

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 184 OF 2017

OSMAN GAO HOZA.....PLAINTIFF

VRS

PAULA INTERBUSINESS CO. LTD.....1ST DEFENDANT

HASHIM PAULA GAO.....2ND DEFENDANT

JUDGMENT

B.K.PHILLIP,J

It is the plaintiff's case that the defendants have been borrowing money from the plaintiff from time to time so as to inject the same as the working capital in the 1st defendant's business and the same was supposed to be paid back to the plaintiff without any interests. It is alleged in the plaint, that by the year 2009, the defendants were indebted to the plaintiff to a tune of USD 55,000.00 out of which the defendants paid USD 5,000:00 and left USD 50,000:00 unpaid. In their endeavour to pay the said USD 50,000:00, the defendants issued five postdated cheques with different dates, worth USD 10,000:=each. Furthermore, the plaint reveals that out of the said five cheques, only one cheque was honoured, the rest were dishonoured and endorsed "*refer to drawer*", thus the unpaid amount stood at USD 40,000:00.

In addition to the above the plaintiff alleges that in 2004, he lodged his claims against the 1st defendant for the above mentioned outstanding amount at Dar Es Salaam Resident Magistrate's Court at Kisutu (henceforth " Kisutu"), vide Civil case No 115 of 2015 in which he won the case but later on the decision was reversed by the High Court of Tanzania vide Civil Appeal No. 253 of 2016, which was preferred by the 1st defendant. The plaintiff prays that the time he spent in prosecuting the case at Kisutu, should be exempted in computation of the time limited in lodging this case in Court.

In this case the plaintiff claims against the defendants as follows;

- i. Payment of USD 40,000.00.
- ii. Interest on (a) above at Commercial rate of 31% per annum from June, 2011 to the date of judgment.
- iii. Interest on the decretal sum at Court's rate of 7% per annum from the date of judgment to the date of full settlement.
- iv. General damage at the rate to be assessed by the court.
- v. Costs be provided for.
- vi. Any other order(s) and/or relief(s) that the honourable court may deem just and fit to grant.

On the other side, the defendants disputed the plaintiff's claims and alleged that there has never been any business transaction between the plaintiff and the defendants, and that the plaintiff's claims is fabricated. The defendants further alleged that the 1st defendant did not issue any cheque(s) to the plaintiff and the cheques that are alleged to have been

issued by the 1st defendant were stolen and tempered with by the plaintiff due to family conflicts. Furthermore, the defendants stated that the time which the plaintiff spent in prosecuting this dispute at the resident Magistrate's Court of Dar Es Salaam at Kisutu cannot be excluded on the ground that the plaintiff was not diligent in handling this matter and other factors applicable for such an exemption are lacking.

The following issues were drawn for determination by the Court;

- i. Whether the time between 2014 and 29th July 2017 should be excluded from the computation of time limit in filing this case in court as per the Law of Limitation Act.

If the answer in issue No. (i) above is in the affirmative, then,

- ii. Whether the defendants have been borrowing money from the plaintiff and what were the terms agreed by the parties.

If the answer in issue No. (ii) above is in the affirmative, then,

- iii. Whether the transactions in issue No. (ii) above was legal.
- iv. Whether the cheques worth USD 40,000/= were issued by the defendants in favour of the plaintiff
- v. To what reliefs are the parties entitled to.

At the hearing of this case the learned advocates Wilson Ogunde and Juma Mtatiro appeared for the plaintiff and defendants respectively.

Starting with the first issue, that is **Whether the time between 2014 and 29th July 2017 should be excluded from the computation of**

time limit in filing this case in court as per the Law of Limitation Act, it is not in dispute that the time between 2014 and 29th July 2017, the plaintiff was prosecuting a case against the 2nd defendant at Kisumu. Mr. Ogunde is of the view that, the aforementioned period should be excluded in terms of section 21 (1) of the Law of Limitation Act, Cap 89 and that the cause of action arose on 29th November 2011 when the first Cheque bounced, while Mr. Mtatiro is of the view that, the said period should not be excluded since the plaintiff did not demonstrate any due diligence in prosecuting the case at Kisumu and further contended that the suit is time barred since from 2007 when the plaintiff alleges that the 1st defendant started borrowing money from the plaintiff to 2017 when the case was filed in court 18 years had lapsed, while the time limit for instituting a case arising out of breach of contract is six (6) years.

Time Limitation for instituting matters in courts of law as well as exclusion of any time/period in computation of the time limit for institution of a case is a matter of law. The applicable law is the Law of Limitation Act, Cap 89. Section 21(1) of the Law of Limitation Act, Cap 89 provides as follows;

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceedings is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect

of jurisdiction or other cause of a like nature, is incompetence to entertain it”.

The circumstances in this case fits squarely in the above quoted provision of the law since the judgment of this court in Civil Appeal No 253/2016 which arose from the judgment of the **Resident Magistrate Court of Dar Es salaam at Kisutu in Civil Case No. 115 of 2014 between Paul Interbusiness Co Ltd vrs Osman Gao Hoza**, (Exhibit D2) shows clearly that the period from 2014 to 29 /08/2017, the plaintiff was prosecuting the same against the 1st defendant . I have considered Mr. Mtatiro’s contention that due diligence on part of plaintiff lacks, but I find it not meritorious because he did not give any explanations on the same, leave alone convincing explanations. However, I have also taken notice of his argument that the 2nd defendant is being sued for the first time. In my considered view, the exemption of the period from 2014 to 29th November 2017 is applicable to the 1st defendant only, since the suit that was filed by the plaintiff at Kisutu was against the 1st defendant only. For avoidance of any confusion/uncertainty, let me make it clear that though it is alleged in the pleadings that the 2nd defendant is the managing Director and majority shareholder of the 1st defendant, the position of the law is that the 1st defendant is a legal entity distinct from its shareholders and/or directors (see the case of **Salomon Vrs Salomon (1897 AC 22)**). Therefore, by suing the 1st defendant at Kisutu does not mean that the 2nd defendant was also sued at Kisutu or was party to that case. This explains my findings herein above that the issue of exemption of the period from 2014 to 29th November 2017 is applicable to the 1st defendant only.

Having made the above findings, the next issue that arises therefrom is; whether the suit against the 2nd defendant is not time barred. Let me point out on the onset that I am in agreement with Mr. Ogunde that , the cause of action against the defendants arose on 29th November 2011, when the first cheque that is alleged to have been issued to the plaintiff bounced at the bank and was endorsed "refer to drawer". I am also in agreement with Mr. Mtatiro that the time limit for instituting a suit arising out of contract is six years (see part I, item 7 to the schedule in the Law of Limitation Act ,Cap 89). Now, counting from 29th November 2011, six years within which the plaintiff was supposed to institute the case against the 2nd defendant as per the pleadings expired on 23rd October, 2017. Therefore , it goes without saying that since the case against the 2nd defendant was instituted for the first time in November 2017, the same is time barred, thus untenable.

Having determined the 1st issue to the effect that the case against the 2nd defendant is untenable, then the rest of the issues will be determined in respect of the 1st defendant only. Let me proceed with the determination of the second issue, that is **Whether the defendants have been borrowing money from the plaintiff and what were the terms agreed by the parties**, PW1 testified to the effect that there were oral agreements between the plaintiff and the 2nd defendant whereby the 2nd defendant used to borrow money from plaintiff from the year 2007, for the purpose of injecting the same as working capital in the company (1st defendant). It was PW1's testimony that by the year 2011 the defendants

had borrowed from him a total of USD 50,000 and the same had been due for payment for quite a long time. In its efforts to pay the said debt, the defendants issued five post dated cheques each worth USD 10,000:=-. However, before depositing those cheques, the 2nd defendant paid him USD 10,000:= thus, he returned one cheque and remained with four cheques (Exhibit P1), which upon depositing them at the bank, they bounced.

During cross examination PW1 told this court that it is the 2nd defendant who borrowed the money and that there was neither a written agreement nor agreed time for repayment of the money. PW1 also confirmed that he is related to the 2nd defendant and denied the allegations that the cheques (Exhibit P 1) were stolen from the 1st defendant.

PW2 testified as follows; that he is the young brother of Hashim Paula Gao who is the majority shareholder and managing Director of Paula Interbusiness Co Ltd (1st defendant), that in several occasions when the 2nd defendant was in need of money to inject in his company, used to borrow money from the plaintiff and no interests was charged on the amount granted to the 2nd defendant as the plaintiff and the 2nd defendant are related. Furthermore, PW2 testified that he was a guarantor to all the amount of money borrowed by the 2nd defendant and was always informed when any amount of money was granted to the 2nd defendant as well as when the 2nd defendant paid back the money. In addition to the above , like PW1, PW2 testified that by the year 2011 the defendants were indebted to the plaintiff to a tune of USD 50,000 out of which USD 10,000

only were paid leaving an outstanding amount of USD 40,000 which could not be cleared since the posted cheques issued by the defendants to settle the outstanding amount bounced.

Responding to the question during cross examination, PW2 told this court that there was no agreement with the 1st defendant, the business transaction was between the plaintiff and the 2nd defendant and it was mainly based on family relationship.

DW1 was Mr. Billa Rashid Paula who testified that the names of Osman Gao Hoza are fictitious names used by the plaintiff in fraud transactions, that there was a family conflict between the plaintiff and the 2nd defendant which resulted into this case. Furthermore, DW1 testified that sometimes in 2008 and 2009, one Gao Mandia was working with the 2nd defendant. The plaintiff and the said Gao Mandia conspired to steal from the 2nd defendant. They managed to steal a lot of money from the 2nd defendant and later on cheques were stolen too. The matter was reported to the police. In addition to the above DW1 testified that the defendants neither borrowed money from the plaintiff nor issued any cheque to the plaintiff. The cheques alleged to have been issued by the 1st defendant were stolen from the 1st defendant.

DW2, Hashim Paula Gao testified as follows; that the plaintiff is related to him and his real names are Gao Rashid Hoza, the plaintiff is a liar and he forged his passport and driving licence (Exhibit D1). Furthermore, DW2 testified that the plaintiff had never engaged in any business transaction with him, in the year 2009 there had been a family conflict which

reached its climax in 2012, when he (DW2) decided to terminate the employment of one Gao Mandia and Talhatwa Manyamuru who were working with him in his company, and had access to the cheques at issue which were stolen from him.

Looking at the evidence adduced as summarized herein above, according to the testimonies of plaintiff's witnesses it is clear that the person who used to borrow money from the plaintiff is the 2nd defendant not both defendants as pleaded. Thus, the closing submission by the plaintiff's advocate which indicates that both PW1 and PW2 testified that the defendants borrowed money from the plaintiff is not correct. The 2nd defendant denied to have been engaged in any business transaction with the plaintiff. However, since I have already made findings that the case against the 2nd defendant is time barred, I do not need to spend any time to determine who is speaking the truth between the 2nd defendant and the plaintiff, since the evidence adduced by the PW1 and PW2 show clearly that the 1st defendant have not been borrowing money from the plaintiff and this is supported by the evidence of DW 1 and DW2. From the foregoing it is the finding of this court that the 1st defendant has not been borrowing money from the plaintiff.

Since the case against the 2nd defendant has collapsed for being time barred and I have made a finding that the 1st defendant has not been borrowing money from the plaintiff, the third issue that is **Whether the transactions in issue No.(ii) was legal** has become redundant.

As regards the fourth issue, that is **Whether the cheques worth USD 40,000/= were issued by the defendants in favour of the plaintiff,** PW1 and PW2 testified that the cheques at issue were issued by the defendants for repayment of the money alleged to have been borrowed by the 2nd defendant, whose case I have said that cannot be entertained for being time barred, therefore, under the circumstances this issue is also redundant.

Now, the last issue, that is, **to what reliefs are the parties entitled to,** the legal consequences for the case that has been filed out of time is dismissal, this is per the provisions of section 3 (1) of the law of Limitation Act, Cap 89. Thus, having made a finding that the case against the 2nd defendant has been filed out of time, it is obvious that the same has to be dismissed. From what I have explained herein above, the case against the 1st defendant also collapses because it was dependent on the case against the 2nd defendant who was alleged to have been borrowing money from the plaintiff and issued the cheques for payment of the money.

In the upshot this case is dismissed with costs.

Dated at Dar Es Salaam this 7th day of February 2020




B.K.PHILLIP

JUDGE