

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN SUB - REGISTRY OF MWANZA**  
**AT MWANZA**

**PC CIVIL APPEAL NO 63 OF 2021**

*(Arising from the Civil Appeal No 04 of 2021 from District Court of Misungwi at Misungwi and Originating from Misungwi Primary Court on Civil Case No 7 of 2021)*

**NESTORY ZAKAYO MATUNDA .....APPELLANT**

**Versus**

**ALFRED MGANGA MPUYA ..... RESPONDENT**

**WILLIHERMINA DEO..... RESPONDENT**

**JUDGMENT**

*15<sup>th</sup> February & 12<sup>th</sup> April, 2022*

***Kahyoza, J:.***

**Nestory Zakayo Matunda** sued **Alfred Mganga Mpuya** and **Willihermina Deo** claiming Tzs. 3,840,000/=. **Nestory Zakayo Matunda** alleged that **Alfred Mganga Mpuya** and **Willihermina Deo** borrowed the claimed amount of money in 2013. The trial court found the suit time barred and dismissed it.

Dissatisfied, **Nestory Zakayo Matunda** appealed to the district court where he lost the appeal. Still undaunted, **Nestory Zakayo Matunda** appealed to this Court raising two grounds of complaint paraphrased as follows-

1. that the court erred in law for holding that the suit was time barred; and

2. that the court misdirected itself for its failure to hold that time started running in 2018.

**Nestory Zakayo Matunda**, the appellant, prosecuted his appeal through his advocate Mr. Julius Mushobozi. On the date the appeal came for hearing Mr. Fundikira appeared for **Nestory Zakayo Matunda**. Whereas **Alfred Mganga Mpuya** and **Willihermina Deo** neglected to appear dully served. The appeal proceeded *ex parte* them. The appellant's advocate argued the two grounds of appeal jointly. There is only one issue that is whether the suit was time barred or not.

It is beyond dispute that the appellant lent Tzs. 3,840,000/= to **Alfred Mganga Mpuya** and **Willihermina Deo** in 2013. **Alfred Mganga Mpuya** and **Willihermina Deo** promised repay the loan on 1/8/2013. They defaulted. **Nestory Zakayo Matunda** sued them in 2021 before the primary court. **Alfred Mganga Mpuya** and **Willihermina Deo** neglected to enter appearance, the primary court granted leave to the appellant to proceed *ex parte*. The primary court suspected after **Nestory Zakayo Matunda** testified that the suit was time barred. It invited **Nestory Zakayo Matunda** to address it on the issue whether the suit was time barred or otherwise. **Nestory Zakayo Matunda** complied. The primary court found that the cause of action accrued in 2013 when **Alfred Mganga Mpuya** and **Willihermina Deo** defaulted to repay the loan. It also found that time limit for a suit based on contract is six years, which, had long time expired before the appellant instituted the suit. Relying on the provisions of the **Law of Limitation Act**, [Cap. 89 R.E. 2019], the primary court held that the suit was time barred and dismissed it.

**Nestory Zakayo Matunda** appealed and lost, hence the current appeal. The appellant's advocate submitted that the trial court erred to hold that the suit was time barred while the parties entered into an oral agreement in 2018 where the respondents promised to repay the loan. For that reason, the **Nestory Zakayo Matunda** was justified to institute a suit in 2021. He added that there was a letter dated 23 June 2018 in the record showing that the respondents agreed to repay the loan and paid Tzs. 200,000/=. He submitted further that after the respondents paid Tzs. 200,000/= in 2018, started avoiding the appellant. The appellant had no any other option but to sue them. The primary court erred to determine that the cause of action accrued in 2013.

It is not disputed that the appellant and the respondents executed a written contract showing among other things the repayment date to be 1<sup>st</sup> August, 2013.

The appellant's advocate submitted that the cause of action accrued on the 23/ June/ 2018 when the respondents admitted to be liable and made part payment.

Time limit for institution of suit founded on contract is six years as the item 7 of Part I of the Schedule to the LLA provides. The appellant advanced a loan of Tzs. 3,840,000/= to the respondents in 2013 and the latter promised to repay the loan in August, 2013. The respondents defaulted. The appellant sued the respondents praying the court to order them to pay the loan. The appellant's claim reads-

*"Ninaomdai Mdaiwa anilipe kiasi cha Tzs. 3,840,000/=. Nilimpa kwa ajili ya ada ya mtoto wake."*

In addition, the appellant testified on oath the the respondent had not paid him that is why he sued them. He deposed that-

*"Lakini mpaka sasa sijalipwa. Ndio maana nimefunua mdai haya...."*

The record does not support the appellant's advocate submission that the respondents made part payments and the last instalment paid on the 23<sup>rd</sup> June, 2018. The record does not suggest that the respondents made part payments and promised to repay the loan in 2018. The appellant's submission was not evidence but the submission from the bar. I perused the primary court record nowhere is it depicted that the respondent made part payments. The appellant sued the respondents for Tzs. 3,840,000/= and testified on oath the they respondents had not paid him.

Even, if it is true that before the appellant sued the respondents, the latter promised orally to repay the loan, those promises or negotiations would not stop time from running. I read in the primary court record that the respondent pleaded the appellant not to sue them. The record reads-

*"Nilichelewa kufungua shauri maana mdaiwa alikuwa ananisihi nisifungue shauri kuwa agenilipa."*

It is trite that law pre-court action negotiations have never been a ground for stopping the running of time. See the decision in **Consolidated Holding Corporation v. Rajani Industries Ltd & Another**, Civil Appeal No, 2 of 2003 ( CAT unreported). J.K Rustomji in his book on the Law of Limitation, 5th Edition had the following-

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

*parties.”*

The appellant’s advocate argued that the appellant, on one side and the respondents, on the other, entered into an oral agreement to reschedule the date of paying the loan. Unfortunately, it was very hard for the appellant’s advocate to convince me, that such an oral contract was executed. Even if, parties executed an oral to contract, oral contract cannot alter terms contained in a written agreement. See regulation 14(1) of the Magistrates’ Courts (Rule of Evidence in the Primary Courts) Regulations, G.N. No. 22/1964 & 66 of 1972. It provides-

*14. Evidence which may not be given in civil cases*

*(1) **Where an agreement is in writing, no oral Evidence**, may be given by the parties to the agreement or their representatives, in a civil case, to contradict or vary the written terms.*

*Exceptions:*

*(a) evidence may be given of any fraud or duress or mistake in writing down what was previously agreed;*

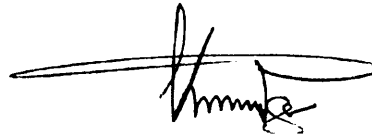
*(b) evidence may be given of a separate oral agreement on any matter on which the writing is silent which is consistent with the writing; or of a separate oral agreement made after the written agreement which cancels or modifies the written agreement;*

*(c) evidence may be given of customs by which terms are made part of contracts although the terms are not included in the written agreement.*

The appellant is not allowed to lead oral evidence to prove that they modified written term regarding the date of repaying the loan. On the same vein, the appellant’s advocate cannot prove by submission that the parties’ oral agreement modified written terms of contract.

In the end, I am unable to find merit in the appeal. I uphold the decision of the courts below that the appellant instituted the suit out of time. Consequently, I dismiss the appeal in its entirety for want of merit. I make no order to costs.

I so order.

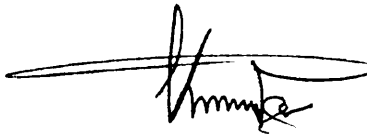


**J. R. Kahyoza**

**JUDGE**

**12/4/2022**

**Court:** Judgment delivered in the absence of the parties dully notified. The appellant's advocate sent his legal officer, Ms. Agnes. B/C Ms. Martina (RMA) Present.



**J. R. Kahyoza**

**JUDGE**

**12/4/2022**