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

CIVIL CASE NO 170 OF 2019

SAID OMARI MTULIA
MOHAMED SEIF NDWIKA
HAMIS MOHAMED MSANGA | **.....PLAINTIFFS**
ALLY SAID ALLY
HASSAN ALLY NGAUGA

VERSUS

CHAMA CHA USHIRIKA IKWIRIRI.....1ST DEFENDANT
CHAMA CHA USHIRIKA KIBITI.....2ND DEFENDANT
CHAMA CHA USHIRIKA KILIMANI.....3RD DEFENDANT
CHAMA CHA USHIRIKA MWASENI.....4TH DEFENDANT

RULING

J. L MASABO, J

The plaintiffs claim from the Defendants a sum of Tshs 280,499,555 being outstanding price for the cashew nuts they supplied to the Defendants in 2011/2012. Upon being served with the plaint, the Defendants raised a preliminary objection on a point of law premised on the following limbs: points:

1. the suit is time barred;
2. the court has no pecuniary jurisdiction to entertain the matter; and
3. the plaint is defective and incompetent for contravening rules of procedure.

Hearing of the preliminary objection proceeded in writing. Arguing in support of the first limb of the preliminary objection, the Defendants through the service of M/s White Law Chambers Advocates argued that pursuant to section 3 and 4 of the Law of Limitation Act [Cap 89 RE 2019], the time limitation for suits for recovery of monies is 6 *years* counted from the time when the plaintiff became acknowledgeable. Thus, since this suit was filed on 23rd September 2019 whereas the cause of action arose in 2011/2012 the time of 6 years have lapsed and the plaintiff are late by 21 months (if 2011 is deemed as the date upon which the claim accrued) or 9 months is 2012 is deemed as accrual date.

On the 2nd limb, they submitted that the plaintiff claim sum is bellow Tsh 300,000,000/= thus it ought to have been filed in the district court/Court of Resident Magistrate pursuant to section 40(2)(a)and (b) of the Magistrate Courts Act, Cap 11 RE 2019.

On the third limb, it was submitted that the plaint is defective in that, it contains the names of 5 persons whereas there are 194 plaintiffs. Thus, it was argued, with reference to the decision of this court in **Luka Jonas Mkoka v Issa Abdallar &Others** Land Case No. 107 of 2014, that all the names ought to have been listed to the plaint.

In reply, the plaintiff under the service of Mr. Gidfrey Namoto learned counsel, prefaced their submission with a narration that prior to the filing of

this suit, the plaintiff had filed Civil Case No. 217 of 2018. In the said case the Defendants raised preliminary objections to wit:

i. the court lacks jurisdiction to entertain the matter
ii. the plaint is vague and lacks cause of action against the defendants
iii. the plaint is defective and incompetent for contravening Order VI rule 14.

Based on this it was argued that the preliminary objections are res judicata to the preliminary objections raised in the former suit.

On the substantive aspects of the preliminary objections, the plaintiff did not dispute that the suit is time barred. It was argued instead, that time limitation is not a purely point of law hence, it has been wrongly raised as it needs evidence to support it. The plaintiff pleaded that this point be argued in the course of hearing where he will render evidence to show that the Defendants are to blame as they were the ones dragging the matter by giving endless assurances to the plaintiffs that their dues would be paid.

On the second preliminary objection, the plaintiffs having cited section 13 of the Civil Procedure Code and Section 2(1) of the Judicature and Application of Laws Act, Cap 358 RE 2019, argued that the matter is well within the jurisdiction of this court. Lastly, on the 3rd limb it was argued that the plaint is correctly drawn as the plaintiffs have sued in a representative capacity having obtained a leave of this court to file representative suit vide Misc. Application No. 697 of 2016.

In rejoinder the Defendants did not dispute that the preliminary objection herein was raised in Civil Case No. 217 of 2018. They however argued that the same were not determined by the court thus it cannot be deemed to be *res judicata* as they were not conclusively determined by the court of competent jurisdiction.

I have considered the submissions by both parties. There are basically three issues for determination namely, whether the matter is time barred; whether this court has jurisdiction; and third, whether the plaint is defective.

Before I embark on these issues, I will preface my analysis with two points which I have found to be crucial. The first regards the plea by the plaintiff that the preliminary objections are res judicata as they were finally determined in the former suit. These claims were not contested. The defendants reply was that the above points while raised they were finally determined. Unfortunately, none of the parties supplied the copy of the ruling in support of the contentions. All what the parties furnished was a drawn order which I found to be less helpful. In the interest of justice and for purposes of avoiding conflicting decision, I had to call and examine the case file for Civil Case No. 217 of 2018. Upon scrutiny of the file, I observed that, indeed the Defendants raised three points of preliminary objection, that: the court lacks jurisdiction to entertain the matter; the plaint is vague and lacks cause of action against the defendants; the plaint is defective and incompetent for contravening Order VI rule 14. Of these points, only one was determined whereby the court held that the plaint was in contravention

of Order VI Rule 14 as it was not duly signed by the Plaintiff. On the basis of this one point, the suit was struck out. The first two points were thus left undetermined. Under the circumstances, the doctrine of res judicata does not apply save for a preliminary objection based on Order VI rule 14 which was finally determined.

The second is whether the first and third limb of the preliminary objection qualify as preliminary objection. The plaintiff has argued that, time limitation does not qualify as preliminary objection as it is not a pure point of law and so does the third objection. This contention drifts me to the scope the landmark case of **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696** which defines the scope of preliminary objection in the following terms:

> ".... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection 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 to the suit to refer the dispute to arbitration." Law, J.

Further, in the same case it was held that:

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion." **Sir Charles Newbold**

This has been the position of the law in our jurisdiction. The question therefore is whether the two objections pass the tests. Let me say straight forward that, I reject the argument that the first limb of the preliminary is not a pure point of law and does not therefore qualify as preliminary objection. It is needless to add any explanation to the definition above as it categorically lists time limit as one of the issues falling within its scope. As the law is very settled on this point, I am bound to apply it. Holding otherwise would be inconsistent with well-established principles of law. The same is also true on the issue of joinder and non-joinder of parties is also which has been raised on the third limb of the preliminary objection.

On the merit of the preliminary objection, as correctly submitted by the Defendants, the time limitation for suits pertaining to recover of any sum is 6 years (item 10 of part I of the Law of Limitations Act [Cap 89 RE 2019]. Pursuant to section 4 and 5 of this Act, the period of limitation commences/accrues from the date on which the right of action/ cause of action arises. In the instant case, what can be discerned from paragraph 4(a), (b), (c) and (d) of the plaint is that, the cause of action accrued in 2012 when the Defendant neglected/refused to pay the amount due to the Defendant. This suit was instituted on 16th September 2019. As there is specificity as to the date and month on which the cause of action accrued, assuming that the right of action accrued in December 2012 it is obvious that the suit became time barred in December 2018 when the period of six years lapsed. Thus, at the time of filing the suit, it was late by 9 months. This interpretation is however erroneous because it suggests that the plaintiffs had slept over their rights in all these years which is incorrect.

Records indicate that, the plaintiffs have been in the corridors of this court since 2016 when they filed their application for leave to file a representative suit without which they could not sue in the representative capacity. Their application was granted on 23rd July 2018 which entails that they spent about two years in pursuit of the leave. When this period is excluded from the time above the time within which this suit was filed, was certainly, well within the time prescribed by the law. The first point is therefore without merit.

Regarding the 2nd point, Sections 2 (1) and (3) of the Judicature and Application of Laws Act [Cap 358 R. E. 2019] state that:

> 2.-(1) Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters;
>
> (3) Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation ....."

On the other hand, section 13 of the Civil Procedure Code (supra) states that:-

> "Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purpose of this section, a court of resident magistrate and a district court shall be deemed to be courts of the same grade.
>
> Provided that the provisions of this section shall not be construed to oust the general jurisdiction of the High Court"

It is therefore crucial that the provision of section 2(1) and (3) of the Cap 358 be read together or interpreted subject to the provisions of section 13 of the Civil Procedure Code and section 40 of the Magistrate's Courts Act [Cap 11 RE 2019]. I entirely subscribe to the reasons advanced by this court in the case of P**eter Keasi Versus the Editor, Mawio Newspaper & Jabir Idrissa**, Civil Case No. 145 Of 2014, HC DSM (unreported) which have been cited by the plaintiff. In that, case, the Court while interpreting the provision of section 13 of the CPC, held that:

> "The object and purpose of the said provision is I think three-fold. First, it is aimed at preventing overcrowding in the court of higher grade where a suit may be filed in a court of lower grade. Second, to avoid multifariousness of litigation and third, to ensure that case involving huge amount must be heard by a more experienced court."

In the light of this, I am of the settled view that matter ought to have been instituted in the district court as its pecuniary value falls within the pecuniary jurisdiction of district court and court of the resident magistrates. The 2nd limb of the preliminary objection is therefore allowed to the extent above.

With respect to the 3rd preliminary objection it is a general rule that all persons interested in a suit are to be joined as parties to it so as to avoid multiplicity of suits. Order I rule 1 of the Civil Procedure Code States that:

"All persons may join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative

where, if such persons brought separate suits, any common question of law or fact would arise"

The exception to this rule is provided for under Order I rule 8 which states that terms:

> **"8.**-(1) Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested..."

In the instant case, the plaint suggests that the plaintiffs are suing in the representative capacity on behalf of 297 persons in respect of whom they were granted leave to institute a representative suit. In practice, when leave is granted and the suit is filed in court, the name of the representatives are listed on the plaint followed by the number of the person on whose behalf the suit is instituted. The list of those persons and their signature is also appended to the plaint. Thus, in the instant case, the name of the last plaintiff would have been followed by words 'and 297 others' to show that the suit is of a representative nature and a list containing the names and signature of the 297 persons would have been appended to the plaint. Conversely only the names of the representatives appear on the title. Elements of the representative nature of the suit are contained under paragraphs 4 and 6 of the plaint. As the title is entirely silent on the representative aspect, unless one reads the two paragraphs, he cannot tell whether it is of a representative nature. The form preferred by the plaintiff is not in tandem with the well-established practice on titling representative suits. I have observed that, the number of persons listed in the appended

list does not correspond to the number listed in the leave for representative suit. It is also not signed. To this extent the third preliminary objection is allowed.

In the final even, I find and hold that the plaint is defective to the extent above demonstrated and has been wrongly filed in this court. Accordingly, I order that, that the plaint be returned to the Plaintiff so that it can be filed in the District Court Rufiji pursuant to Order VII Rule 10 (1) and (2) of the Civil Procedure Code. Meanwhile the, Plaintiff is allowed the amend the plaint to the extent above demonstrated. The parties are to bear their respective costs.

DATED at DAR ES SALAAM this 11th day of August 2020.

J.L. MASABO

JUDGE