

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO.229 OF 2022

RUBUYE AGRO-BUSINESS COMPANY LIMITED.....1ST PLAINTIFF

LEONARD DOMINIC RUBUYE T/A

RUBUYE AGRO CHEMICAL SUPPLIES.....2ND PLAINTIFF

VERSUS

NMB BANK PLC.....DEFENDANT

RULING

POMO, J

On 14th December, 2022 the Plaintiffs herein, by way of plaint, filed this suit against the defendant. Their claims, which are stated under paragraph 3 of that plaint, are for: -

- 1. Declaration that the defendant is in breach of contract by failing to comply with the 1st plaintiff's instructions to pay a sum of Tsh 120,000,000 and Tsh 480,000,000 to YARA Tanzania Limited via TISS;*

2. *Declaration that the defendant is in breach of contract by failing to comply with the 1st Plaintiff's instructions to redeem Agricultural Subsidy vouchers and pay a sum of Tsh 325,430,000/- to YARA Tanzania Limited*
3. *Declaration that the defendant has committed fraud against the plaintiffs*
4. *Declaration that the Defendant is in breach of the fiduciary duty it owes the Plaintiffs*
5. *An order that the Defendant refund the 1st Plaintiff the sum of Tsh 120,000,000 being TISS transfers which the Defendant did not comply with*
6. *An order that the Defendant refund the 2nd Plaintiff the sum of Tsh 480,000,000 being TISS transfers which the Defendant did not comply*
7. *An order that the Defendant refund the 1st Plaintiff the sum of Tsh 325,430,000 being the value of Agricultural Subsidy vouchers which the defendant was instructed to redeem and pay YARA Tanzania but did not do so*

8. *An order that the Defendant pay the Plaintiffs specific damages of Tsh 9,967,486,349*
9. *And order that the Defendant pay the Plaintiffs general damages of Tsh 300,000,000 or such other sum as assessed by the Honourable Court*
10. *An order that the Defendant pay the Plaintiffs punitive damages to be assessed by the Honourable Court, and*
11. *An order that the Defendant pay the Plaintiffs interest on the decretal sums at the court rate from the Honourable Court enters judgment until the date the decree is satisfied in full*

This suit stands instituted against the defendant following the decision of the High Court, in Commercial Case No.29 of 2016 in its judgment delivered on 26th June, 2016, condemning the 1st plaintiff to pay YARA TANZANIA LIMITED Tsh 727,346,800.46 unpaid balance arising from fertilizers supplied and delivered to them. Dissatisfied, appealed to the Court of Appeal vide Civil Appeal No.219 of 2018 which was determined on 13th July, 2022 by ordering the 1st Plaintiff to pay Tsh 281,975,000.00 together with interest thereto. The plaintiffs believed are not indebted by YARA TANZANIA LIMITED for the fertilizers supplied to them on credit between

2013 and 2014. The basis of so believing is the alleged payments they made by way of TISS from their bank account No. 22510006837 in the name of the 1st Plaintiff and bank account No.60303500161 in the name of the 2nd Plaintiff both held with the Defendant's bank. The contended payments by way of TISS to YARA TANZANIA LIMITED were made by the plaintiffs from the said bank accounts held in the Defendant's bank from April, 2013 to May,2015, which was effected on the dates stated under paragraph 9 and 10 of the plaint

YARA TANZANIA LIMITED complained and instituted the said commercial Case No.29 of 2016 against the plaintiffs for their failure to make good the outstanding debt on the fertilizers supplied to them on credit, the act which irritated and prompted the plaintiffs to ask the defendant's bank on what happened on the amount deducted from their bank accounts to pay the debt. The defendant through a letter dated 29th March, 2016, which is annexure P6 under paragraph 16 of the plaint, confirmed to the plaintiffs that she effected payment to YARA TANZANIA LIMITED, the fact which was confirmed untrue by the court in the case instituted by YARA TANZANIA LIMITED thereby ordering the plaintiffs to pay the stated amount of Tsh 281,975,000.00 together with interest. As alluded above, the decision

declaring the plaintiffs to pay that amount was delivered by the Court of Appeal on 13th July, 2022.

Since the court conclusively determined that YARA TANZANIA LIMITED was not paid by the plaintiffs the debt owed; and as long the plaintiffs believe to have paid the debt by way of TISS payment system and the defendant having confirmed to them to have effected the payment to YARA TANZANIA LIMITED while in fact she didn't, despites deducting the plaintiffs' cash from their bank accounts held with the defendant bank, the plaintiffs have commenced the instant suit against the defendant for **one**, breach of contract; **two**, fraud and **three**, breach of fiduciary duty.

The suit has encountered preliminary objection, the notice of which being embodied into the Written Statement of Defence (WSD) filed on 10th May,2023 by the Defendant. The objection provides thus: -

- 1. To the extent that the suit is based on alleged breach of contract by the Defendant in respect of transactions carried out between 2013 and 2015 and the fact that this suit was filed on 14th December,2022, it follows therefore that the suit is time barred".***

I ordered the disposal of the objection be by way of written submissions. Whereas the Plaintiffs had legal service of Mr. Michael Mkenda, learned advocate, the defendant enjoyed legal representation of Mr. Makaki Masatu, learned advocate. Both sides complied the schedules of filing their respective submissions. I am grateful to them.

Arguing the objection, Mr. Masatu submitted that this suit is time barred. His thrust of argument is that the plaintiffs' suit is founded on allegations of **one**, breach of contract, **two**, breach of fiduciary duty and **lastly**, fraud. And among others, the plaintiffs' prayers are for declaratory reliefs the same being evident under paragraphs (i); (ii); (iii) and (iv) of the relief's clause of the plaint.

That, suits for declaratory reliefs the limitation of time of action is not specifically provided for under the Law of Limitation Act, [Cap. 89 R.E.2022] thus falls under Item 24 of Part 1 of the schedule to the Act which sets six years. Supporting his stance, he cited the case of **CRDB (1996) LTD versus Boniface Chimya** [2023] TLR 413 at pp. 413 – 417 and **Benedict Gregory Mkasa versus Mbaruku Selemani and Others**, Land Case No. 4 of 2021 HC at Dar es Salaam (Unreported). That, the transactions complied of by the Plaintiffs against the defendant leading to the filing of this suit are

plaintiffs' instructions issued between 2013 to 2015 allegedly not honoured by the defendant. These are pleaded facts under paragraphs 9, 10 and 13 of the plaint. Thus, in terms of Item 24 of Part I to the schedule of the Law of Limitation Act, read together with section 5 and 6(i) of the Act, the plaintiffs' cause of action arose latest May, 2015 thus the six years expired in May, 2021. This suit which was filed in December, 2022 was thus time barred.

That, if the plaintiffs are to assert that they were not aware of the alleged failure by the defendant to honour their instructions to make payment to YARA Tanzania Limited as pleaded, the fact that in 2016 a suit was instituted against them as pleaded under paragraphs 16 and 17 of the Plaint and filed their defence on 2nd May, 2016 therefore by virtue of that suit the plaintiffs became aware or ought to have become aware as of 2nd May 2016 of the alleged failure to honour their pleaded instruction. Thus, counting accrual of cause of action in that respect, time expired on 1st May, 2022 and the suit being filed on 14th December, 2022 was out of time for about six months.

Regarding breach of contract, it is Mr. Masatu's argument that the pleaded facts under paragraphs 9, 10 and 13 of the plaint is that the alleged breach occurred between 11th April, 2013 and 4th May, 2015 which is the

period within which the defendant was given instructions complained of to be breached. Therefore, the suit was supposed to be filed within six years from the date of the complained breach. He referred this court to the case of **M and R Agency Limited versus Mwanza City Council and Another**, Civil Case No. 35 of 2021 HC at Mwanza (Unreported) at page 9. Thus, six years from the date when the cause of action arose ended on 4th May, 2021 and the suit being filed on 14th December, 2022 was therefore filed out of time

Regarding breach of duty of fiduciary which is pleaded under paragraphs 5(a), 25, 26, 29 and paragraph (iv) of the claimed reliefs in the plaint, Mr Masatu submitted that, the same is based on the alleged failure to honour the instructed transactions pleaded under paragraphs 9, 10 and 13 read together with paragraph 7(a) to (e) of the plaint, the alleged breach which occurred between 11th April, 2013 and 4th May, 2015. Limitation of time on suit founded on breach of fiduciary duty falls under Item 24 of the Law of Limitation Act which is six years. Therefore, from 4th May, 2015 to 14th December, 2022 when this suit was filed, it was out of time for about 19 months.

It is also Mr. Masatu' argument that the plaintiffs did allege fraud as pleaded under paragraphs 24, 28, 30 and paragraph (iii) of the relief clause of the plaint. That, the basis of fraud is stated under paragraph 24(a) and (b) which is connected to the plaintiffs' un-honoured instructions pleaded in paragraphs 9, 10 and 13 issued between 11th April, 2023 and 4th May, 2015. That, although under paragraph 30 of the plaint did state to became aware of the fraud when the Court of Appeal delivered judgment against them, his stance is that such mode of pleading fall short of the legal requirement set under Order VII Rule 6 read together with Order VI Rule 4 both of the Civil Procedure Code, [Cap. 33 R.E. 2022] in that the dates of the alleged fraud are not specifically pleaded.

That, cause of action for fraud accrues from the time the plaintiff discovers the said fraud or could with reasonable diligence have discovered. This is per section 26 of the Law of Limitation Act. To cement the point, Mr. Masatu cited the case of **Meet Singh Bhachu versus The Administrator General and Another**, Misc. Civil Application No. 70 of 2020 HC at Arusha (unreported) at page 17-19. That, the plaintiffs ought to have stated the date on which they discovered the fraud. On this, Mr. Masatu referred this court to the decision **of Ramanathapuram Market versus East India**

Corporation Ltd, AIR 1976 Mad 323, (1975) 2MLJ 214 and **Saranpal Kaur Anand versus Praduman Singh Chandhok**, Civil Appeal No.... of 2022.

Basing on that, Mr. Masatu argued that the Plaintiffs ought to have discovered the alleged fraud when they were sued by YARA Tanzania Limited and filed their defence on 2nd May 2016 per paragraph 16 and 17 of the plaint. Had they checked their bank statement, could have discovered. Six years counted from 2nd May, 2016 to 14th December, 2022 when this suit was filed, it was out of time by six months. Concluding, prayed the objection be upheld and the suit be dismissed with costs for being time barred.

In reply, Mr. Mkenda is of the contention that the suit is not time barred. His argument is that facts of the case are pleaded within the legal requirement set under Order VII Rule 4 of the Civil Procedure Code, [Cap. 33 R.E. 2022] citing paragraphs 30; 30.1; 30.2 and 31 of the plaint. To him, the objection raised fall short of being objection on pure point of law. He cited **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd** [1969] E.A. 696 at page 701 and **Soitsambu Village Council versus Tanzania Breweries Limited and Another**, Civil Appeal No. 105 of 2011 CAT at Arusha (unreported) and concluded that the objection raised by the defendant is untenable.

As regards compliance of the requirement of Order VII rule 6 of the CPC, Mr. Mkenda argued that the plaintiffs have complied by showing grounds upon which exemption is claimed and cited the case of **Mohamed Chiumba versus Dar es Salaam Small Industries Co-operative Society** [1986] TLR 91

That, the plaintiffs are not complaining about their money being deducted by the Defendant. Have no problem with that and the bank statement proved the money was deducted. Their problem is, the defendant deducted and stole those money. It is YARA Tanzania Limited bank account which can reflect of the money deposited by the defendant therein or not, the bank account they have no access to it. No amount of diligence regarding their bank statement could have served no any purpose in detecting the alleged fraud. In the end, Mr. Mkenda prayed the objection be overruled

In his rejoinder, Mr. Masatu basically reiterated the submission in chief and added that the plaintiffs are not entitled to exemption

On my part, having heard the rival submissions by both sides, now the issue I have to determine is whether the plaintiffs' suit is time barred.

It is common ground that this suit was commenced by the plaintiffs against the defendant following the instructions (TISS Transfer Fund Requests) they issued in 2013 to 4th May, 2015 ordering the defendant to deduct money from their bank account held in the defendant's bank and effect payment to YARA Tanzania Limited bank account for the fertilizer they had bought on credit from YARA (see paragraph 9 and 10 of the plaint). The defendant deducted the money (see paragraph 11). YARA Tanzania Limited denied receiving payment allegedly paid by the plaintiffs through TISS hence in 2016 commenced suit against the plaintiff (see paragraph 17 of the plaint). Inquiry from the defendant by the plaintiffs on such payment query did receive confirmation letter dated 29th March, 2016 to the effect that payments were effected to YARA Tanzania Limited (see paragraph 16 of the plaint and annexure P6 thereto).

The suit against the plaintiff by YARA Tanzania Limited, Commercial Case No.29 of 2016 before the High Court was followed by Civil Appeal No. 219 of 2018 before the Court of Appeal of which the judgment was delivered on 13th July, 2022. All the time, the plaintiffs' maintained to have paid YARA Tanzania Limited the claimed amount in the manner they instructed the defendant to deduct the same from their bank account (see paragraph 18 of

the plaintiff). The decision of the Court of Appeal in the said Appeal was delivered on 11th July, 2022 by concluding that YARA Tanzania Limited was not paid the amount claimed and are to be paid by the plaintiff (see paragraph 21 of the plaint and annexure P13).

This suit was filed on 14th December, 2022 five months from the date the Court of Appeal concluded that YARA Tanzania Limited was not paid.

From the pleaded facts, I asked myself, is there anything suggesting that the plaintiffs had prior knowledge or ought to have known the breach allegedly committed by the defendant earlier than the date the Court of Appeal delivered its decision on 11 July, 2022 concluding that YARA Tanzania Limited was not paid the claimed amount of which the plaintiffs maintained they paid YARA Tanzania by way of TISS through the defendant?

The law is settled, where a suit is preferred out of time the plaintiff has to disclose ground for exemption. This is a legal requirement set under Order VII Rule 6 of the Civil Procedure Code, [Cap.33 R.E.2022] which provides thus:

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

There is plethora of decisions of the court in which Order VII Rule 6 of the CPC was considered. Among others, are the cases of **Stanbic Bank Tanzania Limited versus M/S Tradexim Company Limited**, Civil Appeal No. 75 of 2019 CAT at Dar es Salaam; **Kigoma Ujiji Municipal Council versus Ulimwengu Rashid t/a Ujiji Mark Foundation**, Civil Appeal No. 222 of 2020 CAT at Tabora, **Ali Shabani and 48 Others versus Tanzania National Roads Agency (TANROADS) and Another**, Civil Appeal No. 2020 CAT at Tanga; **Fortunatus Lwanyatika Masha versus Claver Motors Limited**, Civil Appeal No. 144 of 2019 CAT at Mwanza and **M/S. P & O International Ltd versus The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020 CAT at Tanga (All unreported).

For instance, in **M/S. P & O International Ltd** (supra), the Court of Appeal, at page 11, stated thus:

"Next, we shall consider whether the appellant pleaded facts to exempt her from limitation. In terms of Order VII rule 6 of the CPC, a party who seeks to rely on exemption from time limitation has an obligation to plead grounds for such exemption".

In **Alphons Mohamed Chilumba versus Dar es Salaam Small Industries Co-operative Society** [1986] cited at page 13 in **M/S. P & O International Ltd (supra)**, it was stated thus: -

*"Order 7 rule 6 CPC provides that **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 other words, where but for some ground of exemption from the law of limitation, a suit would prima facie be barred by limitation, it is necessary for the Plaintiff to show in his plaint such ground of exemption. If no such ground is shown in the plaint, it is liable to be rejected under rule 11(c) of the same Order".*

In the instant suit, under paragraph 29 and 30 of the plaint, the plaintiffs have stated thus:

"29- That, in the period when the plaintiffs gave the instructions regarding the TISS payments and the Agricultural Subsidy vouchers and the date when the Court of Appeal delivered its judgment the following transpired

- a. The plaintiffs held the Defendant in a position of trust and hence believed their unconscionable documentary and verbal untruths that the payments had been made and received by YARA Tanzania Limited; and*
- b. The matter of whether YARA Tanzania Limited had received or not received the payments which the Plaintiffs*

had instructed the Defendant to make was the subject of court proceedings which only came to a close after the Court of Appeal rendered its judgment”.

And

"30.- That, the Plaintiffs only definitively **became aware that the Defendant had not made the payments to YARA Tanzania Limited and thereby committed breach of contract, fraud and breach of fiduciary duty after the Court of Appeal delivered its judgment”.**

It is crystal clear from the above paragraphs of the plaint that the plaintiffs are aware to be out of time to file the suit against the defendant and thus pleaded for exemption in the manner stated. In my view, what the plaintiffs pleaded and the above reproduced paragraphs of the plaint suffices compliance of Order VII Rule 6 of the Civil Procedure Code, [Cap.33 R.E.2022]. I am fortified by the position obtaining in **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd** [1969] E.A. 696 at page 701

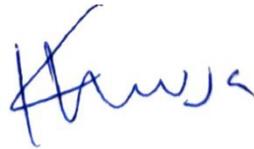
*"A preliminary objection is in a nature of what used to be a demurrer. **It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct**”.*

Now, there is complaint by the defendant that the plaintiffs ought to have known the alleged breach the time they were sued by YARA Tanzania Limited and filed their defence, that is on 2nd May, 2026 if at all they were diligent enough. In my considered view, when the Court of Appeal rendered its judgment concluding that YARA Tanzania Limited had received no payments from the plaintiffs is the only time which can be said with certainty that the plaintiffs were made aware payment, if any, were not made by the Defendant to YARA Tanzania Limited. That was 13th July, 2023. I can't comprehend if YARA Tanzania Limited Bank statement was within the plaintiff's reach, taking into account the assurance the defendant had given the plaintiffs through her confirmation letter that money to YARA Tanzania was paid per TISS instructions. Therefore, counting days from the 13th July, 2022 when the Court of Appeal delivered its judgment on whether the money was paid to YARA Tanzania Limited or not, up to the 14th December, 2022 when this suit was filed, it is only five months lapse of time. That being the case, in my view, this suit is not caught by limitation of action be for breach of contract, fraud or fiduciary duty whose limitation of actions are far beyond five months.

I the upshot, I find the objection to be devoid of merit and hereby overrule it with costs. The suit shall proceed from where it ended

It is so ordered

Dated at Dar es Salaam this 15th day of December, 2023



MUSA K. POMO

JUDGE

15/12/2023



Court: - Ruling delivered this 15/12/2023 in the presence of Ms. Kulwa Shilemba holding brief for Michael Mkenda for the plaintiff and Kulwa Shilemba for the defendant only

S. B. FIMBO

DEPUTY REGISTRAR

15/12/2023