

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 67 OF 2022

TBC (1998) LIMITED.....PLAINTIFF

VERSUS

FRANCIS ANDREW.....1ST DEFENDANT

CASHEW NUT BOARD OF TANZANIA.....2ND DEFENDANT

THE LIQUIDATOR

ILULU COOPEARATIVE UNION.....3RD DEFENDANT

RULING

A.A. MBAGWA, J.

This is a ruling in respect of preliminary objections raised by the defendants against the competence of plaintiff's case.

The plaintiff herein is a limited liability company incorporated in Tanzania and it is licensed to carry on business of manufacturing, importation and supply of gunny bags, among other things. The plaintiff, by way of a plaint, instituted this suit claiming for judgment and decree against the defendants severally and jointly in the following orders: -

1. The 1st defendant be ordered to effect payment to the defendant a sum of TZS 675,055,829.55 from the funds held at CRDB Bank as



ordered by the Principal Secretary, Ministry of Agriculture and the Registrar of Cooperatives.

2. Payment of interest on the principal sum at commercial rate of 20% from when the cause of action arose to the date of judgment.
3. Payment of interest on decretal sum at court's rate from the date of judgment till payment in full.
4. Costs of the suit.
5. Any other relief /reliefs that the Honorable Court may deem fit to grant.

In order to appreciate the gist of this ruling, it is important to narrate a brief background of the dispute.

The plaintiff's contentions as gleaned from the amended plaint which was filed in this Court on 25th November, 2022 may be summarized as follows; On the 11th day of October, 2012, the plaintiff and Ilulu Cooperative Union, the predecessor of the 3rd defendant, the Liquidator entered into supply contract of empty gunny bags. It was agreed that the plaintiff would supply 200,000 new empty gunny bags to facilitate bagging operations for the 2012/2013 season. It was agreed further, that the purchase price for each bag was TZS 3,500/= which equals to a total sum of TZS 700,000,000/= payable within sixty (60) days from the date of receipt of goods. Further the facts were that on 13th October, 2012 and



19th October, 2012, Ilulu Cooperative Union issued local purchase orders to the plaintiff for supply of 200,000 gunny bags. The plaintiff supplied the gunny bags as per local purchase orders and on 18th December, 2012 issued a tax invoice worth TZS 700,000,000/=. It was the plaintiff's averment that at the beginning things went well but later on the 3rd defendant defaulted in repayment of the outstanding balance which stood at TZS 1, 253, 289, 845.00 as of 31st December, 2016 being the purchase price and accrued interests. Parties' efforts to settle the debt culminated to a meeting between the plaintiff, Lindi Regional Authorities and officials from the Cooperative Societies. In the said meeting, the plaintiff's claims were verified and found to be TZS 815,080,812 being the purchase price and interests of gunny bags supplied to Runali Cooperative Union, Lindi Mwambao and Ilulu Cooperative Union as of 17th March, 2021. Consequently, the 1st defendant was instructed by the Permanent Secretary, Ministry of Agriculture to pay the verified debt but the 1st defendant neglected and or refused to pay. In the result, the plaintiff decided to bring the present suit for the orders as indicated hereinabove. Upon service, the 1st and 2nd defendants filed their written statements of defence along with notice of preliminary objections to the effect that;

- A. The suit is bad in law for contravening the provision of section 6(2), (3) and (4) of the Government Proceedings Act, [Cap 5 R.E 2019]

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as amended by the Written Laws (Miscellaneous Amendment) Act No.1 of 2020;

- B. The plaintiff has no cause of action against the 1st and 2nd defendants. The 1st and 2nd defendants were not party to agreement entered between the plaintiff and Ilulu Cooperative Union;
- C. This suit is unamenable in law for being hopelessly time barred;
- D. This court has no jurisdiction to determine this matter.

Similarly, the counsel for the 3rd defendant raised two limbs of preliminary objections as well to the effect that;

- 1. The suit is hopelessly time barred
- 2. In the alternative, that the plaintiff has no cause of action against the 3rd defendant.

During hearing of the preliminary objections, the plaintiff was represented by Mr. Mpale Kaba Mpoki assisted by Ms. Emma Ambonise, learned counsel. On the other side, the 1st and 2nd defendants had services of Mr. Boaz A. Msofe and Malangwe Mchungahela, learned State Attorneys whilst the 3rd defendant was advocated by Mr. Hussein Mtembwa, learned counsel.

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On the hearing day, counsel for both sides adopted skeleton arguments which they had earlier filed in court and added a few comments on their skeleton arguments.

At the outset of the skeleton argument, the learned State Attorney informed the Court that he had abandoned the 4th preliminary objection. Submitting on the 1st preliminary objection, Mr. Stanley Mahenge, had it that the suit is incompetent before the Court for non-joinder of the Attorney General and failure to serve a Ninety (90) day notice contrary to the dictates of section 6(2), (3) and (4) of the Government Proceedings Act. He expounded that the plaintiff impleaded the 1st defendant as employee of the 2nd defendant as such, it was improper to sue the 1st and 2nd defendant without joining the Attorney General. He added that according to section 16 of the Government Proceedings Act, the 2nd defendant, CASHEW NUT BOARD OF TANZANIA is the government institution hence the Attorney General was a necessary party in this case. In that regard, the learned State Attorney candidly contended that the plaintiff has violated the provisions of section 6(2) of the Government Proceedings Act by filing a case without first issuing a Ninety (90) day notice to the 2nd defendant and copy to the Attorney General and Solicitor General. To bolster his argument, Mr. Mahenge cited the decision of this court in case of **The Board of Trustees of the Social Security Fund**



vs M/S Mara Security Guard & Patrol Services, Civil Case No. 1 of 2020, HC at Musoma wherein it was held;

'The objective of the amendment in section 6(3) & (4); and reading the Act as a whole, I need not be detained on the subject. I hold that all the proceedings by or against the Government, the Attorney General must be joined as a necessary party.'

In light of the above authority, Mr. Mahenge submitted that non joinder of the Attorney General as a necessary party vitiated the suit as per section 6(4) of the Government Proceedings Act and for that reason, he urged the Court to strike out the suit with costs.

Regarding the 2nd preliminary objection, the learned State Attorney had it that the plaintiff had no cause of action against the 1st and 2nd defendants on the ground that they were not parties to the contract in dispute between the plaintiff and Ilulu Cooperative Union. In buttressing the point, Mr. Mahenge referred this Court to the case of **John M. Byombalilwa vs Agency Martime Internationale (Tanzania) Ltd** [1983] TLR 1 wherein it was held;

'Although the expression "cause of action" has not been defined under the Civil Procedure Code, but that expression simply means essential facts which a plaintiff in a suit has to plead and later prove by evidence if he wants to succeed in the suit'



Moreso, the learned State Attorney cited Mulla on Civil Procedure, 13th Edition which defines cause of action as follows;

'A cause of action' means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them give the plaintiff a right to relief against the defendant. It must include some acts done by the defendant since in the absence of such an act no cause of action can possibly accrue.'

In view of the foregoing authorities, the learned State Attorney was opined that the plaintiff has no cause of action against the 1st and 2nd defendants as such, he beseeched the Court to strike out the suit with costs.

With respect to the 3rd preliminary objection, the Mr. Stanley Mahenge lamented that the suit is hopelessly time barred. He elaborated that the present suit is founded on contract whose time limitation is six years starting from when the cause of action arose as per item 7 of Part I of the First Schedule to the Law of Limitation Act. He submitted that according to annexure "A" to the plaint, the last date of payment was 31st December, 2012 and for that reason the cause of action started to accrue after 31st December, 2012. He submitted further that, according to annexure "D", by January, 2013 the interest had accrued to TZS 51,111,000/=, a fact



which proves that Ilulu Cooperative Union defaulted payment immediately after 31st December, 2013. He thus concluded that the claim against Ilulu Cooperative Union now its successor, the Liquidator of Ilulu Cooperative Union (3rd defendant) was supposed to be brought within six years from 1st January, 2013. As such, the time for institution of suit expired on 31st December, 2019, the learned State Attorney opined. He submitted that since the present suit was filed on 27th June, 2022 and there was no extension of time in terms of section 44 of the Law of Limitation Act, it goes without saying that the case was filed out of prescribed time and therefore it is incompetent before the Court.

Citing the case of **M/S International Ltd vs The Trustees of Tanzania National Parks**, Civil Appeal No. 265 of 2020, CAT at TANGA, the learned State Attorney submitted that pre-court negotiations do not stop running of time limitation. He clarified that the negotiations between the plaintiff and other authorities as pleaded at paragraph 13 of the plaint did not estop the time limitation.

In conclusion, the learned State Attorney implored the Court to dismiss the suit with costs for being time barred.

Mr. Hussein Mtembwa, learned counsel for the 3rd defendant, on his part, adopted the skeleton arguments filed hitherto. He then informed the Court



that he had abandoned the 2nd preliminary objection relating to cause of action against the 3rd defendant. He submitted that the contract indispute between the plaintiff and the defunct Ilulu Cooperative Union was executed on 11th October, 2012. Mr. Mtembwa said that according to paragraph 3 of the plaint, the payment was supposed to be made not later than 31st December, 2012 for that reason, the cause of action accrued from 1st day of January, 2013. He added that the suit at hand was filed on 27th day of June, 2022 after nine years from the time the cause of action accrued. According to Mr. Mtembwa this suit was filed beyond the prescribed time of six (6) years. He contended therefore, that according to section 3(1) of the Law of Limitation Act, every suit which is filed out of time is liable for dismissal. The learned counsel explained that the nature of contract was not continuous as envisaged under section 7 of the Law of Limitation Act. To back up his point, he cited the case of **Zaidi Baraka & 2 Others vs Exim Bank (Tanzania) Limited**, CAT at Dar es Salaam wherein it was held;

'In the present case there was only one form of breach of contract; failure to repay the overdraft facility within the agreed period of two months. The nature of the agreement was not one requiring performance on periodic basis of any obligation such that failure thereof would give rise to a new action'.

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Mr. Mtembwa proceeded that there was no extension of time by the Minister as required under section 44(1) of the Law of Limitation Act and in fact as of now, even the Minister has no mandate to enlarge time because the original and one-half period have expired. On that note, he referred to the case of **Rajabu Hassan Mfaume (Administrator of the Estates of the Late Hija Omary Kipara) vs Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children and 3 Others**, CAT at Mtwara, to support his contention.

Furthermore, the 3rd defendant's counsel insisted that the matter is time barred and there are no grounds in the plaint upon which exemption could be claimed under Order VII rule 6 of the Civil Procedure Code. In the end, Mr. Mtembwa urged the Court to dismiss the suit with costs.

In rebuttal, Mr. Mpale Kaba Mpoki, learned counsel for the plaintiff assaulted the defendants' preliminary objections for want of merits.

Replying on the 1st preliminary objection, Mr. Mpoki conceded that the plaintiff did not issue a ninety (90) day notice as per the requirement under section 6 of the Government Proceedings Act. However, he was so quick to opine that the effect is to strike out the suit and not dismissal as suggested by the defendants' counsel.

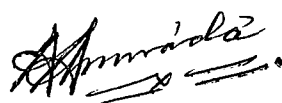


With regard to non-joinder of the Attorney General, Mr. Mpoki had it that the 2nd defendant, Cashew Nut Board of Tanzania is a proper party but not a necessary party. As such, the counsel was opined that since the necessity of joining the Attorney General is brought in by suing the 2nd defendant, the appropriate remedy to take was to strike out the 2nd defendant which will naturally extinguish the need to join the Attorney General. On this, he banked on the provisions of Order 1 rule 9 of the Civil Procedure Code which provides;

'No suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actual before it'

The plaintiff's counsel stressed that the duty of this Court is to see the right and interests of the parties actual before it are litigated and the person who is not necessary in Court is just left in order to proceed with the suit. He cited the case of **Godfrey Nzowa vs Selemani Kova**, Civil Appeal No. 183 of 2019, CAT at Arusha where the Court of Appeal ordered a retrial of matter in order to allow the party to join a necessary party.

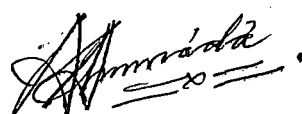
Responding on the 2nd preliminary objection, Mr. Mpoki strongly argued that the defendants' counsel failed to grasp the gist of the claims in a plaint. He told the Court that the suit is not based on contract rather



specific performance. He explained that the plaintiff's prayer is for an order to the defendant to pay the plaintiff a sum of TZS 675,055,829.55 from the funds at CRDB Bank as ordered by the Principal Secretary, Ministry of Agriculture and the Registrar of Cooperatives. He was of the view that since the suit is based on specific performance, the cause of action accrued on 30th March, 2022 when the 1st defendant refused to pay the verified amount and for that reason the suit was within the time.

In the alternative, Mr. Mpoki submitted that assuming the suit was founded on contract, paragraph 17 of the plaint was loud and clear that part payment to the plaintiff extinguished the limitation of time. He said that the 1st defendant paid a sum of TZS 188,435,890/=. In support of his contention, he cited section 27(3) of the Law of Limitation Act which is to the effect that;

"Where a right of action has accrued to recover a debt or other pecuniary claim, or to recover any other movable property whatsoever, or to recover any sum of money or other property under a decree or order of a court and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right of action in respect of such debt, pecuniary claim or movable property, or as the case may be, the right of action in respect of an application for the execution of the decree or the enforcement of the order,



shall be deemed to have accrued on and not before the date of the acknowledgement or, as the case may be, the date of the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but a payment of interest shall be treated as a payment in respect of the principal debt”.

In fine, the plaintiff’s counsel implored the Court to overrule the objection, strike out the 2nd defendant and proceed to hear and determine the matter against the 1st and 3rd defendants.

Having summarized the material facts and the rival submissions, albeit in brief, I wish to register my appreciation for the insightful submissions made by the counsel before I delve into determination of the preliminary objections.

I have painstakingly canvassed the arguments by both sides and had occasion to scan the amended plaint filed by the plaintiff. At the outset, it is worthwhile to note that parties are bound by their own pleadings and in similar vein the court is bound by the pleadings brought before it by the parties. See **Pravin Girdhar Chavda vs Yasmin Nurdin Yusufal**, Civil Appeal No. 165 of 2019, CAT at Dar es Salaam and **James Funke Gwagilo vs. Attorney General** [2004] T.L.R. 161.

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After thoroughly appraising the rival arguments, I propose to start with the 3rd preliminary objection on time limitation for the reasons which shall be apparent shortly. From paragraph 7 to paragraph 13 of the plaint, it is clear that the plaintiff claims emanate from the contract entered into between the plaintiff and the defunct Ilulu Cooperative Union. At the expense of prolonging this ruling, I find it desirable to produce some paragraphs of the amended plaint.

- 7. That, on the 11th day of October, 2012, the plaintiff herein entered into a supply contract with the Ilulu Cooperative Union, the predecessor of the 3^d defendant wherein he was to supply 200,000 new empty bags to facilitate bagging operations for the 2012/2013 season.*
- 8. That, according to the terms of the agreement the price of each bag was 3,500/= making the total contract cost to be Tshs 700,000,000/=. A sum which was to be paid by Ilulu Cooperative Union to the plaintiff within 60 days from the date of receipt of the goods. Copy of the supply agreement is annexed and marked "A" to which the plaintiff craves leave to refer as part of the plaint.*
- 9. That, like any other commercial contract and ordinary mercantile practice late honoring of the invoice did attract an interest of 10% per month for the late delay of payment form, (sic) Ilulu Cooperative*



A. Aminda


Union to the plaintiff, and the interest would stop when the sum is paid in full.

10. *That, pursuant to the terms of agreement on the 13th October 2012 and 19th October, 2012, Ilulu Cooperative Union issued a local purchase order to the plaintiff to supply 200,000 gunny bags and in fulfillment of the supply agreement the plaintiff supplied the same as per copies of local purchasing order and delivery notes which are annexed and marked "B" Collectively to which the plaintiff craves leave to refer as part of the plaint.*
11. *That, on the 18th day of December, 2012, the plaintiff issued to Ilulu Cooperative Union a Tax Invoice of Tshs. 700,000,000/= being payment for the supply of 200,000 gunny bags. Copy of the Tax invoice is annexed herewith and marked "C" to which the plaintiff craves leave to refer as part of the plaint.*
12. *That, Ilulu Cooperative Union started paying the said sum but in the process did default in payment of the sum so outstanding on time as a result of which the amount outstanding and interest accruing therefrom stood at Tshs. 1,253,289,845.00 as of 31st December, 2016, as per copy of statement of account which is annexed herewith and marked "D" to which the plaintiff craves leave to refer as part of the plaint.*

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13. *That, following the non-payment of the sum by Ilulu Cooperative Union the plaintiff did submit the claim of the outstanding sum due to the plaintiff Company with the Regional Authorities in Lindi and the officials of the Cooperative Societies whereby a tri-partite meeting was called and it was resolved and confirmed as follows: -*

- i. That, the outstanding sum was Tshs. 294,273,000/= comprised of 48,410,907.00 being sum outstanding on the part of Ilulu Cooperative Union and 295,862,093.00 for various Primary Cooperative Societies.*
- ii. That interest on Ilulu Cooperative Union stood at 1,307,700,753.00 and on the various Primary Cooperative Societies.*
- iii. That the debt on Tshs. 295,862,093.00 in respect of the Primary Cooperative Societies be paid by 20.03.2017.*
- iv. That the debt of Tshs. 48,410,907.00 in respect of Ilulu Cooperative Union be paid by 20.03.2017.*
- v. That interest on the client due to Ilulu Cooperative Union be reduced by 50% to be 626,644,922.00 in considerations that the outstanding sum of 626,644,922.00 would be paid by 30.03.2017.*

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vi. *That in the event of failure of Ilulu Cooperative Union to pay the sum by 31st December 2017 then interest so suspended should continue to accrue. Copy of the minutes of the meeting are annexed herewith and marked "E" to which the plaintiff craves leave to refer as part of the plaint.*

From the foregoing paragraphs, it does not require an extra intelligence for one to understand that the plaintiff's claims are founded on the contract which was concluded between the plaintiff and the erstwhile Ilulu Cooperative Union on 11th day of October, 2012. It is also clear from paragraph 10 of the plaint and Annexure "D" to the plaint that the default had occurred after 31st December, 2012 because the interest for January, 2013 was TZS. 51,111,000/= . As such, it is my considered opinion that the cause of action arose as from 1st January, 2013 and for that reason the six-year period which is available for suits founded on contract lapsed on 1st January, 2019.

The plaintiff's counsel has submitted that the time limitation was extinguished by part payment allegedly made by the 1st defendant under paragraph 17 of the plaint. However, upon a glance at the said paragraph, there is no payment that was made by the 1st defendant. What is contended thereunder is the communication in relation to payment of debt



between the 1st defendant and the Registrar of Cooperatives which was also copied to the plaintiff. Further, the plaintiff's counsel's argument that the plaintiff's claim is not founded on contract rather specific performance is unfortunately not supported by his own pleadings.

The record is clear that this suit was instituted on 27th day of June, 2022 which, according to the above deliberations, was out of the prescribed time of six (6) years and extension of time was not sought and obtained from the Minister as required under section 44(1) of the Law of Limitation Act. Thus, it naturally follows that the suit is out of time.

Both counsel for the defendants have submitted that a suit which is filed out of time is liable for dismissal. I entirely agree with both Mr. Stanley Mahenge and Huseein Mtembwa on this position. Section 3(1) the Law of Limitation Act states as follows;

"3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence'

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The above position was restated by the Court of Appeal in the case of **NBC Limited and Imma Advocates vs Bruno Vitus Swalo, Civil Appeal 331 of 2019, CAT at Dar es Salaam at page 9 and held;**

'The reason for considering this issue first is simple. It is that courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which litigation period has expired'.

The Court further emphasized that limitation of time for suit founded on contract is six (6) years from the date the cause of action accrued.

The plaintiff's counsel has tried to show that in between there were negotiations between the plaintiff and relevant authorities. Without mincing the words, negotiations like the ones portrayed in the plaint are not bar to time limitations. In the case of **M/S International Ltd vs The Trustees of Tanzania National Parks** (supra), the Court of Appeal at page 10 and 11 held;

*"We draw a similar inspiration from a decision of the High Court at Dar es salaam in **Makamba Kigome & Another v. Ubungu Farm Implements Limited & PRSC**, Civil Case No. 109 of 2005(unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement: "Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant,*

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however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time, "(at page 16) "

In light of the above authorities, it is my considered opinion that this suit is out of time hence liable to be dismissed. I therefore sustain the 3rd preliminary objection and proceed to dismiss the suit with costs. Since the 3rd preliminary objection is sufficient to dispose of the suit, I find it a redundant exercise to delve into other preliminary objections.

In the upshot, this suit is hereby dismissed for being filed out of time. The plaintiff should bear the costs.

It is so ordered.

Right of appeal is explained.




A.A. Mbagwa

JUDGE

24/07/2023