

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 208 OF 2021

CHIMA MSIGALA T/A FREE CAN DESIGN 1ST PLAINTIFF

ROSE SILVESTER MSOFE 2ND PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF

ARCHDIOCESE OF DA ES SALAAM 1ST DEFENDANT

THE REGISTERED TRUSTEES OF

EVANGELICAL LUTHERAN CHURCH

IN TANZANIA EASTERN AND COASTAL DIOCESE 2ND DEFENDANT

THE REGISTERED TRUSTEES OF THE ANGLICAN

CHURCH OF TANZANIA (Contracted as Diocese of Dar es Salaam,

Ubungo Anglican Church) 3RD DEFENDANT

REV. AMANI LYIMO 4TH DEFENDANT

REV. DR. PHILEMON TIBANENASON 5TH DEFENDANT

BISHOP TITUS MDOE 6TH DEFENDANT

FR. BENNO KIKUDO 7TH DEFENDANT
FR. KALIST TESHA 8TH DEFENDANT
FR. KASESE XAVERI 9TH DEFENDANT
FR. THOBIAS AMUKO AWUONDA 10TH DEFENDANT
REV. CANON PAULO MTWEVE 11TH DEFENDANT
JOSEPH CHARLES KUNGURU 12TH DEFENDANT
OCTAVIAN BETRAM MATUPA 13TH DEFENDANT

RULING

09th June & 08th September, 2023

BWEGOGGE, J.

The plaintiffs herein commenced civil proceedings against the defendants claiming both special and general damages, among others, for breach of contract. In tandem with filing defence, the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 10th and 11th defendants filed notices of preliminary objections on points of law as thus:

- 1. That, the suit is hopelessly time barred for contravening the provisions of item 7 of Part 1 of the Schedule to the Law of Limitation Act [Cap. 89 R.E.2019].*

2. *That, the amended plaint has been filed out of time and contrary to the court's order of 16th June 2022 by Hon. Mustapha Ismail, J.*

During the hearing of the preliminary objections above mentioned, the plaintiffs were represented by Mr. John James, learned advocate, and the defendants herein were represented by Messrs Eric Geberhard Mhimba (1st, 6th, 7th, 8th, 9th, & 10th defendants), D.K. Muttabuzi (2nd defendant) and John Mponella (3rd & 11th defendants), learned advocates. The objections were argued by written submissions whereas Messrs Mhimba and Muttabuzi abandoned the 2nd limb of the preliminary objections raised herein. The arguments of both counsel are briefly recounted hereunder.

In arguing the 1st preliminary objection, Mr. Mhimba submitted that the plaintiffs' suit is time-barred in terms of Item 7 of Part I of the Schedule to the Law of Limitation Act [Cap. 89 R.E. 2019]. That it is the law that, any suit lodged in court has to be filed within the prescribed time limit. That section 4 of the Law of Limitation Act provides that the period of limitation in relation to any proceedings shall commence from the date on which the right of action for such proceedings accrues. The counsel asserted that the present suit, in which the plaintiffs are claiming remedy for a breach of contract, was supposed to be brought before this Court within six years from

the date when the cause of action arose. However, asserted the counsel, the suit herein was filed after the expiration of the statutory period.

In the same vein, the counsel argued that paragraphs 24 and 25 of the plaint entail that the contract for the supply of the covenanted goods and purchase order was executed on 16th April, 2015. That the first delivery was made on 10th August, 2015 as acknowledged by delivery note No. 001 whereas the last delivery was made on 8th September, 2015. That paragraph 36 of the plaint confirms that the payment was to be effected within 90 days after the delivery of the goods. Therefore, the period of 90 days covenanted for payment of supplies expired on 7th December 2015. However, the suit herein was initially filed before this court on 17th December, 2021, beyond the prescribed period of six (6) years. That the prescribed time to sue lapsed on 6th December, 2021. Hence, the counsel alleged that the suit herein was filed eleven (11) days after the prescribed time lapsed.

The counsel concluded that the remedy for the suit filed beyond time limitation is dismissal as per section 3(1) of the Law of Limitation Act. The counsel cited the case of **Felician B. Itemba vs. The Board of Trustees of ELCT- Eastern & Coastal Diocese** (Civil Case 22 of 2021) [2022] TZHC

209 to bolster the point. Based on the foregoing premises, the counsel prayed the suit be dismissed with costs for being time-barred.

Messrs Muttabuzi and Mponella, likewise, replicated the argument made by Mr. Mhimba with respect to the 1st preliminary objection, which I find needless to reproduce herein, save the fact that Mr. Mponella considered the date of execution of the contract (16th April, 2015) to be the date upon which cause of action arose.

In a bid to substantiate the 2nd limb of the preliminary objection, Mr. Mponella submitted that on the 16th June, 2022 when this matter was called for order, the counsel for plaintiffs prayed to amend the plaint. The prayer was granted and the court ordered that the amended plaint be filed within 10 days from the date of the order. Therefore, the plaintiffs ought to have filed the pleading any time before 26th June, 2022. However, argued the counsel, the record of the court reveals that the amended plaint was filed on the 27th June, 2022, beyond the prescribed period.

Further, the counsel charged that the plaintiffs were duty-bound to comply with the court order. The cases; **Africarriers Ltd vs Shirika La Usafiri Dar Es Salaam and Another**, Commercial Case No. 50 Of 2019, HC

(unreported); **Estate of the late Peter Kisumo vs Salum Peter Kisumo** (Miscellaneous Application 441 of 2018) [2019] TZHC 91 and **Idahya Maganga Gregory vs Judge Advocate General, Court Martial Criminal Appeal No. 4 of 2002** (unreported) were cited to buttress the point. Based on the above premise, the counsel for the 3rd defendant prayed that the preliminary objections raised herein be sustained and the suit be dismissed with costs.

Primarily, in reply, Mr James, admitted that the cause of action arose on 08th September, 2015 as rightly asserted by Messrs Mhimba and Muttabuzi. That, as the contract provided that payment of supplied goods was to be effected in 90 days from the date of delivery, then the cause of action arose on 08th December, 2015, the day the alleged breach occurred. The counsel cited the case; **Mr Erick John Mmari vs. M/S Herkin Builders Limited**, (Commercial Case 19 of 2019) [2022] TZHC ComD 12 to validate the argument.

Further, the counsel contended that the suit herein was filed online on 20th October, 2021 through the Judiciary Statistic Dash Board (JSDS). The JSDS printout thereof is annexed to the submission in reply filed hereto. Therefore,

opined the counsel, vide rule 21 (1) of Judicature and Application of Laws (Electronic Filing) Rules 2018, the suit was appropriately filed on 20th October, 2021, not on 17th December, 2021 the date upon which the plaint was physically presented in court. On the above account, the counsel asserted that the 1st limb of the preliminary objection is misconceived.

In respect of the 2nd preliminary objection, the counsel was brief in that the date (26th June, 2022) on which he was supposed to file the amended plaint, was Sunday. Therefore, by virtue of sections 60 (1) (e) and 60 (2) of the Interpretation of Law Act [Cap. 1 R.E. 2019], the amended plaint was to be filed on Monday 27th June, 2022, as Sunday, in law, is an excluded day.

On the above premises, the counsel for plaintiffs prayed the purported preliminary objections to be dismissed with costs.

The issue for determination is whether the preliminary objections on points of law raised by the defendants herein are merited.

Principally, a preliminary objection is expected to raise a pure point of law based on ascertained facts from the pleadings which, if argued, should be capable of disposing of the case. It is a law that a preliminary objection cannot also be raised if what is sought is the exercise of judicial discretion.

See the cases of **Attorney General vs. The Board of Trustees of the Cashewnut Industry Development Trust Fund**, (Civil Appeal 72 of 2015) [2015] TZCA and **Mukisa Biscuits vs. West End Distributors Ltd** [1969] EA 696, among others.

Unarguably, the 1st limb of the objections raised herein passes the legal test above mentioned. It is obvious that the plea on time limitation in the 1st limb of the preliminary objection raised is premised on the provision under item 7 of Part 1 of the Schedule to the Law of Limitation Act. This limb of the objections raised herein, if ascertained, is capable of disposing of this suit in its entirety. However, the 2nd limb of the objection, obviously, is not premised on the point of law and cannot in any way dispose of the suit herein, as what is sought is an exercise of judicial discretion available under Order VI, rule 18 of the CPC. Seemingly, this is the reason which constrained Messrs Mhimba and Muttabuzi to abandon the 2nd limb of the preliminary objection raised hereto.

Having made the observation above, I now proceed to delve into the preliminary objections raised above commencing with the 1st limb of the objection. The allegation is that the suit was filed beyond statutory time limitation. From the outset, I find myself constrained to clarify the following

facts: **One**, it is gleaned in the plaint and corresponding annexures that the contract entered by the parties herein was executed on 16th April, 2015. **Two**, Clause 2 of the relevant contract, provided that payment for supplied goods was to be made within ninety days (90) after the delivery and receipt of the goods. **Three**, the disputed payment is with respect to goods delivered whereas the last consignment thereof was supplied on 08th September, 2015. Thus, based on the factual matrix above, the cause of action in this suit rose on 08th September, 2015. All counsel herein are on all fours with the observations I made herein, save for the counsel for the 3rd and 11th defendants who asserted that the cause of action in this suit is the date of execution of the contract (16th April, 2015).

In view of what was agreed by parties herein under clause 2 of the contract executed by the same, I find myself constrained to agree with Mr. James, counsel for plaintiffs, Messrs Eric Geberhard Mhimba and D.K. Muttabuzi, counsel for the 1st, 2nd, 6th, 7th, 8th, 9th and 10th defendants in that, in law, the cause of action in this suit arose the date on which the alleged breach occurred.

The counsel for the plaintiff has enlightened this court that the counsel for the defendants had taken cognizance of the record on the plaint presented

physically on 17th December, 2021 which doesn't reflect the actual filing record. That the actual reality is that the plaint was filed electronically on 20th October, 2021. Therefore, the plaint was lodged within the prescribed time for lodging a suit based on the contract. I have gone through the annexures attached to the submission in reply filed by the plaintiffs. One of the annexures thereof is a long list of cases filed in the JSDS ranging from 2019 to 2023. And, I found out that item 58 of the enlisted cases thereof, is the registration record of this suit. It is observed that the suit herein was filed on 20/10/2021 at 17:19:34 hrs. No rejoinder submission was filed to controvert this fact. Therefore, impliedly, the defendants subscribed to the submission made by the plaintiffs' counsel. And, I would add that the filing fees receipt found in the case file herein supports the fact that the suit herein was instituted within the time limitation.

As rightly submitted by the plaintiff's counsel, timely electronic filing takes precedence over the physical presentation of the pleadings at the registry of this court. The provision of rule 21 (1) of the Judicature and Application of Laws (Electronic Filing) Rules 2018, aptly provides:

"A document shall be considered to have been filed if it is submitted through the electronic filing system"

before midnight, East African time, on the date it is submitted, unless a specific time is set by the court or it is rejected.”

Based on the position of the law above revisited, I am constrained to agree with the counsel for the plaintiffs in that the suit herein was filed within the statutory period for filing a suit based on contract. It follows that, as rightly asserted by the plaintiff’s counsel, the 1st limb of the objection preferred by the defendants is patently misconceived.

The 2nd limb of the objection filed herein need not detain me. The counsel for the 3rd and 11th defendants alleged that the amended plaint filed by the plaintiff, pursuant to the order of this court dated 16th day of June, 2022 was filed on 27th June, 2022, contrary to the prescribed time. That the plaintiff was supposed to file the pleading by 26th June, 2022, but failed to. I need not mention the fact that the plaintiff’s counsel admitted to have filed the amended pleading on 27th June, 2022, but contended that, in law, the pleading was filed in time notwithstanding the fact that he was late for one day.

I have directed my mind to the provision of section 60(1) (e) of the Interpretation of Laws Act [Cap.1 R.E. 2019] Act which provides:

"Where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day."

Moreso, the provision of section 60(1) (h) of same Act provides:

"Where an act or proceeding is directed or allowed to be done or taken on a certain day, or on or before a certain day, then, if that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day that is not an excluded day."

And, the excluded day is defined under the provision of Section 60 (2) of the Act to mean:

"For the purposes of this section, "excluded day" means Saturday, Sunday or public holiday throughout or in that part of which is relevant to the event, act, thing or proceeding concerned."

See also the decisions of this court in the cases: **Samson Kimso Okaro vs Karume Osodo** (Civil Appeal 12 of 2020) [2020] TZHC 3742 and **Zainabu Musa Mmbaga (Administrator of Estate of the late Edhena Hassan Msuya) vs Sadi Ibrahim (Administrator of the Estate of the late Ibrahim Ramadhan) & Another** (PC Civil Appeal 17 of 2020) [2022] TZHC 29.

Based on the above, as the plaintiff was required to file the amended plaint by 26th June, 2022, which happened to be on Sunday, the excluded day, the same was allowed to file the pleading on the next day of 27th June, 2022, which the court reopened. On the foregoing, I am constrained to subscribe to the assertion made by the plaintiff's counsel that the 2nd limb of the preliminary objection is likewise, misconceived.

In view of the foregoing, I find both preliminary objections raised by the defendants herein bereft of substance. I hereby overrule the same with costs.

DATED at **DAR ES SALAAM** this 08th day of September, 2023.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", is written over the seal.

O. F. Bwego

JUDGE