

IN THE HIGH COURT OF ZANZIBAR

HELD AT VUGA.

CIVIL CASE NO. 66 OF 2014

ITALFOOD LIMITEDPLAINTIFF

VERSUS

1. THE ATTORNEY GENERAL ZANZIBAR

2. THE DIRECTOR GENERAL ZANZIBAR INVESTMENT PROMOTION AUTHORITY

3. BARAZA COMPANY LIMITED

4. BARAZA TRUST LIMITEDDEFENDANTS .

RULING

Mwampashi, J.

In this suit filed by the Plaintiff Italfood Limited against The Attorney General Zanzibar, The Director General Zanzibar Investment Promotion Authority, Baraza Company Limited and Baraza Trust Limited hereinafter to be referred to as the 1st, 2nd, 3rd and 4th defendant respectively, a number of points have been raised as a preliminary objection on the propriety of the plaintiff's suit. The preliminary objection which is the subject of this ruling has been taken by the 1st, 2nd and 3rd defendant. Before the points raised are demonstrated and the submissions for and against the objection are revisited it is better, under the circumstances of this matter, to first grasp the gist of the plaintiffs case against the defendants.

Briefly the facts giving rise to the suit as they can be gathered mostly from the plaint and from the list of documents produced by the plaintiff under Order XV rule 1 of the Civil Procedure Decree, Cap 8

and therefore forming part of the plaintiff's pleadings, are as follows; In 1990 the Plaintiff applied for and was granted by the 2nd defendant an interim certificate of approval for her Bwejuu Village Hotel project. The approval of the plaintiff's project by the 2nd defendant was in 1991 for that purpose followed by the Government leasing to the plaintiff a plot of land at Bwejuu Dongwe (Site Plan No. 39/91) in Southern District Unguja measuring 5.05 hectares. The plaintiff took possession of the plot and started constructions by putting upon it some structures but because up to 2003 the project had not been completed and for other reasons as well, the plaintiff's project approval was in October, 2003 cancelled by the 2nd defendant. The cancellation of the project approval was followed by the revocation of the lease by the Government in 2004. Then the plaintiff's structures upon the plot were evaluated and the plot was in 2005 leased to the 3rd defendant who took over the plot and commenced her own development upon it. After learning that her project and the lease had been revoked and that the plot had been leased to the new investor the plaintiff complained to the 2nd defendant but her efforts proved futile. The plaintiff did also refuse to accept the amount given to her as compensation for her structures she had put upon the plot as the amount did not correspond with the value of her property and on 31/12/2014 she eventually filed this suit against the defendants.

The plaintiff's case and the reason why she has filed this suit is better stated by her under paragraphs 33 and 35 of the plaint in which she states as follows;-

33. That the Plaintiff have (sic) preferred this; Plaint to move this honourable Court to call for the record of the Defendants

deliberations with his officers and the decisions thereof in respect of your humble Plaintiff case with a view of to quashing the decision of the Defendants to cancel the Project and Lease of the Plaintiff as stated above on the grounds that;-

35. That the Plaintiff is for trespass and recovery of lands, damages and all other matters relating to land which falls under normal courts in the amendment of the Land Tribunal Act, 1994 and also concerns violation by the Revolutionary Government of Zanzibar of the Constitution and other laws and for trespass and for purposes of court fee the same attracts a maximum fee hence this honourable court has the mandate to adjudicate over the matter as the Government is party.

The gist of the plaintiff's case against the defendants can also be understood from the reliefs or orders being sought by the plaintiff. In her plaint the plaintiff seeks for reliefs and orders in the following form;-

- (a) An order by the court declaring that the act of the 1st and 2nd Defendant to cancel the Plaintiff project and purported revocation of her lease vested in the suit plot without hearing her and/or without adequate compensation is illegal and contrary to the Constitution of Zanzibar and quashed the same.

- (b) A declaration that the acts of the Government to wit, the Minister responsible for Land matters, then the Minister Responsible for Finance, The Executive Secretary of the Zanzibar Commission for Tourism, the Attorney General, Director General ZIPA and other Government officials and Ministers are unconstitutional, illegal and contrary to the rules of natural justice.
- (c) An order of nullification of any purported allocation of her land at Bwejuu Dongwe with Site Plan No. 39/91 for land admeasuring 5.05 Ha to the Third, Fourth and Fifth defendants due to fraud and illegalities; a declaration that the suit property belongs to the Plaintiff; stoppage of trespass.
- (d) An order by the court to order the First and Second defendants severally or jointly reinstate the Plaintiff plot and Lease and Project at the land at Bwejuu Dongwe with Site Plan No. 39/91 for land admeasuring 5.05 Ha plus a compensation of Tshs 2,500,000,000/- (Two Billion and Five Hundred Million Shillings) to the Plaintiff immediately.
- (e) An order for stoppage of trespass and payment of general damages for the said trespass to be determined by the Court of not less than US \$ 2,000,000 (US \$ Two Million) jointly and severally by the Defendants.
- (f) An order that the Defendants should jointly and severally pay general damages for financially loss and harassment to be determined by the Court not less than US \$ 500,000/= (US \$ Five Hundred Thousand).
- (g) An order that the Defendants should jointly and severally pay

punitive damages for demolition of Plaintiff properties apart from the illegal entering in her land to be determined by the Court of not less than US \$ 500,000/= (US \$ Five Hundred Thousands).

- (h) An order that the Defendants should jointly and severally pay the Plaintiff is also claiming jointly and severally against the Defendants for nullification of any purported allocation of her land at Bwejuu Dongwe with Site Plan No. 39/91 for land admeasuring 5.05Ha to the Third, Fourth and Fifth Defendants due to fraud and illegalities; a declaration that the suit property belongs to the Plaintiff; stoppage of trespass.
- (i) An order that the Defendants jointly and severally should pay the Plaintiff compensation for loss occasioned due to the Defendants' act of interfering with her leased land and intended project of not less than US \$ 120,000/= (US Dollars One Hundred and Twenty Thousand) per year from the date of encroachment and trespass and is continuing at the same rate per year.
- (j) An order that the Defendants jointly and severally should pay general damages to be assessed by the Court for hardship they have caused to the Plaintiff.
- (k) Costs and incidental to the suit be provided for.
- (l) Any other and further relief beneficial to the Plaintiff as the court may deem appropriate be given.

It has also to be clearly pointed out at this very stage that the date on which the plaintiff's cause of action arose is stated by her on paragraph 36 thus;-

36. *That the cause of action arose on 30th November, 2004 when the Plaintiff realized that the conduct of the Defendants is not harmonious to her rights and is continuing daily until the interference and non payment of full market compensation is stopped.*

In support of the preliminary objection the 1st defendant has raised four points which are in the following form;-

- (a) The suit is barred in law for non compliance with Government Proceedings Act No. 3/2010
- (b) The suit is time barred under the Limitation Decree, Cap 12 of the Laws of Zanzibar.
- (c) Plaintiff has no locus standi
- (d) Plaintiff discloses no cause of action against 1st Defendant.

As for the 2nd and 3rd defendants each has raised a single point to support the objection to wit; that the suit is barred in law for non compliance with the requirements of the Government Proceedings Act No. 3/2010 and that the suit is hopelessly time barred, respectively.

The hearing of the preliminary objection proceeded by way of written submissions whereby Mr. Massoud Nassor Mohamed (SA) for the 1st defendant, Mr. Abdulla S. Abdulla (Legal Counsel) for the 2nd defendant and Mr. Rosan Mbwambo (Adv) for the 3rd defendant did file their submissions in support of the objection while on the

other hand Mr. Abdulkhaliq M. Aley (Adv) for the Plaintiff filed his submissions against the objection.

It has been submitted by Mr. Massoud Mohamed on his first ground that the Government Proceedings Act, 2010 has been violated because the plaintiff did not first serve the Government with the notice to sue the Government as required under S. 6(2) of the Act. He has argued that the plaintiff's purported notice dated 25th September, 2014 was not delivered or left at the 1st defendant's offices as there is no evidence to prove that the same was received by the 1st defendant. He therefore prayed for the suit to be struck out with costs for the plaintiff's failure to comply with S. 6(2) of the Government Proceedings Act No. 3 of 2010.

Mr. Abdulla S. Abdulla for the 2nd defendant who had also raised the same ground in regard to the notice to sue the Government has in his submissions amplified what has been submitted by Mr. Massoud. He has maintained that since there is no proof of service of the notice to the Government as required by S. 6(2) of the Government Proceedings Act 2010 then the suit is not maintainable.

In his submissions against the 1st and 2nd defendants' point that S. 6(2) of the Government Proceedings Act, 2010 has not been complied with by the plaintiff it has been Mr. Aley's argument that the defendants argument that no notice to sue the Government had been served to the Government prior to the institution of the suit merely because there is no evidence to prove the same is a misconceived argument. He has submitted that the ground is not on a pure point of law but it is a point that requires evidence. He has referred the court to the cases of *Musangang'andwa vs. Chief Japhet* [2006] TLR 351 and that of *COTWO (T) OTTU UNION* [2000] TLR 88 where it was emphasized that a preliminary objection on a

point of law need be on pure point of law and that it should base on facts which are certain and further that if not, such a point should not be acted upon. He has further argued that whether the notice to sue the Government has been served or not is a matter to be ascertained by evidence which cannot be raised as a preliminary point.

Mr. Aley has also submitted that the 2nd defendant being an autonomous body as per ZIPA Act No 11 of 2004 cannot be heard complaining that the notice to sue her was not served upon her as per S. 6(2) of the Government Proceedings Act, 2010. He has therefore prayed for the ground to be dismissed.

It is a firm observation of this court that the point in regard to the plaintiff's failure to comply with S. 6(2) of the Government Proceedings Act No 3 of 2010 as raised by the 1st and 2nd defendant should not detain me at all. As correctly put by Mr. Aley the question whether the plaintiff did properly serve the Government with the notice to sue as claimed by her in the plaint or not is a question of evidence. The point does not qualify as a point that can be raised as a preliminary point. As it was held in a celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd*** (1969) EA 696. by Law, J.A among other things;-

'a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the

suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration'.

It was further held in that case by Sir Charles Newbold. P that;-

' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion''.

As on the ground that the plaintiff has no locus standi it has been submitted by Mr. Massoud that since the plaintiff's lease over the disputed plot of land has been revoked then the plaintiff has no right to file the suit at hand over the plot. In his attempt to cement his argument Mr. Massoud had referred the court to the case of **Lujuna Shubi Balonzi, Senior vs. Registered Trustees Chama cha Mapinduzi** [1992] TLR 203 where it was held by the High Court of Tanzania among other things that locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. He therefore maintained that because the plaintiff's right over the leased plot in dispute had been terminated then the

plaintiff has no locus standi and therefore that the suit should be dismissed.

On the ground that the plaint does not disclose a cause of action against the 1st defendant it has been submitted by Mr. Massoud that since the plaintiff has no rights over the plot in dispute as her lease had been revoked since long time and as the plaintiff did not take any legal actions in time then he has no cause of action against the 1st defendant. He referred the court to Order VII rule 12(a) of the Civil Procedure Rules, Cap 8 where it is provided that a plaint that does not disclose a cause of action should be rejected. Mr. Massoud did also cite the case of ***Auto Garage and Others vs. Motokov*** {1971} EA 514 where it was held among other things that there are three essential elements to support a cause of action; that the plaintiff enjoyed the right, that the right has been violated and that the defendant is liable. The Court did also conclude that if any of the three elements is missing the plaint is a nullity and no amendments can be made as there is nothing to amend. For this Mr. Massoud prayed for the plaint to be rejected as no cause of action has been disclosed against the 1st defendant.

Mr. Aley has combined the grounds on locus standi and cause of action raised by the 1st defendant and argued them together. On these it has been his submissions that according to ***Mukisa Biscuit Manufacturing Co Ltd*** (supra) the two grounds ought to have not been raised because they are not on a pure point of law. He has argued that the issue whether the lease was lawfully revoked or not is an issue requiring ascertainment on evidence. Mr. Aley has maintained that the plaintiff has locus standi and has disclosed cause of action as there are several issues which need to be determined by the court.

In regard to the points on locus standi and cause of action although I do not agree with Mr. Aley who argues that the points cannot be raised as preliminary points. The points can be raised as preliminary objection however under the circumstances of the suit at hand, I find the points worthless. Looking at the plaint and the documents on which the plaintiff's case is based it cannot be said that the plaintiff has no locus standi or that no cause of action has been disclosed by him. Locus standi simply means the right to be heard by the court of law. Furthermore a cause of action is defined to mean the facts which it is necessary for the plaintiff to prove before he can succeed in the suit. From the above definitions and looking at the plaintiff's plaint with its annexures it cannot be argued that the plaintiff has no locus standi or that no cause of action has been disclosed against the 1st defendant. The facts that the plaintiff's project approval was revoked by the 2nd defendant and that the Government did also revoke the plaintiff's lease over the plot in dispute are not disputed. It is also not in dispute that the lease over the plot has been granted to the 3rd defendant. These facts among other facts as pleaded in the plaint sufficiently disclose a cause of action. Furthermore that the plaintiff has locus standi as she is the one whose project approval and lease had been revoked does not need the use of magnifying glasses for one to see. The plaintiff has the right to sue because she had rights over the revoked project licence approval and lease as well as over the plot in dispute. The objection by the 1st defendant based on cause of action and locus standi is therefore baseless and it is hereby overruled.

Before I turn to the last point on limitation the point which has been raised by the 1st and 3rd defendants I should first determine the argument by Mr. Massoud that the plaintiff ought to have filed the suit in the Land Tribunal. This argument by Mr. Massoud is based on

S. 49 of the Land Tenure Act No 12 of 1992. This court finds the argument to be devoid on merits not only because as correctly argued by Mr. Aley S. 6(4), (5) and S. 23(2) of the Government Proceedings Act No. 3 of 2010 clearly provide that all proceedings by or against the Government or to which the Government is a party should be instituted or tried by the High Court or Regional Magistrate's Court but also because S. 49 of the Land Tenure Act is not applicable to the suit in question. S. 49 of the Land Tenure Act, 1992 used to cover appeals against decisions on termination of leases where the termination was on grounds of violation or breach of terms and conditions restricting the sale, assignment, sub letting, sub lease or sub division. In the suit at hand the plaintiff's lease was not terminated because of breach or violation of any of the said conditions or terms i.e the lease was not terminated because the plaintiff had sold, assigned, sub-leased or sub- divided the lease in question.

As pointed out earlier, Mr. Massoud, the learned State Attorney for the 1st defendant, did also raise a point that the suit is time barred. On this it has been argued by him that since the Plaintiff's interim certificate for the project and the lease were revoked and terminated in October, 2003 and December, 2004 respectively, and as the suit was filed on 31/12/2014 then the suit is hopelessly time barred under item 10 of the Schedule to the Limitation Decree. Cap 12 where the period of limitation to set aside any act or order of an officer of the Government in his official capacity is one year.

The point on limitation has also been raised by the 3rd defendant's counsel Mr. Mbwambo who has, in support of the point, submitted that basing on the lease agreement between the plaintiff and the Government, the relationship between them was contractual. He has

insisted that as far as the lease agreement is concerned their relationship was that of the lessor and lessee.

It has further been submitted by Mr. Mbwambo that what the Government did through the 1st and 2nd defendants was to cancel the plaintiff's project interim certificate approval and revoke the lease agreement. He then referred the court to paragraph 33 of the plaint where it is admitted by the plaintiff among other things that the project and the lease were cancelled. Mr. Mbwambo then argued that the words cancel and revoke are synonymous with the word rescind and that since all what it is being claimed and complained by the plaintiff is the defendants' act of cancelling or revoking the project and the lease agreement, then the suit is for rescission of the contracts in respect of both the hotel project interim certificate of approval and the lease agreement and therefore that because according to item 101 of the Schedule to the Limitation Decree, Cap 12 of the Laws of Zanzibar the prescribed period of limitation for rescission of contract is three years, then the plaintiff's suit is time barred as the rescission took place on 16/10/2003 and the three years period expired on 15/10/2006.

It has also been insisted by Mr. Mbwambo that the plaintiff's claim for damages for the cancellation and revocation of the project and the lease agreement as per paragraphs 16,17 and 29 and as per reliefs being sought under items (d), (e), (f), (g), (i) and (j) is also barred under item 103 of the Schedule to the Limitation Decree, Cap 12 because the period of limitation for compensation for breach of contract is six years from when the breach occurs. Mr. Mbwambo has also submitted that even the plaintiff's claims in paragraphs 10, 11, 12, 16, 17, 29 and 35 and the reliefs sought under items (e), (f), (g) and (i) against the 3rd and 4th defendants for special; general and

punitive damages being compensation for trespass and or allegedly illegal act of entering into the plot in dispute are time barred because the period of limitation for compensation for trespass upon immovable property as per item 29 of the Schedule to the Limitation Decree, Cap 12 is three years.

In his further submissions Mr. Mbwambo has argued that the plaintiffs desperate attempt under paragraph 37 of the plaint to try to show that the suit is within time and that the court has jurisdiction is a futile attempt because even if it is argued that the Limitation Decree does not specifically prescribe limitation period on suits for violation of the constitution still item 26 of the Schedule to the Limitation Decree, Cap 12 sets out two years as the period of limitation on suit for compensation for malfeasance, misfeasance or nonfeasance independent of contract which is not specifically provided for. He has therefore insisted that claims for compensation for violation of the constitution, breach of contract and various torts and damages as stated by the plaintiff in paragraphs 12, 17, 29 and 37 of the plaint and items (d), (f), (g) and (i) in the reliefs claimed, all fall under item 26 of the Schedule to the Limitation Decree. He has also added that even item 107 of the Schedule to the Limitation Decree prescribes six years limitation period on suits for which no period of limitation is provided for and therefore that even if it is said that the acts complained of by the plaintiff were committed and communicated to the plaintiff in 2005 or 2006 still the period of limitation ended in 2012 hence rendering all the claims by the plaintiff against the defendants time barred.

Mr. Mbwambo did not end there, he continued arguing that even the plaintiff's attempt under paragraphs 11 and 36 of the plaint under which it alleged by her that the act of trespass by the 3rd and

4th defendants upon the suit is continuing daily and therefore that the suit is within time is a proposition which is not correct and it is against all principles and laws governing continuing wrongs. He argued that S. 23 of the Limitation Decree under which it is provided that in case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of time during which the breach of the wrong, as the case may be, continues, cannot be stretched to mean that a suit for trespass and or compensation for trespass upon immovable property (land) has no time limit. He has explained that S. 23 simply provides that in some cases there may be a continuing wrong and not that in every trespass to land there is a continuing wrong because if that was the case then item 29 of the Schedule to the Limitation Decree would be superfluous as there would be no need of setting time limit for suits for compensation for trespass upon immovable property.

To cement his argument that not every trespass is a continuing wrong Mr Mbwambo referred the court to the text book titled **Mitra on Limitation Act** 1963, 19th Ed, Eastern Law House, New Delhi, 1994 where Mallick M.R, a former judge of Calcutta High Court, extensively discusses the concept of continuing wrong as provided under S. 23 of the Indian Limitation Act, 1963 which is pari materia with S. 23 of our Limitation Decree, Cap 12. In that book at page 384 it is stated that where the injury complained of is complete on a certain date there is no continuing wrong even though the damage caused by the injury may continue. In such a case the cause of action arises once and for all at the time when the injury is inflicted. Furthermore at page 285 it is stated by the learned author that where the wrong amounts to dispossession of the plaintiff then although it may be a continuing wrong, the plaintiff cannot receive possession after the expiry of the period prescribed therefor and

further that complete usurpation of possession and occupation is a wrong which is complete from the moment of the dispossession.

Mr. Mbwambo has also referred the court to the Indian case of *Mahendra Builders vs. Parves Ghaswala & Others*, 2006(4) BomCR 824 to which the learned author Mallick made reference and in which the court decision was based on the cases of *Balakrishna Savalram Pujari Waghmare and Others vs. Shree Dhyaneshwar Mharaj Santhan and Others* and that of *J.H.S. Evangelical German Superintendent Leprosy Asylum, Chandkhuri vs. Mahant Ramsahaigir Chela Sunsergir Gosawi* (1939) AIR, Nagir 145. In the first case it was observed that section 23 of the Limitation Act refers not to a continuing right but to a continuing wrong and that if the wrongful act causes any injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue.

Thereafter basing on the above authorities, which to him are very persuasive, Mr. Mbwambo has referred the court to paragraphs 8, 10, 11 and 16 of the plaint where it is stated by the plaintiff that her land lease was cancelled, that the plot has been allocated to the 3rd and 4th defendants who have demolished the structures put by her and that the 3rd and 4th defendants have erected their own hotel buildings upon the plot and also that the acts amount to trespass entitling her to damages as prayed under items (e), (f), (g) and (i). He has also referred the court to the plaintiff's listed and filed documents particularly to documents numbers 11, 12, 13, 14, 15, 16 and 17 in which the plaintiff acknowledges among other things that as of 12/08/2005 the plot had already changed hands and that the new investor had made developments on the plot after taking possession. From the above facts which are given by the plaintiff

herself, it has therefore been argued by Mr. Mbwambo that there is no dispute that there had been complete usurpation of possession and occupation of the plot in dispute and that the plaintiff had been dispossessed of the plot since 2004. He has insisted that the act of dispossessing the plaintiff of the plot was complete the moment the new occupier took possession of the plot and therefore that in that case there is no continuing wrong or trespass.

In conclusion it has been submitted by Mr. Mbwambo that time started to run against the plaintiff from the day of dispossession and/or from the day the defendants took possession of the plot in dispute. He has therefore argued that if one goes by the plaintiff's own letter dated 12/08/2005 (document No. 12 to the listed documents filed by the plaintiff) in which it is stated by the plaintiff that by that date the plot had already changed hands and that the 3rd defendant had already entered into the plot and had demolished all the structures put by the plaintiff, then it follows that the trespass was complete by that date. That being the case therefore, the three years period of limitation expired in 2008. He has therefore insisted that the plaintiff's suit which was filed in 2014 is six years out of time and that therefore that it should be dismissed with costs.

In response to the ground of limitation as raised and argued by the 1st and 3rd defendants it has firstly been submitted by Mr. Aley that the cause of action did not arise on 16/10/2003 as claimed by the 1st defendant but on 30/11/2004 as stated under paragraph 36 of the plaint. He has also argued that since the 2nd defendant did by her letter dated 29/03/2006 acknowledge liabilities then the period of limitation which is 12 years should be computed from the date of acknowledgment. Mr. Aley has also submitted that the issue of limitation is an arguable issue which cannot be raised as a

preliminary point. He has again referred the court to the cases of *Musangang'andwa* and that of *COTWO (T) OTTU UNION* (supra) arguing that preliminary objection must be on pure point of law and not otherwise.

It has also been submitted by Mr. Aley that the suit is not for rescission of contract and that it is not barred under items 29, 101, 103 or 107 of the Schedule to the Limitation Decree as argued by the 3rd defendant counsel. He has argued that after all it is the Government that can be said to have rescinded the contract and not the plaintiff. Mr. Aley has contended that the plaintiff's suit is as stated under paragraph 35 of the plaint and that the main cause of action is in relation to the recovery of land of which its period of limitation as per item 131 of the Schedule to the Limitation Decree is 12 years. He has maintained that the plaintiff is not seeking for the rescission or revocation of the contract but is seeking for vacant possession. Mr. Aley has also referred the court to the *Black's Law Dictionary*, 6th Ed. 1990, and argued that from the definition of the words revoke, cancel and rescind given therein, the words revoke and cancel cannot be equated to the word rescind.

Mr. Aley has further submitted that as stated in paragraph 35 of the plaint the suit is for trespass based on a continuous wrong as per paragraph 36 of the plaint which gives right to a fresh cause of action daily. To substantiate his argument he has referred the court to the case of High Court of Tanzania of *Albert R. Moshi vs. Engareolmotony Cooperative Society Limited* [2008] TLR 51. He has also contended that item 29 of the Schedule to the Limitation Decree prescribes the period of limitation for a trespass which has stopped. The court has also been referred to the book titled *The Law of Limitation: Indian Limitation Act of 1908* by Kaikhosru J. Rustomji at

page 11 where it is put that when there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstance, and the other, the shorter, to special circumstances only, the longer term ought prima facie to be applied.

In his further submissions against the preliminary objection and particularly on the limitation point Mr. Aley has asked the court to disregard the 3rd defendant's counsel submissions and cases cited on what is a continuing wrong because to him the High Court of Tanzania case of **Albert R. Moshi** (supra) is binding to this court.

Mr. Aley has concluded his submissions by contending that the plot or land in dispute belongs to the plaintiff and therefore that the Government cannot become a landlord to the land not belonging to her. He has therefore prayed for the preliminary objection to be dismissed as all the points raised are on matters requiring evidence.

In his rejoinder Mr. Mbwambo the learned counsel for the 3rd defendant has submitted that the argument by Mr. Aley that a point on limitation cannot be taken as preliminary objection is a misconceived argument because limitation goes to the jurisdiction of the court and can be ascertained from the averments in the plaint. He has maintained that in the case at hand limitation has been taken with reference to the nature of the case, the cause of action and when it arose as averred by the plaintiff in paragraphs 10,11,12,13,16,17,18,19,20,27,28,29,33,35,36 and 37 of the plaint. He has added that his submissions in support of the point have also based on the documents annexed to the plaint particularly documents numbers 12 and 13 in which it is acknowledged by the plaintiff that the plot in dispute had already changed hands as the plot had been allocated to a new occupier. It has therefore insisted by Mr. Mbwambo that from the plaint and particularly from her

documents number 12 and 13 the plaintiff was dispossessed of the plot in dispute sometimes in 2004 or 2005 and that basing on **Mallick Mitra's** authoritative distinction between the injury caused by the wrongful act and effects of the said injury, the plaintiff's suit is time barred as the dispossession of the plot was complete since 2004 as stated by the plaintiff in paragraph 36 of the plaint.

Mr. Mbwambo has also reiterated his stand that the relationship between the plaintiff and the 1st and 2nd defendants was contractual and that it was governed by the Lease Agreement which is listed and attached to the plaint as document number 1. He has also argued that the plaintiff has not challenged the proposition that the limitation period for claims for breach of contract is six years as per item 103 of the Schedule to the Limitation Decree and that limitation period for claims for breach of the constitution is not specifically provided and thus fall under item 26 of the Schedule to the Limitation Decree.

The proposition by Mr. Aley that the suit is for recovery of land whose limitation period is 12 years has also been opposed by Mr. Mbwambo because the relationship between the plaintiff and the 1st and 2nd defendants was governed by the contract or the Lease Agreement. It has also been argued by him that a lease agreement is not a right of occupancy and that an occupier of land under a right of occupancy is different from an occupier under a lease because the occupier under the right of occupancy is a proprietor/owner while that under the lease is a mere tenant who is not even allowed to sale, assign or sub divide the leased land under S. 51(3) of the Land Tenure Act, No. 12 of 1992. In support of the argument that leases do not confer ownership to the lessee the court has been referred to SS. 2 and 45 of the Registered Land Act, No. 10 of 1990. He has

insisted that a lessee like the plaintiff does not own any land as leases do not confer ownership to the lessee but that the owner of the leased land is the lessor. He has also pointed out that a right of occupancy is under S. 8(1) (a) and S. 24(1) of the Land Tenure Act, 1992 grantable to Zanzibaris only while leases can be granted to any person as per S. 46 of the Act.

Mr. Mbwambo has concluded by submitting in rejoinder that all what led to the institution of the suit at hand is the acts of the Government to cancel the plaintiff's interim certificate of approval of her hotel project and the subsequent revocation of her lease. He has therefore argued that because this is what the plaintiff complains that it was illegal and unconstitutional then the plaintiff's suit is time barred as limitation period for actions/claims to set aside any act of an officer of the Government as per item 10 of the Schedule to the Limitation Decree, Cap 12 is one year from the date of the act.

The point on limitation is the point considered by this court to be the centre of the preliminary objection at hand. The first observation which has to be made by this court on this point is on Mr. Aley's argument that such a point cannot be taken as a preliminary objection. With due respect to Mr. Aley, the argument is a misconceived argument. As correctly submitted by Mr. Mbwambo, limitation is one of the points of law that goes to the jurisdiction of the court and it can be taken as a point to support a preliminary objection. It is a point that is not necessarily required to be ascertained from evidence in every case. Limitation can be determined from the pleadings and in particular from the plaint and its annexures if any. Limitation is a kind of points that may finally dispose a case. There are some cases however wherein a point on

limitation may not be ascertained from the pleadings but from the evidence, this case at hand is not one of such cases.

In determining whether a suit is time barred or not the court is normally guided by the following factors; the kind or the description of the suit or case at hand, the period of limitation for that kind of the suit as prescribed by the law, the time from which such period begins to run and the date the suit was filed in court. For a suit to be ruled time barred the court has to be certain on the kind or description of the suit in question or the kind of the claims being made by the plaintiff in the suit in question, the prescribed period of limitation for that kind of suit or claim, the time from which the prescribed period of limitation begins to run as against the plaintiff and finally the date the suit in question was filed in court.

In the suit at hand the date the plaintiff filed her suit in court and to some extent the time from which the period of limitation should begin to run is not that much in dispute. The date the suit was filed in court is not disputed at all. It was filed on 31/12/2014. As for the date the period of limitation should begin to run it is averred by the plaintiff in paragraph 36 of the plaint that the cause of action arose on 30/11/2004. This date is therefore the date on which the period of limitation may be computed from. Furthermore from the plaintiff's documents which are attached to the plaint and particularly to the letters attached as documents numbers 12, 14, 16 and 17, it is apparent that by 2005 the plaintiff already had the knowledge that her project licence approval and the lease had been revoked and it was also to her knowledge that she had been dispossessed of the plot in dispute. According to document number 12 which is a letter dated 12/08/2005 the plaintiff wrote to the 2nd defendant complaining that the plot in dispute had changed hands.

Again on 25/06/2008 as per document number 17 the plaintiff's lawyer wrote to the 2nd defendant notifying her and expressing the plaintiff's intention of taking legal actions against the 2nd defendant and any other relevant party. That being the case therefore the period of limitation can also be computed from 2005. Basing on the plaintiff's pleadings the period of limitation can also at most be computed from 25/06/2008 which is the date the plaintiff finally notified the 2nd defendant that she was contemplating of taking legal actions against the defendants.

The most contentious or problematic question in determining whether the plaintiff's suit is time barred or not in as far as the case at hand is concerned, is on the kind or the description of the plaintiff's suit or claim. As hinted above, it is only when the kind or the description of the plaintiff's suit or claim is ascertained when the court will be in a better position not only to tell what is the prescribed period of limitation but also to tell whether the suit is time barred or not. It is Mr. Aley's contention that the suit is for the recovery or possession of the plot/land and therefore that the prescribed period of limitation as per items 131 and 133 of the Schedule to the Limitation Decree Cap 12 is 12 years. On the other hand it is the contention by the 1st and 3rd defendants' counsel that the suit is for setting aside the acts of the officers of the 1st and 2nd defendants, compensation for trespass, violation of the Constitution and for rescission of a contract and therefore that the period of limitation is either one, two, three or six years. The main issue here is therefore on ascertaining the kind of the plaintiff's suit or claims.

First of all it is an observation of this court that according to the Lease Agreement which is attached to the plaint as document number 1 and as correctly submitted by Mr. Mbwambo, the

relationship between the Government and the plaintiff in regard to the plot in dispute is that of a lessor and lessee. According to Article One of the Lease Agreement the plot in dispute was leased by the Government to the plaintiff for the period of 33 years and the agreed rent per year was USD 2525. Basing on the Lease Agreement and on the kind of relationship between the Government and the plaintiff the plot in dispute is therefore the property of the lessor i.e the Government and not of the lessee i.e the plaintiff. Furthermore as it has been correctly submitted by Mr. Mbwambo, unlike where a person holds land under a right of occupancy a person holding land under a lease does not become the owner of the land in question. Leases merely give possession and right of use of the leased property to the lessee it does not give ownership to him. Under leases the ownership and title to the leased property remains with the lessor. It is therefore a misconceived argument for Mr. Aley to claim and argue that the plaintiff who as per the Lease Agreement was a mere lessee is the owner of the plot in dispute. The owner of the plot in dispute was and still is the lessor i.e the Government.

On the description or the kind of the plaintiff's suit or claims it is my considered view that the description or the kind of the plaintiff's suit is as summarised by the plaintiff herself in paragraph 33 of the plaint where it is put by her thus: *That the Plaintiff have (sic) preferred this Plaint to move this honourable Court to call for the record of the Defendant deliberations with his officers and the decisions thereof in respect of your humble Plaintiff case with a view of to quashing the decision of the Defendants to cancel the Project and Lease of the Plaintiff as stated above on the grounds that..*

In essence the plaintiff's suit, as put by her in paragraph 33 of the plaint, is therefore for quashing or setting aside the defendants' acts

of cancelling her project licence and the lease. The first three reliefs sought by the plaintiff in prayers (a), (b) and (c) do also support the observation that the plaintiff's suit is for setting aside the decisions or acts of the Government of cancelling the project licence and the lease. In those items the plaintiff prays for a declaration that the acts of the 1st and 2nd defendants to cancel her project and lease are illegal and contrary to the Constitution of Zanzibar and contrary to the rules of natural justice. She also prays for the nullification of the allocation of the plot in dispute to the 3rd and 4th defendants. The suit by the plaintiff is therefore mainly the kind of the suit described in item 10 of the Schedule to the Limitation Decree, Cap 12 i.e the suit to set aside any act or order of an officer of the Government in his official capacity of which the prescribed period of limitation is one year and of which the limitation period begins to run from the date of the act or order sought to be set aside.

Furthermore basing on paragraph 35 of the plaint where it is averred by the plaintiff that the suit is for trespass and recovery of land it is also an observation of this court that the plaintiff's suit is also for compensation for trespass, special, general and punitive damages, damages for violation of the Constitution, breach of contract and damages for various torts. Paragraphs 10, 11, 12, 16, 17, 29 and 37 of the plaint as well as reliefs being sought under items (d), (e) (f),(g) and (i) are also to that effect. These types of claims fall under items 26, 29 and 103 of the Schedule to the Limitation Decree to which the prescribed period of limitation is two, three and six years respectively.

This court does not however agree with Mr. Mbwambo that the suit is for rescission of a contract. As correctly argued by Mr. Aley the plaintiff has not sued the defendant for the rescission of any contract

and for that reason item 101 of the Schedule to the Limitation Decree, Cap 12 which prescribes the period of limitation for the rescission of a contract is not applicable to the suit at hand.

As on the contention by Mr. Aley that the alleged trespass is a continuous one thus falling under S. 23 of the Limitation Decree, Cap 12 it is a considered view of this court that under the circumstances of this matter where the plaintiff has been completely dispossessed of the plot in dispute and where her structures upon the plot have been pulled down and replaced by the structures erected by the 3rd defendant to whom the plot had been leased then there is no continuing trespass. Since the plot in dispute has changed hands and it is now in the 3rd defendant's possession then the act of dispossession is complete and there is no continuing trespass. In so observing I rest my reliance on ***Mallick M. R. Mitra On the Indian Act, 1963*** (supra) referred to by Mr. Mbwambo wherein at page 384 of the book it is observed by the learned author among other things that where the injury complained of is complete on a certain date there is no continuing wrong even though the damage caused by the injury may continue. He further observes that in such a case the cause of action arises once and for all, at the time when the injury is inflicted and that to give rise to a continuing wrong there must not be a single wrongful act from which injurious consequences follow, but there must be a state of affairs every moment's continuance of which is a new tort.

Furthermore with due respect to Mr. Aley the decision of the High Court of Tanzania in ***Albert R. Moshí*** (supra) cited by him, apart from it not being binding to this court, is distinguishable from the case at hand. In that case among other things the claim in question arose from a wrong or an act of trespass allegedly done on different dates

which is not the case in the suit at hand. The fact that in the case at hand the alleged trespass and usurpation was complete at the moment of the dispossession of the plot in dispute from the plaintiff renders the trespass not a continuing trespass (see *Evangelical German Mission Mahant Ramsahaigir*, AIR 1939 Nag 145)

Again this court does not agree with Mr. Aley that the plaintiff's suit can be rescued under items 131 and 133 of the Schedule to the Limitation Decree, Cap 12 where the period of limitation prescribed is 12 years. It is an observation of this court that the plaintiff whose possession of the plot in dispute was based on the Lease Agreement between her and the Government and who is not the owner of the plot in dispute cannot rely or claim that her suit is not time barred and that she is still within the period of 12 years as prescribed under items 131 and 133 of the Schedule to the Limitation Decree, Cap 12. The limitation period of 12 years prescribed under items 131 and 133 within which a person can recover possession of an immovable property does not apply to every person but it applies in favour or against a person who is the owner of the property sought to be repossessed. If you are a tenant or lessee and you are dispossessed of the leased property by your landlord or lessor you cannot benefit from the 12 years limitation prescribed under items 131 and 133 because your possession of the property is based on a contract or lease and the leased property does not therefore belong to you but to the lessor. Items 131 and 133 of the Schedule to the Limitation Decree, Cap 12 can be applied in favour or against the owner of the property in question. That being the position the plaintiff who was a mere lessee and not the owner of the plot in dispute cannot therefore use items 131 and 133 as a shield to avoid the defendants' attacks on her suit that it is time barred.

Having ascertained as amply demonstrated above that the plaintiff's suit falls under items 10, 26, 29 and 103 of the Schedule to the Limitation Decree, Cap 12 of the Laws of Zanzibar which limit the period for instituting suits by 1, 2, 3 and 6 years respectively I would then, in determining whether the suit is time barred or not, apply item 103 because it is an item that, under the circumstances of this suit, gives the longer period of limitation i.e 6 years. According to item 103 read together with item 102 both of the Schedule to the Limitation Decree, the period of limitation for compensation for breach of contract begins to run when the breach in respect of which the suit is instituted occurs. In the case at hand the contract or the Lease Agreement was breached when the project certificate approval and the lease were revoked in 2004. That the period of limitation should be computed from 2004 is also precisely stated by the plaintiff under paragraph 36 of the plaint where it is averred by her that the cause of action arose on 30th November, 2004. That being the case therefore the period of limitation i.e six (6) years which began to run on 30th November, 2004 elapsed on 31st November, 2010 and the suit which was filed on 31st December, 2014 was therefore filed out of time. Even if we agree with the suggestion by the plaintiff's counsel that the period of limitation should be computed from 29th March, 2006 when the 2nd defendant vide document No. 15 is said to have acknowledged liabilities or even on 25th June, 2008 when the plaintiff lastly communicated with the 2nd defendant vide document No. 17 notifying the 2nd defendant of her intention to take legal actions against the defendants still by the time the suit was being filed on 31st December, 2014 the period of limitation had elapsed since 30th March, 2012 and 26th June, 2014.

In the final analysis and for the above given reasons and observations the preliminary objection based on the point of

limitation as taken by the 1st and 3rd defendants is sustained. The suit by the plaintiff is found to be filed out of the prescribed period of limitation and it is therefore hereby dismissed with costs under S. 3(1) of the Limitation Decree, Cap 12 of the Laws of Zanzibar.

Abraham Mwampashi

JUDGE.

23/08/2016.

Delivered in court this 23rd day of August, 2016 in the presence of Mr. Abdulhaliq M. Aley (Adv) for the plaintiff who also holds brief for Mr. Mbwambo (Adv) for the 3rd defendant and in the presence of Ms. Salama Rama (SA) for the 1st defendant.

Abraham Mwampashi

JUDGE.

23/08/2016.