

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 14 OF 2012.

ROBBY TRADERS LIMITEDAPPLICANT

VERSUS

CRDB BANK LIMITED.....1ST RESPONDENT

TANZANIA NATIONAL ROADS AGENCY

(TANROADS).....2ND RESPONDENT

RULING.

BUKUKU, J.

The plaintiff has instituted a claim against the defendant for payment of T.shs. 44,885,700.00/= being an outstanding sum plus accrued interest calculated at commercial rate being the amount 2nd defendant agreed to pay the plaintiff under the terms of the road works contract titled "Routine Maintenance of Msishindwe – Mambwekenya Roads" with reference No. RUK /K/006/2005/2006.

The allegations raised in the plaint are such that, in the year 2005/2006 the plaintiff and the 2nd defendant entered into road works contract as enumerated herein. The value of the contract was T.shs. 44,885,700.00/=. It is alleged that, the contract was executed to the satisfaction of both parties wherein the 2nd defendant issued a certificate of substantial completion of works with defect liability period of 45 days, the period which was concluded on April, 2006 and payment Certificate issued.

Somehow, it is alleged that, the 2nd defendant paid the decretal amount but, the monies never reached the plaintiff. It is further alleged that, on or about February, 2006, defendant deposited two bank cheques with a total value of T.shs. 44,885,700/= at the 1st defendant's bank in favor of the plaintiff, one being cheque No. 067030 for the sum of T.shs. 33,154,550/= dated 3rd June, 2006 and the other cheque for an amount of T.shs. 11,731,150/= dated 27th January 2006.

It is further alleged that, in their normal business of reconciling their income, plaintiff discovered that, the two cheques subject of this dispute were not issued and therefore not honored, instead and for reasons best known to the defendants, the 2nd defendant's Sumbawanga bank cashed the two cheques to people unknown to the plaintiff and without plaintiff's instructions. What followed was a demand notice issued to the defendants following a resolution of the plaintiff's board of directors issued on 29th June, 2010.

It is further alleged that, the suit was first instituted at Kisumu Resident Magistrates' Court, however due to defect of jurisdiction, it was struck out hence this suit.

The 2nd defendant who is represented by Mr. Byabato, has raised two points of preliminary objection besides denying the claim.

The notice of the preliminary objection reads as follows:-

"1. The Claim is time barred; and

2. The suit is bad for misjoinder".

On the date fixed for hearing of the Preliminary objection, Mr. Byabato prayed to withdraw the second preliminary point, which prayer was readily granted. Subsequently, he proceeded to argue only one point namely:

"That the claim is time barred."

In essence, both defendants claim that, the suit is time barred because, the suit is founded on contract and according to item 7 part 1 of the 1st schedule to the Law of Limitation Act, the limitation is 6 years. They also alleged that the cause of action started on 27th June, 2006. When the cheque valued at T.shs.11,731,150.00/= was issued in favor of the plaintiff. Both defendants do not dispute that the second cheque for the sum of T.shs. 33,154,550.00/= dated 3rd June, 2006 is not time barred,

but since the claim is centered on the two cheques, then the claim cannot be separated.

With regard to the issue that the plaintiff was prosecuting the defendants for the same relief before the Kisutu Resident Magistrate's Court, the defendants claim that, that plea cannot be taken now but can only be applicable when a party is seeking for extension of time. They therefore pray that the suit be dismissed relying on the case of **Steven Masato Wasira V. Joseph Sinde Warioba and The Attorney General (CAT Mwanza)- Civil Application No. 1/1999 TLR [1999] 334.**

The plaintiff controverts the above arguments. In a nutshell, it is the plaintiff's submission that, the case is for breach of contract for non performance and the cause of action is centered on work performance and not the mode of payment as contended. According to Mr. Chambiri, learned counsel for the plaintiff, the plaintiff knew about the cheque on 24th June, 2011 and immediately wrote a demand note to the defendants. He therefore avers that, time started to run from 24th June, 2011. Mr. Chambiri further said that, prior to filing of this suit in this Court, the plaintiff had been in good faith and diligently prosecuting the defendants for the same relief before Kisutu Resident Magistrates Court, and that due to defect of jurisdiction, the Court ruled that it was incompetent to entertain it.

The issue to be determined here is, which period the period of limitation starts to be counted pursuant to the provisions of Act No 10 of 1971. While the defendants claims to be 27th January 2006 when the first cheque was issued, the plaintiff claims the cause of action started to run on 24th June, 2011, when the issue of the cheques came into the knowledge of the plaintiff and wrote a demand note to the defendant. My understanding is that, the period is taken to count from the date the infringement occurred and not from the date of entering the contract. This is so far the following reasons. First, we have to consider what is a cause of action. In order to do justice to this matter, I have to start by this fundamental consideration – what is a cause of action. Simply put, a cause of action is the right to sue. Therefore, it means the necessary legal conditions, which empower one to sue another. Such conditions are a result of a defendant's infringement of a plaintiff's rights. Which is why Black's law dictionary Ninth Edition at page 251 defines a cause of action as being:

"A group of operative facts giving rise to one or more basis for suing: Factual situation that entitles one person to obtain a remedy in court from another person."

Even though the expression "cause of action" has not been defined in the code, my understanding is that, a cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree, in other words, it is a bundle of essential facts which it is

necessary for the plaintiff to prove before he can succeed in the suit. Cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it, the suit must have been filed. If a plaintiff does not disclose a cause of action a Court will reject such a plaintiff.

Equally important, it is to establish how the cause of action may be seen or established by a Court of law. It is settled that, a cause of action must be reflected in the plaintiff (or petition) as presented to Court. Therefore, when determining whether a complaint discloses a cause of action or not, the Court need not, at this early stage of the suit, determine the liability or not of the defendant. What the Court should do is merely to pursue through the plaintiff and its annexure if any and presume that what is stated therein is true. A proof to the contrary comes at a later stage in the form of evidence to be adduced.

It is also necessary for the plaintiff to state specifically when such cause of action arose. This will enable the defendant as well as the Court to ascertain from the plaintiff whether in fact and in law the cause of action as alleged in by the plaintiff in the plaintiff did arise or not, and also to help the Court in ascertaining whether the suit is not barred by limitation.

The foregoing considered in the light of this suit, it is apparent that, according to paragraph 6 of the plaintiff, the plaintiff is claiming redress due to the defendant's failure to honor the road works contract entered into between the plaintiff and 2nd defendant in the year 2005/2006.

I find the words of **Mandam J. A in D.T Dobie (K) Ltd V. Joseph Mbaria Muchina & Another (Kenyan Court of Appeal Civil Appeal No.37 of 1978)** citing two earlier cases (**Waters V. Sunday Pictorial Newspapers Ltd – 1961 – 2 All ER 758** and **Drummond Jackson V. British Medical Association – 1970- 1 All ER 1094**) to be very inspirational. He stated:

"The Court ought to act very cautiously and carefully ... to consider all facts of the case without embarking upon a trial thereof, before dismissing a case for non disclosure of a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery. Without oral evidence tested by cross examination ... the Court ought not to overact by considering itself and summarily dismiss the action the action. No suit ought to be dismissed summarily unless it appears so hopeless that it plainly and obviously discloses, no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendments. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought to act in darkness without full facts of a case before it"

Considering the facts in this matter, my opinion is that, the cause of action emanated from breach of contract.

Second and more important however, is when did that cause of action arise. In order to determine this, the Court must look at the plaint and nothing else. (See: the cases of **John M. Byombalirwa V. Agency Maritime International (T) Limited [1983] TLR 1** and **Juray Sharif & Sons V. Chotai Fancy Stores [1960] EA at 375**).

Now what do we have at hand. According to paragraph 6 of the plaint, the plaintiff has averred that, the 2nd defendant agreed to pay the plaintiff under the terms of the said tender. The terms of the tender or even the contract as mentioned in paragraph 4 of the plaint are not attached to the plaint and therefore it is difficult for this Court to ascertain the terms contained therein, including the date on which payment was to be effected. Looking at paragraph 7 of the plaint, there is an allegation that, on or about February 2006, the 2nd defendant deposited two bank cheques with a total value of T.shs. 44,855,700.00/= at the 1st defendant's bank for clearance on drawers account and transmission to plaintiff's account at National Bank of Commerce. The first cheque with No. 067030 is for the sum of T.shs. 33,154,550.00/= dated 3rd June, 2006 and the other cheque for the amount of T.shs. 11, 731,150.00/= dated 27th January 2006. But then one wonders, according to paragraph 5 of the plaint, the contract was executed to the satisfaction of both parties on 13th April, 2006, how come payment was effected on January, 2006? Equally

surprising, according to the submission made by Mr. Chambiri, learned counsel for the plaintiff, the plaintiff knew about the issue of the cheques on 24th June, 2011 and immediately wrote a demand note to the defendants. According to annexure RTL III to the plaint which is the demand note, it shows that it was written on 3rd June, 2010.

I have to admit here that, this has tasked my mind. In my considered opinion, it seems the plaintiff is not certain as to the date in which the cause of action arose. It is now trite that, the plaintiff must give such particulars as will enable the defendant and the court to ascertain from the plaint whether in fact and in law the cause of action did arise as alleged or not. The plaintiff must state the period for which the defendant has been in default as that is a matter within his knowledge. In a suit for breach of contract like this one at hand, the plaint should state the terms of the contract and state when it was breached. My understanding is that, the maintainability of a suit cannot be adjudged from the effect which the decree may cause. It has to be determined on the basis of ostensible pleadings made and the stated relief claimed in the plaint.


Going by what has been pleaded in paragraph 11 of the plaint, the plaintiff has failed / neglected to state the date when he realized that the two cheques subject of this dispute were never issued and therefore not honored or issued, and that the 1st defendant failed to transmit the same as per the plaintiff's instructions. In my opinion, that date could have been very important to determine the cause of action.

Likewise the allegations contained in paragraph 15 of the plaint that the plaintiff had been in good faith and diligently prosecuting the defendant for the same relief, is silent as to when exactly the plaintiff was prosecuting the case and when it was dismissed. One could have thought that, the plaintiff could have made available to this court the ruling which struck out the suit, or could have pleaded the dates when the case was heard and struck out. This could have enabled the court to determine when the said case was prosecuted. This the plaintiff did not do. Under such circumstances therefore, it is not easy for this Court even to be able to determine if the suit is time barred for the simple reason that there is no date for reckoning the running of time.

May I in passing conclude that, the law of Limitation is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. The consequences of failure by the plaintiff to disclose the date when the cause of action arose is to strike out the suit.

For the foregoing reasons, the preliminary objection is hereby upheld to the extent indicated above, and the suit is hereby struck out with costs.

It is accordingly ordered

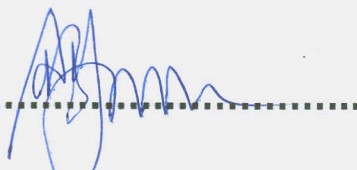


A.E BUKUKU

JUDGE

02 JULY, 2012

Ruling delivered this 02nd July, 2012 in the presence of Mr. Mwarabu Learned Counsel for the Plaintiff, Mr. Tesha Learned Counsel for the 1st Defendant and in the absence of the 2nd Defendant



A.E BUKUKU

JUDGE

02 JULY, 2012