

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MOSHI**

**AT MOSHI**

**CIVIL APPEAL NO. 19 OF 2021**

*(C/F Civil Case No. 22 of 2020, in the District Court of Moshi)*

**DR. JONAS KIPOKOLA .....APPELLANT**

**VERSUS**

**ANNA KITEMBURE SARIA.....RESPONDENT**

*28/4/2022, 30/6/2022*

**JUDGMENT**

**MWENEMPAZI, J.**

The appellant here named is aggrieved by the ruling of the District Court of Moshi at Moshi before Hon. J. E. Edward, SRM in Civil case no. 22 of 2020. Thus, he has appealed against the whole ruling and orders of the trial court.

The appellant was the plaintiff in the trial court and the respondent was the defendant. The appellant and the respondent entered into a loan agreement for the purpose of clearing an overdraft of Tanzania Shillings Thirty-two million only (Tshs. 32,000,000/=) being an amount of money outstanding against the borrower, the respondent herein with the Exim

Bank Ltd at Moshi Branch. The respondent had borrowed through the trade name SARIA HERITAGE EXPRESS CAR WASH which is under the management of the Respondent, one Anna Kitumbure Saria.

The duration of the loan was agreed to be six (6) months commencing from the date of disbursement, 22<sup>nd</sup> August, 2013 and ended on 22<sup>nd</sup> February, 2014. It was agreed that the whole loan Tanzania Shillings Thirty-Two Million (Tshs. 32,000,000/=) shall be repaid in terms of American Dollars i.e., USD 20,000.00 (United States Dollar Twenty Thousand only) within the period of six (6) months. The borrower had agreed that the security to the loan to be the borrower's house constructed on Plot No 123 Block 'c' Moshi Municipality, which is comprised under the Certificate of Title No. 17853, Land office No. 20844. It was further agreed that any default in repaying the loan on time, the lender shall have the right of lien on the security. The interest to the loan was agreed to be 1.5% per month which is equivalent to 18% per annum.

In the trial court the plaintiff claimed against the defendant for unpaid loan to the tune of United States Dollar Eighteen Thousand (USD 18,000.00) plus interest to the tune of [Tshs. 41, 280,000/= that is Tanzania Shillings Forty-one Million, two hundred Eighty Thousand which is accruing as per agreement. The defendant in her defence filed also a notice of preliminary objection to the effect that the matter is incompetent before the trial court for being out of time. Upon hearing the preliminary objection raised by the defendant, the trial Court Magistrate ruled that the objection had merit and dismissed the suit for being out of time. Hence the present appeal.

The appellant has raised seven grounds of appeal which for the sake of brevity I will not reproduce them. They will be referred to and considered in the course of dealing with the appeal.

At the hearing of the appeal the appellant was represented by Mr. Modestus Njau, learned advocate and the respondent was represented by the Mr. Willence Shayo, learned advocate. Parties sought leave to proceed with hearing by way written submission. They complied to the scheduling order and duly filed their written submissions.

The counsel for the appellant commenced his submission with ground 1 of the appeal that the learned trial Magistrate erred in law and fact by failing to consider the principle laid in the Landmark case of **Mukisa Biscuit Manufacturing Co. Ltd. Versus West End Distributors Ltd [1969]1 E. A. 696** wherein it was held that:

*"Preliminary objection should be raised on a pure point of law, and cannot be raised if any fact has to be ascertained. Further, that a preliminary objection is argued on assumption that all the facts pleaded by other side are correct and which if argued as preliminary point may dispose the suit."*

According to the submission, the issue on the exact time the breach of the contract occurred need to be ascertained. That can be achieved through tendering evidence. Thus, the Preliminary objection raised does not fall withing the meaning of preliminary objection as per ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd***(supra)

In this case, the respondent did not comply to the terms of the contract and therefore prayed for extension of time to repay the debt due to financial constraints. The appellant granted time for repayment of which the respondent did not comply. The counsel for the appellant has argued that under the circumstances, evidence is mandatory to be prove the allegations by the appellant.

On the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ground of appeal, the appellant faults the trial Magistrate that she erred in law and in fact by dismissing the case on the point of preliminary objection while the evidence was required to prove the same.

A point of objection stands where it is on a pure point of law which does not need to be ascertained nor calling of evidence to prove the same is necessary. In this case, the counsel has submitted that they need to prove that there was breach of contract. He referred the case of **Edna John Mgeni vs. National Bank of Commerce Ltd and another\_[2016] TLS LR 446** where the High Court in dealing with the issue of Limitation of action in respect of contractual matters held that:

*"Since the question of whether the plaintiff's claim is based on time barred debts requires not only putting the plaintiff(creditor) to proof of facts what the debt is not time barred but also scrutinizing when the debt arose and when it became payable, it does not qualify to be treated as a preliminary objection."*



The counsel for the appellant submitted that the trial magistrate at page 5 of the Judgment cited **section 5 of the Law of Limitation Act, Cap. 89 R.E. 2019** as a standing point; it provides that:

*"Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises."*

She went on and cited section 6(f) of the same law which provide that:

*"In the case of a suit for damages for inducing a person to break a contract, the right of action shall be deemed to have accrued on the date of the breach;"*

The issue which was left to be determined by the trial magistrate was when the cause of action accrued. Section 7 of the same law provides 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."*

With the case at hand, at the instance of the appellant, there was continued oral communication between the appellant and the respondent. That is negotiations, discussions, and promises which revised the first contract. That facilitated continued breach of the contract which existed. That is why the respondent was on the position to continue repaying the debt up to 2017. Hence the cause of action accrued on 2017 and not 2014 as claimed by the Respondent.

In further clarification of the situation in the present case, the counsel has cited the case of **Mr. Erick John Mmari vs. M/s Herkin Builders Ltd, Commercial Case no. 138 of 2019, HC-Commercial Division, Dar es salaam ([2020] TZHCComD 1991 11)** wherein there was articulated under what circumstances performance of the contract can be continued or impliedly ended despite of expiry of its tenure. It reads as follows: -

*"Although the general rule is that the cause of action accrues upon the date of the breach of contract, it may be possible to extend the time within which an action may be brought by establishing that, after the original breach, the relationship between parties subsisted such that there may be found to exist a continuing duty under the contract to rectify the original breach."*

The Counsel also referred to the case of **Felician B. Itemba vs. The Board of Trustees of ELCT Eastern and Coastal Diocese, Civil Case No. 22 of 2021, High Court of Tanzania at Dar es Salaam** (unreported) where the Court observed that:

*"It is the principle of law that where there is evidence of an implied or written terms that parties have agreed to continue their relationship despite of expiry of their contract, then the court may find that, there existed continued duty under the contract to rectify the original terms or in other words continued contractual relationships post the initial breach."*

The counsel for the appellant submitted that in the present case parties had an understanding which impliedly shows they had a continued

contractual relationship post initial breach. He has invited this court to refer to paragraph 11 of the respondent's written statement of defence filed at the trial court, which states that between 16<sup>th</sup> January and March, 2017 the defendant paid the plaintiff a total 2,000,000/= (Tanzania shillings Two Million only) through her advocate, one Ralph Njau. Thus, clearly show there were still contractual relationship between the parties up to 2017.

However, since the date the Respondent failed to pay as agreed, the appellant was aggrieved and on 18<sup>th</sup> September, 2020 issued 21 days demand notice to the respondent. This time again she failed to act in accordance to the demand notice. A suit was instituted against her.

It is clear there was a continued breach of contract on the part of the Respondent, therefore the cause of action should be counted from the date when the demand notice was issued (18<sup>th</sup> September, 2020) or from 2017 when it was the last date of the Respondent to pay the appellant and not 2014.

To prove whether there was negotiations or amendment of the first contract it will require evidence and under the circumstances to dismiss that case without looking at its merit will be denial of the appellant's right to be heard as provided for under Article 13(6) (a) of the Constitution of the United Republic of Tanzania.

On ground six (6) of the appeal the issue of the acceptance of the loan and promise to repay and the fact that the respondent prayed for extension of time for repayment, which prayer was granted by the appellant, may be seen in the written statement of defence. Thus, the decision to dismiss the



suit with cost was not exercised judiciously, and makes the appellant suffer further damages.

On the seventh (7) ground of appeal, the appellant has submitted that the trial Magistrate was biased that is why she even dismissed the case without even considering the merits of the case. Although awarding costs is the discretion of the court, still the court in exercise of the discretionary power, must do so judiciously while taking into account the circumstances of each case. The guiding principles are justice, equity and common sense and not as a punishment to the losing party. He has referred this court to the cases of ***Tanga Cement Company Ltd vs. Jumanne O. Masanga and Amos A. Mwalanda, Civil Application No. 6 of 2001, Court of Appeal of Tanzania*** (unreported).

The Magistrate therefore was biased and the award of cost was a punishment to the appellant an act which is contrary to the law and further that the award of costs was not exercised judiciously and by the nature of the case, cost should have not been granted.

The counsel for the appellant thus prays that ruling of the trial court be quashed and order set aside, that the suit be returned to the trial court so as to be heard and determined on merits and costs of the appeal be provided for. The counsel for the appellant also prays for any other remedy (ies) which this court deems fit and just to grant.

In reply to the submission by the counsel for the appellant, the counsel for the respondent has submitted on the 1<sup>st</sup> ground of appeal that the principle laid down in the case of **Mukisa Bziscuit Manufacturing Co. Ltd Vs.**



**West Distributors Ltd [1969]1 E.A. 696** was not contravened. According to the counsel, the principle referred to by the counsel for the appellant is on the nature of preliminary objection on points of law that the same should not be on matters which will require evidence but on matters purely on law.

Time limitation is a creature of statute and not facts which will require evidence. The court has even gone further to emphasize that time limitation is a jurisdictional issue as in the case of the **Director of Public Prosecution vs. ACP Abdallah Zombe and 8 others, Criminal Appeal No. 254 of 2009, Court of Appeal of Tanzania at Dar es salaam**(unreported) where it was observed that:

*"This Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain any incompetent proceedings."*

According to the counsel for the respondent, the question as to whether a matter is out of time does not need submission of any evidence but consideration of the pleadings and the law with simple calculation as required by the law. Section 5 of the Law of Limitation Act, Cap. 89 R.E. 2019 states among other things that:

*"Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date which the cause of action arises"*.

In this matter then, the right of action accrued from the 22<sup>nd</sup> February, 2014. Also, section 6(f) of the same act, states that the Right of action in the case of breach of contract shall be deemed to have accrued on the date of the breach.

The counsel has also submitted that visiting the First schedule to the Law of Limitation Act, Cap. 89 R.E. 2019 Item 7 of the schedule provides that the time limit for suits founded on contract shall be six years. Reading this item together with section 5 and 6(f) of the Act, one will be in a position to make a simple calculation to determine whether the matter is in time or otherwise out of time from the date of the alleged breach.

The counsel has concluded that time limitation is creature of statute and the same is purely point of law which does not require submission of any evidence. Hence, they pray the 1<sup>st</sup> ground of appeal has no merit, hence they pray it be dismissed with costs.

On the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal, the appellant complains that the trial Magistrate erred in law and fact by dismissing the case of the point of preliminary objection while the evidence was required to prove the same. The respondent's counsel has submitted that each case requires evidence to prove. However, the preliminary objection is guided by the law. The decision is made after reading the law and interpreting the same and making necessary orders.

By simple calculations of time from 22<sup>nd</sup> February, 2014 when the cause of action arose to 12<sup>th</sup> November, 2020 when the suit was filed in this court it is a total of 6 years, 8 months and 12 days. By operation of law the

plaintiff ought to have filed a suit before 22<sup>nd</sup> February, 2020 (within 6 years stipulated in the Law of Limitation Act). It is clear that the plaintiff is late for more than 8 months to file the suit before this court.

In the submission, the Counsel has asserted that the case of **Edna John Mgeni vs. National Bank of Commerce Ltd** (supra) is distinguishable from the present case. In that case, breach of the contract was traceable in the books of accounts to see whether and when the breach occurred. In the present case the breach does not require any calculation and visit of the books of accounts, the right of action accrues instantly from the alleged date which is clear from the pleadings and does not need any calculation whatsoever from the books of account as in the former case.

The submission that there was continued oral communication between the appellant and the respondent to mean negotiations are not true as the respondent had paid all the required debt. Further more this is an afterthought that was not associated with any proof attached to the pleadings or at all pleaded. The counsel has cited the case of **Ally Mussa Mwambapa & 7 Others vs. Tanzania Breweries Limited, Revision No. 849 of 2018, High Court of Tanzania, Labour Division at Dar es Salaam** (unreported) at page 8 where the court quoted a statement in the case of **Leons Barongo Vs. Sayona Drinks Ltd** on a statement that:

*"Though the court can grant extension, the applicant is required to adduce sufficient ground for delay. I believe the reason that the applicant was negotiating with the respondent does not amount to*

*sufficient ground for delay, more so, because the respondents have denied to be engaged in such negotiations.”*

The counsel alleges the fact of there being negotiations is an afterthought as it was not pleaded.

On the sixth (6<sup>th</sup>) ground of appeal the counsel has submitted that the allegations made by the counsel for the appellant that there was an application for the extension of time to continue payment of the debt is an afterthought. As the same was not pleaded and even during the submission on the preliminary objection in the trial court it was not submitted. Section 7 of *Law of Limitation Act, Cap. 89 R.E. 2019* is irrelevant in the present circumstances where there is no allegation of continuing wrong. He has prayed that the ground be dismissed with costs.

On the seventh ground of appeal, it has been complained that the trial Magistrate was biased that is why she dismissed the case. The respondent has submitted that the trial Magistrate did not err in any way but clearly observed the requirements of the law in the similar situation. The effect of the suit filed out of time is clearly under section 3(1) of the **Law of Limitation Act, Cap. 89 R.E. 2019**.

The counsel has cited the case of **Kishore Komaldas Pabari T/A Highland Motors versus Mbozi District Council, Civil Appeal No. 21 of 2019, High Court of Tanzania Mbeya**(unreported) wherein the Honourable Appellate Judge cited Section 3(1) of the **Law of Limitation Act, Cap. 89 R.E. 2019** and insisted that the remedy to the matter which is time barred is to dismiss the same. The same position was pronounced

in the case of **Mohamed Ahmed Soli and Omary Abdul Useja(Administrators of the Estate of the late Mohamed Useja Mwendapole) Vs. Rajabu Shabani Kinande and Frida Mwinshehe(The Adminstrators of the Estates of the late Mariam Mohamed Useja)**, Civil Appeal No. 153 of 2019, High Court of Tanzania at Dar es salaam Registry(unreported) where it was held that "*once the matter is time barred the remedy is to dismiss it*". The counsel concluded that in their opinion, the Magistrate did not err neither in law nor in fact in dismissing the suit that was found to be out of time. Hence, he prayed the ground to be dismissed with costs.

The counsel for the respondent submitted in general that the purposes for enacting the law of limitation is to cater for situations like the present case. The same does not deny one's right to access the court but at least one should have followed procedures to apply for extension of time before getting into the court corridors whenever one wishes. There should be the end to litigation. The counsel for the respondent has emphasized the position by citing the case of **Tanzania Fish Processors Ltd vs. Christopher Luhangula, Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania at Mwanza** where the Court had this to say:

*"The question of limitation of time is fundamental issue involving jurisdiction...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of Justice. Limitation is there to ensure that a party does not come to court as and when he chooses."*

In the opinion of the counsel for the appellant the decision of the trial court is a just decision thus he prays the appeal to be dismissed with cost for lack of merit.

In rejoinder the counsel for the appellant has argued the case reiterating the position opined in the submission in chief. He has submitted that although time limitation is a creature of statute but the evidence needs to be called so as to ascertain on when the cause of action accrues and whether if the time was extended after the first breach.

In this case, according to the counsel for the appellant, the respondent requested to be allowed to repay the loan, unfortunately she failed to do so. Under the circumstances, the evidence was necessary for the purpose of establishing whether after the original breach, the relationship between the parties subsisted such that there may be found to exist a continued duty under the contract. In his view, section 7 of the Law of Limitation Act, Cap. 89 R.E. 2019 is relevant under the circumstances and he thus prayed that this court refers to paragraph 11 of the written Statement of Defence by the respondent.

Under the circumstances, it was not proper to rely on the Preliminary Objection raised to dismiss the case in the trial court.

On the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> ground of appeal, the appellant's counsel in rejoinder has submitted that in the present case, evidence was required so as to prove on when the breach occurred and that requires the trial Magistrate to take the evidence and not to dismiss the case as she did. He



prayed that this court finds the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ground of appeal to have merit and allow the appeal.

On the 6<sup>th</sup> ground of appeal, the Counsel for the appellant, submitted by insisting that section 7 of the Law of Limitation Act, is relevant under the circumstances of this case as there was continuing breach. The counsel submitted that the meaning of continuing breach of contract was given in the case of **Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and another, Commercial Case No. 42 of 2020**(Tanzlii). In that case the High Court of the United Republic of Tanzania relying on the Indian case of **Rehabilitation Plantations Ltd Vs. P. S. Ansary**, on 21 December, defined what constitutes a continuing breach. It was stated that:

*"The term 'continuing breach' is intended to apply to contracts obliging one of the parties to adopt some given course of action during the continuance of the contractual obligation. But a continuing breach or wrong is different from a continuing damage. The former gives rise to a fresh cause of action but not the latter."*

In the present case there was continuing breach of contract and also the Respondent did clearly accept that under paragraph 11 of the Written Statement of Defence when alleged to have finished paying the appellant in 2017 while under the contract she was required to have finished the repayment of the loan in 2014.

In a bid to enforce the point the counsel for the appellant has cited the case of **Felician B. Itemba vs. The Board of Trustees of ELCT**



**Eastern and Coastal Dioceses, Civil Case No. 22 of 2021, High Court of Tanzania at Dar es Salaam** (tanzlii), where the Court was to the view that:

*"It is a principle of law that where there is evidence of an applied or written terms that the parties have agreed to continue their relationship despite the expiry of their contract, then the Court may find that, there existed continued contractual relationship post initial breach."*

Also, in the case of **Lindi Express Ltd vs. Infinite Estate Limited, Commercial Case No. 17 of 2021** (tanzlii) the Court had the view that:

*"Cases involving 'continuing' or 'successive breaches' include those cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance etc. In a case of a continuing tort, for instance, a fresh period of limitation begins to run at every moment of the time during which the breach or the Tort as the case may be continues."*

The counsel submitted that this court finds the appeal to have merit and allow the same.

On the 7<sup>th</sup> ground of appeal, the counsel for the appellant has submitted that they are reiterating the submission in chief and submitted further that the trial magistrate was biased by dismissing the case without considering on its merits; worse enough awarded costs without considering the loss



which the Appellant suffered. The award of cost was not exercised judiciously and that is a hinderance to appellant's access to justice.

The appellant has prayed that the appeal be found to have merit and be allowed in its entirety and further that the ruling of the trial Court be quashed and set aside, the suit be returned to the trial court so as to be heard and determined on merits. Costs of the appeal be borne by the Respondent and they are praying for any other remedy (ies) the court may find it fit and just to grant.

I have read the record and the submissions made by the parties and I am required to determine whether the appeal has merit and that it should therefore be allowed. Generally, the complaint in this appeal centers around the dismissal of the suit basing on the preliminary objection raised by the counsel for the respondent in the trial court that the suit was time barred.

When I was researching on the way to resolve this appeal I came across the decision in the case between **IBRAHIM ABDALLAH (the Administrator of the Estate of the late Hamis Mwalimu) versus SELEMAN HAMISI (The Administrator of the Estate of the late Hamisi Abdallah)**, ***Civil Appeal No. 314 of 2020, Court of Appeal of Tanzania at Arusha***(unreported). In that case, the court delt with the issue as to whether relying on bare pleadings it can safely be vouched that the appellant's suit was time barred before the High Court. After revisiting the claims before the court, it was then observed that:



*"It is a settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence."*

The court after referring to the famous quote from the case of ***Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd*** [1969] E.A.696 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 assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."*

Drawing from the definition quoted above, the Court stated that:

*"a preliminary objection may only be raised on a pure question of law which can be discerned if the court is satisfied that the pleaded facts are not contentious or if any of the facts has to be ascertained in a proper trial."*

After reviewing the Ruling in the cited case, the Court held as follows:

*"Although we agree that a time barred matter deserves to be dismissed int terms of section 3 of the Limitation Act, this is subject to ascertaining proof by evidence be it oral or by affidavit. In the premises, in the wake of contentious facts on the point of preliminary objection, the High court could not conclusively determine the point of objection at that stage."*



In my opinion, the complaint made by the appellant in the present appeal, fits in square to the circumstances in the cited case, although the setting and original claims may differ. The common issue is dismissal of a suit basing on the pleading before ascertaining facts to establish as to when the cause of action arose.

Under the circumstances obtaining in this case, no evidence was ever obtained by the court be it oral or evidence by way of an affidavit. The dismissal of the suit came immediately parties had completed the file their pleading, heading for preparation to hear the case. Therefore, the first ground of appeal has merit and it is therefore allowed.

There has been argument on the question as to whether there was continuation of breach of contract in the circumstance between the parties herein. It is in the pleading that the agreement from which this case emanates was entered into on the 22<sup>nd</sup> August, 2013 which agreement was to end on the 22<sup>nd</sup> February, 2014. In the end of March 2014 only Euro 200 had already been paid by the Respondent. On the 18<sup>th</sup> September, 2020 the defendant was served with the demand notice to repay the outstanding loan and interest. Indeed paragraph 11 of the Written Statement of Defence by the Respondent herein it I stated by respondent, I quote:

*"In further reply to what is stated in the plaint the defendant state that, on 13<sup>th</sup> August she paid the plaintiff 4,000,000/= (Four Million Tanzania Shillings). On the 9<sup>th</sup> September, 2014 she paid the plaintiff Us Dollars 600, through Home and Furniture Account which is the plaintiff's business having being directed so by the plaintiff, that on*

*16<sup>th</sup> January and 1<sup>st</sup> March 2017 the defendant paid the plaintiff total of 2,000,000/= (Two Million Tanzania Shillings. Through his advocate (Adv. Ralph Njau).*

The counsel for the appellant in a bid to explain how contractual obligation may continue referred this court to the case of of **Mr. Erick John Mmari vs. M/s Herkin Builders Ltd (supra)**. In that case, the High Court judge (my learned brother Hon. Nangela J.) observed that the continued relations come from the new arrangements regarding when the contracted assignment was to be completed. It is recorded that:

*"It is important to note that, even if there may be no expressly new written contract as argued by the learned counsel for the Defendant, it is a well-accepted legal position that, subsequent actions, as well as words of the parties, may create a new contract after the expiry of the earlier one. In essence, the key to establishing such a fact is to look at the conduct of the parties, judging them objectively and with an eye to find out how consistent their conduct is with the terms of the old contract."*

I have the opinion that looking at the pleading it was necessary to ascertain the contentious facts which have been stated by the parties before the trial court could objectively rule that the suit by the plaintiff was time barred. The opinion is thought out of the paragraphs in the plaint as well as the written statement of defence by the plaintiff and the defendant respectively. Hence, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ground of appeal have merit. They are allowed as well.



As on the 6<sup>th</sup> ground of appeal, it is very clear in my dealing with the above issues that according to the nature of the contract and the way parties dealt with it, there were new agreements by the parties which needed to be ascertained. The pleading to suggest there being some understanding as to the extension of time and or continual duty under the contract which can only be ascertained upon receiving evidence from the parties.

I have a different opinion on the issue of costs cannot be proof that the Magistrate was biased. I therefore believe costs were awarded as a matter of principle that costs follow event although it may have been not judiciously.

For the reasons stated, I have a strong view this appeal has merit and therefore allowed with costs. The ruling of the trial court is hereby quashed and order set aside and case file for the suit be returned to the trial court so as to be heard and determined on merits by another competent Magistrate. It is ordered accordingly.

Dated and delivered at Moshi this 30<sup>th</sup> day of June, 2022



**T. M. MWENEMPAZI**

**JUDGE**

Judgement delivered this 30<sup>th</sup> day of June, 2022 in court in absence of the parties.



**T. M. MWENEMPAZI**

**JUDGE**