

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MWANZA DISTRICT REGISTRY  
AT MWANZA**

**CIVIL CASE NO. 29 OF 2022**

**PATEL TRADING CO. LTD (1961) LIMITED-----PLAINTIFF  
VERSUS  
KIGOMA DISTRICT COUNCIL----- 1<sup>st</sup> DEFENDANT  
ATTORNEY GENERAL-----2<sup>nd</sup> DEFENDANT**

**RULING**

*Last Order: 22.11.2022  
Ruling Date: 28.11.2022*

**M. MNYUKWA, J.**

The defendants through the learned state attorneys Ms. Sabina Yongo and Onyango George are moving this Court to dismiss the suit by sustaining the preliminary objection raised and argued by the parties that, the suit is time-barred. The notice of preliminary objection was filed in this Court on 18/08/2022 along with the joint written statement of defence of the defendants.

As a matter of practice, the preliminary objection was argued first and it was argued orally by the parties consent and with the leave of the Court.



Briefly, the background of the suit goes that; by various Local Purchase Orders (LPO) and written instructions issued between 2010 and 2014, the 1<sup>st</sup> defendant instructed the Plaintiff to carry out routine maintenance services and provide replacement spares on the 1<sup>st</sup> defendant's motor vehicles. The 1<sup>st</sup> defendant's motor vehicles were serviced at the plaintiff's garage situated at Mwanza. Following the delivery of service to the 1<sup>st</sup> defendant, the plaintiff raised various tax invoices for settlement of the bill for the service. It is alleged that, the 1<sup>st</sup> defendant ignored, refused and failed to settle the invoices totalling Tshs. 142,551,952.07/=, which he was contractually bound to settle within a period of 30 days from the respective days of each invoice. The plaintiff alleged that, the 1<sup>st</sup> defendant breached the contract for failure to settle the invoices and continues to be in such breach despite various reminders to effect both documentaries, electronic and oral.

The plaintiff prays for judgement and decree against the 1<sup>st</sup> defendant by this Court to make a declaration that, the 1<sup>st</sup> is in continuous breach of contract of contractual obligations to pay the services delivered to the 1<sup>st</sup> defendant's motor vehicles, an order against the 1<sup>st</sup> defendant for payment to the plaintiff Tshs. 142,551.952.07/= being arrears or outstanding and unpaid charges for services delivered



by the plaintiff to the 1<sup>st</sup> defendant's motor vehicles, interest at commercial rate of 21% per annum from the date of the first breach to the date of judgement, Interest on the decretal amount at the court's rate of 12% per annum from the date of judgement to the date of final and full satisfaction of the decree, costs of the suit and any other reliefs as this Court will deem just to grant.

When the preliminary objection was argued, the plaintiff enjoyed the legal services of the learned counsel Mr. Lubango Shiduki while the 1<sup>st</sup> and 2<sup>nd</sup> defendants were represented by Ms. Sabina Yongo and Mr. Onyango George, the learned state attorneys.

Arguing in support of the preliminary objection, the defendants' counsel quickly asserted that, the suit is time-barred as the course of action is found on contract and the contract was entered by the parties between 2009 and 2014 on diverse dates between the above periods. He further asserted that, as the plaintiff claimed that, the last motor vehicle was serviced in 2014 as it is shown in Annexure PTC 1 and as supported by paragraphs 6 and 8 of the Plaint, the suit is time-barred.

He went on to submit that, the contract of maintenance of the motor vehicles was entered in the form of the Local Purchase Orders (LPO). Thus, for the purpose of knowing when the breach was done, a



reference has to be done to when the plaintiff demanded payment to be done through tax invoices. He added that, it is the tax invoices which show the terms of payment and when the payment is supposed to be done.

The counsel for the defendants went on by clarifying Exhibit PTC 2, which shows that, the time to make payment was within 30 days from 21/05/2009 and the last tax invoice shows that, payment has to be made within 15 days from 15/04/2014. When calculated, the last contract was alleged to be breached in 2014 and up to now when the matter was instituted that is on 30/6/2022, it is almost 8 years which is contrary to section 3(1) of the Law of Limitation Act, Cap 89 R.E 2019 on Item No 7 Part 1 of the Schedule.

He finalized his submission by stating that, the suit found on a contract has to be filed within 6 years. He supported his argument by referring to the decision of the Court of Appeal in the case of **Moto Matiko Mabanga vs Ophir Energy PLC & Others**, Civil Appeal No. 119 of 2021, that the suit on contract which is instituted after six years is time-barred. He retires by stating that, as the present suit was filed after the expiration of 6 years, it is time-barred and he prays the suit to be dismissed with costs.



Responding, the counsel for the plaintiff admitted that, the suit was on breach of contract but it is a continuous breach of contract as it was stated on paragraphs 4, 10, 11 and the relief in the Plaint indicated so. He went on that, if the breach is continuous, section 7 of the Law of Limitation Act, Cap 89 R.E 2019 came into play. He refers to the decision of the Court of Appeal of England in the case of **Hole v Chard Union**, Chancel Division Vol 1 of 1893 which explains the concept of a continuous course of action as it arises from the repetition of an act. He also cited the Indian case of **Tilakram Lalula v State of Madhya Pradesh**, AIR 1966 MP 154 which explain the continuous cause of action.

The counsel for the plaintiff admitted that, the contract for maintenance of motor vehicle services started from 2009 to 2014 as per the contract as it is Exhibited on PTC 1. The counsel went on to refer to Annexure PTC 2 which are invoices. He added that, in the said invoices, each of them is accompanied by tax (Value Added Tax), in which Cap 148 R.E 2019 indicates when tax is paid, which goes together with Tax Administration Act, Cap. 483 R.E 2019. He emphasized that, the contract between the parties is on continuous breach because one of the



obligations of the plaintiff is to pay tax according to the invoices received for payment from the 1<sup>st</sup> defendant.

He went further submitting that, as per paragraph 10 of the Plaint, the defendants did not dispute the fact that, the amount was not paid. He went on that, the limitation period does not apply because, the amount remained unpaid to enable him to pay tax and therefore, there is a continuous breach and the plaintiff is covered under section 7 of the Law of Limitation Act, Cap. 89 RE: 2019. He insisted that, since the defendant did not dispute the claim on the Plaint, the present suit is maintainable. He finalized by distinguishing the case of **Moto Matiko Mabanga** (supra) because it was not dealing with a continuous breach as the same was on the normal breach. He, therefore, prays the preliminary objection to be overruled with costs.

Re-joining, the counsel for the defendants opposed the assertion that the contract was a continuous breach as submitted by the learned counsel for the plaintiff. He insisted that, for a continuous breach to exist, the court has to prove that there should be a promise which is not fulfilled. He further clarified that, continuous breach goes with promise. In the absence of promise, the breach became the normal breach. He added that, the matter which is before this Court as per Annexure PTC 1



and PTC 2 in which the plaintiff attached in his Complaint, does not prove that there is a continuous breach.

He kept emphasizing that, the case of **Moto Matiko Mbanga** gives the circumstances for determining the time-barred in which the Court has to look at the Complaint and its Annexure without going into any further evidence to determine whether the suit is time-barred. He went on to attack the plaintiff's submission on a continuous breach by stating that, as the plaintiff submitted that, there was maintenance of the motor vehicle which was done in a different time and therefore it was a different contract and not one contract which has the nature of the continuing. He relies on this argument stated that, as per Annexure PTC 2, each invoice had its own terms of payment which shows that those are different contracts.

He attacked the issue of value-added tax as it is not the proper time to explain the issue of tax, as tax is paid after payment if payment is not done, then tax cannot be claimed to be paid. He added that, the issue of disputing debt cannot be deliberated and discussed at this juncture as the main issue is arguing the preliminary objection. He insisted that, the objection raised on time-barred is merited and that, the plaintiff waived his right to bring the suit within the prescribed time



required by the law. He, therefore, prayed the preliminary objection to be allowed with costs.

From the above-competing arguments from the counsels of both parties, the main issue for consideration and determination is whether the suit is time-barred.

In the very beginning, it has to be noted that, as a general rule, the objection on time-barred touches the jurisdiction of the court in the sense that, the Law of Limitation Act, Cap. 89 R.E 2019 prescribes the time limit within which a case has to be filed in court. It is only when the case is filed within the prescribed time, is when the court can have the power to hear and determine it. That is to say, any case which has been filed out of the prescribed time provided by law, the court is not clothed with jurisdiction to entertain it and if entertained, its decision is a nullity. Therefore, the court must satisfy itself whether it has jurisdiction to hear and determine the matter before it, as the issue of jurisdiction goes to the very root of the matter.

As objection on time-barred touches the jurisdiction of the court, its determination does not require the ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the plant and its annexures without any further facts or evidence to be





ascertained in determining whether the suit is time-barred. In the case of **Ali Shabani and 48 Others vs Tanzania National Roads Agency and The Attorney General**, Civil Appeal No. 261 of 2020, when the Court of Appeal faced with an akin situation, at page 8 of its Judgement it stated that: -

*"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."*

The above-settled position of law goes parallel with a trite position of law that, in determining preliminary objection the court has to look on the pleadings presented by the parties which do not need support from evidence.

Turning now to the gist of our case, parties are in agreement that the matter before this court is based on contract as the plaintiff entered into a contract with the 1<sup>st</sup> defendant to carry out routine maintenance services and provide replacement spares on the 1<sup>st</sup> defendant's motor vehicles. It is also not disputed that the 1<sup>st</sup> defendant's motor vehicles



were serviced at the plaintiff's garage situated at Mwanza. Parties are also in agreement that, the contract was executed between the years 2009 to 2014 and that the last motor vehicle was serviced in the year 2014 as shown in Annexure PTC 1 and as evidenced in paragraphs 6 and 8 of the Plaint.

The defendants' asserts that, the suit is time-barred as the plaintiff was supposed to institute his claim within six years from the date when the contract was breached. According to him, the contract was breached in 2014 and since the plaintiff instituted the suit on 30/6/2022 he is out of time, and therefore the suit is time-barred, and same deserves to be dismissed. He went on to refer to Annexure BCL2 which are taxes invoice that also shows the modality of payment specifically as to when payment has to be done. He stated that, Annexure BCL2 shows that, payments on tax invoices have to be done within 30 days, while the last tax invoice which is also part of Annexure BCL2 shows that, the payment has to be done within 15 days from 16/04/2014.

On his part, the plaintiff's counsel claimed that the nature of the present suit is not a normal breach of contract but a continuous breach of contract as it is stated on paragraphs 4, 10, and 11 of the Plaint and as it was prayed in the relief section. He went on that if the breach is continuous, section 7 of the Law of Limitation Act, Cap. 89 R.E 2019



came into play. He asserted that the breach is continuous because in Annexure BCL2, the plaintiff is required to pay value-added taxes which are unpaid up to now and the same is accumulating, therefore, there is a continuous breach.

Before I embark to determine whether the suit is time-barred or not, I must confess that to determine whether the suit is time-barred or not, one has to determine whether the present matter is on breach of contract as alleged by the defendants and not a continuous breach of contract as it is alleged by the plaintiff. To my understanding, for a continuous breach of contract to occur, there must be a valid existing contract between the parties. That is to say, enforcement of a contract is a necessary part for it to be a legally binding contract, and contract is a legally binding agreement if legal rights or a course of action accrues when it is breached.

It follows that a continuous breach usually happens when there is a series of continuous breaches which may have implications in running the period of limitations which must go to the date of the commission of the last breach. Thus, the continuous breach can be established from the continuing breach and not the continuing effects of the breach.

It is the plaintiff's assertion that there is a continuous breach of contract since the plaintiff is obliged to pay value-added tax from the



amount which is indebted to 1<sup>st</sup> defendant. To my view, this is not the correct position of law as far as the continuous breach of contract is concerned. I say so because there was no series of the continuous breach on the part of the 1<sup>st</sup> defendant after the last maintenance services were done by the plaintiff in 15/04/2014 in which the payment was supposed to be done within 15 days from that date. That is to say, the payment was supposed to be done before or on 30/04/2015, which is the date on which the cause of action accrues.

The records shows that from that date there was no binding contract, there is nothing to show that there is a series of breach on the part of the 1<sup>st</sup> defendant as the issue of non-payment of value-added tax is an effect of a breach as the same is payable only once the payment is done. Therefore, as there is no continuing delivery of services by the plaintiff to the 1<sup>st</sup> defendant, non-payment of value-added tax cannot be considered as a continuous breach as the same is the effect of earlier breach of contract and always paid when the payment is done.

In the case of **Brookside Dairy Tanzania Ltd v Liberty International Ltd & Another**, Commercial Case No. 42 of 2020, HCT Commercial Division at Dar es Salaam, my learned brother Nangela, J



quoted the Halsbury's Law of England 4<sup>th</sup> Edn., Vol. 28 in paragraph 662 as it is stated that:

*"In an action for a breach of contract, the cause of action is the breach. Accordingly, such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within the six years of action brought."*

Additionally, when defining the meaning of a continuous breach which results in the continuing cause of action, this Court in the case of **Brookside Dairy Tanzania Ltd** (supra) when citing an English Case of **Holes v Card Union** (1894) 1 Ch. D. 293 in which the Court was of the view that:

*"In continuing cause of action arises from repetition of acts or omissions similar to those in respect of which action is brought. Lindley, L.J. said "what is continuing cause of action? Speaking accurately, there is no such thing, but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."*

In the case at hand, the plaintiff's counsel tried to invoke the provision of section 7 of the Law of Limitation Act, Cap. 89 R.E 2019 to show that the above provision applies in the circumstance of this case.



For ease of reference, I find it worthy to reproduce the above section which states that: -

Section 7.

*"Where there is a continuous breach of continuing wrong independent of a contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrongs as the case may continue."*

With due respect from the counsel of the plaintiff, as alluded to above, the above provision does not fit in the circumstances of our case at hand as there was no continuous breach of contract.

In the case of **Zaid Baraka & 2 Others v Exim Bank (Tanzania) Limited**, Civil Appeal No. 194 of 2016, CAT, had this to say on the issue of the continuous breach of contract;

*"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 the failure thereof would give raise to a new cause of action. As alluded to above, in this case, the cause of action arose once after the appellants had defaulted to repay the overdraft facility within the agreed period of two months from 23/2/2021."*



Guided by the above decision of the Court of Appeal, it is clear that the nature of the breach in our case at hand is not a continuous breach as failure to repay within the agreed period would not give rise to a new cause of action. From the pleadings available in the court file, and from what I have earlier on indicated, there was only one form of breach of contract as the last invoice for maintenance of the 1<sup>st</sup> defendant's motor vehicle was supposed to be paid within 15 days from 15/04/2014. In that respect, the cause of action accrued on 30/04/2014.

Thus, the act of the plaintiff of filing this case on 30/6/2022 after 8 years 2 months and 15 days, means that the claim was filed in contravention of Item 7 of Part 1 of the Schedule to the Law of Limitation Act, Cap. 89 R.E 2019 which required the suit to be filed within the period of six (6) years. For that reason, I agree with the learned state attorneys representing the defendants that, the suit is indeed time-barred as the plaintiff delayed for two (2) years and two (2) months and fifteen (15) days to bring the suit and therefore deserves to be dismissed as it is provided for under section 3(1) of the Limitation Act, Cap. 89 R.E 2019.

The argument of the plaintiff's counsel that, the defendants did not deny the fact that they are indebted by the plaintiff is misplaced at



this stage when the court is called on to determine the preliminary objection on the point of time-barred. In the case of **M/S P & O International Ltd v The Trustees of Tanzania National Parkes (TANAPA)**, Civil Appeal No. 265 of 2020, the Court of Appeal of Tanzania buying inspiration from the decision of this court in **John Cornel v A. Grevo (T) Limited**, Civil Case No. 70 of 1998 held that:

*"However unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."*

It follows thus that, since the suit before this Court is time-barred, this Court had no requisite jurisdiction to adjudicate the matter. In the upshot, I find the preliminary objection raised by the learned state attorneys has merit and is consequently sustained.

In the event, the suit is accordingly dismissed with no order as to costs.

It is so ordered.



**M.MNYUKWA**  
**JUDGE**  
**28/11/2022**

**Court:** Ruling delivered on 28<sup>nd</sup> November 2022 in the presence of both parties.



**M.MNYUKWA**  
**JUDGE**  
**28/11/2022**