

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)**

AT ARUSHA

CIVIL APPEAL NO. 9 OF 2021

(C/f Civil Case No. 58/2020 of the Resident Magistrate Court of Arusha at Arusha)

BAHATI MGONJA T/A Y&H MGONJA ENTERPRISES.....APPELLANT

VERSUS

THE DON'S GROUP TANZANIA..... 1ST RESPONDENT

JACQUINE ALBERT MSANDO2ND RESPONDENT

ALBERT GASPER MSANDO3RD RESPONDENT

JUDGMENT

22/3/2022 & 21/4/2022

GWAE, J

This appeal is aimed at inviting this court to ascertain whether the decision of the Resident Magistrate's Court of Arusha at Arusha (Trial court) delivered on the 22nd January, 2021 sustaining the respondents' preliminary objection on a point of law based on the limitation of time on a part of the appellant's claim contained in paragraph 7 (viii) of the plaint, was properly founded.

On the 21st September 2020, the appellant, Bahati Mgonja t/a Mgonja Enterprises instituted a suit against the respondents herein above claiming payment of outstanding debt balance at the tune of Tshs.181, 236,300/=, interests, general damages, payment of costs of the suit and

any other relief (s) that may be deemed fit to grant by the court of first instance. One of the appellant's claims against the respondents is on paragraph 7 (viii) of his plaint which reads and I subscribe as herein under;

"The plaintiff also demands from the defendants the total of Tanzania Shillings eighteen million three hundred seven thousand and eight hundred (Tshs. 18, 307, 800/=) which occurred from previous business of Hook up after the defendants managed to pay only four million (Tsh. 4,000,000/=) through cheque No. 000460 of 5th March 2020 out of the total debt of Tanzania Shillings Twenty million three hundred and twenty-seven and eight hundred (Tsh.22,327,800/=)".

The trial court having heard the parties' advocates on the canvassed point of law by way of written submissions came into a conclusion that the claim by the appellant under paragraph 7 (viii) of the plaint reproduced herein above is time barred on the ground that the appellant did not state when precisely the cause of action arose and that parties' negotiations as to payment of the debt without taking legal actions on the part of the plaintiff is done at his own risk. He relied on the decision of **Makamba Kigome and another vs. Ubungo Farms Implements Limited and another**, Civil Case No. 109 of 2005 (unreported-H.C).

Consequently, the appellant's claim under paragraph 7 (viii) of the plaint was dismissed.

Aggrieved by the order of the trial court dismissal the said part of his claim, the appellant filed this appeal advancing one ground of appeal, to wit;

"That the trial court erred in law and fact by dismissing the claim contained in paragraph 7 (viii) of the plaint by the reason that the same is time barred"

When this appeal was called on for its scheduled hearing, the appellant and respondents were represented by Mr. Muhalila and Mr. Allen Godwin respectively, both are the learned advocates.

Arguing for the appellant's appeal, Mr. Muhalila was of the opinion that the appellant's claim under the paragraph 7 (viii) of the plaint was not time barred since last payment was made on the 5th March 2020. Therefore, according to him, the cause of action did arise when the respondents defaulted repayment as per section 5 of the Law of Limitation Act, Cap 89 Revised Edition, 2019 (Act) not the period when the parties entered into the contract. He then urged this court to make a reference to a Journal known as "**St. John's Law Review**".

Opposing this appeal, the learned counsel for the appellant argued that, the said appellant's claim was time barred as found by the trial court as it is clear that the complained breach arose since 2014 when the appellant was not paid. According to the respondents' counsel, the period started to run against the appellant from the date of his supply adding that the said Hook up was closed since 2015. He then invited the court to make a reference to the decision in **Zaidi Baraka and two others vs. Exim Bank**, Civil Appeal No. 194 of 2016 (unreported-CAT).

The appellant's counsel rejoined to the oral submission by the respondents' advocate by stating that, the case of **Zaid** cited by the respondents' counsel is distinguishable from the latter since the payment for the supply of beverages in this case was not specific while in the former case the period for payment was specific. He further added that the preliminary objection canvassed by Mr. Allen is not a pure point of law as it requires proof.

The issue before me is therefore, whether the trial court was justified to dismiss the appellant's claim under paragraph 7 (viii) of the plaint on the reason that the same was time barred as it contravenes item 7 of Part 1 of the schedule to the Act.

I am alive of the law of Law of Limitation (supra) if an action filed out of the prescribed period in the District Court or that of Resident

Magistrate Court or this court, the consequential order is no other than an order dismissing a suit or an appeal or an application pursuant to section 3 (1) of the Law of Limitation Act (supra) which provides:

"3(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite there to in the second column, shall be dismissed whether or not limitation has been set up as a defence".

This position of the law has been consistently been stressed in various judicial decisions, for instance in **Soza Plastic Industries v. Scolastica Chawalla**, Labour Revision No. 73 of 2012 (unreported-Labour Division) where it was held inter alia that, the remedy for a time barred application filed without condonation is dismissal. The Law of Limitation was essentially enacted to prevent a party from coming to a court at any time of his or her own choice and therefore maintenance of speedy administration of justice.

In our case, the part of the appellant's claims contained in the Para. 7 (viii) of the plaint though emanates from previous business in the name of Hook up, however the plaintiff did not specify the period when it was closed nor did the defendants specifically state when it was closed save

to his general denial of the appellant's claims under paragraph 7 of the plaint.

Moreover, there is no copy of the parties' contract that was appended to their pleadings to enable the trial court to justly and opportunely rely in its decision sustaining the respondents' preliminary objection on limitation of time, the said lapse of six years is either scantily pleaded or not all pleaded as opposed to the case **Zaidi Baraka and two others vs. Exim Bank** (supra) where the cause of action arose once after the appellants had defaulted to repay the overdraft facility.

In my considered view, the respondents' preliminary objection is not maintainable in law as the same need ascertainment of some facts for example when exactly the said Hook up was closed, when the contract between the appellant and the said Hook up was entered into and when specifically the appellant supplied beverages in favour of the respondents for the last time. Preliminary objection must be based on a pure point of law which, if argued and determined, will dispose of the matter. This legal position was emphasized by the court (**late Rweyemamu, J** may her soul rests in peace) in **Musanga Ng'andwa vs. Chief Japhet Wanzagi and 8 others** (2006) TLR 352 where she held among other things that;

The expression preliminary objection has been used in our jurisdiction to refer to objection to the jurisdiction of the Court, a plea of limitation and the like; it contains a point of law which, if argued as a preliminary point, may dispose of the suit; a preliminary objection cannot be raised if any fact has to be ascertained, that is, it cannot be based on unascertained factual matters"

(See also the most famous judicial prudence in the case of **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD** (1969) EA 696).

In our instant suit, there are facts which require proof as earlier explained, the parties' pleadings leave a lot to be ascertained during hearing of the matter on merit rather than at the stage of preliminary hearing. Therefore, the learned trial magistrate ought to have declined sustaining the respondents' PO.

I have also considered the appellant's pleaded fact especially the fact that, the respondents managed to pay only four million (Tsh. 4, 000, 000/=) out of the claimed sum of money (Tshs. 22, 327, 800/=) through cheque No. 000460 dated 5th March 2020. This appellant's pleading presupposes that, the respondents in a certain period of time (5/3/2020) acknowledged the appellant's claim by paying a part of the claim. According to law of limitation, if a party, debtor makes a part payment of

a debt, then accrual of an action used to statutorily start afresh pursuant to section 27 (3) of the Law of Limitation (supra) which provides;

"27 (3) Where a right of action has accrued to recover a debt or other pecuniary claim, or to recover any other movable property whatsoever, or to recover any sum of money or other property under a decree or order of a court and the person liable or accountable acknowledges the claim or makes any payment in respect of it, the right of action in respect of such debt, pecuniary claim or movable property, or as the case may be, the right of action in respect of an application for the execution of the decree or the enforcement of the order, shall be deemed to have accrued **on and not before the date of** the acknowledgement or **payment**, as the case may be, **the date of the last payment** (emphasis supplied)".

The appellant has also plainly pleaded an acknowledgment by the respondents of his outstanding debt through a copy of letter dated 22nd July 2020, the pleading which is capable of justifying statutory exclusion of accrual of a right of an action as per section 27 of the Act. More so, a cause of action for breach of unspecific contract accrues at the moment the contract is breached and not when the contract was entered into as correctly argued by the appellant's counsel. Worse still, it is evident from the appellant's plaint, that, the alleged breach is of 2019 and not of either

2014 or 2015 (See Para.7 (i)-vii) save to viii where she plainly seeks statutory exclusion of the accrual right of action as alluded above.

For the foregoing reasons, the appellant's appeal is hereby allowed. The decision of the trial court sustaining the respondents' PO on limitation of time is quashed and set aside. The matter be remitted to the trial court for hearing and determination on merit including Paragraph 7 (viii) of the plaint and be given first the priority as far as expeditious hearing and determination of the same is concern. For avoidance of unnecessary apprehension of bias by the appellant which may lead to further delay of disposal of the matter, the matter be re-assigned to another Resident Magistrate with a competent jurisdiction. Costs of this appeal shall be in the course.

Order accordingly.

Dated at Arusha this 21st April 2022




M. R. GWAE
JUDGE
21/04/2022

Court: Delivered in the presence of the parties' advocates namely; Mr. **Bwemelo** for the appellant and in the respondent's absence.




M. R. GWAE
JUDGE
21/04/2022