

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: NDIKA, J.A., SEHEL, J.A., And, KAIRO, J.A.)**

**CIVIL APPEAL NO. 75 OF 2019**

**STANBIC BANK TANZANIA LIMITED ..... APPELLANT**

**VERSUS**

**M/S TRADEXIM COMPANY LIMITED ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,  
Commercial Division at Dar Es Salaam)**

**(Mruma, J.)**

**dated the 30 day of August, 2016**

**in**

**Commercial Case No. 30 of 2017**

**.....**

**JUDGMENT OF THE COURT**

4<sup>th</sup> & 30<sup>th</sup> November, 2022

**KAIRO, J.A.:**

The appellant in this appeal is challenging the decision of the High Court of Tanzania (Commercial Division) sitting at Dar es Salaam delivered in favour of the respondent in Commercial Case No. 30 of 2017. In that decision, the appellant was ordered to pay the respondent TZS. 475,000,000.00 allegedly withdrawn unlawfully from the respondent's account together with interest thereon.

It all started when the respondent filed a suit against the appellant accusing her of negligence and breach of contractual obligation on the part of the appellant. It was the respondent's averment that the appellant allowed, accepted and endorsed two individuals namely; Silla Munanka and Anderson Mudimi Muhogolo to open an account No. 0117897801 on 17<sup>th</sup> June, 2005 and operate the same without observing the appellant's account opening and operating procedures including getting the authority to do so from the Board of Directors of the respondent company.

It is the respondent's further averments that, the two persons who were previously allotted some shares of the respondent company, secretly opened and operated the account up to 6<sup>th</sup> February, 2011 when Mr. Muhogolo passed away and the respondent's Principal Officer, one Mr. Narmit Gordhandas Davda (PW1) came from the UK for funeral. According to him, that is when the scam came to light after PW1 came across a cheque book of the bank account No. 0117897801 which was opened and being operated without the knowledge and authorization of the majority shareholders and directors including PW1. It was on those grounds that the respondent in his plaint contended that, the appellant bank is in breach of express and implied obligations of the bank to its customers by failing to authenticate the authority for opening the

account before it was opened and by failure to inquire from the respondent company on the genuineness of the persons who opened the account.

It is further on record that after discovering of the said scam, the respondent through PW1 sought explanation from the appellant and tried to settle the dispute amicably through correspondences but the effort did not bear fruits as the appellant denied liability. The respondent further sought administrative intervention from the Central Bank (BOT) but again the effort proved futile. Finally, the Commercial Case No. 30 of 2017 was instituted on 11<sup>th</sup> March 2016 as intimated above.

Apart from denying liability through her written statement of defence by stressing that the appellant complied with the laid down procedures in opening the account at issue, the appellant raised a preliminary point of objection to the effect that the suit was time barred. However, the objection was overruled.

After hearing both parties to the dispute, the trial court found the appellant negligent for failure to adhere to account opening procedures and condemned her to pay the withdrawn amount with interest and costs as earlier intimated. Aggrieved, the appellant approached the Court armed with four grounds of appeal as follows:

- 1) That the trial court erred in law for failure to hold that the suit was time barred;*
- 2) That the trial court erred in law and fact for failure to consider the corporate governance and indoor management principles, applicable to corporate bodies;*
- 3) That, the trial court erred in law and fact for failure to hold that the respondent had failed to prove the source of payments made into the respondent bank account resulting into the respondent's failure to prove special damages; and*
- 4) That, the trial court erred in law and fact for failure to take cognizance of the appellant's evidence over normal practise of the bank in opening customer's bank account.*

At the hearing of the appeal, the appellant was represented by Mr. Zacharia Daudi, learned counsel who prayed to adopt his written submission in support of the appeal as part of his oral submission. On the adversary side, Mr. Said Adam Nyawambura, learned counsel represented the respondent.

On the first ground, the appellant faults the trial court for failing to hold that the suit was time barred. Elaborating, Mr. Daudi submitted that, Item 6 of the First Schedule to the Law of Limitation [Act Cap.89 R.E. 2019] (the Act) provides for the period of limitation for the suit found on tort to be 3 years. He went on to submit that Section 4 of the Act dictates for the commencement of the cause of action and that the right to sue commences from the date on which the right of action of

such proceedings accrues. It was Mr. Daudi's submission that the cause of action in respect of the suit at hand commenced on 31<sup>st</sup> March, 2011 when the respondent through PW1 became aware that there was a bank account opened with the appellant and wrote a letter to her, enquiring more information about it. He contended that, counting from 31<sup>st</sup> March 2011 when the cause of action arose to 11<sup>th</sup> March, 2016 when the respondent instituted the suit it was five years down the lane, thus, out of time of three years prescribed by law for tortious claims. As a consequence, Mr. Daudi submitted that under section 3 (1) of the Act, every proceeding described under the First Schedule which is instituted after the period of limitation is time barred and shall be dismissed. To buttress his arguments, he cited the cases of **Consolidated Holding Corporation vs. Rajani Industries Limited and Another**, Civil Appeal No.3 of 2003 and **Tanzania Revenue Authority vs. Dawson Ishengoma**, Civil Appeal No.126 of 2011 (both unreported).

In conclusion, the appellant implored the Court to find that the suit was filed out of time, as such it ought to have been dismissed by the trial court instead of entertaining it. In that regard, he prayed the Court to find the first ground with merit and allow this appeal.

In reply, Mr. Nyawambura prayed to adopt the respondent's written submissions to form part of his oral submission and made a brief clarification on it.

In his submission, the learned counsel contended that, the argument to the effect that the suit was time barred was raised as a point of objection at the trial court but it was overruled for want of merit. He thus implored the Court to take a similar position as regards this ground in this appeal. He however did not dispute the appellant's contention that the suit at hand is founded on tort and that the time limit for filing such a claim is three (3) years. He did not dispute either that the cause of action in this suit and the right to sue commenced on 31<sup>st</sup> March, 2011 when the respondent through PW1 became aware of the presence of the bank account opened with the appellant and wrote an enquiry concerning the account at issue. He also joined hands with the appellant, on the legal stance to the effect that, where a suit is instituted beyond limitation time prescribed by law, the same shall suffer dismissal as a consequence under section 3 (1) of the Act. However, according to Mr. Nyawambura, the suit at hand is not an ordinary claim for tort which ought to have been filed within three (3) years. That, though it was filed five years later, it would not have been correct to dismiss it instantly due to its peculiarity. He added that, the cited cases

by the appellant are therefore distinguishable and not applicable in the circumstances of this appeal.

Elaborating, Mr. Nyawambura submitted that the point of departure of the cited cases by the appellant with the case at hand is three folds and invited the Court to consider them as grounds of exemption of time limitation which has the effect of rendering time bar without consequence as follows:

**First;** administrative measures pursued by the appellant to remedy the situation. It was his argument that the respondent started by engaging the appellant through correspondence geared to have an out of court settlement, to no avail. He then wrote to the Central Bank (BOT) being the Regulator and overseer of the banking industry in the country for interference, but she was advised to seek legal redress in the court of law and he immediately instituted the suit on 31<sup>st</sup> March, 2016. He went on to argue that time started to tick against the respondent sometimes after 10<sup>th</sup> March, 2015 when the BOT advised her to take legal action. To substantiate his arguments, he cited the case of **Laemthong Rice company Ltd vs. Principal Secretary, Ministry of Defence** [2022] T.L.R. 389.

**Second;** that, PW1 who is the shareholder and founder of the respondent company was outside the country which situation, Mr.

Nyawambura argued, to amount to disability under section 15 of the Act, thus allowed for the exclusion of time for the purpose of computing limitation time. He added that PW1 being a British National with place of abode in the UK was not within the jurisdiction of the Court, hence was unable to institute the suit. According to him, section 20 of the Act which provides for the exclusion of time of absence when the defendant is out of the court's jurisdiction covers the respondent as well.

**Third;** the presence of continuing breach of contract or a continuing wrong independent of contract. He clarified that, when the scam was discovered, there was TZS. 4,000,000.00 in the account. He argued that to date the account has not been closed and the respondent cannot withdraw the money. Yet, the amount is among the monies that the appellant utilises in his usual banking business. It is his contention that the continued keeping of the respondent's money amounts to continuing breach covered under section 7 of the Act. He concluded that the above three grounds rendered the time limitation arguments without consequence, as such the trial court was correct to find that the suit was not time barred. He concluded by praying the Court to find that this ground is without merit and dismiss it with costs.

In rejoinder, Mr. Daudi reiterated his earlier submissions praying the Court to rule out that it was an error on the part of the trial court



not to find that the suit was filed out of time. He prayed the Court to reverse the trial court's decision with costs.

Having gone through the record of appeal and hearing the rival submissions by learned counsel for both parties, the issue for our determination is whether the suit was lodged within time as held by the trial court.

It is common ground as per plaint that the suit at hand is founded on the tort of negligence which under item 6 of the First Schedule to the Act instructs that the period of limitation within which to lodge such claims is three years. The parties are further at one that the cause of action accrued on 31<sup>st</sup> March 2011 when the respondent through PW1 wrote a letter to the appellant complaining about the opening of the account at issue allegedly without directors' authority. This is the date when the right to sue commenced. The record also reveals that the suit at hand was instituted on 11<sup>th</sup> March, 2016 that is five years later. It is on this reason that, Mr. Daudi faulted the trial court for failing to hold that the suit at hand was time barred.

On the other hand, Mr. Nyawambura fronted three scenarios which according to him, the claim of time limit finds itself without consequence in this suit due to exclusion of the same. He argued that basing on the said legal exclusions, the trial court was correct not to

dismiss the suit as provided in section 3 (1) of the Act for being filed out of time.

Before embarking on the analysis of the said scenarios or grounds for exclusion of time limitation as per Mr. Nyawambura's argument, we wish from the outset to state that, in her plaint, the respondent did not plead any grounds upon which she could have claimed exemption from limitation. The omission contravenes Order V11 Rule 6 of the Civil Procedure Code Cap 33 R.E.2019 (the CPC) which reads thus:

*"where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed"*

Nonetheless, for the sake of argument, we intend to examine the claimed grounds for exemption beginning with the contention that the administrative measures by way of negotiations between the parties could legally operate to stop the accrual of the limitation time prescribed by law.

Essentially the dictates of section 3 (1) of the Act provides that every proceeding described under the First Schedule to the Act which is instituted after the period of limitation prescribed is time barred and shall be dismissed. It means that the alleged negotiations must be

conducted within the time of limitation lest it lapses without instituting a claim as it happened.

We are aware that the Act has provided for some exclusions in computing the period of limitation but with much respect to Mr. Nyawambura, the time taken in negotiation or pursuing of administrative measures, though geared at reaching an amicable settlement, is not one of the grounds on in which time computation for the purpose of limitation is excluded. As such the argument by the appellant that accrual of the time limitation in this suit stopped due the administrative measures pursued by the respondent is untenable. We are supported in this stance by the learned author **K.J. Rustomji, "The Law of Limitation," 5<sup>th</sup> Edition Vol. I** at page 23 quoted in the case of **Consolidated Holding Corporation** (supra) at page 21 wherein among other things the learned author stated:

*"The statute is not defeated or its operation retarded by negotiations for a settlement pending between the parties"*

We understand that Mr. Nyawambura sought reliance from the case of **Laemthong Rice Company** Ltd (supra) to substantiate his arguments. However, we find it distinguishable. Going through it, we observed that the issue in the cited case was whether acknowledgement

of time barred debt coupled with a promise to pay may give rise to a fresh period of limitation and the Court answered affirmatively. According to section 25 (1) (c) of the Contract Decree of Zanzibar, an acknowledgement of debt made after the expiration of the period of limitation would give rise to a fresh period of limitation if it is accompanied with a promise to pay the debt. But, in the case at hand, the appellant neither acknowledged the liability alleged nor promised to pay or heed to the respondent's claim. It is our firm finding that the alleged administrative measures taken by the respondent are not one of the grounds or instances in which time can legally be excluded when computing the period of limitation as argued by Mr. Nyawambura.

As for the second ground of exemption as argued by Mr. Nyawambura, the question to be addressed is whether being outside the jurisdiction of the Court by the Principal Officer of the respondent amounts to disability within the context of section 15 of the Act.

We wish to start by quoting the cited provision of law for ease of reference:-

*"Section 15. If on the date on which a right of action for a suit or an application for the execution of a decree accrues, the person to whom it accrues is under a disability, the action may be brought at any time before the expiry of*

*the period of limitation prescribed for such action computed from the date when the person ceases to be under a disability or dies, whichever event first occurs."*

We also think it is imperative to know what disability means. The **Black's Law Dictionary 8<sup>th</sup> Edition** has defined the word at page 494 to mean "*inability to perform some function*" or condition of an impairment, physical or mental. In other words, it means an incapacity that would hinder a person from performing a required act.

Interpreting the quoted provision having in mind the meaning of the word disability, we are of the view that the referred disability is pegged to an individual and not in our view a legal person as the situation in this case. But further PW1 who alleges to be outside the country was not a plaintiff in the suit at issue, instead the plaintiff is a company registered in this jurisdiction. Though, we understand that the respondent being a limited company performs its function through her directors, PW1 is not a sole director or shareholder of the respondent's company, as such other directors or shareholders would have taken an action to sue within time. In our view, to hold that the absence of PW1 amounts to disability to the respondent Company to take action within the prescribed time by law, would be over stretching the definition. On

that basis, the second ground of exemption is again untenable and we dismiss it.

Regarding the submitted third ground of exclusion, the issue to be determined is whether there was a continuing wrong or breach of contract in terms of section 7 of the Act in this suit. It is the argument of Mr. Nyawambura that the act of the appellant continuing keeping TZS 4,000,000.00 in the account at issue to date without closing the account or allowing PW1 to withdraw it while using the same into her business, amounts to continuing breach under the above section. According to him, the cause of action and the right to sue accrues every day of failure by the appellant to correct the alleged wrongful act. Section 7 on which the respondent based his arguments states that:

*"Section 7. Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be".*

In defining the expression "*to continue*", the Court in **Zaid Baraka and Two Others vs. Exim Bank (Tanzania) Limited**, Civil Appeal No. 194 of 2016 (unreported) quoted with approval the learned author of the book "**Law of Limitation**," 2<sup>nd</sup> Ed; 2012 Reprint, Modern Law Publishers New Delhi, Alliahabab when defining the expression as

used in section 22 of the Limitation Act, 1963 which is similar to section 7 of the current Act and stated:-

*"This section speaks of a 'continuing breach of contract' and a 'continuing tort' without defining what those expressions mean. Therefore, one has to resort to the general law, where the expression means nothing more than that the 'breach' or the 'wrong' is not the result of single positive act but is the result of a neglect or default which continues to exist over a number of days, so that fresh neglects and defaults are deemed to occur every day giving rise to fresh cause of action."*

**The Black's Law Dictionary** at Page 1643 has also defined continuing wrong to be *"an ongoing wrong that is capable of being corrected by specific enforcement"*. According to record, the respondent is accusing the appellant for negligence by allowing the opening of the account without following the required procedures and regulations. This can be plainly seen in paragraphs 4 and 5 of the respondent's plaint to which we reproduce here in verbatim:

*"4 That, on 17<sup>th</sup> June 2005, through negligence or complicity, or both, the Defendant Bank allowed, accepted and endorsed two individuals who held minority shares in the Plaintiff*

*Company, namely Silla Munanka and Anderson Mudimi Muhogolo, to open an Account No. 0117897801, without satisfying itself as to the legality and or competence of the Applicants to open, and to subsequently operate the Account, on behalf of the Plaintiff company.*

*"5. That, the Defendant bank, through negligence and or want of care, failed to observe its own Account opening and operating procedures and regulations, known among the banking fraternity as Know Your Client, popular by its acronym, KYC, thus failing to satisfy itself as to the authenticity of the application to open a Company Account, and thereby giving room for theft of the Plaintiff's money".*

It is plain from the quoted paragraphs that, the wrong complained of is negligent account opening which in our view is a single act and not continuing in nature. As such, the argument is, with due respect, misconceived.

All in all, having found that all of the submitted grounds for exclusion are inapplicable in the circumstances of this case, we are of the view that, this suit which was lodged five 5 years after the accrual of the cause of action, was time barred. We thus find merit in the first ground of appeal.



Given that the foregoing determination is dispositive of the matter, we find no need to consider the other grounds of appeal. Consequently, we allow the appeal with costs and proceed to quash and set aside the trial court's judgment.

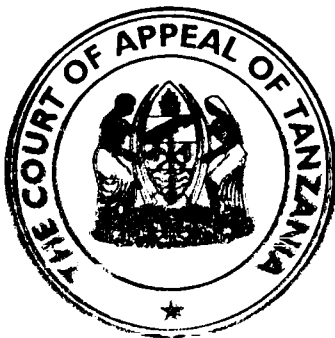
**DATED** at **MWANZA** this 28<sup>th</sup> day of November, 2022.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

L. G. KAIRO  
**JUSTICE OF APPEAL**

The Judgment delivered this 30<sup>th</sup> day of November, 2022 in the presence of Mr. Zacharia Daudi, learned counsel for the Appellant and Mr. Said Nyawambura, learned counsel for the Respondent via Video link, is hereby certified as a true copy of the original.



  
C.M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**