

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

**CIVIL CASE NO. 106 OF 2021**

**FLOMI HOTEL LIMITED ..... PLAINTIFF**

***VERSUS***

**EQUITY BANK TANZANIA LIMITED..... DEFENDANT**

**RULING**

*Date of Last Order: 24/2/2022*

*Date of Ruling: 3/8/2022*

**LALTAIKA, J.**

This is a ruling on a preliminary objection raised by the defendant against the plaintiff's suit. The objection raised is to the effect that;

- i. The suit is incompetent for contravening Order IX Rule 6(1) of the Civil Procedure Code Cap. 33 RE 2019*
- ii. In terms of clause 6,7 and 9 of the plaint, the suit is hopelessly time barred.*

A brief background of what led to this ruling is as follows: On 17<sup>th</sup> August 2017 the plaintiff herein instituted a civil case indexed as Civil Case No.163 of 2017 against the defendant claiming payment of Tanzania Shillings 51,118,729.00 being interest on the stolen money, payment of Tsh 757,480,473 being loss of business profit and payment of Tanzania Shillings 100,000,000 being general damages, interest and cost of the

suit. The main reasons for the claim in an alleged fraud and negligence by the defendant.

As part of the ongoing efforts by this court to clear backlog cases, the suit was assigned under special sessions and scheduled for hearing on the 15<sup>th</sup> June 2021. On the material date neither the plaintiff nor his counsel appeared. As a result, this court dismissed the suit with costs for want of prosecution. On 8<sup>th</sup> July 2021 the plaintiff filed a fresh suit against the defendant for the alleged negligence claiming payment of Tanzania Shillings 100,084,876.638 being the interest on the stolen money, payment of Tanzania Shillings 757,480,473.00 being loss of business profits and Tanzania Shillings 100,000,000 as general damages, interest and cost of the suit. Counsel for the defendant Mr. Godwin Nyaisa strongly believes that this suit is purely found on tort. Holding on that ground, therefore, when filing the written statement of defence, Mr. Nyaisa incorporated a notice of preliminary objection. Such a notice is the subject matter of this ruling.

With leave of this court the preliminary hearing was heard by way of written submissions. The plaintiff's submission was drawn and filed by DR.M. J. Lugaziya, Advocate while the defendant enjoyed the service of Mr. Godwin Nyaisa, Advocate

Mr. Nyaisa in his submission in support of the Preliminary objection argued that, in terms of clause 6,7 and 9 of the plaint, the plaintiff provided that cause of action in this matter arose from negligence and collusion be the defendant which occurred between 13<sup>th</sup> and 19<sup>th</sup> February 2015. The main reason for the claim is the alleged negligence by the defendant in releasing signed cheque issued to her. The suit is purely

found on tort. As per item 6 of the first schedule to the Law of Limitation Act, Cap 89 R.E 2019-time limitation for suit found on tort is three years.

The suit at hand, asserts Advocate Nyaisa, was instituted on 8<sup>th</sup> July 2021-six years later from the date when the cause of action arose. Therefore, Mr. Nyaisa opined, the suit has been filed beyond the period of limitation prescribed by the law rendering the suit hopelessly time barred. To fortify his stance, he referred this court to the case **of Ishara Godfrey Versus Chief Registrar & Another, Civil** case No.50 of 2018 where among other things the court held..." *that section 5 of the law of Limitation Act [Cap 89 RE 2019) is crystal Clear that the right of action is respect of any proceedings shall accrue on the date on which the cause of action arose"*.

Moreover, Mr. Nyaisa cited the case of **Mbezi Mgaza Mkomwa versus Permanent Secretary, Prime Minister's Office & Another,** Civil Appeal No.27 of 2017 CAT whereupon the Court of Appeal sustained an objection whereby the plaintiff failed to file a suit within a prescribed time limit by the reason that he spent his time pursuing his claim with the Government through correspondences.

Mr. Nyaisa argued further that the order given by this court when dismissing the Civil Case No.163 of 2017 thus "if wishes the plaintiff would re file it" does not act as an automatic extension of time. He referred to the provision of the law under Order IX Rule 6 of the Civil Procedure Code, Cap 33. R.E 2019 where the law precluded the plaintiff from bringing a fresh suit in respect of the same cause of action where a suit is wholly or partly dismissed under rule 8. To bolster his argument, Mr. Nyaisa cited the case of **East African Development Bank v. Blueline Enterprises Limited,** Civil Appeal No.101 of 2009 where the court of appeal cited with

approval the case of **Olam Uganda Limited suing through its attorney United Youth Shipping Company Limited vs. Tanzania Harbours**, Civil Appeal No.57 of 2002.

It is Mr. Nyaisa's submission further that when the Civil Case No.163 of 2017 was dismissed on 15<sup>th</sup> June 2021, the position of the parties went back to 13<sup>th</sup> February 2015 when the alleged cause of action occurred as if the Civil Case No.163 of 2017 was never filed in this court. He insisted that the current suit was filed on 08<sup>th</sup> July 2021 almost six years later hence out of time.

Turning to the second point of the preliminary objection that the suit is incompetent for contravening **Order IX Rule 6(1) of the Civil Procedure Code, Cap 33 R.E 2019**, Mr. Nyaisa argued that order IX Rule 6(1) provides for the rule against filing fresh suit in respect of the same parties claiming under the same cause of action where the suit was partly or wholly dismissed. The learned counsel submitted further that the said provision of the Law entails that once a matter has been dismissed partly or wholly, unless there is an order to set the dismissal aside, the plaintiff is precluded from bringing a fresh suit. The learned counsel insisted that such a legal provision acts as an estoppel to such parties to relitigate the same matters in any subsequent proceedings which has been dismissed.

It is Mr. Nyaisa's reasoned opinion that the provision also provides the directives on what to do when the matter has been dismissed. He asserts that in the present suit, the plaintiff's cause of action is alleged to have arisen from negligence of the defendant as a result the plaintiff prays for payment of stolen money, business loss and general damages. Mr. Nyaisa is of a firm belief that the same was in Civil Case No.163 of 2017

before this court and was dismissed for want of prosecution on 15<sup>th</sup> June 2021. To that end, Mr. Nyaisa asserts, filing the same suit is a gross error that renders the suit incompetent and unmaintainable error. To back up his argument Mr. Nyaisa cited the case of **Tanzania Rent a Car vs. Peter Kimuhu**, Civil Appeal No.226/01 of 2017 and the case of **Clara Mathias Kwilasa vs. Efc Tanzania Microfinance Bank Limited & 2 Others**, Land case No.143 of 2020 where the plaintiff instituted a fresh suit on the same cause of action where the same was dismissed for want of prosecution and the court regard it to be functus officio as dismissal is not open for further determination of a fresh suit of the same parties and subject matter without an order setting aside the dismissal order.

On the strength of his arguments Mr. Nyaisa submitted that the suit is incompetent as it contravenes Order IX Rule 6(1) of the Civil Procedure Code, Cap 33 R.E. 2019. Mr. Nyaisa concluded his submission in chief by emphasizing that the dismissal order issued in Civil Case No.163 of 2017 dated June 2021 bars the plaintiff from filing a fresh suit on the same cause of action.

In his reply opposing the Preliminary Objection, Counsel for the Plaintiff Dr. Lugaziya acknowledged that there was a Civil Case No.163 of 2017 which was dismissed by this court for want of prosecution. The learned counsel, moreover, does not dispute that the time limit to institute a tortious claim is three years. Nevertheless, Dr. Lugaziya contended that since the dismissal order gave an option to refile if the plaintiff so wishes, the plaintiff had acted accordingly and filed the case immediately thereafter.

It is Dr. Lugaziya's submission that the defendant's objection that the matter is hopelessly out of time by listing number of authorities,

spirited his intention to avoid its culpability in its careless mishandling of the plaintiff's account which resulted into a colossal sum to be stolen. According to Mr. Lugaziya the leave to refile was granted by the court itself on its decision of 15<sup>th</sup> June 2021. As a result, the learned counsel asserted, there was no point of asking for the leave once again.

Dr. Lugaziya submitted further that where a party is diligently pursuing a matter in court, if the matter falls on any reason and if the affected party opts to file a fresh suit, then the time he was in court would be taken into account when calculating time. In this case, the learned counsel averred, since the dismissal order was on 15<sup>th</sup> of June, the copy of the ruling was extracted on the 30<sup>th</sup> of June, the present suit was lodged on the 8<sup>th</sup> of July, 2021 it was evident that the Plaintiff was in court diligently pursuing its claim against the defendant and that the same would be excluded for purpose of calculating time.

To cement his argument, he cited the case of **Dr. Fortunatus Lwanyantika Masha vs. Dr. William Shija** [1997] TLR 154, **Amani Girls' Hostel vs. Isaack Charles Kamela**, Civil Application No.325 /2008 of 2019 and **Victor Rweyemamu vs. Geoffrey Kabaka and Another**, Civil Application No.602 /2008 of 2017 whereupon, the learned counsel contended, delay when a party was pursuing the same right in the courts was excusable and the days spent in court will be excluded from calculating the time-limit as it was termed a technical delay.

Submitting on the point that where a suit has been dismissed the same cannot be refiled without leave of the court or until the dismissal is set aside, Dr. Lugaziya argued that, **the cases of EADB v. Blue Line Enterprises Ltd**, Civil Appeal No.101 of 209, **Hashim Madongo & 2 others vs. Minister for industry and Trade and Two Others**, Civil

Appeal No.27 of 2003,**Olam (Uganda) Ltd vs. Tanzania Harbours**, Civil Appeal No.57 of 2002,etc as cited by the defendant were clearly distinguishable from the facts herein.

It is Dr. Lugaziya's submission that in the circumstances where the leave is already given in the dismissal order itself, is not obtained in any of the cited cases by the defendant. The counsel submitted further that, courts exist to meet the proper ends of justice, adding that frivolous and vexatious objections should not be allowed to stand in the way to justice. Dr. Lugaziya concluded his submission by a prayer that this court be guided by the over-riding objectives principle and dismiss these objections so that the matter filed could be determined on the merits.

In a rejoinder, Mr. Nyaisa submitted that the argument by the learned counsel for the plaintiff that the dismissal order dated 15<sup>th</sup> June 2021 which gave an option to refile was an automatic extension of time was a misconception. The learned counsel asserted that the statement by the court that "*if wished, the Plaintiff would refile it*" is subject to Law of Limitation. It is Mr. Nyaisa's assertion further that the phrase: "Leave to refile" is often used in courts of Law to mean that the party concerned is not barred to bring a fresh suit/application but the same is subject to time limitation.

Mr. Nyaisa emphasized that such a practice has never meant to include an extension of time adding that once a suit is dismissed with leave to refile, the party becomes subject to time limitation whether or not such words were used in the order of the court. To bolster his argument, he cited the case of **Emmanuel Eliazry versus Ezironk K. Nyabakari**, Land Appeal No.56 of 2018.

It is Mr. Nyaisa's submission that in terms of section 44(1) of the Law of Limitation Act, Cap 89 RE 2019 powers to extend time for filing a suit out of time are vested with the Minister not the court. Therefore, the learned counsel contended, notwithstanding the court order to allow the plaintiff to refile, that filing was bound to adhere to the time limitation of the suit. The learned counsel emphasized that since the plaintiff had been caught in the web of time limitation, the best option should have been to apply for extension of time from the Minister in terms of section 44(1) of the Law of Limitation Act prior refiling.

With regards to the assertion by Dr. Lugaziya that the time the plaintiff had spent in court should be excluded, Mr. Nyaisa was quick to point out that for court to do so, the same must have been pleaded in the Plaint as provided under Order VII Rule 6 of the Civil Procedure Code Cap 33 RE 2019. The plaintiff plead in all paragraphs has never pleaded the ground upon which exemption is claimed. There is no paragraph which even state that there was previous suit that was dismissed. It is only in his submission after preliminary objection the plaintiff mention that. He contended that the court cannot infer facts that are not in the pleadings.

It is Mr. Nyaisa's contentions that submissions of counsels are mere statements from the bar amplifying the pleadings hence they cannot amplify what is not in the pleadings. He asserted further that parties are bound by their pleadings and no party is allowed to present a case contrary to its pleadings. Applying the argument to the matter at hand, the learned counsel averred that the plaintiff herein had narrated in his plaint the facts constituting the cause of action and time when the cause of action arose but nothing was said in relation to the exemption being sought. To cement his argument, Mr. Nyaisa cited the case of **Ms. P & O**



**International Ltd v. The trustees of Tanzania National Parks** (TANAPA), Civil Appeal No.265 of 2020, **Tanzania National Road Agency & A.G vs. Jonas Kinyagula**, Civil Appeal No.471 of 2020,

Arguing further on that point Mr. Nyaisa submitted that if the plaintiff's reason for adjournment was genuine, he would have applied to set aside the dismissal order. However, the learned counsel averred, it is because he had no genuine grounds to apply for dismissal order that is why he opted to avoid the route.

Mr. Nyaisa took the opportunity of his rejoinder to distinguish the case of **Amani Girls Hostel vs. Isaack Charles Kamela**, Civil Application No.325 of 2018 and **Victor Rweyemamu Binamungu vs. Geoffrey Kabaka**, Civil Application No.602/08 of 2017 which counsel for the plaintiff had used in convincing this court to exclude the days spent in court. To this end, Mr. Nyaisa submitted that, these cases are distinguishable as they were applications for extension of time in which the applicants pleaded in their affidavits time spent in court corridors. The suit at hand, reasoned Mr. Nyaisa, is not an application for extension of time and allegations of spending time in court did not appear in the plaint.

Arguing on the plaintiff's attempt to call upon this court to apply the principle of overriding objectives, Mr. Nyaisa submitted that the said principle cannot be applied to defeat or rather circumvent the mandatory requirement of the law. The learned counsel invited this court to the decision of the Court of Appeal in **Mondorosi Village Council & 2 Others versus Tanzania Breweries Limited & 4 Others** Civil Appeal No.66 of 2017.

Mr. Nyaisa concluded his submission by a prayer that this suit be dismissed with costs for being time barred under section 3(1) of the Law

of Limitation Act, Cap 89 RE 2019. Alternatively, the learned counsel opined, the suit be struck out with costs for contravening provisions of Order IX Rule 6(1) of the Civil Procedure code, Cap 33 RE 2019.

I have dispassionately examined the pleadings and taken into account the contending submissions of the parties. The sticking point for determination is whether the preliminary objections are meritorious.

The court of appeal in the case of **COTTWU (T) OTTU Union & Another and Hon. Idd Simba Minister on Industries and Trade and Others**, Civil Application No.40 of 2000(unreported) stated that, a preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained that should dispose of the matter. Therefore, a preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds.

Mr. Nyaisa, learned advocate for the defendant in his preliminary objection raised the following grounds, namely;

- i. The suit is incompetent for contravening Order IX Rule 6(1) of the Civil Procedure Code Cap. 33 RE 2019
- ii. In terms of clause 6,7 and 9 of the plaint, the suit is hopelessly time barred

Needless to say, a preliminary objection is one that challenges the competence of a court to hear and determine a particular cause before it.

In the course of determining the merit or otherwise of the raised objections, I am inclined to start with the objection that the suit is hopelessly time barred. I have carefully studied the plaint from the first paragraph to the last one as well as the prayers sought by the plaintiff. It is undisputed that the cause of action in the filed suit revolves around

paragraph 6 where it is stated that on the 13<sup>th</sup> February 2015. The law under Section 3(1) of the Law of limitation Act, Cap 89 R.E 2019 provides that;

*"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."*

First schedule of the law of Limitation Act, Cap 89 R.E 2019 provides that time limitation for a claim found on tort is three years. Moreover, section 4 of the same Act stipulates on commencement of such time limitation. It provides that;

*"The period of limitation prescribed by this Act in relation to any proceeding shall, subject to the provisions of this Act hereinafter contained, commence from the date on which the right of action for such proceeding accrues."*

From the above provisions of the law, it is clear that since the cause of action arose in 2015 and the claim emanate from tort, the plaintiff was duty bound to adhere to the law of limitation.

The suit at hand was filed on 08<sup>th</sup> August, 2021. There is a difference of six years. Re filing a suit does not mean that the new file will be counting from the date when the older file of the same cause of action was dismissed. To recapitulate, I agree with Mr. Nyaisa learned advocate, that after dismissing the Civil case No.163 of 2017, the position of the

parties remained as it was before the filing and the dismissal of the suit. Therefore, computation of time for the purpose of limitation commences when the cause of action arose which is on 13<sup>th</sup> February, 2015.

It is my finding that the second point of the preliminary objection raised by the defendant met the test enunciated in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd. (1969) EA 696.**

In the circumstance and for the reasons given above, I find the second point of the preliminary objection meritorious and I sustain it.

Bearing in mind that this point is enough to dispose of the matter, I do not see any reason to proceed with the second limb of the preliminary objection. I accordingly dismiss the suit.

Cost to follow the event.



**E.I. LALTAIKA**

**JUDGE**

**3/8/2022**