

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MJASIRI, J.A., MMILLA, J.A., And MZIRAY, J.A.)**

**CIVIL APPEAL NO. 70 OF 2012**

**ROBBY TRADERS LIMITED .....APPELLANT**

**VERSUS**

**CRDB BANK PLC .....1<sup>ST</sup> RESPONDENT**

**TANZANIA NATIONAL ROADS**

**AGENCY (TANROADS).....2<sup>ND</sup> RESPONDENT**

**(Appeal from the Ruling of the High Court of Tanzania (Commercial  
Division) at Dar es Salaam)**

**(Bukuku, J.)**

**dated the 2<sup>nd</sup> day of July, 2012**

**in**

**Commercial Case No. 14 of 2012**

**JUDGMENT OF THE COURT**

17<sup>th</sup> February, & 22<sup>nd</sup> March, 2017

**MJASIRI, J.A.:**

This appeal arises from the decision of the High Court of Tanzania, Commercial Division (Bukuku, J.). The appellant/plaintiff filed a suit against the respondents claiming a sum of Shs. 44,885,700/= being payment for engineering works done by the appellant on behalf of the 2<sup>nd</sup> respondent, relating to the contract which was entered between the parties in 2005/2006.

The plaint did not disclose the date the contract was entered into nor was a contract agreement annexed to the plaint.

The first respondent is a Commercial Bank and the second respondent is a government National Roads Agency responsible for maintaining and repairing roads.

According to paragraph 9 of the plaint two cheques were drawn by the second respondent in favour of the appellant, one in the sum of Shs. 33,154,550 dated 3<sup>rd</sup> June 2006 and the other one for Shs. 11,731,150 which was dated 27<sup>th</sup> January, 2006. The said cheques were never received by the appellant. It was not in dispute that the cheque dated January 27, 2006 was time barred.

Before the suit proceeded on merit, the respondent filed a preliminary point of law to the following effect:-

1. *The claim is time barred*
2. *The suit is bad for misjoinder.*

The appellant subsequently withdrew the second ground of objection.

Consequently, the High Court Judge upheld the preliminary objection and the suit was struck out with costs for being time barred.

Aggrieved by the decision of the High Court, the appellant has appealed to this Court. He has presented a seven (7) point memorandum of appeal which is reproduced as follows:-

- 1. That the Court erred in law and fact having found that the cause of action arose in 3<sup>rd</sup> June, 2010 or 24<sup>th</sup> June, 2010 failed to rule that the computation of either of the period is within six years provided by item 7 Part 1 of the 1<sup>st</sup> Schedule to the Law of Limitation Act, [Cap 89 R.E. 2002] thus arriving at its erroneous decision instead of ruling that the suit is within time.*
- 2. That the Court erred in law and fact by failing to refer or by only referring partially to documentary evidence on record and submitted in court forming part of the plaint where the plaintiff categorically stated that the cause of action started to run five (5) days from the 3<sup>rd</sup> June, 2010 as per demand notes collectively marked 'Ann. RTL III'.*

3. *That the Court erred in law and fact by picking and choosing few paragraphs on determination of the date of accrual of cause of action instead of considering the whole of the plaint.*
4. *That the Court erred in fact as even upon finding that the pleading in paragraph 11 of the plaint is important in determination of the cause of action hence limitation period the Court deliberately ignored to refer or partially referred to annexure collectively marked 'Ann. RTL II' and 'Ann. RTL IV' of the plaint.*
5. *That the Court erred in law and fact in its failure to accept the fact presented by plaintiff and admitted by Defendants in pleadings and also in hearing of preliminary objection that immediately prior to re-institution of Commercial Case No. 14 of 2012 in the High Court of Tanzania, Commercial Division at Dar es Salaam, this case had been diligently and in good faith instituted and*

*prosecuted as Civil Case No. 174 of 2010 in Dar es Salaam Resident Magistrates Court at Kisutu (Hon. Tarimo, RM) however due to defect of jurisdiction the subordinate court ruled that it was incompetent to try the same.*

*6. That the Court having found that the cause of action is based on contract and that payment purported to have been made by mode of a cheque dated 3<sup>rd</sup> June, 2006 was not time barred yet erred in law and fact in striking out the suit.*

The appellant sought the following orders:-

- (i) Reversing and/or quashing the decision.*
- (ii) The suit be heard and determined on merit.*
- (iii) Costs of this appeal be borne by the respondents.*
- (iv) Any other relief as the Honourable Court may deem just to grant.*

At the hearing of the appeal the appellant was represented by Mr. Chacha Werema Chambiri, learned advocate. The first respondent had the

services of Mr. Florence Tesha and the second respondent was advocated by Mr. Justinian Byabato, learned advocates. Counsel asked the Court to adopt their written submissions.

According to Mr. Chambiri the case is based on limitation and the issue to be determined is whether or not at the point of filing the case in the High Court, Commercial Division, the suit was time barred. He submitted that the suit was filed within time. He relied on section 26 (c) of the Law of Limitation Act, [Cap 89, and R.E.2002], (the Limitation Act). Mr. Chambiri's basis for relying on section 26 (c) of the Limitation Act is that the appellant filed a suit in the Resident Magistrate's Court but the case was struck out.

Mr. Tesha on his part, argued that the plaint did not disclose the date or time upon which the suit arose. The plaint was therefore defective. According to him the plaint did not disclose when the cause of action arose. In relation to the first cheque dated 27<sup>th</sup> January, 2006, six (6) years had lapsed. The second cheque which was issued on June 3, 2006 was in time. However as the claims were combined the cause of action could not be separated. The plaint was filed on February 17, 2012.

Mr. Byabato, on his part, joined hands with Mr. Tesha and informed the court that he totally supported Mr. Tesha's submissions.

We, on our part, after a careful examination of the record, and the submissions by counsel, are of the considered view that the main issues for consideration and decision are as follows:-

1. *Whether or not the plaint discloses when the cause of action arose.*
2. *Whether the suit is time barred.*

Upon a close scrutiny of the plaint it is evident that the plaint does not state when the cause of action arose. The plaint simply makes reference to the engineering contract entered into between the parties. It makes reference to the year 2005/2006. A copy of the relevant agreement is also not annexed to the plaint. Paragraph 5 of the plaint makes reference to the certificate of completion and approval of payment. The said certificate is not annexed to the plaint. The appellant makes reference to two cheques one dated January 27, 2006 and the other June 3, 2006. However the appellant claimed that the said cheques were not received. The plaintiff's cause of action does not seem to be well illustrated. The time the cause of action arose is quite vague and is simply 2005/2006. The suit was filed on 17<sup>th</sup>

February, 2012. Basing on the cheque dated January 27, 2006, it goes well beyond the six (6) years limitation period prescribed under the Limitation Act.

Under Order VII Rule (1)(e) of the Civil Procedure Code [Cap 33, RE 2002], (the CPC) a party is required to indicate in the plaint, the facts constituting cause of action and when it arose. In a case where the plaintiff's claim is for breach of contract for instance, the pleading should set out the terms of the contract, its date, the parties involved and the breach with all the necessary details. The particulars as to when the cause of action arose must be pleaded in the plaint. The significance of this is that from the date given the Court will know whether or not the suit is barred by the law of limitation, and the defendant will be under no illusion as to the date or time the events took place.

The appellant cannot seek refuge under section 21(1) of the Limitation Act because no evidence was presented that a suit was filed in the subordinate court and rejected. The same applies to section 26 (c) of the Limitation Act as no fraud or mistake has been demonstrated. It therefore goes without saying that the suit filed by the appellant was time barred.

Section 21(1) and 26 (c) of the Limitation Act are reproduced as under.



Section 21 (1) provides that:-

*"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another Civil Proceeding, whether in Court of first instance or in the Court of Appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it".*

Section 26 (c) provides as follows:-

*"the proceeding for relief from the consequences of a mistake the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence, have discovered it."*

Section 3 of the Limitation Act is to the effect that no action founded in contract shall be brought after the expiration of six (6) years from which the cause of action arose.

The effect of filing actions out of time stipulated by statute of limitation was succinctly stated in the case of **Ndaula Ronald v Haji Nadduli Abdul, Election Petition** No 20 of 2006 (CAU). It was stated that -:

*"It makes good logic to recognize that rules are made to be observed and must not be taken for granted. Clearly non compliance with both substantive law and procedural law is an illegality and cannot be over looked by mere technicalities."*

Considering the effect of section 3 of the Limitation Act, the Court of Appeal for Eastern Africa in **Iga v Makerere University** had this to say:-

*" A plaint which is barred by limitation is a plaint barred by Law."*

In **Dhanesvar Mehta V Manilal M shah** [1965] EA 321 it was stated that:-

*The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand and on the other hand to protect a defendant after he had lost evidence*

*for his defence from being disturbed after a long lapse of time. The effect of limitation enactment is to remove remedies irrespective of the merits of a particular case.*

We are of the view that the High Court Judge was justified in upholding the preliminary point of law.

In the result we find the appeal devoid of merit and it is accordingly dismissed with costs. It is so ordered.

DATED at DAR ES SALAAM this 7<sup>th</sup> day of March, 2017.

S. MJASIRI  
**JUSTICE OF APPEAL**

B.M. MMILLA  
**JUSTICE OF APPEAL**

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**