

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 184 OF 2023

BETWEEN

DORIS EDWARD MBANGUKIRA PLAINTIFF

AND

AIRTEL TANZANIA PLC DEFENDANT

RULING

Date of last order: 12/04/2024

Date of ruling: 19/04/2024

NGUNYALE, J.

The plaintiff filed his plaint claiming against the defendant the following reliefs; -

- a) Declaration that the defendant has unjustly enriched itself by unlawful usage of the plaintiff image without lawful compensation, misrepresentation, false endorsement and passing off with no authority and/or consent for commercial gain.*
- b) Payment of special damages to a tune of Tanzania Shillings Six Hundred Million only (TZS 600,000,000/-) being loss sustained by the plaintiff on the cancellation of the other related arrangements and infringement of the plaintiff commercial charges.*

- c) An order for payment of the sum of Tanzania shillings Eight Hundred Million (TZS 800,000,000/=) as damages for unauthorized use of plaintiff's images in marketing and promoting the defendants' services and products.*
- d) An order against the defendant for payment of 25% royalties arising out of the benefit gained as a result of publishing and advertisement infringing plaintiff's rights when the advertisement was posted infringing plaintiffs rights when the advertisement was posted to the date of judgment, with interest of 20% per annum from the date of cause of action to the date of full payment.*
- e) An order compelling the defendant to forward the royalties prayed under paragraph (c) above to the plaintiff.*
- f) Aggravating damages.*
- g) Interest on the decretal amount in (b) and (c) above at the court rate of 7% per annum from the date of judgement to the date of final payment and satisfaction in full.*
- h) Costs of the suit and any other reliefs this court deems fit and just to grant.*

Before the hearing of the suit on merit, the defendant raised a preliminary objection on point of law that the plaintiff's suit is founded on the tort of violation of the plaintiff privacy and or unjust enrichment, then the suit filed on 18th September 2023 is hopelessly time barred contrary to Item 6, part I to the Schedule of the **Law of Limitation** Act Cap 89 R. E 2019.

The preliminary objection was heard by written submission, the plaintiff appeared represented by Mr. Shalom Msacky and the defendant was ably represented by Mr. Gasper Nyika & Ms. Samah Salah both learned Counsels.

The objector Counsel submitted that it is a settled law that an objection on account of time limit is one of the objections which is based on pure point of law which touches on the jurisdiction of the court. Its determination does not require ascertainment of facts or evidence but only the review of the plaint and its annexures. This was stated by the Court of Appeal in **Moto Matiko Mabanga vs. Ophir Energy Plc & Others**, Civil Appeal No. 199 of 2021 (unreported). He also cited the case of **Momella Sawmill Company Ltd v. Hon. Minister for Natural Resources and Tourism and Others**, Civil Appeal No. 31 of 2017 in which the Court of Appeal emphasized that the nature of a suit may be determined by looking at the statements of facts constituting the cause of action as contained in the plaint as well as the annexures and the reliefs sought. The court went further and stated that, it is from the nature of the suit that the period of limitation may be determined. According to the plaint, it is undoubtedly that the alleged cause of action is founded on the tort of violation of the plaintiff's privacy and or unjust enriching.

In his further submission he referred to Item 6 of Part I of the Schedule to the **Law of Limitation Act** in which claims relating to tort are to be brought within three years of the occurrence of the wrong complained of. Under section 4 of the **Law of Limitation Act**, the period of limitation

commences on the date on which the right of action accrues. The accrual date as provided for under section 5 of the **Law of Limitation Act** is the date on which the cause of action arises. This means that the right of action accrues when the wrong complained of occurs. In this case the wrong occurred in 2014 when the defendant started using the plaintiff's likeness (images) in different media platforms without the plaintiff's knowledge and/or consent to mark and promote its brand, services and/or products to the consumers of such services and the general public at large. In the reliefs prayed by the plaintiff in para 'd' above he claims interest of 20% per annum from date of cause of action to the date of full payment.

The suit was filed on 18th September 2023 about 9 years from when the cause of action of tort arose. This means that the suit is time barred under Item 7 of the First Schedule to the **Law of Limitation Act**. The law does not exclude the period which the plaintiff was unaware of the wrong. If the date when he discovered the wrong is relevant still the plaintiff will be time barred. It was alleged that she discovered the same early 2020, still she is out of time. Even if she discovered in January 2020 by 18th September 2023 when she filed the suit she was already out of time because three years had already expired. The Counsel for the defendant

prayed the court to dismiss the suit in view of Section 3 of the **Law of Limitation Act**.

The plaintiff submitted that the suit is within time because the cause of action started to accrue early January 2020 and specifically on 4th January 2020 when she received a letter terminating the contract with the defendant. The plaintiff spent time in litigating Civil Case No. 24 of 2020. The said suit was filed on the 12th February 2020 and it was withdrawn with leave to refile on the 22nd August 2023 before Mkwizu, J. Therefore, the plaintiff spent a total of 2 years and 240 days litigating diligently Civil Case No. 24 of 2020. The period which the plaintiff spent in litigating Civil Case No. 24 of 2020 that is from 12th February 2020 to 22nd August 2023 which is a period of 2 years and 240 days must be automatically excluded from calculating the period of limitation. Section 21 (2) of **the Law of Limitation Act** Cap 89 is clear about his position. That position was interpreted in the case of **Geita Gold Mining Limited vs Anthony Karangwa** Civil Appeal No. 42 of 2020 Court of Appeal of Tanzania (unreported). From that view, the plaintiff claimed to be within time because it was unnecessary to move the court by way of application for extension of time because that time is excluded automatically.

In their further submission the plaintiffs' Counsel submitted that the matter at hand is in a form of continuing breach that, every date when the defendant continues not to cure the breach, the breach continues. The defendants are still enjoying the rights and privileges of the plaintiff likeness by continuing to advertise on various location up to date something which hasn't been denied by the defendant. On this point he relied to Section 7 of the Law of Limitation Act Cap 89 which provides; -

"where there is continuing breach of contract or 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"

It was their humble submission that, there is a continuing wrong which the plaintiff is suffering on daily basis due to the actions of the defendants. It is a further view of the plaintiffs' Counsel that the defendants misconceived the matter because it is subject to multiple causes of action which this court is within time. The issue of consequential damages arose in January 2020 and the damages are occurring and arising to date hence the defendants are in a continuing breach. And there is claim of contractual relations between the parties which contain in paragraph 15, 16 and also the second prayer. Suits founded on contract time limitation is six years per Item 7 of the Schedule to the Law of Limitation. Further

reading of Order II Rule 3 (1) of the Civil Procedure Code Cap 33 R. E 2019 provides; -

"Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant, or the same defendants jointly may unite such causes of action in the same suit"

It was their humble submission that the said suit contains multiple causes of actions which are within the time limit for being entertained by this court. The cause fall under the law of tort and contract. Contract cases time limit is 6 years.

In rejoinder the objector reiterated his earlier stance insisting that the court has no jurisdiction because the fact of being prosecuting the erroneous registered case does not automatically grant them jurisdiction on exceptional basis.

On the issue that the matter at hand is a continuing breach, the defendant rejoined that Section 7 of the **Law of Limitation Act**, allows a fresh period of limitation to run at the very moment of breach of contract or continuation of the wrong complained about. However, such continuation of wrong must be clearly pleaded. In the present suit at hand the Plaintiff cannot benefit from the concept of continuing breach envisaged under

section 7 of the Law of Limitation Act since what the plaintiffs' experienced is continuation of injury and not continuation of breach, the plaintiff image was posted by the defendant once in 2014 but the cause of action arises when the plaintiff discovered that her images are being used by the defendant in early 2020. He cited the case of **Radi Services Limited v. Stanbic Bank (T) Limited**, Civil Appeal No. 260 of 2020.

Regarding the issue of multiple causes of action, the defendant rejoined by disputing the presence of multiple cause of action stating that facts constituting cause of action are founded in the plaint as well as its annexures and the same cannot be derived from written statement of defense. See the case of between **Babito Limited v. Freight Africa NV-Belgium & Others**, Civil Appeal No.355 of 2020 at page 16. As for this case looking at the plaint, its annexures and reliefs sought the wrong complained is of tort of violation of plaintiff's privacy and or unjust enrichment by defendant by using plaintiff's images and there is no allegation of breach of contract or relief for breach of contract sought.

Appreciating the submissions made by both parties, I have keenly considered the rival submission advanced by the learned Counsels for the parties concerning the issue of time limitation raised, it is now a proper opportunity for the court to make deliberation on whether the suit is time

barred or not.

In deciding this matter, the following points once determined will answer the objection raised sufficiently **one**, cause of action in which the suit is founded **two**, application of section 21 of the law of limitation Act on excluding some periods.

As rightly submitted by the defendant's advocates the cause of action is derived from the plaint and its annextures. This is the position in **Babito case** [supra] where the CAT held that:

*"The trial court in the present instance like any other court dealing with a civil suit of this nature had to satisfy itself on two things: (i) that the **plaintiff has been able to establish a cause of action** and (ii) when did a right of action accrue warranting the appellant having a cause of action against the defendants, leading to filing of the Civil Case No. 2 of 2015. And in **determining the time limitation on the one hand and when the cause of action arose on the other, the court had to rely on the plaint and its annextures if any, only**" [emphasis added]*

I have made a thorough perusal of the plaint together with the annextures in which I came out with the firm view that the suit is founded on claims of tort. The plaintiff claims against the defendant for using her image in different media platforms without her knowledge or consent since 2014 which is purely tort. The Plaintiff became aware of the infringement of her rights to privacy and dignity in early January 2020. In

the whole plaint there is no paragraph or annexure suggesting that the parties had a contract.

Therefore, it is a settled position that the suit is founded under the law of tort. It is clear under Item 6 of Part I of the Schedule to the **Law of Limitation Act**, claims relating to tort are to be brought within three years of the occurrence of the wrong complained of. Section 4 of **Law of Limitation Act**, provides that the period of limitation commences on the date on which the right of action accrues. With this stance, I agree with the Plaintiff's advocate that the cause of action arose in January 2020 because it is that time when the plaintiff started to feel the injuries caused by the acts of the defendant.

The defendant had submitted that even if the court has to consider that, accrual of cause of action is January 2020 still the plaintiff is time barred as the time for filing lapsed in January 2023. In their submission counsels for the plaintiff contended that the suit is within time as they were in court under civil case no. 24 of 2020 which was withdrawn with leave to refile hence such time is excluded under section 21 (2) of the **Law of Limitation Act**. The very provision provides that: -

"In computing the period of limitation prescribed for any suit, the time during which the applicant has been prosecuting, with due diligence,

another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

It is the defendant submission that the plaintiffs' suit does not meet the criteria under section 21 above for exclusion of the period she was prosecuting civil case no. 24 of 2020 as she withdrew the matter at her own will as there was no defect of jurisdiction or any other cause of the like nature or the court was unable to entertain it. There is no dispute that section 21 (2) of Law of Limitation Act provides for automatic exclusion of the period the party was prosecuting another case in court. In **Geita Gold Mining case** [supra] the court of appeal held that:

"It goes without saying therefore, that section 21 (2) of the LLA does not require a party who intends to rely on it, to move the court by way of application for extension of time before he can have the time spent in prosecuting another proceeding against the same party excluded when computing the period of limitation. That is the law which, though not fixed, is well settled."

The section above creates the following conditions that for automatic exclusion of time **one**, the parties must be the same, **two**, the cause of action be the same, **three** the relief sought be the same and **four** that the plaintiff should prove that there were defects in jurisdiction or any other cause of the like or the court is unable to entertain it.

In assessing whether the plaintiff met the condition above starting with the first conditions, I have no doubt with the parties of the suit though in civil case no 24 of 2020 there were four parties that is the plaintiff, the defendant and other two parties who were named as **third parties**, who according to the law were joined by the Defendant hence cannot affect the first condition. Also, I have no quarrel with the 2nd and 3rd condition, points of determination arise in the fourth condition that if there were defects in jurisdiction of the court or any other cause of the like or the court was unable to entertain the matter. As rightly submitted by the defendant counsel, the plaintiff did not meet the fourth condition, it is my determination that this case was filed in a court with jurisdiction to entertain it and there is no any other cause the plaintiff has stated to substantiate her recourse to withdraw the matter so that the period of prosecution of Civil Case no. 24 of 2020 which time could be automatically excluded.

Regarding the issue of continuing wrong, the plaintiffs' counsel submitted that the acts of the defendant resulted into continuing injury since the plaintiff enjoys the rights under section 7 of Law of Limitation Act. I find such claim to be misconceived as the plaintiff fails to differentiate between continuing injuries as the result of the tort already done and continuing acts that result to tort. In the plaint and its annexures there is no any

proof that while the plaintiff was filing the present case still the defendant was using her images in advertising her business. Short of such proof one cannot claim on continuing breach for the period of limitation to start afresh.

For those reasons the accrual of the cause of action remains to be January 2020 which lapsed in January 2023 hence the matter became time barred.

The Court to Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla**, Civil Appeal No. 25 of 2020, observed that: -

"We are alive with the settled position of the law that time limitation goes to the Jurisdiction issue of the Court, and it can be raised at any time."

Also, the Court of Appeal in **Moto Matiko Mabanga v. Ophir Energy Plc & Others, Civil Appeal No. 199 of 2021** reiterated with approval its decision in the case of **Swilla Secondary School v. Japhet Petro**, Civil Appeal No. 362 of 2019 where it was stated that:

*"The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. **Courts or tribunals are enjoined not to entertain any matter which is time barred and in any event they did so, the Court unsparingly declare the proceedings and the consequential orders a nullity.**" [Emphasis added].*

The **Law of Limitation Act** under section 3(1) provides for the consequences of a matter which is time barred that:

"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 a defence.”

Accordingly, pursuant to section 3 of the **Law of Limitation** (supra) the suit becomes a suitable candidate for dismissal with costs as I hereby do.

The preliminary objection raised is therefore, sustained. It is so ordered.

Dated at Dar es Salaam this 19th day of April, 2024.



D. P. Ngunyale
Judge

Ruling delivered this 19th day of April 2024 in presence of Ms. Antonia Agapit holding brief for Mr. Msacky for Plaintiff also Ms. Antonia Agapit for the defendant.



D. P. Ngunyale
Judge

