

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

AT DAR ES SALAAM

CIVIL CASE NO. 22 OF 2021

FELICIAN B. ITEMBA..... APPLICANT

VERSUS

**THE BOARD OF TRUSTEES OF ELCT –
EASTERN AND COASTAL DIOCESE..... DEFENDANT**

RULING

Date of last Order: 14/12/2021.

Date of Ruling: 18/02/2022.

E.E. KAKOLAKI, J

This is a ruling in respect of the preliminary points of objection raised by the Defendant against the Plaintiff's suit premised on three grounds going thus:

1. That the suit is hopeless time barred for being filed out of time contrary to the law of Limitation Act, [Cap. 89 R.E 2019].
2. That, the suit is incompetent in law as it did not comply with the mandatory provision of Rule 1(b),(c) and (e) of Order VII of the Civil Procedure Code, [Cap. 33 R.E 2019].

3. That, this suit is defective for being improperly verified contrary to the requirement of Order IV, Rule 15(b) of the Civil Procedure Code, [Cap. 33 R.E 2019].

Briefly the plaintiff before this court is suing the defendant for breach of consultancy contract duly signed on 01/04/2014 for conducting feasibility study of the Defendant's Kunduchi Trinity Tower project for consideration of Tshs. 300,000,000/-. He is thus claiming for Tshs. 242,200,000/- being outstanding balance of the contract price, general damages to the tune of Tshs. 120,000,000/-, interest on the claimed amount at the Bank rate of 16% and costs of the suit. In her Written Statement of Defence the Defendant denied the claims raised against her, she raised counter claim to the tune of Tshs. 100,000,000/- as general damages on allegation that, it is the plaintiff who breached the contract for entering into contract without legal capacity, restoration of her money Tshs. 78,390,000/- already paid to the plaintiff, interest at the commercial bank rate of 16% and costs of the counter claim. Further to that, the defendant raised the preliminary points of objection as alluded to herein above. As both parties are represented and having considered that it is the court's practice to dispose first the preliminary objection when raised, it was agreed that hearing proceed by

way of written submission in which both complied with the filing schedule orders. The Plaintiff is represented by Ms. Fauzia Mustapha learned advocate while the Respondent enjoying the legal services of Mr. Isaack Zake, learned counsel.

In this ruling, I am intending to address all grounds of objection one after another if need be as canvassed by the parties. Submitting in support of the first ground of objection Mr. Zake contended that, the suit preferred by the plaintiff is time barred for contravening the provisions of schedule 1 item 6 of the Law of Limitation Act, [Cap. 89 R.E 2019) herein referred to as LLA, which provides for time limitation of six (6) years within which to bring the suit for damages on breach of contract. He said as per clause 3(c) and 3(b) of the contract, the first instalment of the contract payments ought to be effected in 30 days following submission of the report of the consultancy work, followed by the payment in four equal instalments paid quarterly and to be completed in one year. According to him, the last date of submission of the report was 22/11/2013 and one year from that date was ending on 22/11/2014, meaning that, the six (6) years within which the plaintiff could lodge suit for breach of contract ended on 22/11/2020. To the contrary, he submitted, the plaintiff filed this suit on 25/01/2021 two months and 3 days

out of time something which is in contravention of the law as section 6(f) of LLA provides that the right for action of damages for breach of contract shall be deemed to have accrued on the date of breach of contract which in this case he asserts is 22/11/2020, when full payment of the contract price was supposed to be paid to the plaintiff. Relying on the case of **Kishore Komaldas Pabari t/a Highland Motors Vs. Mbozi District Council**, Civil Appeal No. 21 of 2019 (HC-unreported) on interpretation of the provisions of section 3(1) of LLA on the consequences of filing the suit out time, Mr. Zake implored this court to find the suit is time barred and dismiss it with costs.

In reply Ms. Mustapha vehemently resisted the defendant's submission on the first point of objection on the ground that, it lacks merit in the eyes of the law. She argued, under section 4 of LLA, the period of limitation of action commences on the date in which the right of action of such proceedings accrued as under section 5 of the LLA, the right of action accrues on the date in which the cause of action arises. Ms. Mustapha argued further that, under section 7 of the LLA where there is continuing breach of contract or continuing wrong independent of contract, then a fresh period of limitation begins to run at the very moment of the breach or wrong continues. Basing

on the provisions of sections 4,5 and 7 of LLA, the cause of action in the present matter accrued in the year 2018 when all elements establishing the claim of breach of contract came into existence and not 2014 as claimed by the defendant, as the plaint and its annexures shows that, after expiry of the initial contract, there was a request by the defendant for extension of performance of the agreement/new agreement which was accepted by the plaintiff. That at the instance of the plaintiff there was continued negotiations, communications, discussions and promises which revived and continued the initially breached contractual relationship. She fortified her stance by referring the court to the cases of **CSR Limited Vs. Adecco (Australia) PTY limited** (2017) NSWCA (CSR Limited) 121 and **Brambles Ltd Vs. Andar Transport PTY Ltd** (2002) VSCA 150 and the quotation from Mitra, BB, **Limitation Act**, 12th Ed, Eastern Law House, New Delhi, (1998) at page 641 as cited with approval by this court in the case of **Mr. Erick John Mmari Vs. M/S Herkin Builders Ltd**, Commercial Case No. 138 of 2019 (HC-unreported), articulating under what circumstances performance of the contract can be continued or impliedly extended despite of expiry of its tenure. On the strength of that submission, she pressed the court to overrule the objection. In his rejoinder submission, Mr. Zake

contested the submission by Ms. Mustapha when argued that there was extended agreement between the parties, stating that the defendant has never entered into such agreement in writings in alteration of clause 3(e) of the agreement hence reiteration on his earlier submission in chief and prayers thereto.

I have carefully internalised and deeply considered both parties conflicting submission as well as subjecting plaintiff under contested and its annexures to serious scrutiny. The central point for determination in this ground of objection is whether the suit by the plaintiff is preferred outside the prescribed time limit as per schedule I item 6 of LLA which is six (6) years. In responding this issue, I find it imperative to establish first as to when the time of filing the action accrues. In this issue I am at one with Ms. Mustapha on her submission that under section 4 of LLA the period of limitation of action commences on the date on which the right of action of such proceeding accrued. And that the right of action accrues on the date on which the cause of action arises as clearly specified under section 5 of the LLA. For easy of reference I find it convenient to quote both sections 4 and 5 of LLA hereunder. Section 4 of LLA reads:

*4. The period of limitation prescribed by this Act in relation to **any proceeding shall**, subject to the provisions of this Act hereinafter contained, **commence from the date on which the right of action for such proceeding accrues.** (Emphasis added)*

And section 5 of LLA provides:

*5. 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.** (Emphasis supplied)*

I do not also differ with Mr. Zake's proposition that, under section 6(f) of LLA, the right of action is deemed to have accrued on the date of the breach of the contract or complained of wrong. Section 6(f) of LLA reads:

*6. For the purposes of this Act:
(f) 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;***

Again there is no dispute that under section 7 of LLA, where there is continued breach of contract or continued wrong independent of contract then a fresh period of limitation begin to run at the very moment of breach of contract or continuation of complained wrong. However such continuation of breach must be proved. Section 7 of LLA provides that:

*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, continues.***

The above position of the law also finds justification in the Australian case of **CSR Limited** (supra) as cited in the case of **Mr. Erick John Mmari** (supra) where the circumstances under which the terms of expired agreement could be continued were considered by McColl JA, who opined thus:

*"Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. ... **There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired.**" (Emphasis supplied)*

Mitra, B.B. in his book **Limitation Act** (supra) at page 641 on continued breach and its effect writes thus:

*"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 the parties subsisted such***

that there may be found to exist a continued duty under the contract to rectify the original breach.”

(Emphasis is mine)

In light of the above cited decision in **CSR Limited** (supra) and the proposition by the learned author Mitra, it is evident to me and therefore acceptable principle of the 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 relationship **post** the initial breach. In the present matter Ms. Mustapha asserts that, there was continued communications, negotiations and promises in writing after expiry of initial contract which implied extension of performance of the contract, hence a proposition that the right of action accrued in the year 2018 when the defendant demonstrated in writing of her intention not to fulfil the contractual obligation and not 2014 as claimed by Mr. Zake. In her submissions, Ms. Mustapha never exhibited the alleged negotiations and promises between the two parties implying that, there was implied continued relationship amongst the plaintiff and the defendant. My perusal of the plaint has failed to unearth any written document proving such alleged

communications, negotiations, discussions and/or promises between the parties as claimed by Ms. Mustapha. What is impleaded in paragraph 8 of the plaint is the fact that, the defendant in December 2018 notified the plaintiff of her unpreparedness to execute the agreement of 01/04/2013 between them, as could not pay the remaining balance of contractual price.

Paragraph 8 of the plaint reads:

8. That, in December, 2018 the Defendant notified the plaintiff that the Church is no longer paying high priority to the subject matter of the agreement executed between the parties on 1st April, 2013 and cannot pay the plaintiff the remaining balance of the contract price. Certified copy of undated letter of uneven reference is attached and marked annex FB13 to form part of this plaint.

The defendant in her WSD disputed the plaintiff's facts as deposed in paragraph 8 of the plaint calling him to strict proof. As can be rightly be noted in paragraph 8 of the plaint, the plaintiff is confessing to the fact that the letter relied on to establish the fact that the defendant communicated him of her unwillingness to execute the contract and pay the remaining contract price is undated. That being the stance, it is therefore uncertain as to when the said letter was written to him, thus difficult for this court to believe and accept plaintiff's assertion that it was communicated to him in

December, 2018. Again this court finds there is no proof by the plaintiff that, the three letters allegedly written by the plaintiff to the defendant making reference to the claimed undated letter from the Defendant of December, 2018 were served to the defendant as a proof that there was live communication between the two parties. It is so found as one would expect to find them bearing official receipt stamp of the defendant or exhibited by dispatch book duly signed by the defendant, which proof undoubtedly is missing in this matter. In absence of such evidence to exhibit that there was communications, discussions, negotiations and/or promises from the defendant, implying that, there existed continued contractual relationship between the parties to the extent of renewing the initially expired cause of action which expired on 22/11/2014, when the one year of payment of the due contract price ended, and since this suit was filed on 21/01/2021 exactly two months and three (3) days after expiry of the six (6) years in which the plaintiff was supposed to file this suit, I am satisfied that this suit was filed outside the prescribed period of time. The issue is therefore answered in affirmative. This ground has the effect of disposing of this matter, and therefore I see no plausible grounds for dealing with the remaining two points of objection.

The above being the position, next issue for determination is what are the legal consequences of the matter filed outside the prescribed time limitation. The answer to this question is provided by section 3(1) of the LLA, in that any matter or proceedings instituted after the period of limitation prescribed opposite to the second column of the first schedule to the LLA, shall be dismissed whether or not limitation has been set up as defence.

As in this matter the suit at hand has been found to have been filed outside the prescribed period of time which is six (6) years, I uphold the 1st preliminary point of objection and proceed to dismiss it with costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.



E. E. KAKOLAKI

JUDGE

18/02/2022.

The Ruling has been delivered at Dar es Salaam in chambers today on 18th day of February, 2022 in the presence of the MS. Lulu Mbinga advocate

holding brief for advocate for the Plaintiff and Ms. Asha Livanga, Court clerk and in the absence of the Defendant.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
18/02/2022

