IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.62 OF 2021

VODACOM (TANZANIA) PUBLIC

LIMITED COMPANY .....PLAINTIFF

VERSUS

THE JUBILEE INSURANCE COMPANY

OF TANZANIA LIMITED ..... DEFENDANT

Date of Last Order: 13/09/2021

Date of Ruling: 15/10/2021

RULING

MAGOIGA, J.

This ruling is in respect of the preliminary objection on points of law formerly raised and filed by the defendant's learned advocate against the competency of the instant suit to the effect that:-

1. The present suit is barred by the decision of this Honourable Court (Hon. Fikirini, J) dated 8th October, 2021, dismissing Commercial case No.48 of 2019 which was a suit in four corners with the present one;
2. In the alternative to objection number one, this suit is bad in law for being barred by arbitration alleged in paragraph 19-21 of the plaint as having conducted between plaintiff and Shivacom Tanzania Limited

(hereinafter also called **("SHIVACOM")** between July 2018 and March 2021;

3. That the suit is bad for being, if anything, a proceeding to enforce against a 3rd party, the defendant, arbitral award by the plaintiff against Shivacom Tanzania Limited (hereinafter also called **"Shivacom."**
4. The suit is hopelessly time barred;
5. The suit is bad for want of a cause of action by the plaintiff against the plaintiff.

Against the above preliminary points of objection, the learned advocate for the defendant prayed and urged this court to dismiss the instant suit with costs.

The facts of this suit as depicted from the pleadings are imperative to be stated. On 15th November, 2004 the plaintiff entered into a Super Dealer Agreement with Shivacom Tanzania Limited in terms of which Shivacom would purchase the plaintiff's products and sell in Tanzania at a commission to be computed on the basis of the terms and conditions of the Agreement. To facilitate the purchase of the said products, Shivacom requested and was granted revolving credit facility in the amount of TShs. 4.6 Billion by the

plaintiff. As security for the performance of the Shivacom's obligations under the credit facility, Shivacom obtained two performance bonds starting from 1st June, 2010 to 31st May, 2012 from the defendant under the terms and of the Super Dealer Agreement, in which the plaintiff was entitled to review the said facility based on performance which may result into increase or decrease.

Further facts were that from 2010 the plaintiff approved a credit facility limit of TShs.18.3 billion but which was later reduced to TShs.17 Billion on the same terms and conditions with the bonds. The bonds upon expiry were extended.

In terms of the Performance Bonds in case Shivacom defaulted in the performance of the terms and conditions the defendant would satisfy the damages suffered by the plaintiff, hence this suit claiming payment of USD.2,500,000.00 and consequential orders.

Upon being served with the plaint, the defendant seriously disputed the claims by the plaintiff in that the extension of the facility, and in particular, second agreement was done without his consent and as such discharged.

Simultaneously, the defendant raised 5 grounds of preliminary objections on the maintainability of this suit, hence, this ruling.

The plaintiff is represented by Mr. Gaspar Nyika, learned advocate. And the defendant is represented by Mr. Audax Kahendaguza Vedasto, learned advocate.

The court ordered the points of objection to be argued by way of written submissions. Parties learned counsel complied with the order as ordered. I have had an opportunity to read every word of the submissions for and against the objection raised. Truly, I am grateful to them and I commend them for their insightful input to the respective stance on the points and for assisting this court in making the ruling possible.

In the determination of this points will deal with one after the other in the order they appear.

Mr. Vedasto arguing the first limb of objection submitted that the instant suit is barred by Commercial Case No. 48 of 2019 through the ruling of Hon. Fikirini, J (as she then was) in which the learned Judge sustained two points of objection raised against that case and dismissed it with costs. The two

objections, according to Mr. Vedasto, are on time barred and that the suit discloses no cause of action against the defendant.

The learned advocate for the defendant ventured into the effect and differences between when a suit is dismissed or struck out and the provisions of section 3 of the Law of Limitation Act,[Cap 89 R.E. 2019] and concluded that since the suit was dismissed, then, obviously it is barred. To substantiate his arguments cited the cases of SARBJIT vs. NIC CIVIL APPEAL NO.94 OF 2017 (CAT) in which the Court held that, the effect of the order for dismissal is that it connotes the matter has been concluded ... if the matter is dismissed, the party cannot come back on the same matter to the court..." and the MM WORLDWIDE TRADING CO. vs. NBC CIVIL APPEAL NO.258 OF 2017 (CAT) in which the Court held that once an issue of limitation has been finally and conclusively decided, it is res judicata ... and no way it can be revived.'

On the foregoing, Mr. Vedasto invited this court to find and hold that the instant suit is barred by the ruling of Hon. Madam Fikirini, J (as she then was) and proceed to dismiss this suit.

On the other hand, Mr. Nyika submitted in reply that Mr. Vedasto's submissions are misleading by arguing that, madam Fikirini, J. (as she then was) decided the former suit on the ground of time barred. According to Mr. Nyika, Madam Fikirini, J. (as she then was) dealt with two preliminary objections on disclosure of cause of action against the defendant and on the suit being improperly without the principal borrower and not on time barred as point of objection. The learned advocate for the plaintiff equally distinguished the cases cited by Mr. Vedasto and went on to cite the cases of NGONI MATENGO CO-OPERATIVE MARKETING UNION LIMITED vs. ALI MOHAMED OSMAN [1959] E.A 577 in which when it comes to the use of the words 'dismissed or struck out' it is the substance that has to be looked at, rather than the words used.

Another cases cited on the point are the case of MABIBO BEER WINES AND SPIRIT LIMITED vs. FAIR COMPETITION TRIBUNAL AND 3 OTHERS, CIVIL APPLICATION NO.132 OF 2015 CAT (DSM) (UNREPORTED) AND ABUBAKARY KHAMIS BAKARY AND 17 OTHERS vs. SPEAKER OF THE HOUSE OF REPRESENTATIVE, CIVIL APPEAL NO. 34 OF 2008 (CAT) (ZNZ) (UNREPORTED).

On the foregoing, the learned advocate for the plaintiff invited this court to overrule the objection and proceed with the suit on merits.

Having dutifully considered the rivaling arguments of the learned counsel for parties' on this point of objection, read the decision of madam Fikirini, J (as she then was) and cases cited by both parties in support of their respective stance, I am inclined with due respect to Mr. Vedasto to find his arguments wanting for what exactly happened in that case. My reasons for taking this stance are not far-fetched. One, Madam Fikirini, J (as she then was) did not make any finding on the first limb of objection on time barred as correctly argued by Mr. Nyika, and rightly so in my opinion, from my own reading the impugned ruling is clear no such finding was made on that point. Two, obviously, without any finding of this court on time barred, by then, the whole arguments by Mr. Vedasto is misplaced and all cases are distinguishable from what exactly happened.

However, of interest in this suit is, what is the effect of holding that the plaint did not disclose cause of action against the defendant as held by madam Fikirini, J. (as she then was). On the effect of dismissal or struck out will come back to that points after determination of the point whether this

suit is time barred or not. If I find the point merited will end there, but if not will come back to them.

Given what I have held above, I find this limb without any useful merits and same is hereby overruled.

Next point for determination now is, whether the instant suit is hopelessly time barred. Mr. Vedasto strongly argues that, from the pleadings, Shivacom committed breach on 2.4.2013 and quoted paragraph 25 of the plaint which stated clearly when breach, if any, occurred, to be between December, 2012 and March 2013. Another point raised and argued was that the liability of the guarantor becomes due, according to Mr. Vedasto, when the debt becomes due i.e March 2013 and the cause of action accrued from that date. Calculating from that date, the instant suit was instituted on 20.05.2021 which is over 8 years contrary to paragraph 7 of part 1 of the Schedule to the Law of Limitation Act, [Cap 89 R.E. 2019]. According to Mr. Vedasto, six years expired on 28th February 2019, hence clearly out of time by 2 years.

The learned advocate for the defendant to bolt up his point cited the cases of HASHIM MADONGO vs. MINISTER OF INDUSTRY AND TRADE, CIVIL

APPEAL NO. 27 OF 2003 CAT (DSM) (UNREPORTED) AND STEPEHN WASIRA vs. JOSEPH SINDE WARYOBA [1999] TLD 334 of which it was held that, under section 3 of the Law of Limitation Act, a proceeding instituted after period prescribed time has to be dismissed.

On the above note, the learned advocate for the defendant, on strong terms, urged this court to dismiss this suit with costs.

On the other hand, Mr. Nyika on this point argued in rebuttal that, it is true on 17th May, 2013 the plaintiff informed the defendant that Shivacom had breached its obligations under the SDA and recalled the Performance Bond and the defendant on 12th June 2013 refused on the ground that Shivacom had not breached the SDA. Nevertheless, Mr. Nyika pointed out that defendant's right to refuse compliance under the Performance Bond was confirmed by the court previous decision in Commercial case No. 48 of 2019 in which it was held that the defendant's liability could only arise after Shivacom's breach has been established under due process. According to Mr. Nyika, Shivacom's default was established on 18th November, 2019 and 9th March, 2021 respectively and concluded that the cause of action in this suit arose on 18th November, 2019. Based on that chronological of events, then,

six years were to expire on 18th November, 2025, hence, the instant suit is within time and not time barred.

In the alternative, Mr. Nyika argues that, the defendant's obligations under the Performance Bond were conditional upon the plaintiff establishing that Shivacom had defaulted, the defendant has been notified and the defendant was permitted time to perform the Performance Bond. In this respect, the learned advocate for the plaintiff gauged the default establishment on 18th November, 2019 and 9th March 2021 and notification was sent on 28th April 2021 which expired on 4th May 2021 and concluded that the cause of action rose in May 2021, so everything is in time.

In rejoinder, Mr. Vedasto reiterated his earlier submissions and faulted Mr. Nyika calculations of when the cause of action rose. In support of his stance cited the case of ZAID BARAKA vs. EXIM BANK, CIVIL APPEAL NO. 194 OF 2016 CAT (DSM) (UNREPORTED) in which the case against guarantors whose suit was filed out of time was dismissed.

Having dutifully considered the rivaling arguments of the counsel for the parties' and dutifully followed the chronological of events regarding the instant suit, I am with due respect to Mr. Nyika, find his arguments wanting

on merits as to when the cause of action rose. The reasons I am taking this stance are abound. **One,** the letter dated 17th May 2013 was a call for Performance Bond of USD. 2,500,000.00 which was replied by the defendant on 12th June, 2013 disputing the call on reasons stated therein. No reason was given by the plaintiff why she did not take legal actions against the defendant within six years from that date. Close observation of the chronological of events, as noted above, a mere refusal to honour the performance cannot be said to stop time from clocking on the part of the plaintiff. **Two,** the decision of madam Fikirini, J. (as she then was) was no for extension of time to institute the instant suit to warrant the plaintiff to enjoy and start counting from that decision. **Three,** the arguments that the Bond was to be enforced upon proof of default is not what parties agreed because the Bond is clear a mere notification was enough to instituted legal remedy. The plaintiff in this suit laid asleep to her legal rights until his rights have become stale and is coming very late of the day to salvage already sinking boat. **Four,** according to section 80 of the Law of Contract Act,[Cap 345 R.E.2019] the liability of the surety (the defendant in this suit) is co-existence with that of the principle debtor, unless it is otherwise provided by the contract. Having gone through SDA agreement it did not provide

otherwise, hence, joining the defendant and the principal debtor only for the claim of USD.2,500,000.00 was not to await for arbitration proceedings because the arbitration proceedings was to cover other related unpaid amount and not the amount guaranteed. This is, in my opinion, what madam Fikirini, J (as she then was) meant in her ruling.

On the totality of the above reasons, I find this suit is hopelessly out of time and guided by the provisions of section 3 of the Law of Limitation Act, same must be and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 15th day of October, 2021.

S. M. MAGOIGA

JUDGE

15/10/2021