

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 90 OF 2013

EDNA JOHN MGENI.....PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE
LIMITED.....1ST DEFENDANT

MBEYA CEMENT CO. LIMITED.....2ND DEFENDANT

RULING

Mansoor, J:

Date of Ruling- 06TH NOVEMBER 2015

The Complaint was filed by the National Bank of Commerce Limited “NBC” against Edna John Mgeni under a Summary Procedure. Leave to defend the suit was granted by the Court to Edna John Mgeni on 4th March 2014. Edna John Mgeni filed a written statement of defense and a counterclaim. In the




counter claim, the 1st defendant was NBC and the 2nd defendant was Mbeya Cement Co. Limited, “Mbeya Cement”.

Against the Counter Claim, NBC raised the following preliminary objections:

1. Edna John Mgeni has no cause of action against NBC;
2. The suit is incompetent for being irregular and noncompliance with the prescribed procedure of the law as it offends the provisions of Order VIII (a) Rule 9 (a) of the Civil Procedure Code;
3. That the counter claim is bad in law for being premised on debts that are time barred;
4. That the counter claim is frivolous and vexatious and all abuse of the court process.

Mbeya Cement also raised the preliminary objections against the counter claim as follows:

1. The counter claim is time barred;



2. The counter claim is bad in law for contravening Order VIII Rule 1 of the Civil Procedure Code;

The preliminary objections raised by both defendants were argued by way of written submissions, I shall first deal with the most pertinent issue of whether or not the counterclaim is time barred or are being premised on debts which are time barred; it be noted that these objections on limitations were raised by both the defendants:

The claim in the counter claim against NBC contained in paragraphs 13 to paragraph 18 of the counterclaim together with Annexure E-2 and E-3 are that the cause of action arose from the deposits made by Edna John Mgeni between the years 2006 to 2010, according to NBC this is when the cause of Action accrued, and argued that the Law of Limitation under Part 1 to the schedule item 12 , provides for a period of six years for such claims to be instituted in court from the time the cause of action arose. NBC argues that the counterclaim was filed on 17th February 2015 is



time barred for the cause of action accrued in 2006. Also as pleaded in paragraph 17 of the counterclaim, the cheques were deposited in 2006 through to 2009, and thus claims regarding the cheque deposits in 2006 are barred by statutes of limitation. NBC prayed for the counter claim to be dismissed under Section 3 (1) of the law of Limitation Act.

On the part of Mbeya Cement, they argued that the prayer against Mbeya Cement in the counter claim is for payment of THz 1,101,980,885.50 being overpayments made by Edna John Mgeni to Mbeya Cement for supply of cements. That paragraphs 11, 12, 16 and 18 of the counterclaim, and the prayers contained therein are based on a cause of action arose in 2006. Edna claims to have made overpayments to Mbeya Cement in the 2006 to 2009. The Counsel for Mbeya Cement argues that Part 1 item 7 of the Schedule to the Law of Limitation Act, the limitation period for suits found on contract is six years, and the counterclaim filed on 17th February 2015 for a cause of



action which arose in 2006 to 2009 is hopelessly time barred, and Mbeya Cement asked the Court to dismiss the suit as it is barred by the statutes of limitation.

On her part Edna John Mgeni responded that there is no time limits for one to sue on debts. She said the suit in the counter claim is not time barred. She cited Section 4 of the Law of Limitation Act, stating that the period of limitations prescribed under the Act in relation to any proceedings shall commence from the date on which the right of action for such proceedings accrues. She said, the right to sue accrued in the year 2010 when Edna learnt that she could not recover the funds from either NBC or Mbeya Cement.

Edna John Mgeni also cited Section 6 of the Law of Limitation Act stating that, in the case for a suit on an account, the right of action accrues on the date on which the last transaction relating to the matter in respect of which the account is claimed took place, and she claims that the last transaction took place in 2010.



I shall overrule and dismiss the preliminary objection raised by NBC that the counterclaim is premised on debts that are time barred, as first of all it is not clearly stated as to what NBC meant by saying that the debts are time barred, and what did they mean by saying "time-barred debt". I did not understand whether by debts they mean that NBC made an express promise to Edna John Mgeni to pay the debts, thus the debts became time barred. Or if the promise is only inferable, and not expressly made, as in case of an acknowledgment, NBC did not show that the debt had been acknowledged and there was a promise to pay the debts by a certain period and since the debts were not claimed within time from the date they acknowledged the debts, then the debts become barred by time from the date of the acknowledgment or from the day they made the promise to pay. In any case this issue requires to put the creditor i.e. Edna John Mgeni to proof of the fact that the debt had not become barred by time. The Court would be required to



scrutinize the books of accounts and promissory notes or any documents to see whether or not there was a debt, and when those debts became due for payments. This objections therefore does not qualify to be treated as preliminary objections, and therefore it is overruled.

On the part of Mbeya Cement, I agree that the cause of action arose from a contract, and the prayers contained therein are based on a cause of action arose in 2006. Edna claims to have made overpayments to Mbeya Cement in the 2006 to 2009. I agree that Part 1 item 7 of the Schedule to the Law of Limitation Act, the limitation period for suits found on contract is six years, and the counterclaim filed on 17th February 2015 for a cause of action which arose in 2006 to 2009 is hopelessly time barred, thus the suit against Mbeya Cement is dismissed for being hopelessly time barred.

On a point of cause of action, I agree with the Counsel of Edna John Mgeni that Cause of action implies a right to sue. The material facts which are imperative for the plaintiff to allege



and prove constitutes the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted *inter alia* to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. For every action, there has to be a cause of action, if not, the plaint shall be rejected summarily.

Edna John Mgeni purchased goods from Mbeya Cement and funds were transferred from Edna John Mgeni's account to Mbeya Cement through her account maintained at NBC. Cause of action has been alleged and denied by NBC in that Edna says NBC did not make payments to Mbeya Cement, and NBC denies, it says the payments were effected to Mbeya Cement, thus there is a cause of action raised by Edna in the counter claim. This objection is therefore overruled and dismissed.



On the 3rd objection that the counter claim is frivolous and vexatious, I agree with the counsel for Edna that an issue of whether or not the debts are time barred is already discussed and determined when disposing the objection on time limitation over the claims of debts which are time barred. The cause of action in the counter claim did not arise from a different set of transactions but in the same transactions as in the main suit between the same parties. The cause of action arisen in the counter claim can be determined in this suit as it involves the transactions between Edna and NBC when operating the bank account, the subject in the main suit. This point is also overruled and dismissed for the counter claim is not frivolous or vexatious or an abuse of the processes of the court.

Consequently, the preliminary objection raised by Mbeya Cement succeeds, and the suit against Mbeya Cement is dismissed for being time barred. The preliminary objections raised by NBC are all overruled and dismissed with costs.



DATED at DAR ES SALAAM this 06th day of November, 2015


MANSOOR

JUDGE

06th November 2015

