IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CIVIL CASE NO 33 OF 2022

EDUCATIONAL SCIENTIFIC AND TECHNICAL COMPANY LIMITED _____ PLAINTIFF

VERSUS

NELSON MANDELA AFRICAN INSTITUTE OF SCIENCE AND TECHNOLOGY AND OTHERS _____ 1ST DEFENDANT

ATTORNEY GENERAL _____ 2ND DEFENDANT

18/04/2023 & 23/06/2023

RULING

BADE, J.

Here is the ruling in respect of the preliminary objection raised by the defendant against the plaintiff suit premised on the ground that the suit filed is hopelessly time-barred for being filed out of time contrary to the Law of Limitation Act Cap 89 RE 2019. The matter arises out of a contract between

the 1st Defendant and Plaintiff for supply delivery and installation of lab equipment.

To be able to put everything in context, I find it helpful to narrate albeit briefly the transactions leading to the present standoff. In April 2014, the plaintiff and 1st defendant entered into an agreement for the supply, delivery, and installation of Laboratory Equipment. By 30th September 2014, the Plaintiff had delivered the lab equipment in good order, the Plaintiff acknowledged such delivery; and by 19th December 2014 the Plaintiff had issued a certificate of completion and installation. The remaining part was payment by the 1st defendant, to complete its side of the bargain on the contract. Five years later in 2019, the payment for the delivered lab equipment had not been accomplished; and the follow-up has not yielded any fruit fast forward to August 2021, when the Plaintiff decided to institute a suit by serving the defendant with the statutory notice of its intention to sue.

Both parties are in the hands of able legal counsel, in the services of Mr. Remmy Ephraim Willima, Advocate for the Plaintiff, and Mr. Peter Museti Senior State Attorney for both Defendants.

Mr. Museti had the ball rolling intimating that they have raised a preliminary point of objection that the suit is hopelessly time barred. He picks on paragraph 8 of the plaint, which is self-explanatory in that the contract to supply and installation was completed on 19th December 2014. He zeroed in on this particular date as the date when the cause of action arises since it is the date that the Plaintiff claim to have completed his part of the contract and the defendant was supposed to have paid for it.

Mr. Museti is adamant that looking at the current suit, which was brought on 6th October 2022. Under item vii of part 1 of the Law of Limitation Act Cap 89 RE 2019 which states all suits brought on contract sets the time limit to be 6 years. Since the present suit was filed on 6th October 2022, if one counts from the time of the cause of action as per para 8 and 9 of the plaint, the period of 6 years would have lapsed on 18th December 2020. This is when the suit should have been filed. He maintains that the current suit is filed within 8 years which is hopelessly beyond the limit.

He takes authority in the case of **Petrol Fuel and Another vs M.A Kharafi and Sons Ltd,** Commercial Case no 107 of 2022, where this court held all suits based on contract must be instituted within a period of 6 years. He also refers the court to the case of **Robi Traders Ltd vs CRDB PLC and Anor,**

Civil Appeal no 70 of 2012, where the Court of Appeal Tanzania stated the circumstances under which a party may rely upon as an exemption under order VII rule 6 that a party must clearly state in the Plaint if they seek shelter under the Civil Procedure Code as to why the suit is brought after the period of limitation. If a party does that, they would have been saved under the Order VII Rule 6 of the Civil Procedure Code, if they comply with this order, he points particularly to page 15 of the Petro Fuel case, in which the Court actually cited several cases that make a compliance to such order a saving.

He argues though that in the current case, the Plaintiff should have stated in the plaint the facts as to why they have filed the suit beyond the time limit prescribed, but the Plaintiff has not done so. That being the case he argues, that the current suit is filed out of time, and the remedy is provided under Section 3 (1) of the Law of Limitation Act Cap 89 RE 2019 that the suit shall be dismissed. He concludes his submission with a prayer that the court uphold the preliminary point of objection and dismiss the suit with costs.

Responding to the learned counsel submissions, Mr. Remmy Ephraim Willima, conceded to the factual account that it is true that the contractual relationship had been entered from 30th April 2014. In further admission, Mr

Remmy Ephraim Willima is not disputing that the goods were delivered on 12th Sept 2014, while the installation was completed by 19th December 2014 as per paragraphs 4, 5, and 8 of the pleaded facts in the Plaint reveals. An invoice was issued for the payment for the demand of the payment, but the first Defendant did not make any payment and requested the Plaintiff for proper verification of the documents before they could initiate the payment.

He submitted further that after the said verification, the Plaintiff was informed that they don't see any documents in respect of the supply of the equipment and asked the plaintiff to have a meeting which was accomplished on 21st August 2019, where they met. The defendant brought the same concern on the requirement of formal resubmission of the documents. The next day on 22 Aug 2019 the Plaintiff submitted the documents as instructed.

On 15th June 2020 the 1st Defendants responded to the letter for resubmission of the documents, where again the Plaintiff was asked to resubmit another set of same documents for them to initiate payment. On 17th June, 2020 the Plaintiff obliged, including submitting bank details for the ease of the Defendant to initiate payment but the defendant never made any payment. As a result, then the Plaintiff was left with no option but to

institute the case. All these correspondences Mr. Willima insists are actually attached to the Plaint, as annexure EL5 together with the statutory notice.

While the plaintiff's counsel admits on the 6-year limitation as good law, he argues that in the present case, the cause of action arose on 7th June 2020 when the plaintiff complied with the instructions to resubmit all the necessary documents for payment, but no payment were received. We believe that's when the breach arises.

The law under Ss 4 and 5; and 6 and 7 of the Law of Limitation Act Cap 89 RE 2019 states when the cause of action arises, which is the mark as to when time starts to run. Counting from 7th June 2020 to 6th October 2022 when the Plaintiff instituted the present case, it is only a year since the cause of action arises, therefore the present suit was filed within the prescribed time under the law.

He countered that the submission from the SSA for the 1st Defendant counting the period of time from 2014 when the work was completed as the time the cause of action arose is wanting and misconceived.

He urges consideration should be given to the time of negotiating and correspondence between the parties to the contract even after the

completion of the contract. The 1st defendant was under a duty to perform the contract by making payment. The correspondence are all attached to the plaint, as per order VII Rule 6 of the Civil Procedure Code Cap 33 RE 2019 which is actually complied with as the correspondence were pleaded under paragraphs 10 to 11 of the Plaint and the annexures are all filed. This was confirmed as the position in the High Court in Commercial Case no. 138 of 2019 between **Erick Mmary and Ms Herkin Builders Ltd**, where the Court had considered that performance of the contract by the defendant was a key issue to be considered in counting the time from when the cause of action arose.

In another case **Felician Itemba vs the Board of Trustees of ELCT** Civil Case No 22 of 2021, while invoking the provisions of Order VII Rule 6 of the Civil Procedure Code, the court insisted that all the correspondences and negotiation were supposed to be pleaded in the plaint to determine when the cause of action arises. In the present case, he reiterates that they did this under paragraph 11 and 12 of the Plaint, and concluded that this is when the cause of cation accrued when the correspondences ended. He made a prayer that the suit be left alone as it was filed within the time prescribed by the law and the Preliminary Objection be dismissed with cost.

Rejoining, Mr. Museti retorts with regard to the Plaintiff's counsel submission that the period of negotiation and correspondences be taken into account. He takes authority in the case of **Petro Fuel Ltd** (supra) at page 14, where the this court made reference to the Court of Appeal of Tanzania in **Consolidated Holding Corporation vs Rajan Industries and Anor**, Civil Appeal no 02 of 2003, that correspondences or negotiation has no effect of rewinding or reviving the period of limitation set by the law of limitation, therefore, the argument by the Counsel for the Plaintiff that there were correspondences or negotiation cannot revive the period of limitation.

He further countered that the Plaintiff counsel cited a letter dated 7th June 2020 purporting to instruct that the Plaintiff resubmit documents, as per annexure EL5 of the Plaint, and that the said annexure supposedly also include a copy of the statutory notice. He distanced himself from this submission and invites the Court If it can make perusal of the plaint, that these documents are not annexed. He insists that still, the position of the law will not change even if the said documents would have been annexed. He urges that the completion of the work is admitted to have ended on December 2014, that is the time accrual of right of action arose where the first defendant ought to have paid having received the goods. Mr. Museti

invited this court to regard the letter of 7th June, 2020 as irrelevant and incapable of extending the period of limitation.

Mr. Museti insists that 19th December 2020 is being alleged as the date which the first defendant should have made payment - See para 8 and 9 of the Plaint, he thus submits that by the Plaintiff's own admission, that is the time the cause of action and right of accrual arose. He, therefore, maintains that this plaint has been filed beyond the period of limitation and urged that the suit be dismissed with costs.

Having heard submissions from both parties, it is indisputable that the issue is not whether the suit is time-barred, but rather whether it being time-barred, can be saved by the exemption under Order VII Rule 6 of the Civil Procedure Code in pleading when the right accrued. This is so because since the suit is based on a contract, the statute is otherwise firm on the time limitation, which is set at 6 years.

Order VII Rule 6 of the Civil Procedure Code requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint should show the grounds upon which the exemption from that law is claimed. This requirement was considered by the Court of

Appeal in **Uganda Railways Corporation vs Ekwaru D.O and 5104 others,** C.A. Civil Appeal No. 185 of 2007 [2008] HCB 61, where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaint, the plaint must be rejected (see also **Murome Sayikwo vs Kuko Yovan and another** [1985] HCB 68).

So it is the requirement that the plaint should show the ground over which exemption is being claimed. The Plaintiff in the circumstance of the matter before me purports to have pleaded the ground to being exempted as protruded correspondence and negotiation with the Defendants. In his submission, while admitting on the 6-year limitation against the suit, he tries to distinguish between the generality of the limitation clause on the contract between the two parties; and the particularity of the accrual of cause of action on the plaintiff. He argues that in the present case, the cause of action arose on 7th June 2020 when the plaintiff, having complied with the instructions to resubmit for the umpteenth time, the 'necessary documents for payment', no payment were received. This is what has been pleaded, but one cannot stop to wonder between the lapses of time period in between correspondences what was happening? Meanwhile, what is it that happened

differently this time around after June 20th, that sprang the plaintiff into action, that is different than what was happening previously that made the plaintiff decide their right to receive payment has now been breached? May be if these were carefully brought into reasoning, it would have made the court to see the grounds that were contemplated under Rule 6 of Order VII.

In any case this ground would have to be considered judicially against the circumstances of a case as to its adequacy to sustain the suit in exemption against time limitation. In my view, there has not been put before the court a ground to be judicially considered since the fact that parties were still negotiating and corresponding has been rejected as such ground by the Court as enough ground to provide exception to the time limit rule.

The choice to go into negotiations is based more on self-efficacy beliefs rather than conditions of impairment. Self-efficacy beliefs are concerned with whether the Plaintiff could accomplish a desired outcome. Obviously, these beliefs would affect what a person chooses to do or not to do, how much effort to put into a task, and how long will one endure on the time and even difficulties. And in my view, this also extends to the choice to negotiate over the decision to sue and bring to book a defaulter on breach of contract. It really is a behavioral choice rather than a functional limitation. It, therefore,

does not qualify as an impairment inherent in the individual party/ Plaintiff nor is it an extraneous circumstance beyond the control of the Plaintiff that would render the Plaintiff unable to file the suit when they should, and hence satisfy as a ground of exemption that is envisaged by the provision under Rule 6 of Order VII of our Civil Procedure Code. If anything in my view, it would hasten the process of settlement that the protruded negotiation after the breach of contracted was trying to effect. It is therefore no surprise that courts have taken the view that protracted correspondences and negotiation (even if it is believed that it might lead to a settlement out of court) do not constitute a justification for exemption from the statute of limitation (see Court of Appeal in **Consolidated Holding Corporation vs Rajan Industries Ltd & Another,** Civil Appeal No 2 of 2003. In **Petro Fuel (T) Ltd and Another vs M. A Kharafi & Sons Ltd,** Commercial Case No 107 of 2020 this Court held that correspondences between parties with a purport to negotiate cannot revive the period of limitation, they do not have the effect of rewinding the period of limitation as set by the law. In **Peter Mangeni t/a Makerere Institute of Commerce vs Departed Asians Property Custodian Board,** S.C. Civil Appeal No. 13 of 1995, the Supreme Court of Uganda held in persuasion to which I view in high regard "..... that

an offer to negotiate terms of settlement between parties to an action, admirable as it may be, has no effect whatsoever on when to serve statutory notice or file a suit in time. It is my opinion that even where genuine and active negotiations are going on or contemplated between the parties, it is still incumbent upon those who need to file documents to do so within the time allowed. Thereafter, they are at liberty to seek adjournments in Court for purposes of negotiation."

Despite the presence of such triable issues apparent on the face of the pleadings of both parties, the whole idea of The Limitation Act is to prevent stale claims. Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is public interest *reipublicae ut sit finis litium,* meaning that litigation is automatically stifled after a fixed length of time, irrespective of the merits of a particular case (see Re-Application of Mustapha Ramathan, (1996) KALR 86 and Hilton vs Sutton Steam Laundry [1946] 1 KB 61 at 81).

I feel inclined to comment on statutory provisions imposing periods of limitation within which actions must be instituted; which seek to serve several aims. In the first place, they protect defendants from being vexed by

stale claims relating to long-past incidents about which their records may no longer be in existence; and their witnesses, even if still available, may well have no accurate recollection anymore. Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is reasonably possible for them to do so, and thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he or she may regard as finally closed an incident which might have led to a claim against them (see Birkett vs James [1977] 2 All ER 801). The legislature must be taken to have sought, and achieved, a proper balance between all these competing interests in enacting that, if actions are to be heard at all, they must be instituted within the various specified periods from the accrual of the cause of action.

Public interest has always been concerned that litigation should be brought within a reasonable time. This enables cases to be dealt with properly and justly. Moreover, the public interest requires the principle of legal certainty. It is for these and other reasons that limitation statutes have been described as "acts of peace" or "statutes of repose". People should be free to get on with their lives or businesses without the threat of stale claims being lurking from further times. The Limitation Act also encourages claimants to bring

their claims promptly and not, in the old phrase, "to sleep on their rights." It is not to extinguish claims (see **Dhanesvar V. Mehta vs Manilal M. Shah** [1965] EA 321; **Rawal vs Rawal** [1990] KLR 275, and **Iga vs Makerere University** [1972] EA 65).

In the final analysis, I uphold the preliminary objection and hold that the suit is time barred. It is consequently dismissed with costs.

Dated at **Arusha** this **23rd** day of **June 2023**

A. Z. Bade
Judge
23/06/2023

Ruling delivered in the presence of parties / their representatives in chambers /virtually on **23rd** day of **June 2023.**

A. Z. Bade
Judge
23/06/2023