

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 331 OF 2019

1. NBC LIMITED1st APPELLANT
2. IMMMA ADVOCATE.....2nd APPELLANT

VERSUS

BRUNO VITUS SWALO RESPONDENT

**(Appeal from the judgment and decree of the High Court
of Tanzania at Mbeya)**

(Levira, J.)

dated the 11th day of December, 2018

in

Civil Case No. 14 of 2016

JUDGMENT OF THE COURT

12th February & 20th April, 2021

LILA, J.A:

The respondent, Bruno Vitus Swalo, was a successful party in a suit he instituted in the High Court (Mbeya District Registry) claiming for payment of TZS 200 Million being mesne profit and loss of income arising out of dispossession of a house on Plot No. 16 block "A" Sisimba area Mbeya (the suit house) and TZS 250 Million being general damages resulting from mental agony, embarrassment and frustration. The claim for mesne profit was found not established and rejected. He was awarded TZS

100 Million as general damages. The appellants were aggrieved. They are, in this appeal, challenging that award.

As the matters stood at the trial, the respondent turned out to be the highest bidder in an auction to sell the aforesaid house conducted by MEM Auction Mart on the authority of the second appellant who, in turn, also acted as an agent of the first appellant. That was on 6/7/2007. A transfer of ownership to his name was duly effected by the appellants. As it were, on 5/9/2007, the same house was sold to Meta P. Meta who happened to be a tenant in that house. The sale of the suit house was a result of one Michael Richard Ngende who had executed a mortgage deed in favour of the 1st appellant to secure a loan of TZS 20 Million failure to service it.

Sometimes later, ownership of the suit house was a subject of discussion in two cases which were instituted in the High Court Land Division (Dar es Salaam Registry). These cases were Land Case No. 246 of 2009 and 92 of 2008. They were subsequently consolidated and tried as one case, that is Consolidated Land Cases No. 246 of 2009 and 92 of 2008. Having noted that the suit touched on the suit house, the respondent applied and was joined as a party in the proceedings. Michael Richard

Ngende was unsuccessful as the respondent was declared the rightful owner of the house. Consequently, Meta P. Meta was ordered to give vacant possession of the house. With that assurance that he was the owner of the house, the respondent instituted Civil Case No. 14 of 2016 on 3/1/2016 against the appellants, the subject of this appeal. The respondent's claims were for:

- (i) Payment of TZS 200 Million being mesne profit and loss income from 6th July, 2007 to 1st July 2016, when the plaintiff was deprived of possession of his house on Plot No. 16 Block "A" Sisimba Area Mbeya.
- (ii) Payment of TZS 250 Million being general damages for mental argon, embarrassment and frustrations suffered by the plaintiff.

Its noteworthy that before the hearing of the main suit commenced, the appellant unsuccessfully raised a notice of preliminary objection on points of law that the suit was *res judicata*, time barred and lack of cause of action. The objection was overruled and the High Court proceeded with the hearing of the suit on merit. At the end, the respondent's claim for

mesne profit was found not proved on the ground that the house was occupied by Metta P. Metta and not by the 1st and 2nd appellants. The respondent was, however, comforted by the award of TZS 100 Million as general damages for the sufferings due to frustration, embarrassment, torture and loss of time and income.

Aggrieved with the High Court decision, the appellants lodged an appeal predicated on seven grounds which read thus:-

- 1. That the learned trial judge erred in law and fact by holding that the matter was not res judicata*
- 2. That the learned trial judge erred in law and fact by holding that the matter was not time barred.*
- 3. That the learned trial judge erred in law and fact by entertaining a land matter registered as a civil case.*
- 4. That the learned trial judge having held that the defendants (now Appellants) had neither been in possession nor enjoying proceeds of the immovable property in dispute and that it was Metta P Metta who was in full of Control of the property during the whole period, erred in law and fact by*

ordering the Appellants to pay general damages to the respondent.

5. In the absence of evidence of loss suffered, there was no justification for awarding the respondent TZS 100,000,000.00 as general damages

6. Even if there was justification, the amount awarded as general damages is exhibitory on the high side.

7. That the decree is vague and non-executable as is not clear who would pay the awarded general damages and whether jointly, severally or jointly and severally.

At the hearing of the appeal, the appellants were represented by Mr. John Laswai while the respondent had the services of Mr. Godwin Mussa Mwapongo, both learned counsel, respectively.

Both sides filed written submissions and made some few elaborations at the hearing before us. However, bearing in mind the course we have taken in resolving the appeal, we are of the view that reference to the parties' submissions in full will not serve any useful purpose. We shall, in

the circumstances, revert to their respective submissions relevant to the issue under our consideration only.

Upon our perusal of the record, the memorandum of appeal and both oral and written submissions thereof by both sides, it is plain that the respondent purchased the suit house in an auction conducted by MEM Auction Mart on the authority of the 2nd appellant. It was not disputed that the 2nd appellant was an agent of the 1st appellant. It therefore goes without saying that MEM acted on behalf of the 1st respondent too. From these uncontroverted facts, it stems out clearly that the respondent bought the disputed house from the 1st and 2nd appellants and there was no any outstanding claims. Looking at the nature of the transaction, it is evident that the parties entered into a legally recognized sale agreement. That contract was in accordance with section 10 of the Law of Contract Act, Cap. 345 R. E. 2002 (now Cap. 345 R. E. 2009) (the LCA) which provides, in part, that: -

"10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a

lawful object, and are not hereby expressly declared to be void."

The parties had the capacity to enter into a valid contract, for according to the pleadings, they are legal persons with capacity to sue or be sued. They were competent to contract in terms of section 11 of the LCA.

What other factors cement the nature of the relationship between the parties? We have also considered the issues framed to which both parties were in agreement. They are:

"1. Whether the defendants handed over the house on Plot No. 16 Block "A" Sisimba Mbeya to the plaintiff after public auction conducted on 6th July, 2007.

2. Whether the defendants intended to defraud the plaintiff when offered for sale to another person the house already sold to the plaintiff.

3. Whether the plaintiff is entitled to mesne profit from 6th July, 2007 to 1st July, 2016.

4. Whether the plaintiff is entitled to general damages.

5. To what reliefs the parties are entitled."

It is evident from the record therefore that the respondent's suit at the High Court was founded on the contract of sale. The sale agreement, we hasten to say, falls under the provisions of Section 3 (1) of the Sale of Goods Act, Cap. 214 which states:

"3 (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, and there may be a contract of sale between one party and another."

In terms of section 5 (1) of the Sale of Goods Act, Cap. 214 R. E. 2002 the parties are at liberty to reduce the agreement into writing or not. The contract may therefore be written or unwritten. That provision states:

"5 (1) Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties."

In the present case, it was not disputed that, upon payment of the bid amount, the appellants went further and transferred ownership of the

suit house into the respondent's name. Each party performed part of its obligation under the agreement. The transaction involving the parties to this suit was therefore a contract of sale of the suit house.

The above laid foundation is with a purpose. The objective is to address the issue whether or not the suit instituted by the respondent against the appellants was time barred as complained by the appellant in ground two (2) of appeal. 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. (see **John Barnabas vs Hadija Shomari**, Civil Appeal No. 195 of 2013 and **Barclays Bank (T) LTD vs Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported). In **John Barnabas vs Hadija Shomari**, (supra) the Court pronounced itself thus: -

*"Consequently, in line with what we have endeavoured to traverse above, we hold that **the Ward Tribunal of Kinyangiri, lacked jurisdiction to entertain the land dispute which was lodged by the respondent because it was time barred.** As a result, the proceedings*

before the Ward Tribunal and those subsequent thereto, were nullity and we nullify them.”
(Emphasis added)

[See also **Mayira B. Mayira and Four Others vs Kapunga Rice Project**, Civil appeal No. 359 of 2019 and **The D.P.P. vs Bernard Mpangala and Two Others**, Criminal Appeal No. 28 of 2001 (both unreported).

In ground two (2) of appeal, the learned trial judge is being faulted for not holding that the matter was time barred. As laid bare above, the appellants fronted the objection before the matter was heard on merit and was overruled. As if that was not enough, the issue of limitation came up again in the appellants’ final submissions whereupon the learned judge considered it again and maintained her earlier stance that it was not time barred. With due respect, it was not right for the learned judge to entertain issues which she had already determined in a ruling overruling the preliminary objection. She was therefore *functus officio*. Be it as it may, we shall leave the matter at that without more. Fortunately, both counsel were agreed, and rightly so in our view, that it was improper to raise that issue twice before the same court. The right course to be taken by the

appellants if they were aggrieved by the ruling of the High Court overruling the preliminary objection was to appeal. We leave the issue at that with a caution to the learned counsel for the appellants that such practice should be avoided.

In considering and overruling the objection that the suit was time barred the learned judge, in her judgment, stated that: -

"Another issue is whether or not the matter at hand is time barred. In his submission the learned advocate for the defendant insisted that the plaintiff and the defendants entered into a contract for sale of house on 6th July, 2007 but, the suit was filed on 23^d September, 2016. Thus the learned advocate was adamant that the suit offends the provisions of Part 1, item 7 of the Schedule to the Limitation act, Cap. 89 which sets as requirement that the suit which are founded on contract should be filed within six (6) years. I suppose the learned advocate misdirected herself due to the facts apparent on the record. The parties are no longer fighting about ownership of the suit premise since the same was finally and conclusively determined by this court at Dar es Salaam vide Consolidated Land Cases No.

2009 and No. 92 of 2008. Rather the suit is tortious claim rooted from the alleged fraudulent acts of the defendants. Be as it may, the plaintiff could by no way sue for mesne profit and loss of income before being declared as a sole owner of the suit land by competent authority. In the same lane, the ground can nowhere stand.”

It is plain that the learned judge was not ready to accept that the suit was founded on contract. She was inclined that it was founded on tort. We have, elaborated above why the suit was founded on contract. We wish to emphasize that settled law is to the effect that parties are bound by their pleadings. There is a plethora of authorities to that effect including **Scan Tan Tour Ltd vs The Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported), **James Funke Gwagilo vs Attorney General** [2004] TLR 161, **Lawrence S Surumbu Tara vs The Hon. Attorney General and 2 Others**, Civil appeal No. 56 of 2012, **Charles Richard Kombe t/a Building vs Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (both unreported). And, in the recent case of **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported), the Court cited with approval a passage in an article by Sir Jack I. H. Jacob Titled “The

Present Importance of Pleadings,” published in Current Legal problems (1960) at page 174 that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

The import of the passage is in the same footing with the expression found in Morghan's Law of Pleading in India, 10th Edition at page 25 that: -

***"The Court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim stated in the plaint."* (Emphasis added)**

Guided by the above solid principle, we shall consider the respondent's pleading, that is the plaint, in our attempt to determine the nature of the claims the respondent presented to the High Court for adjudication and as to the time when the cause of action accrued.

Our starting point is paragraphs 5, 6, 7, 8, 9 and 10 of the plaint in which the respondent (then plaintiff) averred as under: -

*"5. That on 6th July, 2007, the 1st and 2nd defendant through the service of MEM Auction Mart by way of Public Auction sold a house on **Plot No. 16 Block "A" Sisimba area Mbeya** to the plaintiff **Bid Note and deposit Slip are hereto attached so as to form part of this Plaint and are marked as annexure "B1" and "B2" respectively.***

6. That the defendants transferred the property to the names of the plaintiff's and handed over all the ownership documents and subsequently the plaintiff became the refastened owner copies of Transfer and Title Deed are herewith attached so as to form

part of this plaint and are marked annexure "B3" and "B4" respectively.

7. That on 5th September, 2007, the 2nd Defendant with intent to defraud the plaintiff and without Plaintiff's knowledge, offered for sale Plot No. 16 Block "A" Sisimba Area Mbeya to another person called Metta P. Metta on a private contract, despite the fact that the said property had been already sold to the Plaintiff by way of Public auction. Copy of letter from the 2nd Defendant and letter of Metta P. Metta Advocate are hereto attached and marked annexure J1 and J2 respectively forming part of this Plaint.

8. That as a result of what is stated in paragraph 7 above the said Metta p. Metta started to demand the documents and took possession of the said house and proceeded to sue the Defendants.

9. That on 17th July, 2008 the defendants appeared before, Justice Nchimbi (as he then was) in land Case No. 92 of 2008 between the said Metta P. Metta as Plaintiff and 1st and 2nd Defendants as defendants, they did not inform the Honourable Judge that the property belongs to the Plaintiff instead they conceded to the prayer of status quo

ante, and did not bother to inform the Plaintiff about the case until on 27th January, 2009 when the Plaintiff after discovering that the order has been issued by High Court applied to be joined. The order of the Court is hereto attached and forms part of this Plaint and is marked as annexure "B5".

10. That as a result of the sale of the property to the said Metta P. Metta the plaintiff was denied possession of his house until 1st July, 2016 when the said Metta P. Metta was removed by the court and put possession of the property in the hands of the Plaintiff. The eviction order is hereto attached so as to form part of plaint and is marked as annexure "B6"."

Read closely, in the foregoing paragraphs the respondent's (then plaintiff) claim was that the appellants (the defendants) were in breach of the sale agreement between them and him when they sold the house which they had already sold it to him to another person (Metta P. Metta). This, again, makes it explicitly clear and reaffirms that the suit was founded on contract.

As to when the cause of action arose, paragraph 12 of the plaint speaks it loud: -

"12. That the cause of action arose at Mbeya when the defendant failed to give possession to the Plaintiff; after public auction and continued every day until 1st July, 2016 when the plaintiff gained possession as indicated in the notice dated 19th August, 2016 annexed hereto as annexure "B7" forming part of this plaint.
“(Emphasis added)

This was the respondent's own averment in the plaint to which he is bound. Engaging in a search of another date when the cause of action arose would be improper as it will amount to putting such words into the respondent's mouth. He is the one better placed to know it. We are similarly bound by his words. More so, we are, on the authorities above, not permitted to make our own case.

Guided by the principle that parties are bound by their own pleadings and on close examination of the respondent's averments in paragraphs 5 and 12 of the plaint, we are convinced that the respondent was denied possession of the suit house on 6th July, 2007 and the cause of action therefore arose then.

Having been satisfied that the suit was founded on contract and the cause of action arose on 6/7/2007, the question lingering and calling for our determination is whether or not the learned judge was right to hold that the suit was not time barred?

Our resort is to the provisions of item 7 of Part 1 of the Schedule to the Limitation Act, Cap. 89 of Revised Edition 2002 (now R. E. 2019) (the LLA) which sets a time limit on a suit founded on contract to be six (6) years from the date the cause of action accrued. Reckoning from 6/7/2007 when the cause of action arose, a period of six years lapsed on 5/7/2013. That means the suit was late by over three years. The trial High Court, on the authorities above cited, lacked jurisdiction to determine the suit. And, with respect, had the learned judge properly directed her mind she would have realized that fact and in terms of section 3(1) of the LLA would have sustained the preliminary objection in that respect and dismissed the suit. We therefore find ground two (2) of appeal meritorious and allow it.

With the finding that the High Court lacked jurisdiction to entertain the suit, we think determination of the rest of the grounds of appeal will

not serve any useful purpose other than being a mere academic exercise.
We shall not therefore delve onto them.

For the foregoing reason, we allow the appeal and since the suit was time barred, we hereby quash the proceedings and the judgment of the High Court and also set aside the consequential orders for being a nullity. The appellants shall have costs in both this Court and in the High Court.

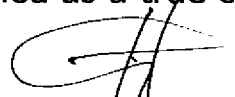
DATED at DAR ES SALAAM this day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered on this 20th day April, 2021, in the presence of Ms. Rashida Jamaldin Hussein, learned counsel appeared for the appellants and Mr. Godwin Mussa Mwapongo, learned counsel appeared for the Respondent. is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL

