

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOPA DISTRICT REGISTRY

AT BUKOPA

CIVIL CASE NO. 16 OF 2021

SAREPTA NETWORK INVESTMENT (SANEICO).....PLAINTIFF

VERSUS

1. BUKOPA DISTRICT COUNCIL.....1ST DEFENDANT

2. THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

23.03.2022 & 12.04.2022

NGIGWANA, J.

This is a ruling in respect of the preliminary objection raised by the Defendants jointly. In this suit, the plaintiff sued the defendants for breach of contract praying from judgment and decree against the defendants as follows: -

- (a) A specific performance of the contract on the party of the 1st defendant.*
- (b) Payment of Tshs. **44,012,816/=** to the plaintiff as outstanding balance.*
- (c) Payment of liquidated damages and interest compounding at Back rates.*
- (d) Costs of the suit.*
- (e) Any other relief or the court may deem fit to grant.*

In response to the plaint, the defendants jointly filed the joint Written Statement of Defense. They denied any liability. They also raised two preliminary objections on point of law that;

- (i) *The suit is time barred.*
- (ii) *That the suit is prematurely filed.*

In this squabble, the plaintiff was represented by Mr. Rogate Elligi Assey, learned advocate while Mr. Daniel Mbaki, learned State Attorney appeared for both defendants.

The defendants through Mr. Daniel Mbaki exercised their right of hearing by dropping the 2nd PO, and submitted only on the 1st limb of the preliminary objection. Submitting on the first limb of the preliminary objection on point of law, Mr. Mbaki argued that the suit has been filed in contravention of item 7 of the law of Limitation Act Cap. 89 R: E 2002 because six year have already expired from where the cause of action arose.

Mr. Mbaki added that, the cause of action arose in 2009, and from there the negotiations have been taking place, but negotiations cannot bar the filing of the case. Mbaki referred the court to the case of **M/s. P & O International Ltd versus The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020 CAT (Unreported) and the case of **Rev. Mahunda Francis Paul versus Bukoba Municipal Director and 26 Others**, Land case No. 08 of 2019 where it was emphasized that pre-court negotiations cannot halt the time from running.

Responding to the PO, Mr. Assey, submitted that the suit is not time barred because the contract was restructured in 2009 and part of the payment was paid on 23/05/2019 and that is evidence that the contract was still subsisting. Mr. Assey insisted that, in the matter at hand the cause of action arose in 2019.

In his rejoinder, Mr. Mbaki maintained that, the cause of action arose in 2009; thus, argued the court to dismiss this suit from being time barred.

Upon consideration of the submissions by both parties, as summarized above, I will proceed to determine the first Preliminary objection (PO).

Item 7, Part I of the Schedule to the Law of Limitation Act. Cap 89 provides the time to institute a suit founded on contract to be six (6) years from the date the cause of action arose. The accrue date as provided for under section 5 of the Law of Limitation Act is the date in which the cause of action arises. The same provides;

5 *"Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises"*

It is the principle of the law that a suit that is time barred by statute must be rejected by the court because in such a suit, the court is barred by law from granting any remedy or relief. **See the case of Iga versus Makerere University** (1972) EA 65. Indeed, the law of limitation knows nether sympathy nor equity. Emphasizing on this point, the Court of Appeal of Tanzania in the case of **Barclays Bank Tanzania Limited versus Phylisiah Hussein Mchemi**, Civil Appeal No.19 of 2016 (Unreported) cited with approval the decision in the High Court of Dsm Registry in **John Cornel versus A. Grevo (T) Limited**; Civil Case No.70 of 1998 in which it was 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"

In determining whether the suit is time barred or not, the court has to look at the plaint as a whole. In case of **Lucy Range versus Samwel Meshack Mollel & 2 Others**, Land Case No. 323 of 2016 High Court of Tanzania, Land Division, at Dar Es Salaam, where it was observed that;

"In determining whether the suit is time barred or not, the court normally looks at the plaint to see as to when the cause of action arose, in other words when the right of action started to accrue".

It should not be forgotten that the plaint must be read together in their totality including the annexures attached thereto, it should never be read in peace meal fashion. See **Isack & Sons Ltd versus North Mara Goldmine Ltd**, Commercial Case No.3 of 2019 (Unreported).

In the instant matter, paragraph 8 of the plaint read;

"That the construction was complete on 10/10/2008 and taken into possession on 8th February 2009 and the certificate of completion dated 10/02/2009 was issued, to certify that the construction work was fully and satisfactorily completed. (a copy of the certificate of completion is hereby annexed as MK12 with leave of this court we crave the same to form part of the plaint"

According to paragraph 8, the 1st defendant has paid the total sum of TZS. 80, 950, 600/= thus, the outstanding debt is now TZS. 44,012,816/= **Annexure MK11 dated 28/10/2011** is a letter written by the Regional Administrative Secretary, Kagera Region titled **"YAH: MALIPO YA TZS. 48,944,816 KWA KAMPUNI YA SANEICO"** to the District Executive Director, Bukoba District Council informing him about the plaintiff's complaint. Part of the said annexure read;

"Kampuni tajwa hapo juu ilifikisha malalamiko yake katika ofisi hii kwa barua yenye kumbu.Na. Saneico/KGR/RQ/Ad/01/11 ya tarehe 10/05/2011 yenye madai tajwa hapo juu.... Kwamba kwa muda mrefu sana mkandarasi huyo amekua akifuatilia na kuombwa kulipwa kiasi hicho cha TZS. 48,944816/= bila mafanikio"

From the plaint read together with the annexures annexed thereto, it is apparent that the cause of action did not arise in 2019. It arose in 2009 when the construction was declared complete and taken into possession by the 1st defendant and the certificate of completion dated 10/02/2009 was issued, to certify that the construction work was fully and satisfactorily completed but the plaintiff was not paid as per contract. The matter at hand was filed in court on 8th day December, 2021. The computation of the period from 2009 to 2021 is almost 13 years, therefore, it is obvious that this matter was filed out of six (6) years prescribed by law. Even where it is assumed that the cause of action arose in 2011, the same is still time barred.

There is no doubt the plaintiff and the first defendant had negotiations since 2009, but the position of the law is very clear that a mere fact that negotiations have taken place between the parties is immaterial because once time begins to run, it runs continuously and that, this principle can be ousted only by a statutory provision.

Addressing the same situation, the Court of Appeal of Tanzania in the case **M/s. P & O International Ltd (Supra)** cited with approval the decision of the High Court of DSM in **Makamba Kigome and Another versus Ubungo Farm Implements Limited and PRSC**, Civil Case No. 109 of 2005 whereas Kalegeya, J. (as he then was) held that;

"Negotiations or communications between the parties since 1998 did not impact on limitation of time. An intending litigant, 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 amount an action for the actionable wrong does so at his own risk and cannot front the situation as a defense when it comes to limitation of time."

On the fore going, I uphold the defendants' objection that the suit is time barred. Accordingly, it is dismissed pursuant to the provisions of section 3(1) of the Law of Limitation Act, Cap 89 R: E 2019. Given to the nature of the case and the conduct of the parties, I enter no order as to costs. It is so ordered.


E. L. NGIGWANA

JUDGE

12/04/2022

Ruling delivered this 12th day of April, 2022 in the presence of Mr. Charles Kagaruki Katabazi; Managing Director for the Plaintiff, Mr. Daniel Mbaki, learned State Attorney for the defendants, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B /C.


E. L. NGIGWANA

JUDGE

12/04/2022