

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO.54 OF 2023

JITESH JAYANTILAL LADWA.....1ST PLAINTIFF

**JITESH JAYANTILAL LADWA. (As administrator of the estate of the late
Jayantilal Walji Ladwa)2ND PLAINTIFF**

VERSUS

AFRICAN BANK CORPORATION (T)LIMITED.....1ST DEFENDANT

MOTTORAMA(T) LIMITED2ND DEFENDANT

BHAVESH CHANDULAL LADWA.....3RD DEFENDANT

NILESH JAYANTILAL LADWA.....4TH DEFENDANT

AATISH DHIRAJLAL LADWA.....5TH DEFENDANT

CHANDULAL WALJI LADWA.....6TH DEFENDANT

RULING

Date of last order:20-10-2023

Date of ruling:20-11-2023

B.K. PHILLIP, J

The 1st plaintiff herein instituted this case in his capacity and as administrator of the estate of the late Jayantilal Walji Ladwa, (2nd plaintiff). The plaintiffs' case is as follows; on 19th March 2012, a loan termed as "Global Facility and mortgage" to the tune of USD 350,000/= was granted to the 2nd defendant by the 1st defendant through a facility letter with reference No.

ABCT/CR/027/2012. It was secured by a landed property situated on Plot No.185 Mbezi Beach Area in Dar es Salaam, with a certificate of title No.112700 in the name of the late Jayantilal Walji Ladwa -(hereinafter to be referred to as " the property"), unlimited guarantees by Bhavesh Chandulal, Jayantilal Ladwa, Nilesh Jayantilal Ladwa, Jitesh Jayantilal Ladwa, and Aatish Dhirajlal Ladwa all in favor of the 1st defendant herein. The property situated on plot no.185 Mbezi, Dar es Salaam mentioned herein above was fraudulently mortgaged by the 6th defendant via a power of attorney purported to have been granted by the late Jayantilal Walji Ladwa. The 1st plaintiff never signed the guarantee deed that is indicated as security for the loan aforesaid. In the years 2013, 2014, 2016, 2017, and 2018, the defendants structured the loan aforesaid to a tune of USD 450,000/= by way of facility letters, without notifying the 1st plaintiff who is the shareholder and director of the 2nd defendant. In all the processes involving the variations of the said loan, the 1st plaintiff was not involved. The 1st defendant being a financial institution failed to discharge its duty of care which required her to diligently inquire from the owner of the property (the late Jayantilal Walji Ladwa) on the validity of the power of attorney and the administrator or beneficiaries including the 1st plaintiff on the restructuring of the loan. The 6th defendant while aware of the death of Jayantilal Walji Ladwa continued to use the power of attorney purported to have been granted to him. He mortgaged the property of the deceased in 2017 and 2018. All defendants/assignees /employees forged the signature of the 1st plaintiff. In 2019, to his surprise, the 1st plaintiff was informed that the directors of the 2nd defendant including himself were issued with a 60 days default notice

demanding the payment of USD 363,221.13, failure of which recovery measures would be implemented for realizing the unpaid loan amount by disposal of the mortgaged property. As a result of the fraud, forgery, and negligence committed by the defendants, the plaintiffs have suffered damages.

Additionally, the 1st plaintiff also alleges that in 2020, he instituted a case in this court against the defendants via civil case no.52 of 2020 which was withdrawn with leave to refile it. The plaintiff's prayers in this case are reproduced verbatim hereunder;

- i) A declaratory order that conducts complained against the defendants are illegal and wrong against the plaintiff, in deliberate breach of duty of care owed to the plaintiffs
- ii) Declaration that plaintiffs have sustained loss and damages as the result of the action complained of.
- iii) An order of permanent injunction restraining the defendants, its directors, managers, employees agents, or assignees from selling, alienating, or transferring ownership of the mortgaged property and/ or from entering on that property to take possession thereof or leasing them to third parties.
- iv) An order for payment of general and punitive damages in amounts to be assessed and determined by the Honourable Court.
- v) Costs of the suit.
- vi) Any other relief(s) the Hon Court may, in the circumstances and its discretion, deem fit, just and proper to grant.

Upon being served with the plaint, 1st defendant through the legal services of learned Advocates from Tan Africa Law, its written statement of defense together with a counterclaim against the plaintiffs and 2nd to 6th defendants inclusive, and together with the points of preliminary objections. The same are couched as follows;

- i) *That the suit by the 1st plaintiff is time-barred in respect of the line of credit dated 19th March 2012 and attendant guarantees; in that both the present suit, and civil case no.52 of 2020 are based on contract and are /were both filed beyond the 6 years threshold for suits based on contracts*
- ii) *The suit by the 1st defendant is time-barred in respect of the line of credit dated 12th December 2013 and the attendant guarantee, in both the present suit and civil case no 52 of 2020 are based on the contract and are/were both filed beyond the 6 years threshold for suits based on contract.*

Similarly, the 2nd to 6th defendants inclusive, through the legal services of the learned Advocates from RK Rweyongeza & Co Advocates, filed their written statement of defense together with a point of preliminary objection, to wit;

- i) *That the suit in respect of the 2nd defendant is hopelessly time barred.*

This ruling is in respect of the above-mentioned points of preliminary objections. As it can gathered from the points of preliminary objections raised by the defendants' Advocates, all of them are concerned with the time

limit for filing this case. Thus, in the determination of all points of preliminary objection I shall deal with one issue, that is, whether or not this suit is time-barred. For convenience, I shall deal with all points of preliminary objection conjointly.

Submitting in support of the points of preliminary objections, the learned advocate for the 1st defendant, Ms. Grace Ndera, argued that the time limitation in civil cases is of great importance since it touches the court's jurisdiction. She cited the case of **Said Mohamed Vs Maharani Juma, Civil Appeal No.110 of 2020** (unreported) to cement her argument. Relying on the case of **Hood Transport Company Limited Vs East African Development Bank, Civil Appeal No.262 of 2019** (unreported), she submitted that it is a trite law that parties are bound by their pleadings. She went on to submit that in this case, pleadings reveal that this case emanates from the credit facility with reference no. ABCT/CR/0271/2012 that was granted to the 2nd defendant by the 1st defendant on 19th March 2012 thus, the cause of action arose eleven years ago. She contended that according to the law of the Limitation Act, the time limit for instituting suits arising out of a contract is six years from the date of accrual of the cause of action. He cited the case of **Radi Services Limited Vs Stanbic Bank, Civil Appeal No.260 of 2020** and **Margareth Lothar Roland Purucker Vs Lothar Roland Purucker, and another, Misc. Commercial Application No.20 of 2022** (both unreported), to bolster his argument. She pointed out that the cause of action in this case arose on 19th March 2012.

Moreover, Ms. Ndera contended that civil case no. 52 of 2020 which was withdrawn recently by the plaintiff was equally filed out of time because it was instituted in court eight years from the date of accrual of the cause of action. She implored this court to dismiss this case for being time-barred according to section 3(i) of the Law of Limitation Act.

Submitting in support of the point of preliminary objection, Mr. Robert Rutahiwa argued that the reliefs prayed by the plaintiffs in this case are declaratory orders to the effect that the conducts complained of by the plaintiffs are illegal and wrongful, and caused the plaintiff to sustain losses. He went on to submit that the plaintiffs' complaints are; that the mortgage created by the 1st defendant in favor of the 2nd defendant and guarantee by the 1st plaintiff, and the 3rd to 6th defendants inclusive, were fraudulently obtained by forging the power of attorney purported to be issued by the late Jayantilal Walji Ladwa. Mr. Rutahiwa pointed out that the power of attorney challenged by the 2nd plaintiff in this case was created on 16th July 2010 and registered on the same date. The loan that was granted to the 2nd defendant, the subject of this case was issued on 19th March 2012. The plaint reveals that the late Jayantilal Walji Ladwa died on 13th May 2017, seven years after the registration of the power of attorney challenged by the plaintiffs in this case, and five years from the date of the mortgage, contended Mr. Rutahiwa. He was of the view that this suit is time-barred since it was filed on 24th March 2023, 13 years from the date of the creation of the power of attorney and 11 years from the date the mortgage deed was signed.

Relying on item 24 in part III of the schedule to the Law of Limitation Act, Mr. Rutahiwa contended that the time limit for filing a suit based on

declaratory orders is six years reckoned from the date the cause of action arose. He cited the case of **Benedict Gregory Mkasa Vs Mbaruku Selemani and 30 others, Land case No. 4 of 2021** (unreported), to cement his arguments. Expounding on this point Mr. Rutahiwa argued that counting six years from the date the cause action arose, the time for filing this case elapsed on 17th July 2016 before the death of the late Jayantilal Walji Ladwa. He was emphatic that according to section 5 of the law of Limitation Act, the cause of action accrues from the date it arises.

Mr. Rutahiwa pointed out that he is aware of the exemption provided in Order VII Rule 6 of the Civil Procedure Code (" CPC") in computing the time limit in initiating a case in courts of law where there are justifiable reasons for the delay. However, he claimed that in the case at hand upon perusing the plaint he noted that nothing had been stated in the plaint to warrant the application of the exemption provided in Order VII rule 6 of the CPC thus, he maintained that the the same cannot be applicable in this case. He cited the case of **Tanzania National Road Agency and another Vs Jonas Kinyagula, Civil Appeal No. 471 of 2020** (unreported), to support his argument.

Mr. Rutahiwa concluded his submission by urging this court to dismiss this case for being time-barred according to section 3(1) of the Law of Limitation Act.

In rebuttal, the learned Advocate for the plaintiffs, Mr. Sisty Bernard contended that all points of preliminary objections are void of merit. Relying on section 71 of the Probate and Administration of Estate Act, Cap 352. R.E. 2019, Mr. Bernard argued that the letter of administration of the deceased

estate is the only document that entitles a person to act for and on behalf of the deceased's estate. He pointed out that the 2nd plaintiff was appointed as the administrator of the estate of the late Jayantilal Walji Ladwa on 29th June 2021. Therefore, he was able to sue on behalf of the estate of the late Jayantilal Walji Ladwa from 29th June 2021 not any prior date. He cited the case of **Swalehe Juma Sangawe (as the administrator of the estate of the late Juma Swalehe Sangawe) and another Vs Halima Swalehe Sangawe, Civil Appeal No. 82 of 2021** (unreported), to support his stance.

Further, Mr. Bernard contended that this suit involves a landed property that was mortgaged and the time limit for instituting a case involving a landed property is 12 years. To cement his argument, he referred this court to items 17,18,19 and 22, part I of the Law of Limitation Act. He was of the view that the contract involved in this case was not an ordinary contract. It is a mortgage agreement involving a landed property. He was emphatic that civil case no.52 of 2020 was filed within the time prescribed by the law and was withdrawn with leave to refile it thus, this case is not time-barred. Mr. Bernard prayed for the dismissal of the points of preliminary objection.

In rejoinder, Ms. Ndera reiterated her submission in chief and expressed her astonishment at the arguments raised by Mr. Bernard in his reply submission, to wit; that the 1st plaintiff was not able to institute this case before he was appointed as the administrator of the deceased estate. She was of the view that the aforesaid argument is an afterthought since the same was supposed to be pleaded in the plaint according to Order VII Rule 6 of the CPC.

Further, Ms. Ndera argued that in paragraph 29 of the plaint, the plaintiff stated that the cause of action in this case is about the bank loan facility to the tune of USD 363,221.3 which is equivalent to Tshs. 836,861,181/=. The same is pleaded in paragraphs 10,16 and 19 of the plaint. She insisted that this case is founded on contract and ought to have been filed within six years from 2012 when the cause of action arose. She refuted Mr. Bernard's arguments and contended that the same has been raised in an attempt to diverge from the issue of the time limit.

Further, Ms. Ndera submitted that even if this case is assumed that involve a landed property thus, a land case this court still will have no jurisdiction to entertain this case as a land case because the same was supposed to be filed in the Land Registry as a land case. To cement her argument, he cited the case of **Baddi Twaha Ally Vs Crdb Bank Plc, Land case no. 175 of 2023** (unreported).

On his part, Mr. Rutahiwa reiterated his submission in chief and went on to submit that Mr. Bernard did not deny that this suit is for declaratory orders thus, he admitted that fact. About Mr. Bernard's contention that the 1st plaintiff was unable to file this suit before he was appointed as the administrator of the deceased's estate, Mr. Rutahiwa contended that the aforesaid argument is fanciful since the power of attorney in question was created in 2010 when the late Jayantilal Walji Ladwa was alive but he neither contested that power of attorney nor the mortgage in respect of his property. He challenged the 1st plaintiff for failure to state in the plaint why the late Jayantilal Walji Ladwa during his lifetime did not sue the defendants herein instead this case was instituted in court after his death.

Further, Mr. Rutahiwa argued that the death of an individual or the appointment of the administrator of the deceased estate does not turn a cause of action that arose before the death of the deceased into a new one. He insisted that even if it is assumed that the appointment of the 1st plaintiff as the administrator of the deceased's estate is the basis for suing the defendants in this case, the same cannot be of any help to the plaintiffs because section 35 of the Law of Limitation Act provides that for suits for recovery of land an administrator of the deceased estate shall be taken to claim as if there had no interval of time between the death of the deceased person and the grant of the letters of administration or as the case may be of probate. He was of the view that the case **Swalehe Juma Sangawe** (supra) is distinguishable from this case because in the former case, the cause of action arose after the death of the deceased while in the case at hand the cause of action arose before the death of the late Jayantilal Walji Ladwa.

Concerning Mr. Bernard's arguments that this suit is for the redemption of land, Mr. Rutahiwa contended that Mr. Bernard is trying to change this case from a civil case to a land case. He insisted that his efforts would not bear fruits because the pleadings revealed that this was a civil case in which the plaintiff was praying for declaratory orders. It is not a land case. He pointed out that parties are bound by their pleadings. He contended that even if this case is a land matter, declaratory suits have to be filed within six years.

Having dispassionately analyzed the rival arguments raised by the learned advocates, let me proceed with the determination of the merit of the points

of preliminary objections. It is a common ground that parties are bound by their pleadings, the time limit for filing a suit for declaratory orders is six years and for recovery of land is twelve years.

The issue that has arisen in the course of the submissions for and against the points of preliminary objections is whether or not this case is a land case or an ordinary civil suit. Mr. Bernard did not dispute the arguments raised by Ms. Ndaró and Mr. Rutáhiwa that the time limit for instituting a suit for declaratory orders is six years. He contended that this is a land case thus, the time limit of six years does not apply to this case. It is noteworthy, that the determinant factor in deciding whether this case is a land case or not is what is pleaded by the plaintiffs in the plaint which states the plaintiffs' case. In paragraph 9 of the plaint, the plaintiff states as follows;

*"9. That the plaintiffs' claims against the defendants jointly and severally, **for declaratory orders, compensation, and damages sustained by the plaintiffs as a result of fraud, waste, forgery, and negligence on the part of the defendants** in dealing with 1st plaintiff's interests in the 2nd defendant (Motorrama (T) Limited) and 2nd plaintiff's interests in landed property situated on plot no.185, Mbezi beach Area, Dar es Salaam with certificate of title no. 112700 in the name of the late Jayantilal Walji Ladwa.*

10. That on 19th March 2012, the loan in terms of Global facility and Mortgage was created vide a facility letter with reference Numbers ABCT/CR/0271/2012 (line of credit No.216) in the name of the 2nd defendant for a sum of USD Three Hundred and fifty Thousand (Usd 350,000) was

issued. Copy of the facility letter is annexed hereto marked "JJL-1" to form part of and be read as one with this plant.

(emphasis is added)

The contents of paragraphs 9 and 10 reproduced herein above, show clearly that the plaintiffs' suit is founded on the loan facility agreement. The issue of whether or not the power of attorney through which the 6th defendant processed the mortgage of the property was proper/valid, is consequential to the execution of the credit facility agreement which required securities. The pleadings clearly show that the cause of action in this case arises from the loan facility agreement. The dispute in this case is concerned with the loan facility agreement as evidenced by paragraph 29 of the plaint. For clarity and ease of understanding let me reproduce it hereunder;

"29-That the cause of actions is concerning the bank loan facility to the tune of USD. 363,221.3 which is equivalent to Tshs.836,861,181 Million at the prevailing exchange rate determined by the central bank (BOT) and that both the plaintiffs and defendant's office are in Dar es Salaam and out of the transaction for banking facilities which were negotiated, concluded, and executed are all in Dar es Salaam where both the plaintiff and the defendants have their registered offices and principally carry on their respective businesses".

(Emphasis added)

Strictly speaking, this case involves business transactions between the 1st defendant and 2nd defendant in which the 1st defendant granted a credit facility to the 2nd defendant. The plaintiffs and the 2nd to 6th defendants inclusive came in the course of execution of the credit facility which required to be secured by a mortgage and guarantees. So, as alluded to earlier in this Ruling, the landed property mentioned in the pleadings is only a security for the credit facility. It is worthy note that the 1st defendant cannot take any step to alienate the mortgaged property unless the loan amount granted to the 2nd defendant is not paid in full as agreed. This is another aspect that shows that this case is founded on the credit facility agreement and is not a land case since there is no land dispute between the parties herein.

In addition to the above, it is common knowledge that a Land case is a case that involves a "land dispute". To determine whether or not this case is a land case, it is important to understand what is "a land dispute". In the case of **Baddi Twaha Ally Vs CRDB bank PLC and another, Land case No.175 of 2023**, (unreported) this court had this to say on what is "a land dispute";

*"first we must resolve the question as to what constitutes a land dispute. A "land dispute" involves conflicting claims to rights in land by two or more parties, focused on a particular piece of land, which can be addressed within the existing legal framework. **The parties to a land dispute must have conflicting interests/claims on either ownership, usage, or possession of the land**"*

(emphasis is added)

In the case of **Charles Rick Mulaki Vs William Jackson Magero, Civil Appeal No.69 of 2017** (unreported) Maige, J as he then was held as follows;

"...the expression " matters concerning land" would only cover Proceedings for protection of ownership and or possessory rights in land"

Now, back to the case at hand, I have already explained in detail the plaintiff's claims. The same does not involve any land dispute as per the definition of the term "land dispute" as defined by this court in numerous decisions since the controversy, in this case, is not over the ownership or possession of the mortgaged property. None of the defendants in this case claims for the right of ownership or possession of the mortgaged property. It is an undisputed fact that the mortgaged property belongs to the estate of the late Jayantilal Walhij Ladwa. So, there is no issue with ownership of the mortgaged property.

From the foregoing, I am inclined to agree with Ms. Ndera and Mr. Rutahiwa that this case does not fall in the category of land cases envisaged in the law. (See Section 3 of the Land Disputes Courts Act.). Therefore, Mr. Bernard's argument is misconceived and has no merit.

The above said, this being a case for declaratory orders whose cause of action arises from a loan facility agreement, according to item 7 part I of the schedule to the law of Limitation Act, Cap 89, the time limit for instituting it in court is six years. Now, the pertinent question here is; when did the cause of action arise? Mr. Rutahiwa and Ms. Ndera argued that this case has been filed out of time because the cause of action arose in 2012 when the alleged

credit facility was granted to the 2nd defendant and all securities for that loan were processed.

In paragraph 23 of the plaint, the 1st plaintiff pleaded that it was not until 2019 when he was issued with the default notice, he became aware of the existence of the loan facility and collaterals in respect of the same. Additionally, in paragraph 24 of the plaint, the 1st plaintiff alleges that on 20th August 2019, through his advocate he communicated with the defendant in writing and informed them about the forgery of the documents in respect of the credit facility and wanted to know who signed the loan facility documents. So, paragraphs 23 and 24 of the plaint indicate that the plaintiff alleges that before being served with the 60-day default notice he was not aware of the existence of the credit facility.

To avoid doubts, let me make it clear that there is nowhere in the plaint indicating explicitly that this case was filed out of time and that the plaintiff relies on the provisions of Order VII rule 6 of the CPC for exemption of some days in the computation of the time limit provided in the law of Limitation Act. As alluded to earlier in this Ruling, the plaintiffs' advocate was of the view that this is a land case. Be as it may, upon reading the plaint between the lines, I noted that evidence is required to ascertain the 1st plaintiff's allegation that there was forgery and fraud committed by the defendants in the process of execution of the credit facility, mortgage deed and restructuring of the credit facility, and that he was not aware of what was going as far as the credit facility is concerned until 2019 when the 1st defendant issued the default notice. This is important in the computation of the time within which the plaintiffs were supposed to institute this case in

court. Thus, I am not inclined to agree with Mr. Rutahiwa and Ms. Ndera that the days within which the plaintiffs were supposed to institute this case in court should be reckoned from 2012 without taking into consideration what is pleaded in the plaint. Under the circumstances, it is evident that the points of preliminary objections lack the characteristics of a pure point of law thus, cannot be determined at this stage. Therefore, I hereby dismiss all points of preliminary objections. The issue of whether or not this case has been filed within the time limit prescribed by the law shall be determined as the 1st issue during the hearing of the case on merit whereby this court will have an opportunity to receive evidence and determine what transpired during the grant of the credit facility and whether or not the plaintiffs were not aware of the credit facility agreement until 2019 as alleged in the plaint. For the reason stated herein above, I hereby dismiss all points of preliminary objections. Each party will bear his/her costs. It is so ordered.

Dated this 20th day of November 2023


B.K. PHILLIP

JUDGE

