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

CIVIL CASE NO: 139 OF 2019

TABECO INTERNATIONAL LIMITED .....PLAINTIFF
VERSUS
ATTORNEY GENERAL .....1ST DEFENDANT
PRINCIPAL SECRETARY
MINISTRY OF INFORMATION, ...2ST DEFENDANT
YOUTH, CULTURE AND SPORTS

RULING

27th October 2020 &
11 November 2020

MASABO, J.:

TABECO International Limited, is suing the defendants jointly and severely for recovery of a sum of Tshs 41,515,481/= and general damages at a tune of 50,000,000. The claims are derived from a Contract of Provision of Service and Maintenance Agency under which the plaintiff contracted to service the first respondent's motor vehicle. It is pleaded that the plaintiff was awarded the contract in May 2010 and provided the service in the financial year 2010/2011 and 2011/2012. That having provided the service, the 2nd Respondent declined to pay the contractual fee which was at the material time Tshs. 6,224,382.00/=.

While filing their written statement of defence, the defendants raised a preliminary objection on the following six points of law:

i. The suit hopelessly time barred;
ii. The suit is purely incompetent for suing unknown parties;
iii. the plaint is incompetent for contravening Order VII rule 1(c), (f), order XXVII rule 1 and Order VI rule 14 of the Civil Procedure Code, [Cap 33 RE 2002];
iv. The plaint is purely defective for want of a proper verification clause;
v. the plaintiff has not exhausted alternative remedy;
vi. the suit is incompetent for contravening section 6(2) of the Government Proceedings Act [Cap 5 RE 2002];

The preliminary objection was argued in writing. Both parties had representation. Mr. Kente, Leonce Rwebangira, learned counsel appeared for the plaintiff and Mr. Erigh Rumisha learned State Attorney was for the Defendants.

Submitting in support of the preliminary objections, Mr. Rumisha abandoned the 2nd and 5th limbs of the preliminary objection and proceed to submit on the remaining limbs. On the 1st limb of the preliminary objection Mr. Rumisha, cited Section 46 and item 7 of part 1 of the Schedule to The Law of Limitation Act [Cap 89 R.E 2019] and argued that the suit is time barred as it was filed after the lapse of the period of six years prescribed by the law.

On the 3rd Limb he argued that since the plaintiff is a corporation, it is imperative that the plaint be signed by the secretary or director of the plaintiff. That, contravention of this requirement has rendered the plaint incurably defective and due for dismissal. He argued further that, the plaint does not disclose the name or position of the person who signed the pleading henceforth it is violative of Order VI rule 14, which requires disclosure of the name of the person who signed the plaint.

On the 4th ground he submitted that the plaint has not been properly verified because, the verification does not itemize all the paragraphs hence it contravenes Order VI rule 15(1) and (2). On the 6th limb that the suit is incompetent for contravening section 6(2) of the Government Proceedings Act [Cap 5 RE 2002], he submitted that the law requires that a person intending to sue the government should issue a 90 days notice. The provision, it was argued contains a mandatory requirement thus failure to issue the notice rendered the suit incompetent. He argued that the notice is intended to notify the Government of existence of the claim, to provide room for amicable settlement and to give them time to prepare their defence. The case of **Arusha Municipal Council v Lyamuya Construction Company Limited** (1998) TLR 13, and **Natural Wood (T) LTD V Attorney General**, Civil Case No. 139 of 2014 (HC) were cited in support.

In reply, Mr. Kente, Leonce Rwebangira, syubmitted that the suit is not time barred. He submitted that the original claims are in respect of 4 orders whose invoices were delivered to the Defendants on 1st December 2010, 13th May

2011, 4th May 2011 and 11th July 2011. That after these claims were dishonouned the plaintiff sent several demands to the defendant. The first demand was dispatched to the defendant on 15/8/2013; the second was on 10th November 2014; the third was on 31st July 2016 and 9th October 2016 he sent a statutory notice of 90 days which was acknowledged on 26/9/2016. Mr. Kente argued further that, I be persuaded to find and hold that the period of limitation became effective as from 31st July 2016 when the 2nd Defendant was issued with the last demand notice.

Mr. Kente submitted further that, the provision of section 7 of the Law of Limitation Act is applicable as there was a continuing breach on the part of the defendant. that, each time he was served with the invoice, there was new breach. Mr. Kente cited the case of **Makamba Kigome and Another V. Ubungo Farm Implements Limited & Another** Civil Case No 109 of 2005 HC Dar es salaam Registry (Unreported) and **Midland Bank Trust Co. Ltd V Hett, Stubbs and Kemp** 1917 and proceeded to argue that the suit was filed within time as the time started to run against the plaintiff on 5th October 2016 when it became impossible for the 2nd defendant to perform the promise for services rendered by the plaintiff.

Regarding the objection that the plaint contravenes Order VII rule 1(c), and (f)of the Civil Procedure Code, [Cap 33 RE 2019], Mr. Kente argued that it is baseless because the plaint is in total compliance with this rule and the cause of action is contained in paragraph 2 of the plaint. He further submitted that the requirement of Order VI rule 14 has been complied with because the

plaint bears the signature of the plaintiff and the verification clause contains the signature of the advocate who drew and filed the plaint. In the alternative he submitted that if the plaint was defective, the defect would not render the suit unmaintainable as it is rectifiable. The argued further that, the verification clause is duly signed by the plaintiff and there is nothing to fault it. Moreover, regarding the compliance with the provision of section 6(2) of the Government Proceedings Act, [Cap 5 RE 2002] he argued that this law was complied with as the plaintiff issued a 90 days notice prior to filing the suit.

I have carefully read and considered the submission fronted in support and in opposition of the preliminary objection. In the first limb of preliminary objection, I have been called upon to determine whether or not the application is time barred. Mr. Kente has passionately argued that the matter is not time barred as there was a continuing breach and that the same expired on 5th October 2016. In fortification of his point, he has referred me to the two cases cited above.

According to item 7 of the Schedule to the Law of Limitation Act [Cap 89 RE 2019] the time limit for suits founded on contract is six years. The accrue date, as provided for under section 5 of the Law of Limitation Act, is the date on which the cause of action arises. The point of contestation is when exactly did the right accrue. Mr. Rumisha has submitted that the accrual date is when the defendant was served with the invoice but refused to pay, which

entails that the cause of action started to accrue on 11th July 2011 when the defendant failed to honour the last invoice. On the defendant's part, Mr. Kente has argued me to find and hold that the time started to accrue after the defendant failed to act to the last demand notice. He has implored upon me to apply section 7 of the Law of Limitation Act which states that:

> "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, continues".

Mr. Kente has further refereed me to the case of **Makamba Kigome and Another V. Ubungo Farm Implements Limited & Another** (supra) which I have thoroughly read. In my view, Mr. Kente's argument with regard to the authority in this case is misconceived. In the said case, the claims derived from termination of an employment relationship and below is what the court found with regard to accrual of time:

> It is beyond controversy that the Plaintiffs were terminated from employment on 31/7/98. Again, it is not disputed that it was on that date that the requisite terminal benefits were to be paid by the Employer. It goes without saying therefore that the actionable wrong against the Plaintiffs was committed upon that refusal to pay. A right of action accrues on a date on which a cause of action arises (Section 5 of the Law of Limitation Act, 1971). A cause of action in this situation arose on 31/7/98. With respect, the Plaintiffs' argument that the cause of action started on 18th September, 2003 when the 2nd Defendant wrote a letter totally disputing indebtness and so is the argument pegged

on Section 7 of the Law of Limitation Act are flawed."[emphasis supplied]

The court held further that,

> "As regards the other limb of the argument, the letter of 18/9/2003 is nothing else but a confirmation of the wrong whose cause of action took place on 31/7/98 when the 2nd Defendant refused/failed to pay terminal benefits.....
>
> Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as a defence when it comes to limitation of time. The above settled, indeed filing a suit on 22/7/2005 is beyond the six year period provided under Item 24 of the First schedule to the Law of Limitation Act- "Any other suit not provided for". Six years counted from 31/7/98 land us on 31/7/2004." [emphasis supplied]

I have cited this judgment in extenso to drive home the point that the learned counsel has misdirected himself on this authority. According to this authority which I have found highly persuasive, the date of action in the instant case accrued immediately after the 2nd Defendant declined to honour the invoices.

As to the application of section 7, in my firm view, the provision of this section can only apply in respect of the invoices. The claims as narrated by

Mr. Kente are from services performed on different dates each of which constitutes a new breach. The first breach, in my firm view, happened on or after the 2nd Defendant declined to honour the invoice dated 10th December 2010; the second was after he dishonoured the invoice dated 13th May 2011, the 3rd was after he dishonoured the invoice dated 4th July 2011 and the last breach happened when he dishonoured the invoice dated 11th July 2012. In my considered view section 7 contemplates such cases where the party to the contract dishonours the promise but continues to enjoy the service rendered by the other party to the contract.

As held by the High Court of Australia in ***Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)*** (1940), 64 C.L.R. 221 (HCA), at p. 236 where Dixon J. (as he then was) stated that:

> If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue

> the examples, the building is out of repair, the life uninsured, or the particular support unprovided. [emphasis added]

From this persuasive authority, it can safely be concluded that as between 10th December 2010 when the 2nd defendant dishonoured the first invoice and 11th July 2011 when he dishonoured the last invoice, there were four independent breaches warranting the application of section 7 of the Law of Limitation Act. On the contrary, applying the provision of section 7 to the demand notices would be seriously flawed. Six years counted from 31/7/98 land us on 31/7/2004.

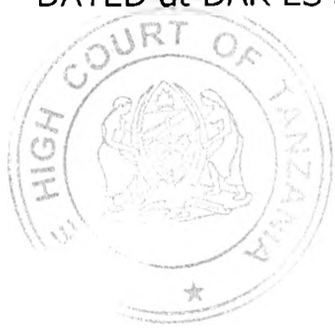
Accordingly, when the period of six years is counted from 11th July 2011 when the last invoice was dishonoured, it lands us to 11th July 2017. The instant suit was filed in court on 26th July 2019 which is two years after the time limit. Certainly, it is time barred.

Although it may seem unfortunate to the plaintiff, the law of limitation on actions, as stated by Kalegeya J (as he then was) in **John Cornel vs. A. Grevo (T) Ltd**, Civil Case No. 70 of 1998 (HC) unreported, *"knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web"* cited in **Makamba Kigome and Another V. Ubungo Farm Implements Limited & Another** (supra). Accordingly, and pursuant to section 3 of the Law of Limitation Act (supra) the suit has become a suitable candidate for dismissal. The first limb of the preliminary objection, is therefore, sustained.

Having sustained the first limb which naturally disposes of the suit, I will not dwell on the remaining limbs of the preliminary objection.

In the final result, the suit is dismissed.

DATED at DAR ES SALAAM this 6th day of November 2020.



J.L. MASABO

JUDGE