

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

**(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 119 OF 2021**

**MOTO MATIKO MABANGA.....APPELLANT**

**VERSUS**

- |   |   |                         |
|---|---|-------------------------|
| <ul style="list-style-type: none"><li><b>1. OPHIR ENERGY PLC</b></li><li><b>2. OPHIR SERVICES PTY LTD</b></li><li><b>3. B.G INTERNATIONAL LIMITED</b></li><li><b>4. B.G TANZANIA LIMITED</b></li><li><b>5. PAVILLION ENERGY P.T.Y</b></li><li><b>6. ROYAL DUTCH SHELL PLC</b></li><li><b>7. MEDCO ENERGY GLOBAL PTE LIMITED</b></li></ul> | } | <b>.....RESPONDENTS</b> |
|---|---|-------------------------|

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

**(Fikirini, J.)**

**dated the 12<sup>th</sup> day of February, 2021  
in  
Commercial Case No. 43 of 2019**  
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**JUDGMENT OF THE COURT**

18<sup>th</sup> & 22<sup>nd</sup> October, 2021

**KEREFU, J.A.:**

This appeal arises from the ruling of the High Court of Tanzania (Commercial Division), at Dar es Salaam in Commercial Case No. 43 of 2019 dated 11<sup>th</sup> February, 2021 that sustained the respondents' preliminary objection that the appellant's suit was time barred. In the said suit, the appellant sued the respondents jointly and prayed for a declaratory order

that the purported acquisition of the interests by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents from the 1<sup>st</sup> and 2<sup>nd</sup> respondents in gas blocks 1, 3 and 4 situated offshore Southern Coast of Tanzania adjacent to Mtwara Region was wrongful, illegal and contrary to the law and prejudicial to the appellant's 15% entitlements in the said blocks. That, the respondents are jointly and severally liable to compensate the appellant the 15% of the value of the blocks. The appellant further prayed for an order of permanent injunction restraining the respondents, their agents and associates present and future from exploiting, investing or engaging in production of gases and oils unless the appellant is paid all its due. The appellant also prayed for general damages and costs of the case.

The brief background of the suit as obtained from the record of appeal shows that, sometimes in 2004 the appellant was requested by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to work and acquire gas blocks in Tanzania. Eventually, the 1<sup>st</sup> and 2<sup>nd</sup> respondents acquired gas blocks 1, 3 and 4 situated offshore Southern Coast of Tanzania. The appellant alleged that, in consideration of his good work, the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into three consultancy agreements with him where the 1<sup>st</sup> and 2<sup>nd</sup> respondents ceded to the appellant 15% of interest in the three gas blocks. The said three consultancy agreements were however terminated through a deed of

termination signed by all parties on 19<sup>th</sup> March, 2010. The appellant alleged that having acquired the three blocks, the 1<sup>st</sup> and 2<sup>nd</sup> respondents conspired with other respondents herein to sideline him in order to enter into lucrative farming out agreement. The appellant claimed that, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents fraudulently, forcefully and without proper evaluation of the appellant's interests in the blocks, ejected him from the said blocks with very little compensation compared to the actual value of the blocks. The appellant alleged further that the respondents have refused to settle the matter amicably despite appellant's requests and demands. As such, the appellant decided to institute the suit against the respondents as indicated above.

In their written statements of defence, the respondents raised several points of preliminary objection challenging the competency of the appellant's suit. One among the points of preliminary objection raised is found at pages 249, 345 and 351 of the record of appeal is to the effect that: -

*"...the suit, arising out of and relating to consultancy agreements entered into in May, 2006 and a termination agreement entered into in March, 2010, is incompetent for having been filed out of time in violation of section 3 (1) of the LLA."*

It was the determination of this point which is the subject matter of this appeal. That, having heard the parties on the said point, the trial court, sustained the preliminary objection holding that the suit founded on contract was time barred as it was instituted beyond six (6) years contrary to item 7 of Part 1 of the First Schedule to the Law of Limitation Act [Cap 89 R.E 2019] (the LLA). As such, the suit was dismissed with costs, hence the current appeal. In the memorandum of appeal, the appellant has preferred the following seven (7) grounds: -

- (1) *That, the honourable trial Judge erred in law and facts by failing to hold that the preliminary objections raised by the respondents were not pure matters of law thus disqualified from being preliminary objection determinable without ascertainment of facts;*
- (2) *That, the learned trial Judge erred in law and facts by considering the preliminary objections on limitation raised by the respondents cumulatively and together while the causes of actions against each respondents arose separately and on different dates, months and years;*
- (3) *That, the learned trial Judge erred in law and facts by holding that the cause of action was one and the same for all respondents based on the consultancy agreements that was terminated on 19<sup>th</sup> March, 2010;*

- (4) *That, the learned trial Judge erred in law and facts by holding that the cause of action against all respondents arose on 19<sup>th</sup> March, 2010;*
- (5) *That, the learned trial Judge erred in law and fact by holding that the suit as a whole was based on contract;*
- (6) *That, the learned trial Judge erred in law and facts by considering unascertained facts (matters of evidence) and thereafter holding that the suit was time barred; and*
- (7) *That, the learned trial Judge erred in law and facts by holding that the suit was time barred against all respondents while it was well within time.*

The above grounds can conveniently be condensed into three issues, that, **first**, whether the point of preliminary objection on time limitation raised by the respondents was a pure point of law; **second**, whether the appellant's claim against all the respondents was based on contract and **lastly**, whether the entire suit was time barred against all the respondents.

At the hearing of the appeal, Mr. Gabriel Simon Mnyele, learned counsel appeared for the appellant. The 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> respondents had the services of Capt. Audax Kijana Kameja, learned counsel. The 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents were represented by Mr. Gerald Shita Nangi, learned counsel and Mr. Gasper Nyika, learned counsel appeared for the 5<sup>th</sup> respondent. It is noteworthy that counsel for the parties had earlier on filed

their written submissions as required by Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) which they sought to adopt to form part of their oral submissions.

Upon taking the stage, Mr. Mnyele commenced his submission by indicating that he would argue the following grounds jointly, **one**, the first and the sixth grounds; **two**, the second and the fourth grounds; **three**, the third and the fifth grounds and **lastly**, the seventh ground which was argued separately. The said grounds are based on the three issues indicated above which will be the basis for the determination of this appeal.

Starting with the first issue, Mr. Mnyele faulted the learned trial Judge by considering the point of preliminary objection raised by the respondents on the time limitation as a pure point of law. It was his argument that the said point was not a pure point of law, as it required ascertainment of facts and evidence to establish when the causes of action in each of the respondents accrued. Although, he admitted that the cause of action for the first and the second respondents was based on the consultancy agreements which were terminated on 19<sup>th</sup> March, 2010, he strongly argued that causes of action for other respondents arose on different dates when each respective respondent become involved and

acquired interests on the said blocks. He insisted that to establish as to when exactly the causes of action arose for each respondent, it needed ascertainment of facts and evidence. He thus faulted the trial Judge for considering only paragraphs 8 and 9 of the appellant's amended plaint and concluded that the suit was time barred. It was the submission of Mr. Mnyele that the issue of time limitation in this case was supposed to be framed as one of the issues to be determined during the trial and not by way of preliminary objection. To support his proposition, he referred us to the cases of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696; **CRDB (1996) Ltd v. Boniface Chimya** [2003] TLR 413; **Jeraj Shariff & Co. v. Chotai Fancy Stores** [1960] E.A 374; **Ali Shabani and 48 Others v. Tanzania National Roads Agency and The Attorney General**, Civil Appeal No. 261 of 2020 and **Shose Sinare v. Stanbic Bank Tanzania Limited and Another**, Civil Appeal No. 89 of 2020 (both unreported).

As regards the second issue, Mr. Mnyele argued that it was only the 2<sup>nd</sup> respondent who was a party to the said consultancy agreements, the other respondents were not parties thereto. He referred us to the doctrine of privity of contract and argued that, it is trite law that a person who is not a party to the contract cannot sue on the same. He thus faulted the

learned trial Judge to conclude that the suit was found on contract against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents who are not parties to the consultancy agreements. To support his proposition, he cited the cases of **Tarloak Singh Nayar & Another v. Sterling General Insurance Company Ltd** [1966] 1 EA 144 and **Austack Alphonse Mushi v. Bank of Africa Tanzania Ltd and Another**, Civil Appeal No. 373 of 2020 (unreported) and argued that, since the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents were not parties to the said agreements, they could not raise objection on time limitation, as there was no cause of action against them in respect of those agreements.

On the last issue, Mr. Mnyele faulted the trial Judge for concluding that the suit falls under item 7 of Part 1 of the First Schedule to the LLA as there were divergent views on that aspect. According to him, the suit against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents falls under item 24 of Part 1 of the First Schedule to the LLA as it was not founded on any agreements but on the subsequent transactions as defined by the prayers and reliefs sought. Based on his submission, Mr. Mnyele urged us to allow the appeal with costs, set aside the decision of the High Court and remit



the case file to the High Court for the case to be determined on merit before a different Judge.

In response to the first and second issues, Capt. Kameja argued that the test for a preliminary objection was already set in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra). He contended that according to the facts pleaded by the appellant in the amended plaint there was no doubt that the suit was founded on the consultancy agreements entered between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 1<sup>st</sup> May, 2006 where the appellant was allotted 15% interest on the three blocks. He argued further that the said agreements were terminated on 19<sup>th</sup> March, 2010, where parties disposed of their interests on the blocks including the 15% interest which belonged to the appellant. He argued that, that was the time when the appellant claimed that he was paid inadequate compensation. It was the argument of Capt. Kameja that the trial Judge was correct to find out that the appellant's cause of action accrued on 19<sup>th</sup> March, 2010 when the said contracts were terminated. That, since the appellant's suit was instituted on 13<sup>th</sup> May, 2019 more than three years out of time, the same was time barred and it needed no further evidence or facts to be ascertained as claimed by Mr. Mnyele.

Capt. Kameja further challenged the submission by Mr. Mnyele that there were different dates for causes of action for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents depending on the specific date when they acquired interests on the blocks. It was the strong argument by Capt. Kameja that, in the circumstances of the case, there are no other causes of action that the appellant could pursue his claim against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents independently without referring to the 15% compensation which is founded on the consultancy agreements. He clarified that the facts pleaded by the appellant in the amended plaint, which were considered by the trial Judge, indicated that: -

- (1) *In 2004, the appellant worked for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to acquire gas blocks in Tanzania;*
- (2) *In consideration of the appellant's work, the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into three consultancy agreements which were terminated on 19<sup>th</sup> March, 2010;*
- (3) *Subsequently, all the 1<sup>st</sup> and 2<sup>nd</sup> respondents' interest in the blocks (including the appellant's 15% Interest) was acquired by the 3<sup>rd</sup> to 7<sup>th</sup> respondents; and*
- (4) *That, it was on the basis of the alleged unlawful termination of the said agreements that the appellant claims compensation.*

He thus insisted that the trial Judge properly considered the above pleadings together with the respondents' responses and correctly found that they were all related to the consultancy agreements which were terminated on 19<sup>th</sup> March, 2010. That, if it was not for these consultancy agreements and their termination, whether lawfully or otherwise, the appellant would have no basis for any claim against any of the respondents.

On the last issue, Capt. Kameja argued that it was correct for the trial Judge to find that the suit falls under item 7 of Part 1 of the First Schedule to the LLA and that it was time barred, because the basis of the appellant's claims is founded on the contract and not otherwise. On that regard, Capt. Kameja urged us to dismiss the entire appeal with costs for lack of merit.

On their parts, Mr. Nangi and Mr. Nyika both associated themselves with the submissions made by Capt. Kameja. In addition, Mr. Nangi argued that, even if the Court decides to go along with the argument by Mr. Mnyele that the suit falls under item 24 of Part 1 of the First Schedule to the LLA, still the suit will be time barred as far as the cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> respondents is concerned. Generally, both counsel urged us to dismiss the appeal with costs for lack of merit.

In rejoinder, Mr. Mnyele challenged the submissions of his learned friends that they have not responded to his submission on the doctrine of privity of contract. He also challenged the submission of Capt. Kameja that the parties to the consultancy agreements were the appellant and the 1<sup>st</sup> and the 2<sup>nd</sup> respondents. He strongly argued that parties to the said agreements were only the appellant and the 2<sup>nd</sup> respondent. He thus emphasized that, since the rest of the respondents were not parties to the said agreements, the cause of action against the 2<sup>nd</sup> respondent could not have covered all of them. He thus reiterated his previous prayers.

Having carefully considered the arguments by the counsel for the parties on the grounds of appeal, we have no doubt that the main issue for our determination is whether the point of preliminary objection raised by the respondents and determined by the learned trial Judge was a pure point of law. We think this is a central issue because, the question of time limitation touches on the jurisdiction of the court to determine a matter before it. In the famous case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra) cited to us by the counsel for the parties, a test for a preliminary objection on a pure point of law was defined at page 700 that:

***"...a preliminary objection consists of a point of law which has been pleaded, or which arises by***

*clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” Emphasis added.*

The above laid down principle on what is a preliminary objection has been followed by courts in Tanzania for many years and there is a plethora of authorities to that effect and some of them have been cited by the counsel for the parties. We however wish to add on the list the case of **Swilla Secondary School v. Japhet Petro**, Civil Appeal No. 362 of 2019 (unreported) where we reiterated that: -

*“The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. **Courts or tribunals are enjoined not to entertain any matter which is time barred and in any event they did so, the Court unsparingly declare the proceedings and the consequential orders a nullity.**” [Emphasis added].*

Going by the above authorities, it is clear that an objection on account of time limit is one of the preliminary objections which courts have held to be based on pure point of law which touches on the jurisdiction of the court and whose determination does not require ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the plaints and its annexures without any further facts or evidence to be ascertained in determining as to whether the suit is time barred. In the case of **Ali Shabani and 48 Others** (supra) when we were faced with an akin situation, at page 8 of our Judgement, we stated that: -

*"It is clear that an objection as it were on account of time bar is one of the preliminary objection 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."*

Similarly, in the case at hand, having perused the pleadings and specifically the appellant's amended plaint and its annexures, where it is clearly indicated that the consultancy agreements subject to the appellant's

claim were entered on 1<sup>st</sup> May, 2006 and terminated on 19<sup>th</sup> March, 2010 and the appellant's suit was lodged on 13<sup>th</sup> May, 2019 after lapse of almost nine (9) years contrary to item 7 of the First Schedule to the LLA, we are satisfied that the learned trial Judge correctly held that the preliminary objection on time limitation raised by the respondents was based on a pure point of law. She was therefore justified to dismiss the appellant's suit for being time barred. As such, we answer the first issue in the affirmative.

As for the second issue on a claim by the appellant that the suit was not based on contract, we have carefully perused the appellant's claims against the respondents under paragraphs 8 and 9 of the amended plaint found at pages 97 to 98 of the record of appeal together with its annexures and we are in agreement with the submission made by the learned counsel for the respondents that, the learned trial Judge rightly held that the appellant's claim against the respondents was founded on contract. We shall let the said paragraphs speak for themselves: -

*"8. Sometimes in 2004, the plaintiff (who is now the appellant) was requested by the 1<sup>st</sup> and 2<sup>nd</sup> defendants (the current 1<sup>st</sup> and 2<sup>nd</sup> respondents) to work and acquire gas blocks in Tanzania. As a result, thereof the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired gas blocks 1, 3 and 4*

*defined and signed PSA agreement with the government of the United Republic of Tanzania... Pursuant thereto, in consideration of the good work done by the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants ceded to the plaintiff's 5% interest of each block upon production thereof thus making a total of 15% interest. Copies of 3 consultancy agreements are annexed herewith and are marked MOTO 1, MOTO 2 and MOTO 3, respectively and form part of this amended plaint.*

*9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants having procured the suit blocks conspired with the 3<sup>rd</sup> and 4<sup>th</sup> defendants to remove the plaintiff from the companies in order to enter a lucrative farming out agreement. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and together fraudulently and forceful and without proper valuation of the plaintiff's interest in the blocks, ejected the plaintiff from the said blocks with very little compensation compared to the value of blocks of which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not disclose to the plaintiff...."*

Our reading of the above paragraphs means nothing less than demonstrating that the appellant's right to claim additional compensation from the initial 15% compensation started with the three consultancies entered between the appellant and the 2<sup>nd</sup> respondent on 1<sup>st</sup> May, 2006



and which were terminated on 19<sup>th</sup> March, 2010. As correctly argued by Capt. Kameja, if it was not for the consultancy agreements and their termination, the appellant would have no basis for any claim against any of the respondents on the additional compensation. With profound respect we find the submission of Mr. Mnyele on this aspect to be misconceived as it is not supported by the record. We equally answer the second issue in the affirmative.

The last issue, should not detain us, having been satisfied that the appellant's claim was based on the consultancy agreements, it goes without saying that the learned trial Judge was right to conclude that the suit was essentially founded on contract was time barred as it was instituted beyond six (6) years contrary to item 7 Part 1 to the First Schedule of the LLA. In the event, we also answer the last issue in the affirmative.

In totality, we are satisfied that the learned trial Judge properly determined the point of preliminary objection raised by the respondents and reached to an appropriate conclusion hence there is no justification to interfere with her decision.

In the circumstances, and for the foregoing reasons, we find the entire appeal to be devoid of merit, it is hereby dismissed with costs.

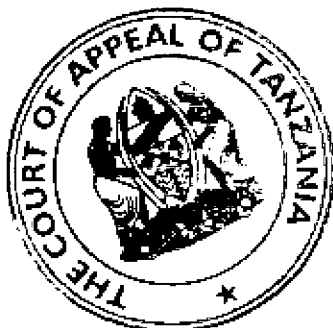
**DATED at DODOMA** this 21<sup>st</sup> day of October, 2021.

J.C.M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 22<sup>nd</sup> day of October 2021, in the presence of the Mr. Leonard M. Haule, learned counsel holding brief for Mr. Gabriel Simon Mnyele, learned counsel for the Appellant, Mr. Malimi Juma, learned counsel holding brief for Capt. Audax Kijana Kameja, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents, Mr. Gerald Shita Nangi, learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents who also holds brief for Mr. Gasper Nyika, learned counsel for the 5<sup>th</sup> Respondent, is hereby certified as a true copy of the original.



  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**