly bossed on alleged illegal release in contravention of the Defence Force Act and the Defence Forces Regulations. The suit is therefore governed by the limitation of six months prescribed by section 62 of Act 24 of 1996 or its successor, section 63 of Cap 192 RE 2002.

It is trite law that, the issue of limitation is so fundamental that it can be raised or considered at any stage of the proceedings, even on appeal.

It is unfortunate that the matter was not raised or considered earlier on in the proceedings, as it could have saved the Plaintiffs and the Court time and expenses. Unfortunate as that may be, the law requires that proceedings instituted after the expiry of the period of limitation prescribed by law shall be dismissed.

Accordingly and for the reasons given above, the present suit having been filed long after the expiry of the period of limitation of six months prescribed by section 62 of Act 24 of 1966, or section 63 of Cap 192 RE 2002, has been filed hopelessly out of time and as a consequence, the suit is hereby dismissed with costs.

As the result of this decision there is no suit which is properly before this court, for determination on its merits. The documentary exhibits tendered by the plaintiff to be returned to the Plaintiffs, if they so wish, after the expiry of the period of appeal if no appeal has been preferred.

  
J. I. Mlay,  
**JUDGE,**

Dated and delivered in the presence of Ms Mwaikambo learned State Attorney and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup>

Plaintiffs, this 3<sup>rd</sup> day of June, 2008. The Right of Appeal is explained.

  
J. I. Mlay

**JUDGE,**

**03/06/2008.**