**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 203 OF 2022**

**MOHAMED IKBAL HAJI .....PLAINTIFF**

**VERSUS**

**ABDALLAH SAID ALLY HAMIS .....DEFENDANT**

**RULING**

*19th June, & 13th July, 2023*

**MWANGA, J.**

The plaintiff and Defendant had formed a Company called Msikimwe Investment Company Limited which had a entered into contract with Temeke District Football Association in a project to develop a football pitch in Temeke, the proceeds from which they were to be shared amongst themselves. Because of the said project, in the year 2008 between 8th and 16th September, 2008 they entered into an agreement where the Defendant borrowed Tshs. 400,000,000/=. According to paragraph 4 and 5 of the plaint and attachments thereto the borrowed sum was to be paid from dividends received from Msikimwe Project.

It may be mentioned that, on 15th September 2009 the Plaintiff entered into another contract with the Defendant where the defendant

borrowed another sum to the tune of Tshs. 200,000,000/= from which according to paragraph 9 of the Plaint and the attachment thereto, MIH-4 its repayment was also depended on the dividend accrued from Msikimwe Project. However, Temeke District Football Association terminated the contract with Msikimwe Investments Company Limited which automatically the Company would never generate dividends and, as such, the Defendant failed to repay the outstanding loans from the anticipated dividends.

Despite all that, paragraph 8 of the Plaint shows that the Plaintiff demanded from the Defendant repayment of the loans amount. It was from such failure to repay the stated loan that this suit was filed before on November 2022.

It is under the aforesaid facts that moved the counsel for the defendant to raise a preliminary object that the suit is time barred and, therefore, this honorable court has no jurisdiction to entertain this matter.

The preliminary objection was argued by way of written submission. The plaintiff was represented by Mr. Fredrick Mpanju, the learned counsel and Ms. Rehema Mghweno, learned counsel appeared for the defendant.

Ms. Rehema submitted that, according to Section 3 (1) of the Law of Limitation Act, Cap 89 [R.E. 2019] and the first Column of the Schedule to this Act at Part 1, Item 7 of the Schedule the time limitation for Suit founded on contract not otherwise specifically provided for shall be Six years.

According to the learned counsel, the provision of Section 4 of the Law of Limitation Act provides that, the period of limitation prescribed by this Act in relation to any proceeding shall commence from the date on which the right of action for such proceeding accrues .Also, the counsel referred the provision of Section 6 of the Law of Limitation at paragraph (f) which provides 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.

In view of the above, the counsel contended that the loan agreement of Tshs. 400,000,000/= was entered on September 2008 which is about 14 years and 2 months to the time when the suit was preferred before this honorable Court. Likewise, the counsel argued that the Oral Contract which was entered on September 2009 is also hopelessly time barred for it is also about 13 years and 2 months from the time the contract was entered to the time the suit was preferred before this honorable Court. In addition to that, the counsel argued that

even if it is taken that it arose later when it became clear to the knowledge of the plaintiff that the Defendant had breached the contract after he had failed to repay the loan the suit would still hopelessly be time barred because it will be about 10 years from that period to the time when the suit was preferred before this honorable Court.

The counsel, referred this court in the case of **Mukisa Biscuits Manufacturing Co. Ltd. Versus West End Distributors Ltd [1969] 1 E.A. 696** whose principle have been adopted in various decisions of the Court of Appeal such as in **Swila Secondary School Versus Japhet Petro,** Civil Appeal No. 362 of 2019 (unreported) where it was stated at Page 10 that; the issue of jurisdiction for any court is basic and it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. According to the decision, Courts or tribunals are enjoined not to entertain any matter which is time barred and in event they did so, the Court unsparingly declare the proceedings and consequential orders a nullity.

Per contra, Mr. Fredrick commenced his submission by stating that that neither of the agreements included any explicit provisions regarding the repayment timelines for the loans extended. However, Defendant's failure to repay the loan constitutes a breach of the agreements. The learned counsel referred the definition of the term "right of action"

according to Black's Law Dictionary to mean the right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon. The counsel also referred the term "cause of action" as defined in Mulla, The Code o f Civil Procedure, 18th Edn, Vol.1, LexisNexis 2014 and the case of **Mashado Game Fishing Lodge Ltd and 2 Others v Board of Trustee of Tanganyika National Park** [2002] TLR 319. In the cited case, the Court held that:-

> ***"a person is said to have a cause of action against another where that person has a right and the other has infringed or breached that right with the result that the person with the right suffers material loss or any other loss".***

In view of the observation of the counsel, it is evident and of utmost importance that in order to ascertain the time-bar status of this suit, it is crucial for this honorable court to establish the date the respective contract breach and, consequently, the accrual of the right of action. To him, it is through this careful evaluation of the timeline that the court can definitively ascertain whether the prescribed time limitation for filing this suit, as stipulated by the relevant provisions of the law, has been exceeded or not. Again, that it is incumbent upon this honorable court to undertake a comprehensive and diligent look into the

circumstances surrounding the alleged breach of contract drawing upon the relevant facts and legal principles, in order to render a just and equitable decision on the issue of time-bar.

It was the counsel view that, in the year 2012 the Plaintiff became aware of the termination of the contract between Temeke District Football Association and Msikimwe Investment Company Limited, which consequently hindered the Defendant's ability to repay the loan through dividends as agreed. As a result, the Defendant became obligated under contract to seek alternative sources for loan repayment.

The counsel contended further that, despite numerous reminders to the defendant, the Plaintiff’s reliance on the Defendant's promise to repay and fact that there was no timeline set in the loan agreement, the Defendant failed to honor his promise. As a result of that, the Plaintiff issued a demand notice on October 18, 2022, seeking payment of the outstanding amount.

The counsel submitted further that, upon careful examination of the aforementioned paragraph, it becomes evident that the breach of contract occurred when the defendant failed to fulfill their repayment obligation, specifically, the breach occurred upon the defendant's explicit refusal to repay the loan, as stated in their response to the demand

notice on October 28th, 2022. Consequently, the 6-year time frame specified by the law would expire on October 28, 2028. Thus, indicating that the suit was filed well within the prescribed time limit.

The counsel narrated further that; it was incorrect for the learned counsel to reflect in her submission that time limitation started to run from September 2008 when the contract was entered because no right of action had commenced at that time. Additionally, it is misguided to consider the termination of the Temeke Football Pitch project, which impacted the Defendant's ability to repay the loan through dividends, as a breach of contract.

Moreover, the counsel found not necessary to address the learned counsel's submission regarding the oral loan agreement entered in September 2009 on the ground that this suit is solely based on the loan agreements entered in September 2008. The focus should remain on the relevant agreements pertaining to this case. It was the counsel view that,

I have gone through this singly point of preliminary objection and submissions of the learned counsels. The rules regarding preliminary objections are clearly set out in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd Versus West End Distributors LTD**

[1969] 1 E.A. 696. Likewise, as rightly argued by Ms. Rehema it is trite law that parties are bound by their own pleadings. See also the case of **Ernest Sebastian Mbele Versus Sebastian Sebastian Mbele and 2 Others,** Civil Appeal No 66 of 2019 (unreported). Also, 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'.***

Having looked at those laid down principles, the plaint subject of this suit at paragraphs 4, 5 and 9 shows that the plaintiff extended various loans to the defendant from the period of 9th September, 2008; 16th September, 2008; and 15th September, 2009. According to paragraph 3 the total loan extended to the defendant for the stated period were Tshs. 600,000,000/= (say, six hundred million Tanzanian Shillings). It was acknowledged by both counsels that, on 2012 the agreement with the Temeke District Football Association to develop football pitch was terminated and this was the time the plaintiff realized that the defendant had breached the contract. The counsel for the defendant argued that even if this period is taken to be the time when the breach of the contract occurred the same would make the suit time

barred as it was filed beyond the prescribed time of six (6) years pursuant to Section 6 (f)of the Law of Limitation Act, Cap. 89. On the other hand, the counsel for plaintiff was contending that; the cause of action in the present matter accrued in the year 2022 when the defendant was served with demand letter via Shariff & Partners Advocates on 28th October, 2022. In essence, the counsel is short of suggesting that communication made through that demand letter with the defendant stopped the running of time.

I have thought carefully the arguments of the learned counsels. It would be material to consider that, the negotiations meeting, promises or communication in writing between the plaintiff and defendant, at no point in time, had an effect of stopping the running of time. In the 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 law 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;***

***"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 was nothing on the face of it 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, 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..."***

From that point of view, the appellant ought to file his case in this court just six years from 2012 after he had realized that the defendant defaulted to repay the loan.

In the upshot, the suit comes to an end for being time bared. It is, therefore, dismissed with costs.

Order accordingly.

**H. R. MWANGA**

**JUDGE**

**13/07/2023**

**COURT:** Ruling delivered in the presence of Mr. Jamilla Kassim, learned Advocate for the Plaintiff, and absence of the Defendant.


**H. R. MWANGA**

**JUDGE**

**13/07/2023**