IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 238 OF 2022

ARBITER TANZANIA LIMITED..... PLAINTIFF

VERSUS

THE NATIONAL EXAMINATIONS COUNCIL OF TANZANIA.....1ST DEFENDANT

TANZANIA BUILDING AGENCY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

20th & 30th June, 2023

MWANGA, J.

Mr. Urso Luoga, the learned State Attorney raised two points of the preliminary objection calling the suit filed by the plaintiff not maintainable before the court on the following grounds:

i. *That, the suit is incompetent for being time barred.*

ii. *That, the Suit is bad in law for contravening Section 6 (2) and (3) of the Government Proceedings Act [CAP 5 R.E] as amended.*

The facts leading to the above points of preliminary objection are that; On 21st December, 2022 the plaintiff had filed a suit against the defendants praying for Judgment and Decree by declaring that the first and second defendant are in breach of contract. The plaintiff also prayed for payment of interest, general damages and costs of the suit.

On the other hand, the Defendants filed a Written Statement of Defense containing these points of preliminary objection and putting the plaintiff into strict proof. The plaintiff pleaded at paragraph 2 and 3 of the plaint that, the 1st and 2nd defendant are government agencies or institutions established according to law. It was alleged that, the defendants had negligently breached construction agreement entered between the plaintiff and the 1st defendant for extension of the printing unit in Dar es salaam commenced on 18th November, 2007. According to paragraph 5 of the plaint, the contract was revised and concluded on July, 2012.

It followed that; the 1st defendant successfully settled the payments of Tshs. 814, 475,620/= out of Tshs. 885,942,116/=which was the contract price, hence the outstanding balance was Tshs. 71,466,496.30/=.

This amount has been the specific claim lodged by the plaintiff against the defendant for the alleged breach of contract.

In fact, the plaintiff claimed such outstanding amount was a result of his engagement by the first and second defendant on 6th May, 2010 to rectify the roofing part of the building and supervise cooling system consultant, the agreement which was promptly and timely executed. According to the plaintiff, the defects were rectified and duly approved by the second defendant, Tanzania Building Agency as a consultant recruited by the first defendant.

Quite unexpectedly of the plaintiff, the second defendant came up with unjustifiable and unreasonable certificate of making good defects bearing in their mind that the plaintiff executed all contractual obligation and made all good defects during the liability period as specified in the contract. On 5th October the second defendant as consultancy wrote a letter to claim retention of the claimed amount of Tshs. 71,466,496.30/= to the first defendant asking them to sign and return it so as to prepare final certificate payment of Tshs. 71,466,496.30/=.

It can be seen that, on 14th September, 2016 the plaintiff wrote a reminder letter to the second defendant for failure to make final claimed

retention money. On 6th October, 2016 the second defendant wrote a letter to the first defendant that the plaintiff incurred unnecessary extra costs. The alleged defaults made the plaintiff to send several reminders and demand letters up to 2021, which in essence, did not yield any results. In consequence thereof, the plaintiff filed this suit against the 1st, 2nd and 3rd defendants. The 3rd defendant being the Attorney General was joined as a necessary party.

The leave was granted for the preliminary objections to be argued by way of written submissions. The defendant was represented by Mr. Urso Luoga, learned State Attorney and the plaintiff was presented by Mr. Richard Mwingo, the learned Advocate.

As a part of general observation by the learned State Attorney the two mentioned points of preliminary objection meet the test endured in **Mukisa Biscuits Manufacturing Company Ltd Versus West End Distributors LTD (1969) EA 696** because they are purely points of law. Further observations were made in the cited case of **Ernest Sebastian Mbele Versus Sebastian Sebastian Mbele and 2 others,** Civil Appeal No 66 of 2019 (unreported) where at page 16 it was stated that parties are bound by their own pleadings.

On the first point of preliminary objection; the learned State Attorney referred Section 3-part 1 item 7 of the Law of Limitation Act, Cap. 84 R.E 2019 stating that every proceeding described in the first column of the scheduled to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence. According to him, part 1 item 7 of the schedule provides that suit founded on contract not otherwise specifically provided for the period of limitation is six years. He contended further that, the provision of the law above is coached in a mandatory term because of the use of the word "**shall**" which, according to Section 53(2) of the Interpretation of Laws Act, Cap. 1 [R.E 2002] such use of that word in any written law it means the function so coffered must be performed.

In referencing to the contents of paragraphs 9, 11 and 20, of the Plaint, the learned State Attorney submitted that a close look at the plaint the Plaintiff admits that he completed the Project since 2012 and no payments were done to date. It was his view that, since the case was instituted on 21st December, 2022, which is 10 years down the line the suit is time bared beyond the time limit prescribed time under Section

3(1)-part 1 item 7 of the Law of Limitation Act Cap. 84 R.E, which is six years. The learned State Attorney supported his contention in case of **Moto Matiko Mabanga Versus Ophir Energy PLC and 6 Others,** Civil Appeal no 119 of 2021 at Dodoma where at pages 14 of the Judgement quoted the Case of **Ali Shabani and 48 Others Versus Tanzania National Roads Agency(tanroads)** (Supra) it was stated that it is clear that an objection as it is on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law.

For the negotiations and several demand letters sent by the plaintiff to the defendants, the learned State Attorney cited the case of **M/S. P &O International Ltd Versus The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal no 265 of 2020 (unreported) where at page 10 it was stated that pre –court action negotiations have never been ground for stopping the running of time. The statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties. It was further held that, an intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable

wing wring, does so at his own risk and cannot front the situation as defence when it comes to limitation of time. Also, the learned State Attorney referred the plaint at paragraphs 12, 13, 14,15,16,17,18 and 21 which shows some of communications with the 1st and 2nd Defendant stating that is not an excuse for plaintiff not filing this suit within time.

In his conclusion, Mr. Luoga recited the case **M/S. P &O International Ltd Versus the Trustees of Tanzania National Parks (TANAPA)** (Supra), where the Honourable Justices of Appeal referred a case of **John Cornel Versus Grevo (T) Limited,** Civil Case No. 70 of 1998 at page 11 stating that the law of limitation is on actions knows no sympathy or equity and, it is a merciless sword that cuts across and deep into all those every who get caught in its web.

Per contra, Mr. Richard Mwalingo submitted that this point of preliminary objection is vague and has no merits at all. According to the counsel, under section 4 of Law of Limitation Act, Cap. 89, the period of limitation of action commences on the date in which the right of action of such proceedings accrued. To him, section 5 of the Act articulates that the right of action accrues on the date in which the cause of action arises. It was the learned counsel view that, under Section 7 of the Law of

Limitation Act 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. It was further submitted that, basing on the provision of sections 4, 5 and 7 of Law of Limitation Act, Cap. 89 as revised in 2019, the cause of action in the present matter accrued in the year 2019 when all elements establishing the claim of breach of contract came into existence and not 2012 as claimed by the defendants' counsel.

The counsel contended further that, the plaint and its annexures particularly annexture AK-11, AK-12, AK-13, AK-14, AK-15 which form part of the pleading shows that, after expiry of the initial contract there was continued negotiations, communications, meetings, discussions and promises which revived and continued the initially breached contractual relationship as the first defendant instructed the plaintiff to rectify some defects so as to effect the payment and the same instruction also were issued to second defendants as consultancy. It was the counsel view that, there was continued negotiations meeting, promises and communication in writing after expiry of initial contract which implied extension of performance of the contract between the parties and also implying that,

there was implied continued relationship amongst the plaintiff and the defendants. The counsel made reference to annexture AK -11, which showed that, on 2018 the second defendant informed first defendant about the negotiation meeting the copy of it was served to the plaintiff, annexture AK-15. On 2019 the first defendant informed the second defendant that they would not make any payment for incomplete works. The same have been seconded by the defendants written statement of defence in the annexture which marked as NECTA-1.

Regarding the second point of preliminary objection, the learned State Attorney quoted Section 6 (2) and (3) of the Government Proceedings Act, Cap. 5[R.E 2019] as amended stating that, no suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and a copy of his claim shall be sent to the Attorney-General and the Solicitor General. The State Attorney also cited the provision of subsection (3) of the provision which states that all suits against the Government shall, after the expiry of the notice be brought against the Attorney-

General, and a copy of the plaint shall be served upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.

The contention by the plaintiff that the 3rd defendant was duly served through Tanzania Postal Corporation, the same was refuted by the learned State Attorney. Mr. Luoga cited the case of **Novatus Williams Nkwama Versus Tughe,** Civil Appeal No 354 of 2020 (unreported) where at pages 11and 12 of the Judgement, the court held that the document must disclose the distinctive character or nature of the documents it evidences to have been sent. The learned State Attorney referred the Contents of Paragraph 23 where it indicates annexture AK-16 which contains a copy of the demand notice which, according to him, were not properly served to the Defendants. It was also added that, the Plaintiff's attached copies of Tanzania Postal Corporation is not clear as to what document was sent to those different Governments authorities. It was his final submission that, the ninety days' notice was not properly served to the Defendants.

On the strength of his submission, the learned State Attorney invited this court to uphold the two grounds of preliminary objection and dismiss the suit with costs.

In reply, the counsel for the plaintiff submitted that the defendant was duly served a ninety days statutory notice of intention to sue pursuant section 6(2) and 3 of the Government Proceedings Act, Cap. 5 as revised in 2019. According to the counsel, since the law does not provide a mode of serving a document, the same was served through Tanzania Post Corporation as it is a lawfully, reliable and credible mode of communications as exhibited in the annexture AK-16. He added that, defendants admitted on the service of statutory notice to the different Government authorities, however, they disputed that annexture AK-16 does not state on the nature of documents or type of documents sent to the respective Government authorities. In view of that, that cannot be called a preliminary objection in the eyes of law since it requires a prove of evidence from the Tanzania Post Corporation personnel to testify on the nature/type of documents admitted and sent on the material date.

In the end, the counsel concluded that preliminary objections raised is full of misconceptions and misdirection, and therefore shall be overruled

with. cost.

I have gone through the two points of preliminary objection and submissions of the learned counsels. The rules regarding preliminary objections are clearly set out in the case of **Mukisa Biscuits Manufacturing Company Ltd Versus West End Distributors LTD** (supra), which I do not have to detain myself on that. Likewise, as rightly argued by Mr. Luoga, it is trite law that parties are bound by their own pleadings. See, Ernest **Sebastian Mbele Versus Sebastian Sebastian Mbele and 2 Others,** (supra) that. Apart from that, in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88 the court had this to say: -

> ***'In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence, he is not permitted to set up a new case'.***

See, also the case of **African Banking Corporation Versus Sekela Brown Mwakasege,** Civil Appeal No. 127 of 2017, the court had also this to say;

> ***"No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party".***

Having looked at those laid down principles, the plaint subject of this suit at paragraph 21 it was pleaded that the contract was concluded on July, 2012. In the present records, the suit was filed on 21st December, 2022 which is almost ten (10) years from the date the contract was entered and concluded. The counsel for the plaintiff is contending that; **one,** there was a continuing breach of contract which allows time to run at the very moment of the breach or wrong continued. **Two,** the cause of action in the present matter accrued in the year 2019 when all elements establishing the claim of breach of contract came into existence and not 2012 as claimed by the learned State Attorney. I have thought carefully the argument of the learned counsel and considered that the same is without any substance. There was nothing pleaded in the plaint to show that there was such a continued breach. What can be seen is that there was various negotiations meeting, promises and communication in writing between the parties. As per the plaint, after the contract had been concluded on 2012 and thereafter the plaintiff started making follow-up of the payments of the outstanding amount. Such follow-up in terms of the negotiations, communications, meetings, discussions and promises, as held by Mr. Luoga has no effect of stopping the running of time. In the

cited case of **M/S. P &O International Ltd Versus The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal no 265 of 2020 the court had held that: -

> ***" ...it is trite that pre –Court action negotiations have never been ground for stopping the running of time. Our decision in Consolidated Holding Corporation v. Rajani Industries ltd and another, Civil Appeal no.2 of 2023 (unreported) cannot be more relevant in this appeal for the proposition that negotiation do not check the time from running. The Court sought inspiration from a book by J.K Rustomji on the law of Limitation ,5th edition to the effect that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties. We draw a similar inspiration from a decision of the High Court at Dar es Salaam in Makamba Kigome and Another Ubungo Farm Implements Limited & PRSC, Civil case no.109 of 2005 (unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement;***
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> ***"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond***

the period provided by law within which to mount an action for the actionable wing wring, does so at his own risk and cannot front the situation as defence when it comes to limitation of time "(at page 16)".

That being said and done, it is fairly to conclude that there is nothing on the face of it were pleaded by the plaintiff to suggest that the suit was filed within the time proscribed by law. As it was held in the case cited above where the Honourable Justices of Appeal cited the case of **John Cornel Versus Grevo (T) Limited**, Civil Case No. 70 of 1998 (Unreported) at page 11 that:-

"However unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It a merciless sword that cuts across and deep into all those every who get caught in its web..."

In the upshot, the suit comes to an end for it being time bared. It is, therefore, dismissed forthwith and without costs. Since this point alone disposes the whole suit, I find no reason to proceed with the determination of the second point of preliminary objection.

Order accordingly.

H. R. MWANGA

JUDGE

30/06/2023

COURT: Ruling delivered in the presence of Mr. Luoga, learned State Attorney for the defendants, also holding brief for Mr. Richard Mwalingo, counsel for the Plaintiff.

H. R. MWANGA

JUDGE

30/06/2023