

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.74 OF 2023

(An appeal from the Ruling and Order of the Resident Magistrates' Court of Dar es Salaam at Kisutu delivered on 27th April, 2023 Hon. M.P. Mrio, PRM in Civil Case No. 271 of 2022)

BETWEEN

KWEYAMBA QUAKER.....APPELLANT

AND

VODACOM TANZANIA PLC.....RESPONDENT

JUDGMENT

POMO, J

The Appellant, KWEYAMBA QUAKER, is aggrieved by the ruling of the Resident Magistrates' Court of Dar es Salaam at Kisutu (the trial court) delivered on 27/04/2023 Hon. M.P. Mrio, PRM dismissing his suit, Civil Case No. 271 of 2022. It was a result of the preliminary objections raised against it by the Respondent challenging the competence and jurisdiction of the court to hear and determine the Appellant's suit.

The background, albeit briefly, of the facts leading to this appeal can be stated as follows. On 24th October, 2022 the Appellant filed Civil Case No. 271 of 2022 before the trial court against the Respondent praying for judgment and decree: -

- (i) A declaration that the Respondent acted in cahoots with a 3rd party inducer/interferor abetting and permitting him to commit tortious interference in the plaintiff's commercial relations and is liable thereof for damages
- (ii) A perpetual injunction restraining the respondent, his associates, agents, workmen and/ or anyone purporting to be under his instructions from further abetting and /or committing all sort of interference in the plaintiff's commercial relations subsisting on his airtime account
- (iii) A permanent order directing the respondent, his workmen, agent, and/ or anyone purporting to be under his authority, permanently unsubscribing the Appellant from "Tusua Mapene" lottery
- (iv) An equitable relief of Tshs 100,000,000/- disgorgement of utility constituted as unjustified enrichment tortiously accruing out of

wrongful and ill-gotten profits as pleaded under paragraphs 21, 22 and 23 hereinabove

- (v) Punitive and exemplary damages as pleaded under paragraph 24 supra and as may be assessed by the honourable court
- (vi) Aggravated damages be assessed by the court as pleaded under paragraph 25 hereinabove
- (vii) Interest on the decretal sum at the court rate of 7% per annum from the date of judgment till payment in full
- (viii) Costs of the suit be provided for
- (ix) Any other and /or further relief and /or orders to be deemed fit and equitable by the court.

And, on 1st December, 2022 the Respondent filed her written statement of defence embodied with a notice of four preliminary objections against the Appellant's suit. Of the four, two were upheld by the trial court to the effect that, **one**, the appellant's suit, being founded on tort, was time barred and **two**, the trial court lacked jurisdiction over the suit because of the existing forum under other the law where it ought to be referred.

Aggrieved with the trial court decision upholding the objections leading to the dismissal of his Civil Case No. 271 of 2022 the Appellant has

approached this court in the instant appeal armed with two grounds of appeal, to wit: -

- 1. That, the learned trial magistrate erred in law in holding that the appellant's case was time-barred while it was filed within time*
- 2. That, the learned trial magistrate committed a fatal error of law in that after finding and holding that the provision invoked by the counsel for the defendant did not ouster jurisdiction of the court to adjudicate over the matter as so craved, she did not stop there, but instead, and relying on inapplicable precedent, went further and fallaciously ruled on jurisdiction*

The Appellant enjoyed legal representation of Mr. Meswin Masinga, learned advocate from Amani Law Associates while the Respondent stood represented by Mr. Gasper Nyika, learned Advocate from IMMMA Advocates. On 27th July, 2023 I ordered appeal hearing be by way of written submissions and both sides complied the schedules of filing their respective submissions. I am grateful to the learned minds for their commendable submissions

Arguing the first ground, Mr. Masinga submitted that it is true that limitation period for suit founded on tort is three (3) years from the date of accrual of cause of action. That, it is true in May, 2018 already existed a

cause of action worth commencing a complaint, only that the perpetrator of the wrong, the tortfeasor was unknown. That, it is until 21st January, 2021 when the matter was referred to TCRA when the tortfeasor came to be known. Therefore, since the suit was filed on 24th October, 2022, it was well within the three years of commencing tort action

In his further argument, Mr. Masinga is of the submission that the cause of action was a repetitive and continuous one therefore a fresh cause of action kept accruing and it is not known when it stopped. Under the circumstances, it is Mr. Masinga's argument that the trial court committed a fatal error to hold that the Appellant's suit was time barred.

Replying on this ground, Mr. Nyika, contends that, under paragraphs 7 and 20 of the plaint, the appellant alleges that on 10th May, 2018 he demanded the respondent to unsubscribe him from the alleged lottery game and he again reminded on 3rd July, 2018 unsuccessfully. Also, at paragraph 9 of the plaint, the appellant alleges that following the Respondent's failure to unsubscribe him, he filed Civil Case No. 104 of 2018 against the Respondent which was dismissed for lack of jurisdiction.

That, there is nothing in the pleaded facts in the Appellant's plaint showing the cause of action arose on 21st January, 2021 as alleged by the

Appellant in his submission from the bar. That, the plaint clearly shows the cause of action arose on 10th May, 2018 and since the Appellant is bound by his own pleaded facts, the same can not be changed by submission from the bar. That, from the pleaded facts, the Appellant knew who he ought to sue since May, 2018 therefore prayed this ground be disallowed.

Having heard the parties, I have to determine this ground first. In determining this ground of Appeal, I have given due consideration the parties' submissions for and against the first ground. From the submissions, I find there is no complaint that the suit by the Appellant before the trial court was on tortious liability of which, as a suit founded on it, need be instituted within three (3) years of accrual of the cause of action. This is per Item 6 of Part I to the Schedule of the Law of Limitation Act, [Cap.89 R.E.2019]. The only area where parties are in disagreement and have locked horns is on when the cause of action accrued for the Appellant to sue the defendant. The Appellant has submitted that it is until 21st January, 2021 when he came to know his tortfeasor, the Respondent herein, and that was only made possible when the Appellant reported the matter to Tanzania Communications Regulatory Authority (TCRA) and the Respondent emerged. But, contrary to such strong and convincing allegation to revive limitation of

time the Appellant's case suffered, having visited all the twenty-six (26) paragraphs of the Appellant's plaint, I find nowhere in that plaint the same to be pleaded.

In my view, as correctly submitted by the Respondent, it is the Appellant's plaint in which under paragraph 7 and 20 he pleads that on 10th May, 2018 and 3rd July, 2018 demanded and reminded respectively the Respondent to unsubscribe him from an sms lottery gaming called "TUSUA MAPENE" the request which was not heeded to by the Respondent.

Time and again, it had been stated by the court of this land that parties are bound by their pleadings. For instance, in **Makori J.B. Wassanga versus Joshua Mwaikambo & Another** [1987] TLR 88 the Court of Appeal had, at page 92, this to state: -

*"In general, and this I think elementary, **a party is bound by his pleadings** and can only succeed according to what he has averred in his plaint **and in evidence he is not permitted to set up a new case**".* End of quote

[See also: **Rashid Abiki Nguwa versus Ramadhan Hassan Kuteya**, Civil Appeal No. 421 of 2020 CAT at Dodoma; **Tanzania tobacco Processors Limited versus The Commissioner General (TRA)**, Civil

Appeal No. 174 of 2019 CAT at Dar es Salaam (Both unreported) and **James Funke Gwagilo versus Attorney General** [2004] TLR 161]

Therefore, from the Appellant's pleaded facts, per paragraph 7 of the plaint, the cause of action accrued on 10th May, 2018 and, the Appellant's suit being filed on 24th October, 2022, was filed after four years and five months hence out of statutory limitation time of three years by one year and five months of filing a suit founded on tort.

From the foregoing, there is nothing therefore to fault the trial court findings upholding that the Appellant's suit was time barred and consequently dismissing it in terms of section 3(1) of the Law of Limitation Act, [Cap. 89 R.E. 2019]. The Appellant's first ground is therefore without merit and I dismiss it.

Since the first ground suffice to dispose of the appeal, in that the Appellant's suit was time barred hence dismissed, I find no need to dwell into the 2nd ground of appeal which challenges if the trial court had jurisdiction or not to try the Appellant's suit. This is based on a simple reason that even if I am to determine it affirmatively, still it will save no useful purposes because the suit is already determined to be time barred hence making the trial court lack jurisdiction to try it.

That said and done, I hereby dismiss the Appellant's appeal in its entirety
with costs

It is so ordered

Right of Appeal explained

Dated at DAR ES SALAAM this 15th day of November, 2023



MUSA K. POMO

JUDGE

15/11/2023



Court: - Judgement delivered in the presence of Ms. Regina Herman for
Gasper Nyika for the Respondent only

Sgd: S. B. Fimbo

Deputy Registrar

15/11/2023