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

CIVIL CASE NO. 03 OF 2022

TIBE KENETH RWAKATARE
(Suing as an administrator of the estates of
the deceased **GETRUDE RWAKATARE.....PLAINTIFF**

Versus

THE BOARD OF TRUSTEES OF DODOMA
NURU SECONDARY SCHOOL.....1ST DEFENDANT
STELLAH LYELU MGIMWA.....2ND DEFENDANT
SINANA ENTERPRISES COMPANY.....3RD DEFENDANT

RULING

Last Order: 06th November2023.
Date of Ruling: 24th November 2023.

MASABO, J:-

This ruling is in respect of a preliminary objection raised by the third defendant challenging the plaintiff's suit. The preliminary objection is premised on two limbs, namely: **one,** the plaintiff has no *locus* to pursue the suit, and **two,** the suit is time-barred.

Hearing of the preliminary objection was done by way of written submissions as ordered by this court on 22nd September, 2023. Submissions by the third defendant were drawn and filed by Mr. Simon Robert Ng'wigulu, learned counsel whilst those of the plaintiff were drawn and filed by Mr. Derick Paschal Kahigi, learned counsel.

Before I go to the submissions by the parties, the kernel of the present suit is a contract of sale executed by the 1st and 2nd Defendants on the one hand and the late Gertrude Rwakatare, on the other hand. In that agreement, the 1st and 2nd defendants being owners of Dodoma Nuru Secondary School located at Plot No. 2, Block C, Ipagala Centre Area in Dodoma (with Certificate of Title No. 10933), agreed to sell the school to Getrude Rwakatare who offered to buy the same at a purchase price of Tshs 240,000,000/=. The certificate of title for the school plot was to be handed over to Gertrude Rwakatare after full payment of the purchase price. In line with her contractual obligation, Getrude Rwakatare paid the purchase price in installments the last one being on 5/9/20008. However, after receiving the purchase price in full, the 1st and the 2nd defendants dishonoured their deal as they failed/refused to surrender the certificate of title. The plaintiff being the legal representative of Getrude Rwakatare who is now deceased, has instituted this suit seeking the indulgence of this court to order specific performance of the agreement and for compensation breach of the agreement.

In support of the first limb of the objection that the applicant is devoid of *locus*, Mr. Ng'wigulu submitted that the plaintiff has no *locus standi* to institute the case against the defendants. With reference to the definition of the term *locus standi* as defined by Black's law Dictionary, 9th Edition and the decision of this court in **Lujuna Shubi Balllonzi Senior v Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 he argued that *locus standi* means the right to bring an action or to be heard in a given forum. Thus, for a person to bring a suit before a court/tribunal he must have a right to bring such suit to such court or tribunal. In the

present case, the plaintiff has instituted the case in the capacity of a legal representative of the late Getrude Rwakatare.

He proceeded that reading paragraph 9 of the plaint, it appears that the gist of the plaintiff's claim against the Defendants is the offer issued by the 1st defendant and payments alleged to be made by the late Getrude Rwakatare in consideration of the school. This pleading, he argued, contradicts the annexture to the plaint as they show that the preferred buyer for the school was St. Mary's International School and not the late Getrude Rwakatare who was General Manager for the School. He proceeded that, much as the plaintiff been the administrator of the estate of the late Getrude Rwakatare has a right to sue in that capacity under section 100 of the Probate and Administration of Estates Act, Cap 352 RE 2019, he has no capacity to sue on contracts concerning St. Mary's International School to which, the late Getrude Rwakatare was just the manager. The school being a legal entity has the capacity to operate its own affairs including executing contracts and suing or being sued in its own name. Thus, the plaintiff cannot stand on her behalf since it is separate from the late Getrude Rwakatare.

It was submitted further that, even if it is found that St. Mary's International School has no legal capacity, the contract is unenforceable for being void ab initio as it was addressed to a non- existing person. He added that even the payment stated under paragraph 11 of the plaintiff's plaint and supported by annexure TID-3, shows that the payments to the 2nd defendant were made by St. Mary's International School and not Gertrude Rwakatare.

It was argued further that, it is a trite law that the power of the legal representative of the deceased is limited to the cause of action which survived the deceased as provided under section 100 of the Probate and Administration of Estate Act. Hence, as an administrator of the estate of the late Getrude Rwakatare, the plaintiff can only sue over the cause of action which survived the deceased. Accordingly, since Getrude Rwakatare was not a party to the agreement and prior to her death she never demanded interest from the defendants, the plaintiff herein cannot and has no right to claim on her behalf considering that the one entitled to the interest if any is St. Mary's International School which, previously, unsuccessfully attempted to protect her interest over the suit land as pleaded under paragraph 5 of the plaint and supported by annexture NURU 2 to the first and second defendant joint written statement of defence.

Submitting on the second limb of the objection, Mr. Ng'wigulu argued that, it is trite law that for the suit to stand, it must be lodged within the prescribed time. In the present case, the subject matter is a parcel of land and it has been in instituted in the year 2022 which is more than 15 years since the execution of the sale agreement allegedly breached by the 1st Defendant as implicitly shown in paragraph 10 of the plaintiff's plaint. He submitted that parties are bound by their pleadings and so is the plaintiff herein. He proceeded that, as per paragraph 10 it was agreed that a written contract between the deceased and 1st defendant would be executed after the deceased had paid the entire purchase price and that the title would then be surrendered to her. Further, in paragraphs 11 and

12 of the plaint, it is pleaded that the late Getrude Rwakatare discharged her contractual obligation by paying the entire purchase price on divert dates and the last payment was made on 5th September 2008 as per annexure TIB-3. Hence, by the time this suit was filed 15 years had already lapsed. Therefore, the suit is offensive of items 7 and 22 of the first schedule of the Law of Limitation Act which provides for 6 years limitation for a suit founded on a contract and 12 years for suits for recovery of land.

In the foregoing, he submitted that, since the available remedy for a suit filed out of time is dismissal as per section 3 of the Law of Limitation Act Cap. 89 RE 2019, the present suit is incompetent and should be dismissed.

In reply, Mr. Kahigi for the plaintiff submitted that the first limb is with no merit as the plaintiff has *locus standi* to sue in terms of section 100 of the Probate and Administration Act, Cap. 352 2019. He was duly appointed an administrator of the estate of the late Getrude Rwakatare and he has, in that capacity, the power to sue in the recovery of her properties the suit land being among them as it is among the properties left by the deceased therefore forming part of her estate as listed in the inventory and final accounts. He prayed that the first limb of objection be overruled with cots.

Submitting on the second limb of the objection, Mr. Kahigi argued that, it is misplaced and misconceived as under paragraphs 5 and 11 of the amended plaint the plaintiff has pleaded continuous breach of contract. The fact that the defendants have not surrendered the suit property to

the plaintiff to date as promised inspite of being paid the whole purchase price constitutes a continuing breach of contract as thus, a fresh period of limitation runs every moment of time during which the breach of promise to surrender the suit property to the plaintiff continues. Hence, the suit is served by section 7 of the Law of Limitation Act. In fortification, he cited the case of **Lindi Express Ltd vs Infinite Estate Limited** (Commercial Case 17 of 2021) [2021] TZHCComD 3313 TanzLII to bolster his submission. He concluded that the suit is within time and prayed that the second limb of objection be overruled with costs.

In rejoinder, the 3rd defendant counsel maintained his submission in chief. On the issue of continuous breach, he submitted that it does not arise in the circumstances of the present case as the nature of the transaction is such that it was only committed once upon failure to fulfil his contractual obligation and from such failure, the cause of action accrues. In fortification of his submission, he cited the cases of **Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Others**, Commercial Case No. 42 of 2020 [2021] TZHCComD 2053 TanzLII and the case of **Makamba Kigome and Another vs. Ubungo Farm Implements Limited and Another**, Civil Case No. 109 of 2005 (HC-Unreported). Based on these authorities he prayed that the preliminary objection be overruled in its entirety with costs.

I have carefully considered the submissions by the parties. The ruling being of a preliminary objection, I will stand to be guided by the principle in the landmark case **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD** (1969) EA 696 which categorically stated

that a preliminary objection must raise a point of law and not facts to be ascertained. It is the position of law in this case and numerous other cases that preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. A preliminary objection cannot be raised where there is a need to investigate facts as there can be no preliminary objection where there is a mixture of legal and factual issues (see **Hezron M Nyachiya v Tanzania Workers Union,** Civil Appeal No. 79 of 2001, [2005] TZCA 66 TanzLII Court of Appeal, and **Soitsambu Village Council v Tanzania Breweries Limited and Tanzania Conservation Limited,** Civil Application No. 105 of 2011, Court of Appeal (unreported).

With this guidance, I have asked myself whether, from the submission above stated the first limb is a pure point of law. This is not to say that I am oblivious of the established principle that, *locus standi* is a pure point of law. Indeed, I am fully aware that *locus standi*, is not only regarded as a pure point of law but has also been termed as a jurisdictional issue by the apex court, the Court of Appeal of Tanzania in the case of **Godbless Jonathan Lema vs. Mussa Hamis Mkangaa & others,** Civil Appeal No. 47 of 2012 (unreported). In that case, the Court while citing a persuasive decision of the Malawi Supreme Court of Appeal in **The Attorney General vs. The Malawi Congress Party & Another**, Civil Appeal No. 32 of 1996 stated that, indeed *locus standi* is a jurisdictional issue. Hence a pure point of law and needs to be resolved at the earliest opportunity.

Looking at the submission in support of the preliminary objection, it would appear that there is a lucid misconception on the part of the defendant, and what has been termed as *locus standi,* does not appear so. As well acknowledged by Mr. Ng'wigulu, the plaintiff is suing in the capacity of the legal representative of the late Getrude Rwakatare and this has not anyhow been controverted in the submission. In fact, the counsel has well acknowledged this fact in his submission and therefore he has no qualms with it. His contention is that the late Getrude Rwakatare was not a party to the agreement and in that regard, neither she nor her legal representative can enforce it. Put otherwise, the counsel has invited this court to hold that the plaintiff has no good claim or cause of action against the defendants as the late Getrude Rwakate whom he is representing was not the party to the agreement allegedly breached by the defendants.

This being the case, it is crystal clear that the term *locus standi* has been loosely and wrongly raised. Besides, even if I was to hold that it has been rightly raised, it can not be determined at this preliminary stage as it is a blend of factual and legal issues. Its determination will necessitate an indulgence into the evidence to determine who were the parties to the agreement and whether the late Getrude Rwakatare being a General Manager of St. Mary's International School could, in his personal capacity, enforce the agreement concluded between the school and the defendants. Such an inquiry cannot be made at the present stage as it will entail determining the suit prematurely. In the foregoing, I decline the invitation by the counsel and overrule the first limb of the preliminary objection.

Turning to the second limb, I have been invited to find that this suit is time-barred and dismiss it. The main argument in support of this proposition is that this suit is based on the breach of the contract of sale whose time limitation as per item 7 of Part 1 of the Schedule to the Law of Limitation Act is 6 (six) years. In the alternative, it has been argued by Mr. Ng'wigulu that, even if the suit is found to be one for recovery of land, it will still be barred by time as the duration of 12 years within which to institute a suit for recovery of land as per item 22 of Part 1 of the Schedule to the Law of Limitation Act had lapsed when the plaintiff filed the present suit. Mr. Kahigi did not dispute this but he has submitted that the suit is served by the doctrine of continued breach contained under section 7 of the Law of Limitations Act.

Admittedly, Item 7 of Part 1 of the Schedule to the Law of Limitation Act provides a duration of six (6) years as a time limit for suits founded on breach of contract whereas under Item 22 of Part 1 of the Schedule to the same Act provides a time limitation of 12 years for suits for recovery of land. As per section 5 of this Act, this duration is reckoned from the date of accrual of the right of action.

As submitted by the parties, the present case emanates from the contract of sale of the school trading by the name of Dodoma Nuru Secondary School located at Plot 2 Block C Ipagala Centre Area in Dodoma. Reading through the plaint it is crystal clear that, the breach of the agreement occurred on 5th September 2008 when the first two defendants failed or refused to surrender and hand over the Certificate of Title to the late Getrude Rwakatare after she had paid the purchase price of Tsh

240,000,000/-. Hence there is no dispute that when the plaintiff filed the present suit for the first time on 29th March 2022, a duration of 14 years had already lapsed. Thus, as correctly argued by Mr. G'wigulu, the time limitation of 6 years within which to institute a suit founded on breach of contract had already lapsed when this suit landed in court. Even the time limitation of 12 years for suits for recovery of land had already lapsed.

Mr. Kahigi has invited me to find that this suit is salvaged by the doctrine of continued breach as provided for under section 7 of the Law of Limitation Act. This provision states thus:

> "Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

Fortifying his argument, he has convinced me to be guided by the persuasive authority of my brother Nangella, J in **Lindi Express Ltd vs Infinite Estate Limited** (supra). I have had the opportunity to thoroughly read the decisions above and I have observed that while relying on the case of **Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Other**, Commercial Case No.42 of 2020, (unreported) and the Indian Case of **The Rehabilitation Plantations Ltd vs. P.S. Ansary**, the court held that,

> Cases involving "continuing" or "successive breaches" include those cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance etc. In the case of a continuing tort, for instance, a fresh period, of limitation begins to run at every moment of the time

during which the breach or the tort, as the case may be, continues.

Further, the court made reference to a previous decision of this court in **TABECO International Ltd v Attorney General and 3 others,** (Civil Case No. 139 of 2019) [2020] TZHC 3561; (11 November 2020) which extensively dealt with the issue of continued breach. The relevant part of this decision is extensively reproduced below for easy of reference It stated:

> "..... view, section 7 contemplates such cases like a breach of tenancy where a tenant does not pay his rental fee but continues to occupy the building. My inclination towards this view is based on the following decision which I have found to be more enlightening and highly persuasive. The first is an old Indian case of **Bhojraj v. Gulshan Ali**, (1882) ILR 4 All 493. In this case, it was held that, the principle of continued breach applies in ***cases in which:***
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> > "the obligation created by the contract is ex necessitate of a continuing nature; and the right of action therefore naturally arises every moment of the time during which the breach continues"
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> Second, is the decision of the High Court of Australia in ***Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)*** (1940), 64 C.L.R. 221 (HCA), at p. 236 where Dixon J. (as he then was) stated that:
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> > If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever

> renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

Third, is the decision of the Ontario Court of Appeal in **Pickering Square Inc. v. Trillium College Inc., 2016 ONCA 179 (CanII)**. In the spirit similar to the one articulated in the first two decisions above, the court unanimously held that:

> "In order to determine the discovery date for the claim, the nature of the breach must first be determined. Breaches of contract commonly involve a failure to perform a single obligation due at a specific time. This sort of breach is sometimes called a "once-and-for-all" breach: it occurs once and, ordinarily, gives rise to a claim from the date of the breach – the date performance of the obligation was due.... A second form of breach of contract involves a failure to perform an obligation scheduled to be performed periodically – for example, a requirement to make quarterly deliveries or payments. A failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach."

In light of this position, I have asked myself whether the present suit can be salvaged by the doctrine of continued breach provided for under section 7 of the Law of Limitation Act as argued by Mr. Kahigi. The answer

is firmly in the negative as the facts of the present case are inconsistent with the position above. The breach of contract from which the present suit emanates is from a one-off sale transaction as opposed to a contract of a continued nature such as a lease agreement which can easily be salvaged by the doctrine of continued breach. Since the agreement between the parties was that the 1st and the 2nd defendant would surrender the certificate of title to the late Getrude Rwakatare after she has paid the sale price in full it follows that, the cause of action accrued when the 1st and 2nd defendant dishonored their promise after the late Getrude Rwakatare had paid the purchase price in full on 5th September 2008. Therefore, the late Getrude Rwakatare had a time of 6 six years from this date to enforce her contractual right but she slept over it and took no steps until her demise in 2020 when the time limitation had already lapsed. By the time the plaintiff herein took over the matter and brought this suit in court in his capacity as personal representative of the late Getrude Rwakatare, the suit was already hopelessly timely barred.

The facts in this case are sharply distinguishable from the facts in **Lindi Express Ltd v Infinite Estate Limited** as the contract at the epicenter of that suit was a lease contract, not a one-off transaction such as the one at hand. I may also add here that, had the view expressed by Mr. Kahigi been a correct position, the limitation period for breach of contracts would be rendered nugatory as every breach would fall under the continued breach.

For the foregoing reasons, I entirely agree with Mr. Ng'wigulu that the suit at hand is hopelessly time barred for being filed beyond the 6 years'

time limit for institution of suits founded on contract. The second limb of the preliminary objection sails and is sustained.

Section 3 (1) of the Law of Limitations Act (supra) provides dismissal as a sole remedy for a time barred suit. Accordingly, having found this suit to be hopelessly time barred, I dismiss it with costs.

DATED at **DODOMA** this 24th day of November, 2023.

J. L. MASABO

JUDGE