

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 52 OF 2021**

**CATIC INTERNATIONAL ENGERRING**

**(T) LIMITED ..... PLAINTIFF**

**VERSUS**

**HANS POPPE HOTELS LIMITED ..... DEFENDANT**

**RULING**

**K. T. R. Mteule, J**

**30/9/2021 & 24/11/2021**

This is a ruling to the Preliminary Objection raised by the defendant to challenge the timeliness of this suit. The objection is premised on the fact that the suit being founded on tort it is time barred under **paragraph 6 of Part I of the Schedule to the Law of Limitation Act, Cap 89 of the R.E 2019.**

The Preliminary Objection is argued by a of Written Submissions. The Defendant's Submissions were drawn and filed by Melchisedeck S. Lutema



from MSL Attorneys. In the Defendant's submissions, Mr. Lutema gathered from paragraph 8, 9, 10, 15 and 28 of the plaint and established that the particulars therein concern fraud in the realm of active concealment which is a tort. Noting that time for a tort of fraud starts to run when the Plaintiff discovered the fraud, Mr. Lutema submitted that the plaintiff was aware in 2012 when certificates for payment were issued and not on 24<sup>th</sup> October 2017 as claimed by the plaintiff. Mr. Lutema added that the plaintiff was supervising the construction and the Defendant was dealing with her Principal Officer since 2012 hence this is the time to start counting.

In response, Mr. Jerry Passian Msamanga drew and filed the Plaintiff's submissions. He denied the assertion that this suit is based on tort. According to Msamanga, the suit is founded on contract of which the time limit is six years pursuant to **item 7 of Part 1 of the Schedule to the Law of Limitation Act**. According Msamanga, the fact that the facts in the plaint originate from a contract suffice to be founded on contract regardless of how the contractual breach arose. It is the submission by Msamanga that even in the Written Statement of Defence, no where the Defendant has defended fraud. He referred to the definition of fraud given by Section 17 of the Law of Contract Act Cap 345 R.E 2019 to mean an act committed by a party to a contract with intent to deceive another party thereto. Msamanga contended that no where in the plaint does the

defendant claim to have been defrauded by the Defendant to enter into the contract. Mr. Msamanga made a distinction between fraud tort and breach of contract by listing elements prerequisite for each concept. According to him elements of Tors include:

- Presence of duty- Duty to take all reasonable precautions to prevent an injury;
- Breach of duty - the Defendant must have failed in his or her duty;
- Injury occurred - Either physical, mental or emotional.

While elements of breach of contract to include:

- Existence of a contract;
- Performance by the Plaintiff or some justification for non-performance;
- Failure to perform the contract by the defendant; and
- Damages

Mr. Msamanga submitted that the whole plaint fall squarely under **Part V of the Contract Act** specifically Section 37 to 41 where each section was related to the paragraphs in the plaint. He explained what is pleaded in the plaint as follows: That Plaintiffs claim against the Defendant is for profit that the Plaintiff could have made if the contract between the Plaintiff and Defendant was executed as agreed. He submitted further that the Plaintiff become aware that the Defendant has executed the contract fraudulently

in contravention of express terms of the contract in the year 2017. According to Msamanga, the awareness was prompted by a letter from Tanzania Revenue Authority and from there the Plaintiff started to enforce the terms and conditions of the contract.

Mr. Lutema filed a rejoinder in which he connected **Section 17 of Cap 345 of 2019 R.E** with fraud committed by a party with intent to deceive the other. In his opinion, fraud occasioned after the signing of the contract stands as an independent cause of action in its own terms. Mr. Lutema cited paragraphs 7, 9, 10, 15 and 28 and submitted that there is no mention of contravention of express terms of contract. He challenged the submissions for containing these words.

Mr. Lutema disagrees with assertion that Fraudulent execution of the contract is as good as saying that there is gross breach of the contract. He considered this assertion as afterthought which is not accepted in law.

From the parties' submissions the issue in dispute is **whether the suit is time barred under the Law of Limitation Act.**

This is a pure matter of interpretation on the facts which cloth the plaint to see whether the suit is time barred. I have carefully read the plaint to get clear interpretation of what is the cause of action. Whenever I read it I see double face in the cause of action. I see a contractual relationship which

ended with nonperformance on the part of the defendant suggesting a breach while at the same time I see tort of fraud reflected therein. Nothing is express in the plaint to show which category does the claim specifically fall between tort of fraud and breach of contract. Since the issue of time limitation touches the jurisdiction of the Court, clear disclosure in the pleadings is paramount.

Nevertheless, the courts are increasingly enjoined to give interpretation which is more favorable towards embracing the substantive justice rather than technical justice under the Principles of overriding objective. **(See Section 3A and 3B of the Civil Procedure Code, Cap 33 of 2019 R.E)** This being the case, I see the Preliminary objection with merit but considering the principles of overriding objective, I will allow the plaintiff to amend the plaint to make a clear disclosure of the matters in controversy to clear any ambiguity as to whether the subject matter falls under breach of contract or under the tort of fraud.

Order accordingly.

Dated at Dar es Salaam this 6<sup>th</sup> Day of December 2021



A handwritten signature in blue ink, appearing to read "Katarina T. Revocati Mteule".

**KATARINA T. REVOCATI MTEULE**

**JUDGE**