IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

CIVIL CASE NO. 01 OF 2019

DEEP QUARRIES LIMITED.....PLAINTIFF

VERSUS

IKUTI INVESTMENT LIMITED.....DEFENDANT

RULING

Last Order: 24th July 2023.
Date of Ruling: 04th August 2023.

MASABO, J:-

By a plaint filed in court on 28th December 2018, the plaintiff is suing the defendant for breach of contract. She has alleged that, she entered into an agreement with the defendant for purchase of an aggregate plant comprising of a complete plant with jaw crusher, conveyers, cone crusher, vibrating screen, motors, switch panel, generators 250KVA, compressor with jack hammers and bits, wheel loader WA 200, excavator and its bucket and stone breaker pc 350, land, storage building, mining license and all buildings at a consideration price of Tshs. 500,000,000/=. That, upon execution of the agreement, she made a part payment to a tune of Tshs. 288,980,000/=. However, the defendant terminated the contract hence the present suit for recovery of the paid sum of Tshs. 288,980,000/=.

Upon being served with a summon requiring her to file her defense, the defendant filed her written statement of defence accompanied by a notice of preliminary objection premised on the following five limbs. *One,* the suit is time barred. *Two,* the plaintiff has brought the suit without authority. *Three,* the plaintiff is suing a nonexisten company. *Four,* the suit closed the door to arbitration thus rendering provisions of clause 13 in the sale agreement meaningless. And, *five,* the plaint was wrongly verified by a counsel.

On 8th May 2023, during the presence of Ms. Amina Sungura, Counsel for the plaintiff and Mr. Langen Robert, counsel for the defendant, this court scheduled the hearing of the preliminary objection to proceed on 20th June 2023. However, on the said date, the plaintiff and his counsel defaulted appearance. The hearing was rescheduled to 24th July 2023, on which date the plaintiff and his counsel once again defaulted appearance. Hence, an *ex parte* hearing of the preliminary objection.

Submitting in support of the first limb of the preliminary objection, Mr. Benard Steven, counsel for the defendant abandoned the third and fourth limbs and submitted in respect of the first, second and fifth limbs. In respect of the first limb of the preliminary objection, Mr. Steven submitted that, the case is premised on a contract dated 17th March, 2012. According to item 7 of Part I of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019, the time limit for suits founded on contract is six years. He proceeded that, Order VII, rule 1(e) of the Civil Procedure Code Cap. 33 R.E 2019, requires the plaintiff to disclose the cause of action and the date on which it accrued. Contrary to that provision, the plaintiff herein did not disclose the date of

accrual of right an omission which entitles the court and the defendant to deem the date of execution of the contract which is 17th March 2012 as the date for accrual of the right of action. Going by such assumption, since the present case was filed in court on 28th December, 2018, it is obvious that the suit was filed out of time as a period of six (6) years, ten (10) months and thirteen (13) days had lapsed when the suit was instituted. Hence, offensive of item 7 of Part I of the schedule to the Law of Limitation Act. In fortification, he cited the case of **Tanzania Revenue Authority vs. Davson Ishengoma**, Civil Appeal No. 126 of 2011, CAT (unreported) and prayed that the first limb of the preliminary objection be upheld.

Submitting on the second limb of the objection, he argued that the present case has been filed by a company. As per section 181, 133 to 151 of the Companies Act, Cap 212, companies communicate through board resolutions. Such mode of operation protects the companies from financial and legal implications and individual with personal interests that may be injurious to the welfare and survival of the company. Contrary to this, in the present case no resolution was made to authorize the institution of case and nowhere in the plaint did the plaintiff plead that he had authority to institute the suit. He concluded that the omission has rendered the suit incompetent and fortified his submission with the case of **New Life Hardware Company and Others vs. Shandong Locheng Export Company Ltd and Others**, Commercial Case No. 86 of 2022 and Miscellaneous Commercial Case No. 86 of 2022, HC Commercial Division (unreported).

On the fifth limb of the preliminary objection, he submitted that Order VI, Rule 15 of the Civil Procedure Code, Cap. 33 RE 2019 demands that,

pleadings must be verified. Further, as the suit was instituted by a company it is subject to Order XXVIII rule 1 of the Civil Procedure Code which provides that pleadings in a suit by a company should be verified by a company secretary, director or a principal officer of the company who is able to depose to the fact of the case. In the instant case, the plaint was verified by the counsel of the plaintiff who also drew it. This violated the requirement of Order XXVIII rule 1 of the Civil Procedure Code and it is incompetent. Supporting his submission, he cited the case of **Banson Enterprises Ltd vs. Mire Artan**, Civil Appeal No. 26 of 2020, CAT. In conclusion, he prayed that the suit be dismissed with costs.

I have carefully considered Mr. Steven's submission in support of the three limbs of the preliminary objection and I am now ready to determine them starting with the 5th grounds of appeal. Verification clause is vital in any pleading. As correctly submitted by Mr. Steven, it is a mandatory requirement of that pleadings must be properly verified. Order VI rule 15(1) of the Civil Procedure Code which deals with verification generally provides that;

> 15.-(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

When a pleading is filed by a corporation, the guidance has to be sought from the provision of Order XXVIII rule 1 of the same law which specifically deals with verifications in suits by or against corporations. It provides thus;

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

The scope of this provision was articulately expounded by the Court of Appeal in **Bansons Enterprises Limited vs Mire Artan** (Civil Appeal No. 26 of 2020) [2023] TZCA 90 (9 March 2023) whose instructive holding is extensively quoted below in avoidance of distortion. It held;

> The issue for our determination is on the competency or propriety of the institution of the suit before the High Court on account of whether or not the plaint was properly signed and verified by PW2 in accordance with Order XXVIII rule 1 of the Code.
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> ....., under Order VI rules 14 and 15 of the Code, pleadings must be signed and verified. For avoidance of doubts, according to Order VI rule 1 of the Code "pleadings" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII.
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> As for suits by or against corporations or companies, a duly instituted suit must be by the presentation to the court of a plaint signed and verified by the company secretary or by any of its directors or other principal officer of the company who is able to depose to the facts of the case. Order XXVIII rule 1 of the Code, provides that:
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> > "In suits by or against a corporation any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case"

> In accordance with Order XXVIII rule 1 of the Code, a plaint for the institution of a suit by a corporation or company must be signed and verified by three categories of persons: One, the company secretary, two, any of the directors of a company and three, any principal officer of the company who is able to depose to the facts of the case. [the emphasis is mine]

In agreement with the definition of the term principal officer as contained in Black's Law Dictionary, 11th Ed, at page 1308, the Court held that, in corporate law, the term refers to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary or treasurer and having established that the person who signed and verified the said pleadings was not among these, it found that the pleadings were incompetent and vitiated the proceedings.

In the present suit, as correctly submitted by the counsel, the plaint was signed by one Rabinder Singh Jabbal who is identified as an 'officer of the plaintiff dully authorized to sign all the pleadings' but it is verified by one Zakayo Ezekiel Njulumi, who also appears to be the counsel who drafted and filed the plaint in court. On the strength of the authority above, there can be no doubt that the pleading is fatally defective for being verified by an incompetent person and the suit is consequently incompetent.

Closely related to the above, is the requirement for a formal authority to institute a suit on behalf of a company which is the subject of the 2nd limb of the preliminary objection, Mr. steven has argued and I entirely agree with him that a person instituting a suit on behalf of a company purporting to have been authorized by the said company, must demonstrate to the court

that he is indeed authorized to do so by producing a formal authority to that effect. Such demonstration is a remarkably vital tool for protecting companies from being taken advantage by ill feted individual who hosts person interests that may be injurious to the welfare and survival of the company. Dealing with a similar issue in **Simba Papers Converters Limited vs Packaging & Stationery Manufacturers Limited & Another** (Civil Appeal Case 280 of 2017) [2023] TZCA 17273 (23 May 2023) [Tanzlii], the Court of Appeal held that;

> "In the premises, since the claimant was a company, it was not proper institute a suit on behalf of the company without its formal authority. This required the express authority by way of resolution of the Board of Directors to institute the case in the absence of which, the suit in the name of the company was defective and it ought to have been struck out.....
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> In view of what we have demonstrated above, since the suit at the trial court which was at the instance of the 1st respondent was instituted without its mandate through the board of directors, it was incompetent and the respective judgment and proceedings are void." P 20

Just like in **Simba Papers Converters Limited vs Packaging & Stationery Manufacturers Limited & Another** (supra), the plaint in this suit is not accompanied by a formal authority for institution of the suit, an omission which has rendered the plaint fatally defective and suit instituted by that plaint legally untenable for being incompetent.

Reverting to the first limb of the preliminary objection, it has been passionately argued by the counsel that the suit is time barred. Relying on

item 7 of Part I of the Schedule to the Law of Limitation, Mr. Steven has argued that, having emanated from a contract, the suit ought to have been filed with 6 years from the date of accrual of right. He has added that, for purposes of computation of the time of limitation, the law requires the plaintiff to indicate not only the cause of action but the date on which it arose. Contrary to this requirement, the plaint has only disclosed the cause of action without indicating the date at which it arose. Consequently, it has been argued that, the date on which the contract was executed be deemed as the date on which the cause of action accrued.

Starting with the time limitation set out under item 7 of Part I of the Schedule of the Law of Limitation Act, it is indeed correct that through this provision, a law has set out a time limit of 6 years within which to institute a suit for breach of contract. A person suing to enforce his contractual right is, therefore, required by law to institute his claims within the period of 6 years. The accrual of such right, is as stipulated under section 5 of the Law of Limitation Act which states that:-

> Subject to the provisions of this Act, the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises.

Therefore, in the present case as it is in other cases based on breach of contract, the reckoning date for accrual of the right is the date on which the contract was breached or the date when the plaintiff became aware of the said breach (see the case of **Ramadhani Nkongela vs. Kasan Paulo** [1988] TLR 56).

To facilitate the ascertainment of the date for accrual of the cause of action and the determination whether or not the suit is time barred, the law requires the plaint to disclose the cause of action and the particulars as to when the cause of action arose. This mandatory requirement is set out under Order VII, Rule 1 (e) of the Civil Procedure Code, Cap.33 which provides that: -

> The plaint shall contain the following particulars
> (e) facts constituting the cause of action and when it arose.

Unfortunately, in the case at hand, there is a partial compliance with this provision. As correctly argued by the defendant's counsel, the plaint has plead breach of contract as the cause of action but discloses neither the date on which the said breach occurred nor the date on which it was brought to his attention. Thus, there is no reference point for reckoning of the period for accrual of right. The omission has deprived this court of the opportunity to asses and ascertain whether, the present application was filed within the time limit prescribed by the law. Mr. Steven has invited the court to deem 17th March 2012, the date on which the contract was concluded, as the date for accrual of the cause of action and has relied on **Tanzania Revenue Authority vs. Dawson Ishengoma** (supra) in fortification. Just like in the present case, in the said case the plaintiff did not disclose the date of accrual of the cause of action in the suit which was founded on tort. The court underscored the duty of the plaintiff to disclose the date for accrual of cause of action when it stated that:

> The plaint here was foiled on 30.12.1999. What would give the court justification to assume that it was filed within time in the absence of a specific mention of the date that the cause of action arose? Mr. Laurean suggested that it was the appellant Authority who ought to have known the exact date

> that the cause of action arose because it wanted to apply the law of limitation. With due respect to the learned counsel, the suggestion is highly misguided. It was the plaintiff, now the respondent who had to show that his suit was in time. Mentioning of the specific date when the cause of action arose in the circumstances of this case was vital.

Further to this observation, the court held that in the absence of the specific date for accrual, the date appearing in the correspondence by the parties, be deemed as the date on which the cause of action accrued. It stated;

> It is on record that the marine police were asked to release the vessel soon after the respondent had paid the fine. The letter which was written to the marine police is dated 14.08.1991. The letter was copies to the respondent. We agree with the learned counsel for the appellant and indeed we are settled in our minds that 14.08.1991 is the date that the cause of action arose. From 14.9.1991 till 30.12.1999 when the suit was filed is over 8 years. The suit was late by 5 years, the learned trail judge ought to have dismissed the suit for having been filed outside the time limited by the law.

Accordingly, and in line with this authority, I am of the settled view that, since the plaintiff abdicated his duty of disclosure of the cause of action, the accrual of right must and should be reckoned from 17th March 2012, the date when the contract on which the present suit is founded was concluded. Counting from this date to 28th December 2018 when this suit landed in court, it follows that the suit was filed out of time as a period of six years and 6 months had already lapsed.

The law is well settled that suits filed in court out of the limitation period should be dismissed under section 3(1) of the Law of Limitation Act which provides that:-

> 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 thereto in the second column, shall be dismissed whether or not limitation has been set up as defence. [emphasis added]

Applying this provision in **Backlays Bank Tanzania Limited vs. Phylisiah Hussein Mchemi,** Civil Appeal No. 19 of 2016 (unreported), the Court of Appeal cited with approval the decision of this court (Dar es salaam Registry) in **John Cornel v. A. G.Grevo (T) Limited,** Civil Case No. 70 of 1998 where it was stated that:

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

That being the position of the law, this suit cannot be maintained. Accordingly, the first, second and fifth limbs of the preliminary objection are upheld and the suit is dismissed with costs.

DATED and **DELIVERED** at Dodoma this 04th day of August 2023

J. L. MASABO

JUDGE