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

CIVIL CASE No.22 OF 2023

1. **N.K IMPEX**
2. **UNIQUE TEXTILES** suing through Power of Attorney to **GAKI INVESTMENT COMPANY LIMITED..... PLAINTIFFS**

VS

1. **DAISSY GENERAL TRADERS .....**
2. **EPAK GENERAL TRADERS .....**
3. **ANGELA CHARLES KIZIGHA .....**
4. **ELVIS PETER KILINGO .....**

DEFENDANTS

VERSUS

RULING

29TH November & 9th February 2024

F.H. MAHIMBALI, J

The plaintiffs who are foreign companies registered in India are through Gaki Investment Company Limited, suing the defendants jointly for the breach of contract they contracted in late 2013 for the supply of rolls of cloth to the Tanzania Police Force, the latter having won the government tender **ME. O14/PF/2013/2014/G/34/LOT1.**

That the plaintiffs performed their duty by supplying various rolls of cloth to the defendants on the government tender they won (annextures GK1 – GK17).

There was part payment done by the defendants to liaise the outstanding debt (GK 18). However, the defendants failed to settle it all as required. In full consideration of the rolls of cloth supplied and the amount settled upon full delivery of the said various rolls of cloth to the defendants, an outstanding principal sum to the tune of $932,448.79 (Nine hundred thousand Thirty-two Thousands Four Hundred Forty-Eight Seventy-nine Cents United States of America Dollars) remain unpaid to the plaintiffs to date.

That after several demands by the plaintiffs from the defendants on the settlement of the said claims which yielded futile, the defendants through Gaki Investment Company Limited had nothing further to opt than preferring this suit on judgment and decree against the defendants as follows:

i. The first defendant should pay the 1st plaintiff/done principal sum to the tune of USD 549,814.01/= as the outstanding amount for the supplied rolls of cloth.

ii. The 2nd defendant should pay the 1st plaintiff/done, principal sum to the tune of USD 279,128.02/= as the outstanding amount for the supplied rolls of cloth.

iii. The 1st defendant should pay the 2nd plaintiff/done, principal sum to the tune of USD 103,506.77/= as outstanding amount for the supplied rolls of cloth.

iv. General damages to the tune of USD 500,000/= to be assessed by the Court.

v. Costs of the suit

vi. Any other relief that this Honorable Court may deem just and equitable to grant.

In reply to the claims by the Plaintiffs, the defendants through the legal services of Mr. Mpaya Kamala, learned advocate amongst other things filed the preliminary legal objections against the claims and the same be dismissed with costs basing on the following points:

a. That the suit has been wrongly instituted in this sub-registry of the High Court as none of the defendants has been impleaded as residing within Shinyanga Region.

b. That a copy of the plaint that the plaintiff's counsel served upon the defendants' counsel does not bear a date or endorsement/signature of the Registry Officer with respect to filing.

c. The plaint is bad for non-joinder of the necessary parties namely, the Tanzania Police Force and the Hon. Attorney General.

d. The plaint does not disclose a cause of action against the 3rd and 4th defendants.

e. The plaintiff's suit is time barred.

As it is the legal requirement that when there is preliminary objection on a point of law, it must first be determined. For the plaintiffs' case, was Mr. Kaunda learned counsel whereas Mr. Mpaya Kamala, learned advocate appeared for the defendants.

In arguing the preliminary objections against the plaintiffs' claims, Mr. Mpaya contended that reading paragraph 5 of the plaint through to 22, the plaintiffs are claiming for sums of money for goods supplied (rolls of cloth) per various purchase orders by the defendants to the plaintiffs constituted in purchase orders. From paragraph 6 to 22, it is pleaded that the plaintiffs supplied rolls of cloth for police uniforms. That was between 2014 to 2015. The plaint is silent on the due dates of payment of the supplied goods. To the contrary, at paragraph 23 of the plaint, it states that the plaintiffs started to alias with the defendants on the payment of the supplied goods. They managed to settle sum of the orders and promised to settle the outstanding,

once Tanzania Police Force through the Ministry of Home Affairs pays the same. Annexure GK 18 of the plaint is bank receipt for the said part payment. This is then a critical point for deliberation. To get to know as to when payments were made, annexures in GK 18 are relevant. In addressing this legal objection, he submitted that the Court has to look on the plaint and its annexures. He invited this Court to read the case of **Moto Matiko Mabanga vs. Opher Energy PLC & 6 Others**, Civil Appeal No. 119 of 2021 at page 14 (paragraph 1). He expounded that looking at annexure GK 18, the following payments were made: On 3rd October 2014 = USD 400,000/=, 17th February 2015 = 400,000/=, 14th July 2015=500,000/=, 209853.76/=. These being the payments, the latest of these payments were made on 15th July 2015. Since deliveries were made between 2014 and 2015 and that payments were also done between 2014 and July 2015, since the plaint is silent on the cut of date, according to section 30 of the Sales of Goods Act, delivery of goods and payments thereof are concurrent conditions. Thus, going by 23rd paragraph of the plaint, as supply of goods was between 2014 and 2015, payment thereof ought to have been done on the same dates unless otherwise fully stated. According to the item 7 to the schedule of the Law of Limitation Act, Cap 89, a suit founded on contract its time limit is six

years. Now counting from 2015 to 26th September, 2023 when this suit was filed, it counts 8 years. That means two years beyond the statutory period. The entire plaint, does not state anything as to why the suit was filed beyond the prescribed time. Thus, this suit is time barred.

He added that, as per **Order VII, Rule 6 of the CPC**, provides that when a suit is filed beyond the statutory period, the plaint has to state the grounds of exemption. In paragraph 23 of the plaint, it is stated that the defendants managed to settle sum of the claims and promised to settle the outstanding. As per section 27 (3) of the Law of Limitation Act, an acknowledgement of a date and a promise to pay gives rise to a fresh accrual of a right of action. Thus, as per plaintiffs' acknowledgement in paragraphs 23 to 31 of the plaint, the defendants made promises to pay. In Mid July 2022 (para 31 of the plaint) the plaintiffs aver that the defendants were in efforts to settle the amount from Tanzania Police Force through the Ministry of Home Affairs. That would entail fresh accrual of courses of action. Section 28 of the Law of Limitation Act is clear that such an acknowledgement must be in writing and signed by the person making it. The pleading is silent if that was done, concluded Mr. Mpaya and urged this Court to find this suit as time barred.

Mr. Kaunda on his part having carefully heard what Mr. Mpaya submitted, he resisted the preliminary objection, and accordingly replied in the order. With time Limitation issue, he countered the argument in reliance to section 7 of the Law of Limitation Act i.e on continuity of wrongs. In essence, he argued that the original cause of action accrued in 2015; and that the defendant's counsel does not dispute that the relationship between the parties is contractual, in the sense that the plaintiffs were suppliers and the defendants were recipients as per para 3.3 of the WSD. The defendants admit the contractual relationship. The defendants won a tender to supply the Tanzania Police Force uniforms. Further, the defendants admit that out of that supply, they made part payment of the deliveries, the same is reflected in annexure GK 18. After that transaction, there is an outstanding amount.

That being the fact, Mr. Kaunda submitted that if there is a continuity breach of contract, the cause of action continues accruing on every breach of that promise. On the continuity breach of contract, that is clear as per para 23 , 24, 25 , 26 – 35 of the plaint in which it is not disputed by the defendants. The contents of paragraphs 23-31 of the plaint, are not disputed by the defendants. Actually what the defendants state in the WSDS is evasive

denial of the facts and not specific denial as mandatorily required under Order VIII, Rule 3, 4, and 5 of the CPC.

On the fact that there is evasive denial by the defendants, which is legally barred and constructively considered as admission to the case, looking at paragraphs 4, and 5 of the WSD and what is claimed under paragraph 24 of the plaint, which states clearly how the defendants kept on promising to settle the claim the sooner Tanzania Police Force pays them, there is no specific denial, on those facts, then that is admission as per law. He relied support of this position in the case of **Beda Mgaya t/a BEFCA Technical and Supplies vs. AG and 20 others**, Civil case No 112 of 2019, where Masabo, J at page 4 put it clear on evasive denial that it amounts to admission. Thus if there is evasive denial to the plaint pursuant to Order VIII, Rule 4 that is admission as per law. Bringing the point home, Mr. Kaunda submitted that what the defendants aver in their joint WSD that is similar in the current case in which the Defendants are making evasive denial. As per Order VIII, Rule 4 of the CPC, that amounts to admission and as well interpreted by Masabo, J. He further alluded this point by making reference to paragraph 25 of the plaint, which is denied by the defendants under para 4 of WSD the same is evasively denied. Since that was not

controverted that means fresh accrual cause of action. Further to that, he submitted that under paragraph 29 of the plaint, there are serious allegations by the plaintiff against the Defendant. A similar stance is to be considered under paragraph 30 of the plaint, that there are serious allegations yet the defendants make only an evasive denial. See also allegations in paragraph 31 of the plaint. In response to this, the defendants in the WSD (para 5) make an evasive denial of those claimed facts.

Lastly, is paragraph 34 of the plaint (2nd paragraph). As to that particular fact, the defendants under para 7 of the WSD plead evasive denial. That in law is insufficient pleading on dispute of the claims. Thus, a fresh cause of action accrued in September, 2023. What presupposes the continuity of the cause of action in the case of **Lindi Express Ltd vs Infinity Estate Limited,** Commercial case No. 17 of 2021 HC. Com. Division at DSM Hon. Nangela, J at pages 8, 12 put it very clear.

Regarding what has been submitted under section 27, 28 of the LLA, Mr. Kaunda was of the view that the same should not be read in isolation but in conjunction with section 7 of the Law of Limitation Act.

With the cause of action, he refuted it by referring to the case of **John Mwombeki Byombarirwa vs Agency Martine International** (1983) TLR 1 the CAT at page 5 that the defendants' counsel only selected paragraphs that don't mention the 3rd and 4th defendants. However, looking at paragraph 5 of the plaint, it covers all the defendants. Thus the argument whether the plaint discloses no cause of action against the defendants, cannot be determined at this time, as it is proved of evidence. He invited this Court to the case of **A/S NOREMCO CONSTRUCTION (NOREMCO) VS. DAWASA**, Commercial case No. 47 of 2009 at page 3, 12, 13 which is very clear on this point. In his considered view, the plaint is very rich on the facts.

With the last ground of P.O that the suit is bad for misjoinder, he hurriedly submitted that on the trite law position under Order 1, Rule 9 of the CPC, that the suit is not defeated by no-joinder of parties. On this trite law position, Mr. Kaunda made reliance to the case of **Abdi M. Kipoto VS. Chief Arthur Mtoi,** Civil Appeal No. 75 of 2017 CAT at page 12. Thus for the purposes of this case, Mr. Kaunda submitted that TPF can be material witnesses of the case and not necessary parties as averred.

In his rejoinder submission, Mr Kamala first maintained his submission in chief and added that it is undisputed that the cause of action in this matter

accrued in 2015. It is also undisputed that this suit involves a contractual issue. However, it is Mr. Kaunda's view that this case involves a continuous breach. He responded that, the averment as to continuing breach are nowhere to be seen in the plaint.

Secondly, in the course of responding to the Preliminary Objections, Mr. Kamala challenged Mr. Kaunda's submissions arguing that it based only on refereed several paragraphs of the WSD instead of basing to the submissions to the legal objections raised. The rule of thumb is, in determining the preliminary objection, Court only looks on the plaint and its annexures and not more (**Rent A Car case**). There is no look at WSD but Plaint and its annexures. The case of **Beda Mgaya**, was correct position as to the matter before Hon. Masabo. Before Her, was an application for judgment on admission. And as such she was invited to look at various provisions of the WSD to ascertain whether it constituted admission. Thus, Order VIII, Rule 4 of the CPC in the current case was quoted out of context, cemented Mr. Kamala.

On the concept of continuous breach, Mr. Kamala was glad about the authorities provided especially the case of **Lindi Express Ltd** and appreciated the authorities provided. However, he invited this Court to pay

attention to pages 9-10. Thus, reading the case of **Lindi**, especially the last page (last paragraph), it is clear that a continuous breach is distinct from continuous damages. In this case, failure to pay was a breach and the reminder to pay was not in law a continuous breach but damages. With the referred paragraphs 23, 24, 25, 28, 30 & 31 of the plaint, none of those constitute a fresh cause of action but were mere promises. Assuming that they were acknowledgements, yet section 27 and 28 of the LLA would still trap them. The judgment by Prof Agatho in **Petrofuel (T) Limited** at pages 7 -8 is very clear that a demand notice in any way does not constitute a cause of action. What is stated by the plaintiffs under paragraph 25 cannot constitute a new cause of action as alleged. With the cause of action, paragraph 5 of the plaint is not a stand-alone paragraph as alleged, submitted Mr. Kamala. It is not conclusive by itself. There must be a look through of other paragraphs as well.

As to non - joinder of parties, Mr. Kamala submitted that, it was submitted just for the Court's appropriate directives, otherwise he reiterated the prayers as per submission in chief.

Having heard the submissions by both sides for and against the preliminary objections raised, the central point for determination is whether

the preliminary objections raised are merited or not. If they are merited, then the preliminary objections are sustained. To the contrary, they will be dismissed for being devoid of merit.

In traversing the submissions by both sides on the preliminary objections raised, it is clear that the first to three preliminary objections raised seem to be abandoned by Mr. Kamala in the course of arguing the legal objections. What remains are only two objections: whether the plaint discloses the cause of action and whether the suit is time barred.

Whether the suit discloses cause of action against 3rd and 4th Defendants, Mr. Kamala seems to be making reference to cumulative paragraphs 6th – 22nd of the plaint which in essence are elaborative to paragraphs 3 to 5. To be elaborative, paragraph three of the plaint provides: *That the 3rd and 4th defendants are mother and son cum Directors and majority shareholders of the 1st and 2nd Defendants respectively.....* Paragraph 4 of the plaint provides: *That both Plaintiffs through their lawful power of attorney, granted to GAKI INVESTMENT COMPANY LIMITED claim against all the defendants an outstanding principal sum to the tune of $ 932,448.79 (Nine hundred thousand Thirty-two Thousands Four Hundred Forty-Eight Seventy-nine Cents United States of America Dollars) arising out*

of the supply of different rolls of cloth to make police uniforms which the plaintiffs supplied to the defendants from their issued orders between 2014 and 2015 as elucidated hereunder.....

Thus, in my considered view, the legal concern that the plaint does not disclose the cause of action against the 3rd and 4th defendants is baseless as exemplified to the foregoing paragraphs. I say so on the strength of the pointed out paragraphs which detail how all the defendants are connected with the case at hand. That said, all the defendants reading the context in paragraph 3, 4 and 5 are well covered but specifically paragraphs 6-22 detail how each company is liable to the plaintiffs as to the deliveries done.

On non-joinder of parties, it is a settled law that under Order 1, Rule 9 of the CPC, the suit is not defeated by no-joinder of parties. As well referred to the case of **Abdi M. Kipoto VS. Chief Arthur Mtoi,** Civil Appeal No. 75 of 2017 CAT at page 12. Had it been a misjoinder of **necessary parties** to the case, the resultant effect would have been different.

I now turn to the central point of determination of the preliminary objection which is, whether the suit is time barred. It is well settled that a suit barred by the law of limitation is no suit at all.

Whereas Mr. Mpaya Kamala learned advocate for the defendants puts it clear that this suit is founded on contract and its life span as per law is six years counted from the last payment date i.e July 2015, he wonders if the current case is legally proper before the Court. He expounded this, looking at annexures in GK 18, that there were several payments made in respect of the said deliveries as exhibited: On 3rd October 2014 = USD 400,000/=, 17th February 2015 = 400,000/=, 14th July 2015=500,000/=, 209853.76/=. These being the payments, the latest of it was made on 15th July 2015. Since deliveries were made between 2014 and 2015 and that payments were also done between 2014 and July 2015, Mr. Mpaya was of the view that since the plaint is silent on the cut of date, then according to section 30 of the Sales of Goods Act, delivery of goods and payments thereof are concurrent conditions. Thus, going by 23rd paragraph of the plaint, as supply of goods was done between 2014 and 2015, payment thereof ought to have been done on the same dates unless otherwise fully stated. Therefore, according to item 7 to the schedule of the Law of Limitation Act, Cap 89, a suit founded on contract its time limit is six years. Now counting from July 2015 to 26th September, 2023 when this suit was filed, it counts 8 years. Since there is

no any legal justification on exemption for the delay of filing the said suit claiming the said reliefs sought, this suit is time barred.

Mr. Kaunda on the other hand refutes this argument on the premise that if there is a continuity breach of contract, the cause of action continues accruing on every breach of that promise. On the continuity breach of contract, that is clear as per para 23, 24, 25, 26 – 35 of the plaint in which it is not disputed by the defendants' WSD. So long as there was a continuing breach of contract, as per the contents of paragraphs 23-31 of the plaint which are not disputed by the defendants, Mr. Kaunda then faults the defendants with this legal objection as their response in WSD contain evasive denial of the alleged facts in the plaint and not specific denial as mandatorily required under Order VIII, Rule 3, 4, and 5 of the CPC. He considered their denial as admission in terms of Order VIII, Rule 4 of the CPC.

In digest to the submissions by the parties on the preliminary objections raised and argued, it is un denied fact that there was a contractual agreement between the parties on sale and delivery of goods by the plaintiffs to the defendants, and that the last payment as per pleading was effected in July 2015. Since this suit was filed in September 2023, beyond the six

years' time limit of filing a suit based on contract, is there a continuing breach in this case which led to accrual of fresh course of action?

According to law, it is true that a continuing breach of a cause of action amounts to a new cause of action. Section 7 of the Law of Limitation Act, is very clear on that. The same reads:

> *"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"*[**emphasis mine**].

Mr. Kaunda in relying to contents in paragraphs 23 – 34 of the plaint, submitted that there was a continuing wrong thus accrual of fresh cause of action. Mr. Mpaya disputes that as not qualifying of breach of new contract. If there was a failure of promise to pay out of the existing contract, unless the same was put into writing, a mere saying does not extend a cause of action and thus amounting to accrual of new cause of action.

It is the settled law that the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises (see section 5

of the Law of Limitation Act). Thus, accrual of rights of action in most cases shall be deemed to have accrued on the date on which the last transaction relating to the matter in respect of which the account is claimed took place. The legal position is, (as per section 3 (1) of the Law of Limitation Act,), that every proceeding described in the first column of the Schedule to the 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. Now according to item 7 of the schedule to the Law of Limitation Act, Cap 89, any suit founded on contract not otherwise specifically provided for, its time limit is six years.

I agree with Mr. Kaunda that when there is an acknowledgement to pay, the same can affect the accrual of right of action as provided by section 27 of the Law of Limitation Act and thus similar to a new cause of action on acknowledgement and part payment. However, for it to be effective, such acknowledgement as provided under section 27 of the Law of Limitation Act, shall be in writing and signed by the person making it, or by his agent duly authorised in that behalf.

Furthermore, Section 27 of the Law of Limitation Act shall not have effect in respect of of acknowledgement or payment if it is made after the

expiry of the period of limitation prescribed for the proceeding in respect of the right of action to which the acknowledgement, or as the case may be, the payment relates. Therefore, for section 27 also to be effective, the said acknowledgement must be done before expiration of the time limit set by the law.

All this notwithstanding, it is the trite law that pre- court action negotiations have never been a ground for stopping the running of time. In the Court of Appeal's decision in **Consolidated Holding Corporation v. Rajani Industries Ltd & Another**, Civil Appeal No, 2 of 2003 (unreported) is extra relevant in this current matter for the proposition that negotiations do not check the time from running. The Court sought inspiration from a book by **J.K Rustomji on the Law of Limitation,** 5th edition to the effect that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties. The Court of Appeal drew a similar inspiration from a decision of the High Court at Dar es salaam in **Makamba Kigome & Another v. Ubungo Farm Implements Limited & PRSC**, Civil Case No. 109 of 2005(unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement:

"*Negotiations or communications between parties since*

1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time, "(at page 16)

In another decision by the Court of Appeal in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mchemi**, Civil Appeal No. 19 of 2016 (unreported), cited with approval a statement from another unreported decision of the High Court, Dar es salaam Registry in **John Cornel v. A. Grevo (T) Limited**; Civil Case No. 70 of 1998 thus:

"*However unfortunate it may be for the plaintiff; the law of limitation is on actions, knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web.* "

It follows thus that, having held that the cause of action arose in 2015, the suit instituted on 26th September 2023, all that is stated by the plaintiffs under paragraphs 23-31 of the plaint do not legally qualify to be acknowledgements for payments but only pre-court action for negotiations. I associate myself to that position that negotiations or communications between parties since 2015 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time in strict compliance to section 3 (1) of the Law of Limitation Act. Thus, the suit is hopelessly time barred as the right to sue expired in July 2021.

The argument that the defendants' WSD contains evasive denial contrary to what is provided under Order VIII, Rule 4,5,6 of the CPC, cannot save the time limitation requirement. By the way, it was not the discussion in the said objection but just a kick of a dying horse in which I have no good basis to consider it.

All this considered in its depth and width, the filed suit is liable for dismissal under section 3(1) of the Act as I hereby do with costs.

DATED at SHINYANGA this 9th day of February, 2024.

F.H. MAHIMBALI

JUDGE

Ruling delivered this 9th February 2024 in the presence of Mr. Paul Kaunda, learned advocate for the applicants and Mr. Mpaya Kamala, learned advocate for the respondents.

Right to appeal to any aggrieved party is hereby guaranteed and explained.

THE HIGH COURT OF TANZANIA

F. H. MAHIMBALI

JUDGE