IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

CIVIL CASE NO. 10 OF 2022

DR. GIUSEPPE DI GIULIO ..... PLAINTFF

Versus

AAR INSURANCE (T) LIMITED ..... DEFENDANT

RULING

22/11/2022 & 07/02/2023

KAMUZORA, J.

The Plaintiff sued the Defendant for breach of medical insurance contract, unreasonable revocation of the offer to renew contract after premium payment was made and failure to refund the Plaintiff's medical insurance claims as per their agreed medical insurance contract. The Plaintiff claims to be indemnified specific damages to the tune of TZS 927,260,956/= arising out of breach of the insurance contract, together with interest at the Court rate from the judgment date until full payment date. He also claims against the Defendant to be compensated TZS 17,885,778/= as the unpaid claims. Other reliefs sought include general damages as may be assessed by the Court, specific performance that he

be reinsured, costs of the suit and any other reliefs as the Court deems fit to grant.

In her written statement of defence filed on 20/06/2022, the Defendant apart from denying all the claims, challenged competence of the suit by raising two points of preliminary objection couched as follows:

a) The claim in this matter is time barred; and

b) This Honourable Court lacks jurisdiction to determine the matter.

On 12/07/2022 when the matter was called for hearing of the preliminary objections, the Plaintiff was represented by Ms Patricia Erick, learned advocate while the Defendant was represented by Mr. Rodgers Godfrey Mlacha, learned advocate. By consensus, it was resolved that the preliminary objections be argued by way of written submissions.

Submitting in support of the first limb of the preliminary objection, Mr. Mlacha contended that the suit is founded on both breach of contract and breach of duty which is tort per-se. He asserted that time limit for suits founded on tort is three years referring item 6 of Part I of the schedule to the Law of Limitation Act, Cap. 89 [R.E 2019], (henceforth "LLA". He referred to paragraphs 17 and 18 of the Plaintiff's plaint which illustrates that the right of action in respect of the unpaid claims, accrued on 15/01/2014 when the Defendant refused to pay the said claims as per the email forming part of annexure 9 to the plaint. It was his further

submission that the suit was filed on 31/03/2022, hence the suit for unpaid claims is rendered hopelessly time barred.

Regarding the claim for breach of contract, it was Mr. Mlacha's contention that failure by the Defendant to renew the medical insurance contract for the years 2013/2014 as per paragraphs 17 and 18 of the plaint forms the basis of breach of contract. It was further submitted that one of the reliefs sought by the Plaintiff is specific performance that, he be reinsured which clearly manifests that there was breach of contract. Mr. Mlacha further submitted that time limit for suits founded on breach of contract is six years making reference to item 7 of part I of the Schedule to the LLA. He added that the Plaintiff's right of action accrued on 18/06/2014 when the Defendant refused to renew the Plaintiff's medical policy for the year 2013/2014, therefore counting from 18/06/2014, the six years lapsed on 18/06/2020. That, since the suit was filed on 31/03/2022, there is therefore no gainsaying that the suit is hopelessly time barred. According to counsel for the Defendant, a suit which is found time barred suffers the wrath of dismissal. To reinforce his contention, he referred this Court to section 3(1) of the LLA and the Court of Appeal decision in the case of **Barclays Bank Tanzania Vs. Phylisian Hussein Mcheni**, Civil Appeal No. 19 of 2016 (unreported).

Substantiating the 2nd limb of the preliminary objection, Mr. Mlacha accounted that courts are barred from entertaining suits which their cognizance is expressly or impliedly barred by some other laws. He made reference to section 7 of the Civil Procedure Code, Cap. 33 [R.E 2019], (henceforth the "CPC"). Reliance in this respect was also made in the case of **Salim O. Kabora Vs. TANESCO Ltd & 2 Others**, Civil Appeal No. 55 of 2015 (unreported). According to Mr. Mlacha, the Insurance Act, No. 10 of 2009 provides specific forum for resolving disputes arising between the insurance consumers and insurance registrants. He referred section 122(1) of the Act, which establishes the Ombudsman Service as a special machinery for entertaining insurance disputes between insurance consumers and insurance registrants. That, the Service has wide range of duties including receiving, investigating, hearing and determining complaints against insurance registrant. Referring sections 123 and 124 of the Act. Mr. Mlacha further submitted that proceedings in the Ombudsman Service are governed by the Ombudsman Regulations, 2013 (G.N No. 411 of 2013) (henceforth "G.N No. 411 of 2013"). He added that this Court lacks jurisdiction to entertain this fresh suit, otherwise, it ought to have been preferred as reference because under paragraph 46 of the Plaintiff's plaint, the matter was referred to the Ombudsman Service

without any success. He concluded by urging the Court to sustain the 2nd limb of the preliminary objection, hence dismissing the suit with costs.

Responding to the 1st limb of the preliminary objection, Ms Patricia averred that section 26 of the LLA read together with order VII Rule 6 of the CPC provide for an automatic exclusion of time when there are allegations of fraud or mistake until such fraud or mistake is discovered. To support her contention, she relied on the decision of the Court of Appeal in the case of **Ms. Safia Ahmed Okash (As the Administratrix of the Estate of the late Ahmed Okash) Vs. Ms Sikudhani Amiri & 82 Others**, Civil Appeal No. 138 of 2016 (unreported). She added that such grounds must be pleaded in the plaint, referring paragraphs 41, 42, 43 and 44 of the plaint where the Plaintiff alleged fraud on the part of the Defendant. In those paragraphs according to Ms Patricia, the Plaintiff had confirmed to TIRA that she had already settled the Plaintiff's claims through court settlement something that was not true. In counsel's view, that was fraud that intended to deceive the authority from proceeding with the Plaintiff's claims. According to Plaintiff's counsel, the fraud was discovered in 2020 through TIRA's letter dated 29/06/2020, which was further confirmed on 26/07/2021 by TIRA's officer Mr. Humphrey.

It was further submitted by the learned advocate for the Plaintiff that the Plaintiff was not idle as he referred the claims to TIRA which is

mandatory procedure before referring the dispute to the Ombudsman Service. However, that the dispute could not be referred to the Ombudsman Service because the same had no jurisdiction to entertain disputes which do not involve direct losses or damages suffered by the claimant that exceed TZS 15,000,000/=, referring section 124(1) of the Insurance Act. She was firm that the Plaintiff's claims exceeded that amount hence could not be resolved by the Ombudsman service. Therefore, that the Plaintiff was prosecuting his dispute through TIRA, a dully established body to coordinate insurance matters including coordinating hearing before the Ombudsman service, only that the service had no jurisdiction to entertain the dispute due to its pecuniary value. According to the learned counsel, the whole sequence of events was reflected under paragraph 38 of the plaint. It was her strong view that such period should automatically be excluded from computation of time as per section 21 of the LLA, which provides for automatic exclusion of time of proceedings where a person has been prosecuting in good faith in a court which, from defect of jurisdiction or other cause like nature, is unable to entertain it. She insisted that since TIRA and the Ombudsman Service are statutory bodies established to deal with resolving disputes arising from insurance matters, then the same are to be regarded as courts within the meaning ascribed to the provision above.

Responding on the 2nd limb of the preliminary objection, Ms Patricia fortified that the law does not make it mandatory for one to refer insurance claim in the Ombudsman Service, referring section 123 of the Act which makes use of the word 'may' which connotes discretion. She also relied on section 53 of the Interpretation of Laws Act, Cap. 1 [R.E 2019] which confirms that the use of the word 'may' does not impose duty/mandatory requirement, it rather implies discretion. Therefore, in her considered view, the Plaintiff was not compelled to refer the dispute to the Ombudsman Service as purported by the defence counsel. She also referred section 124 of the Act which mandates the Ombudsman Service to deal with insurance claims that involve direct losses and damages which does not exceed 15 million. She amplified that the Plaintiff's claim does not involve direct loss and damages and/or exceeds 15 million therefore does not fall within the jurisdiction of the Service. She relied on paragraphs 45 and 46 of the plaint implicating that the Plaintiff started prosecuting the claim with TIRA which had obligation to channel the same to the Ombudsman Service, but it was never heard and determined for want of jurisdiction. She concluded by urging the Court to overrule the preliminary objections with costs since the matter was filed within the prescribed time and it is within the jurisdiction of this Court.

In his rejoinder submission, Mr. Mlacha contended that the Plaintiff's suit is not based on reliefs from consequences of the purported fraud of the Defendant as stated under paragraphs 41, 42, 43 and 44 of the plaint. He asserted that suit is based on fraud when fraud is an essential element of the Plaintiff's claim. To support his stand, he referred this Court to an English case of **Beaman Vs. Arts Ltd** [1949] K.B 550. It was his further submission that the Plaintiff's suit is solely based on breach of medical insurance contract, unreasonable revocation of the offer to renew medical insurance contract after payment of premium and failure to refund in full medical claims as stated under paragraph 3 of the plaint. Also, that the tortuous claims alleged in the plaint do not suggest any fraud, therefore the Plaintiff's suit cannot seek refuge from the law of limitation because his suit is not based on the alleged fraud. Further, there is no averment in the plaint that the Plaintiff's right of action was concealed by the purported fraud on the part of the Defendant. It was Mr. Mlacha's further submission that even if the alleged fraud existed, it was committed against TIRA and not the Plaintiff.

According to Mr. Mlacha Order VII Rule 6 of the CPC relied on by Plaintiff's counsel required the plaint to disclose that the suit was instituted after the expiration of the prescribed period of time and the grounds upon which exemption from the law of limitation is claimed. To bring his

argument home, he relied on the Court of Appeal decision in **Fortunatus Lwanyantika Masha & John Woshi Obongo Vs. Claver Motors Limited**, Civil Appeal No. 144 of 2019 (unreported). He maintained that the Plaintiff in this case has not considered himself time barred as there is no paragraph in the plaint showing that the Plaintiff was time barred, therefore there is no paragraph in the plaint showing grounds upon which exemption from the law of limitation is sought. According to Mr. Mlacha, the case of **Ms Safia Okash** (supra) relied on by the Plaintiff's counsel is distinguishable because that case was based on fraud unlike the suit under consideration.

Regarding reliance on section 21 of the LLA, the defence counsel was of the view that the provision cannot be invoked because neither TIRA nor the Ombudsman Service is a court. Moreover, the plaint does not show that the proceedings in TIRA and Ombudsman service were terminated on account of jurisdiction or other cause of the like nature. That, exemption under section 21 also goes hand in hand with the plaint showing that the suit is time barred hence the Plaintiff pleads as ground exemption from the law of limitation that the proceeding was delayed by the proceedings in the TIRA.

Regarding jurisdiction of the Court, Mr. Mlacha re-joined that the Court has no jurisdiction because as per sections 123 and 124 of the

Insurance Act, the Ombudsman Service has unlimited pecuniary jurisdiction when it comes to hearing and determination of complaints against insurance registrants. The pecuniary jurisdiction according to the learned counsel, is only limited to awarding direct losses and damages, admitting that this case does not fall within the award of direct losses and damages' cases. He reiterated the prayers made in the submission in chief.

I have considered the preliminary objections raised and the competing submissions of the learned counsel for both parties. In disposing the preliminary objections, I will first determine the second limb which challenges jurisdiction of this Court to entertain the suit.

It is undisputed fact that all insurance disputes between the insurance consumers and insurance registrants, must be referred to the Ombudsman Service as a body entrusted to resolve such types of disputes. The Ombudsman established under section 122 of the Insurance Act is tasked with duties to resolve all insurance disputes arising between insurance consumers and insurance registrants. Under section 123 of the Act, all complaints against insurance registrants are to be referred to the Ombudsman service except those enlisted under section 123(a), (b) and (c).

In her submission, the Plaintiff's counsel referring section 124 of the Act argued that jurisdiction of the Ombudsman service is limited to claims that do not exceed TZS 15 million and that the claim should do not involve direct losses or damages suffered by the complaint. It is clear that powers and functions of the Ombudsman are provided under section 124 of the Insurance Act and Regulation 6 of the Insurance Ombudsman Regulations, 2013, G.N No. 411 of 2013.

Section 124. (1) of the act read;

*"The Ombudsman shall have **powers to grant an award** to the complainant for direct losses and damages suffered by the complainant up to a maximum of **fifteen million shillings**"*

Regulation 6 of GN No. 411 of 2013 provides:

"6.- (1) The Ombudsman shall be the head of the Ombudsman service and accordingly, shall: -

*(a) **administer all complaints filed by insurance consumers with monetary value of maximum Tanzania shillings forty million;***

(b) conduct investigations for determining viability of complaints; and

(c) perform other functions and exercise powers as conferred under the Act."(Emphasis added)

From the above provisions, while the powers of the Ombudsman service in granting award is limited by the Act to fifteen million, the powers in

administering complaint is extended to forty million. In other words, the ombudsman can entertain a complaint of up to forty million but can only issue an award not exceeding fifteen million. In that regard, a dispute whose pecuniary value exceed TZ 40 million, cannot lie with the Ombudsman service. Therefore, contention by Mr. Mlacha that the Ombudsman Service has unlimited pecuniary jurisdiction has no legal basis.

The Plaintiff's counsel also referred section 123 of the Insurance Act, which in her view, confer discretion to a party either to refer the dispute to Ombudsman service or to the normal courts because the word used in that provision is 'may' which connotes discretion. Undoubtedly, the learned advocate was in error. Despite the fact that the word used is 'may' in the provision, it was not meant to impose discretion on choice of forum to a party. Once again, it has to be borne in mind that whenever the word 'may' is used in a provision of the law, it does not always mean that such provision is not couched in mandatory terms. In this respect, guidance is resorted in the Court of Appeal decision in **Tambueni Abdallah & 89 Others Vs. National Social Security Fund,** Civil Appeal No. 33 of 2000 (unreported), where it was plainly stated:

"Two, we agree with the respondent that the word "may" in section 4(1) of the Act does not give discretion as to which Court to go ***but***

that an employee has discretion of whether or not to litigate." (Emphasis supplied)

The spirit in the above case law is applicable in the case at hand. The discretion availed to the complainant as expressed in the above provision is whether to litigate or not, and not choice of forum. The circumstance in this case does not suggest that the word 'may' was used to connote alternative forum for referring insurance dispute. It is trite that once the law establishes certain forum for adjudicating certain types of disputes, such forum must be exhausted before resorting to the judicial process otherwise, their establishment would be rendered meaningless. This was reinstated in the case of **Parin A. A. Jaffer and Another Vs. Abdulrasul Ahmed Jaffer and two Others** [1996] TLR 110, at page 116 the court held:

"Nevertheless, I prefer the view that it is a good policy which may be extended to analogous situations. This is out of the recognition that the rule is meant to check the overcrowding of legal actions in the courts of the higher grade. ***Thus, where the law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should, in general be exhausted before recourse is had to the judicial process"*** (Emphasis added)

The above excerpts are in consonance with the import of section 7 of the CPC which bars courts from adjudicating claims which are

specifically reserved by law to be determined by some other bodies. That being the position, I find that Ms Patricia's contention that section 123 of the Act meant to bestow on the Plaintiff choice of forum, is highly misconceived.

Now, whether this Court has requisite jurisdiction to entertain the suit, the answer is in the affirmative. This is due to the fact that the pecuniary jurisdiction of the Ombudsman service as pointed out earlier, is limited to claims with maximum value of forty million only. Claims with value higher than forty million, cannot be entertained by the Ombudsman's service. From the Plaintiff's plaint it was stated under paragraph 46 that the claim was above TZS 40 million therefore beyond pecuniary jurisdiction of the Ombudsman. The same was pleaded in the reliefs sought by the Plaintiff under paragraphs 48(a) and (b) showing that the specific damages claimed go beyond 1billion shillings. That means it is beyond the pecuniary jurisdiction of the Ombudsman service as per Regulation 6(1)(a) of G.N No. 411 of 2013. Since the Ombudsman lacked jurisdiction to entertain the claim, the suit was properly filed in this Court because this Court has unlimited jurisdiction. That said, the second limb of the preliminary objection is overruled.

I now revert to the first limb of the preliminary objection. According to Defendant's counsel, the suit is founded on both tort and breach of

contract claims. At least, the submissions of both learned counsel for the parties converge on the point that the suit was founded on both breach of contract and tort (breach of duty). Both counsel for the parties are also at one stand that right of action accrued in 2013/2014 as per paragraphs 9, 16, 17 and 18 of the plaint.

Mr. Mlacha submitted that since the time limit to file suits founded on breach of contract is six years and since time to file suits founded on tort is three years, the suit is time barred. On her part, Ms Patricia relied on sections 21 and 26 of the Law of Limitation Act (LLA) stating that the law provides for automatic exclusion of time when the suit is based on fraud or mistake, until the time the same is discovered. She added that the law provides for automatic exclusion of the time of proceedings where a party has been prosecuting in good faith in a court, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The question is whether sections 21 and 26 of the LLA read together with Order VII Rule 6 of the Civil Procedure Code, can salvage the Plaintiff from finding the suit time barred. Section 26 of the LLA provides:

> *"26. Where in the case of any proceeding for which a period of limitation is prescribed-*
> *(a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;*

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the proceeding is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered,"

Order VII Rule 6 provides:

"6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed."

In the first place, the Plaintiff's suit was not founded on fraud as pointed out by Defendant's counsel. As pointed out earlier on, the Plaintiff's suit was founded on breach of medical insurance contract and tort. Paragraphs 41, 42, 43 and 44 of Plaintiff's plaint do not specifically plead existence of fraud on the part of the Defendant. Assuming that the said paragraphs 41, 42, 43 and 44 which the Plaintiff's counsel relied on support existence of fraud, still they do not disclose whether the delay to institute the suit was attributed by the alleged fraud. In other words, there is no paragraph in the plaint suggesting that the Plaintiff's right of action was curtailed by any fraud.

According to Rule 6 of Order VII cited above, a party who seeks to rely on exemption under that Rule, must state specifically in the plaint

that the suit is time barred, and at the same time, that party must demonstrate facts showing grounds upon which he relies to exempt him from limitation. It is not sufficient for a party to show that there was fraud in the plaint, he has to expound further that the suit is time barred and facts showing reasons to be exempted from limitation must be apparent on the plaint. Nothing has been stated in the Plaintiff's plaint showing first, that the suit was time barred, and second, the facts showing grounds upon which the Plaintiff relies to exempt him from limitation. The plaint was designed in a way that the suit was filed within time. Therefore, Order VII Rule 6 cannot salvage the Plaintiff from limitation. Applicability of Order VII Rule 6 has been restated by Courts in numerous decisions including the Court of Appeal in **M/S. P & O International Ltd Vs. The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of 2020 (unreported), while faced with an akin scenario, the Court held:

> *"It is clear from the pleadings that the appellant never considered that she was time barred so as to plead exemption from limitation.* ***To bring into play exemption under Order VII rule 6 of the CPC, the Plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation.*** *"*(Emphasis added)

See also: **Fortunatus Lwanyantika Masha and Another Vs. Claver Motors Limited** (supra) and **Ali Shabani & 48 Others Vs. Tanzania**

Roads Agency (TANROADS) and Another, Civil Appeal No. 261 of 2020 (unreported).

What appears in the case at hand is that the Plaintiff engaged himself into endless negotiations with the Defendant which cannot exempt him from limitation. It has been held times and again that negotiations between parties cannot act as bar to limitation of time. In **M/S. P & O International Ltd** (supra), the Court of Appeal referred the decision of the High Court at Dar es salaam in **Makamba Kigome & Another Vs. 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 wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time."*

The Plaintiff's counsel also relied on section 21 of LLA to exempt the Plaintiff from limitation. The provision is clear that the Plaintiff must have been prosecuting with due diligence another civil proceeding whether in a court of first instance or Court of Appeal against the Defendant. In the

first place no case was being prosecuted by the Plaintiff in any court. Contention by Ms. Patricia that TIRA and Ombudsman service are courts, appears novel. There is nothing to evidence the existence of the proceedings alleged. Further, in order for the provision to apply, the proceeding that was being prosecuted must have failed due to defect of either jurisdiction or other cause of the like nature. In the suit under consideration, apart from the fact that there was no suit being prosecuted in any court, there is nothing exhibited showing that such proceedings in TIRA as relied on by the Plaintiff's counsel, failed due to defect of jurisdiction or any other cause of a like nature. Therefore, the Plaintiff cannot seek refuge under section 21 of LLA.

As earlier on stated, the Plaintiff's right of action arose in 2014. In 2015, the Plaintiff wrote a demand letter to the Defendant narrating his claims, but did not take any initiative to institute the suit. The instant suit was filed on 31/03/2022, more than seven years after the right of action accrued. Since the suit is founded on breach of contract and tort whose time limit are 6 and 3 years respectively, there is no gainsaying that the suit is hopelessly time barred. Resultant effect of a suit which is found time barred can be gleaned from the case of **Ali Shabani & 48 Others Vs. Tanzania Roads Agency (TANROADS) and Another** (supra), where the Court of Appeal commented:

"In the light of the clear statement of the law, we are unable to disagree with the learned trial Judge. She rightly held that the appellants suit was time barred it being instituted beyond 12 months from the date on which the time accrued. ***As the suit was time barred, the only order was to dismiss it under section 3(1) of the LLA. Accordingly, we find no merit in ground 2 and dismiss it.***"

Fortified by the above position and having found the suit as time barred, I proceed to dismiss the same with costs.

DATED at **ARUSHA** this 7th February, 2023.

D. C. KAMUZORA

JUDGE