

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO. 15 OF 2022

I& M BANK (T) LTD.....PLAINTIFF

VERSUS

MUSTAFA'S (2005) LTD.....1st DEFENDANT

SALIM M. RATTANSI.....2nd DEFENDANT

KEVAL SOLANKI.....3rd DEFENDANT

RULING

Date of the Last order: 28/4/2022

Delivery of the Ruling: 13/05/2022

NANGELA, J.:

The Plaintiff in this case sues the Defendants and prays for Judgment and Decree against them jointly and severally as follows:

1. The sum of **(a) USD 553,537.84** (equivalent of TZS 1,273,137,035) being balance of money payable by the 1st Defendant to the Plaintiff and **(b) TZS 700,000,000/-** payable to the Plaintiff by the 1st as the Maker of Promissory Notes dated 13th March 2012, 24th September 2012 and 15th February 2013.
2. Interest on the said sums of **(a) USD 553,537.84** (equivalent of TZS 1,273,137,035) and **(b) TZS 700,000,000/-**

, at a commercial rate from the date of default of payment to the date of Judgment and thereafter at the Court's rate till full payment.

3. The Costs of the suit be borne by the Defendants,
4. Interest on the costs at the rate of award thereof till full and final payment of the same.
5. Any other remedies and /or other reliefs that the Honourable Court may deem just and fair and equitable.

On the 8th March 2022, the Defendants filed a joint written statement of defence and, in it, they raised two preliminary points of law, to wit, that:

1. The claims are time barred as they are based on the contracts (Loan Agreement) dated 13th March 2012, and 24th September, 2012.
2. The suit is *res-judicata* (the Court lack jurisdiction to entertain the suit).

On 24th March 2022, the parties appeared before this Court for orders. The Plaintiff enjoyed the services of Ms Hamida Sheikh, learned advocate, who also held the brief of Mr Nehemia Nkoko, learned advocate. On that material date, I made an order that, the two preliminary objections be disposed of by way of written submission and a schedule of filing such written submissions was given and the parties duly complied with it.

In support of the objections, it was Mr Nkoko's views that, since the Plaintiff's claims are based on contracts,

they are, for the purposes of the law of limitation, time barred. Mr Nkoko relied on paragraphs 3 (a) (i), (ii) and paragraph 6 of the Plaintiff and alleges that, the Plaintiff has acknowledged therein that the contracts were dated 13th March 2012, 24th September 2012 and the Promissory Notes were dated 13th March 2012, 24th September 2013 and 15th February 2013. He surmised that, for the purposes of limitation, they should be treated as such.

Bringing into his argument, what item 7 of the Schedule to the Law of Limitation Act, [Cap.89 R.E 2019] provides, Mr Nkoko submitted that, 7 years is the time limit for any claims based on contract. However, Mr Nkoko submitted that, the proper question to ask is when did the cause of action arise? Mr Nkoko submitted, quoting what Annex.P10 of the Plaintiff provides on paragraph 3. That annexure states that:

" you, as the Borrower, have (sic) defaulted in the payment of the monthly instalments so that your loan account with the Bank has been in arrears, in the amount of TZS 1,236,970,367/=(Tanzanian Shillings) being the arrears of the Monthly instalments plus interest for the period from 31st August, 2014 to 31st May 2019."

Likewise, the attention of this Court was directed to annexure P2, a letter dated 25th March 2015 (Repayment of Loan) following the Defendant's reply to a notice of

default. He submitted that, in line with those disclosures, it is a clear fact that, the cause of action arose when the Defendants fell into a default, thereby failing to comply with the terms of the loan agreement, that being the day of the breach.

To support his contention, he relied on the decision of this Court in the case of **Mr Erick John Mmari vs. Ms Herkin Builders Ltd**, Commercial Case No. 138 2019 (unreported). He also strengthened his submission, by bringing to the attention of this Court the Court of Appeal decision in the case of **International Commercial Bank Ltd vs. Jadecam RealEstate Ltd**, Civil Appeal No.446 of 2020, (CAT) [unreported].

In view of the above, Mr Nkoko contended that, in line with section 5 of the Law of Law of Limitation Act, the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises. In that regard, he emphasized that; the right of action in contract must be the date when the breach ensued. He further contended, in respect of the promissory notes dated 13th March, 2012, 24th September, 2012 and February 15th 2013, that, the cause of action in respect of them accrued in 2012 and 2013 if one takes into account what section 5(g) of the Law of Limitation Act, Cap. 89 R.E 2019.

Concerning the leave to defend which was granted by Hon. Mteule, K.T.R, J., on the 11th January 2022 in

Misc. Commercial Application No. 99 of 2021, he was of the view that, that ruling of the Court does not automatically confer right of action as it was subject to the limitation provided under the law. He contended that, in any case, the Plaintiff sought only leave to sue in respect of the omitted cause of action, thus, the order of this Court dated 11th January 2022 did not omit the obligation on the part of the Plaintiff to sue the Defendant subject to limitation of time.

Concerning the second objection, which is pegged on the plea of *res-judicata*, Mr Nkoko submitted that, the doctrine of *res-judicata* entails identity of parties (or their proxies and/or privies); subject matter and the cause of action between two cases, one of which has been conclusively and finally determined before a Court of competent jurisdiction, prior to the suit in question.

He contended that, section 9 of the Civil Procedure Code, [Cap.33 R.E 2019], gives out six mandatory points which needs to be established. These, he pointed out to be, that: (i) the matter was directly and substantially in issue in the former suit, (ii) the issues were between the same parties or between parties under whom or any of them is litigating, (iii) the parties have litigated under the same title, (iv) the former suit was determined by the Court of competent jurisdiction, (v) there are two suits, the

former suit and subsequent suit and, (vi) the issue has been determined conclusively.

To cement the above submissions, reference was made to the case of **Fikiri Liganga and Another vs. Attorney General and Another**, Misc.Civil Cause No.5 of 2017 (unreported) and the Book by **Sarkar on Civil Procedure**, 8th Edition Vol.1, at page 53, where in the learned author stated that:

"The doctrine of res judicata was recognised much ...rest on the principle one should not be vexed twice for the same cause and there should be finality of litigation."

In view of the above, Mr Nkoko submitted that, the present suit is barred as well under the doctrine of *res-judicata*. To further justify that assertion he invited this Court to take into account the cases of **I & M Bank (T) Ltd vs. National Supplies**, Commercial Case No.53 of 2016 (unreported), **Central Paris Complex Co. Ltd & Another vs. Diamond Trust Bank & Another**, Civil Case No.09 of 202, and **Onesmo Olengurumwa vs. Attorney General**, Misc, Civil Cause No.36 of 2019 (unreported).

To wind his submission, Mr Nkoko submitted that, if this Court is to proceed and determine this current suit and come up with a different decision, such a decision will amount to a conflicting decision and will create chaotic

situation and endless litigation on the parties, thus, upsetting the doctrine of *res-judicata*. He urged this Court, thus, to uphold the preliminary objections and in line with section 3(1) of the Law of Limitation Act, [Cap.89 R.E 2019] dismiss the suit forthwith and in its entirety.

In response to the Defendant's submissions, Ms Hamida Hassan Sheikh, the learned counsel for Plaintiff submitted that, the first preliminary objection it totally erroneously made. She argued, in the first place, that, while it is undisputed that the period of limitation for suits founded on contract is six (6) years, the actual computation of the period is based not just on the Calendar dates but also on other factors. To her understanding, the Defendant is mixing up on the dates of execution of the contracts and the date of accrual of cause of action.

She contended that, according to Annex.P2, the Defendant's letter dated 25th March, 2015, the Defendant is acknowledging the loan. She contended that, even if the 25th of March 2015 was to be taken as the basis of computation of time, the first recovery filed by the Plaintiff, which was **Commercial Case No.53 of 2016** was filed within 6 years of the period of limitation for suits based on contract.

Secondly, Ms Sheikh contended that, the accrual of cause of action should not be counted from the date of

formation of a contract but from the date of actual default, which, according to the Defendant was 2015.

Thirdly, Ms Sheikh submitted that, the cause of action for the present suit can even be said to have arisen in the year 2019 when it came to the Plaintiff's knowledge that the proceeds from the sale of the mortgaged property under decree in **Commercial Case No.53 of 2016** would not pay off the loan as the valuer had deliberately inflated the value of the mortgaged property. She contended, therefore, that, there can be other intervening factors for which accrual of cause of action can be delayed, e.g., fraud, whole of Plaintiff out of the country or prosecuting another case in Court.

According to Ms Sheikh, even if the right of cause of action had accrued from the day of the default of payment of the loan, which was in 2015, in computing the period of limitation for any proceedings, certain periods must be excluded. She relied on section 21(1), section 21(2) and (3) (a), (b) and (c) of the Law of Limitation Act, [Cap.89, R.E 2019]. On the basis of these provisions, she submitted that, the whole period when the Plaintiff had filed **Commercial Case No.53 of 2016** until the time when it was concluded (from 31st March 2016 to 14th May 2019), which is over 3 years, must be excluded from the computation of the limitation of time in this present suit, i.e., **Commercial Case No.15 of 2022**.

In her submission, Ms Sheikh, stated that, **Commercial Case No.53 of 2016** was marked settled, the 3rd Party Mortgagor having agreed for the landed property mortgaged as one of the securities for the loan to be sold. Ms Sheikh submitted that, the valued price of the mortgaged property subjected to sale was found to have been inflated and the mortgaged property auctioned under decree in **Commercial Case No.53 of 2016** fetched a much lower amount than expected and could not cover the debt.

According to her, the professional valuer who had misled the Plaintiff on the value of the mortgaged property and causing it to fetch much less than had been expected, was sued in High Court Civil Case No.16 of 2020 and was found to be fraudulent /negligent. She contended that, the time when the Plaintiff was pursuing the High Court Civil Case No.16 of 2020 must also be excluded from the period of computation of this **Commercial Case No.15 of 2022**.

Further still, Ms Sheikh contended that, the time spent on prosecuting **Commercial Case No.110 of 2019** must as well be excluded. She submitted that, being dissatisfied with the outstanding balance of the unpaid loan, i.e., **TZS 1, 273, 137.035445**, the Plaintiff filed **Commercial Case No.110 of 2019**, which was struck out by Hon. Magoiga, J., on the ground that leave under Order II Rule 2(2) and (3) of the Civil Procedure Code,

[Cap.33 R.E 2019] was missing before filing the second recovery suit on the same cause of action (albeit against different Defendants).

She submitted that, **Commercial Case No.110 of 2019** was filed on the 11th of September, 2019 and was struck out on the 25th day of June, 2021, a period which is one (1) year and nine (9) months which must also be excluded in the commutation of the limitation of the latest suit.

According to her submission, following the striking off the **Commercial Case No.110 of 2019** on June the 25th day of June, 2021 from the Court, the Plaintiff, on 16th of July, 2021 did file promptly in this Court, the **Misc. Commercial Appl. No. 99 of 2021** to seek leave to commence legal proceedings against the Defendants jointly and severally for the balance of the sum outstanding on the loan taken by the Defendants. It was her submission, therefore, that, this Court must as well exclude from computation of limitation time, the time used by the Plaintiff to seek such leave of the Court which was over 5 years.

Elaborating on the genesis of this **Commercial Case No.15 of 2022**, Ms Sheikh submitted that, it emanates from **Commercial Case No.110 of 2019**. She contended that, when that case was struck out on the 25th of June 2021, the same was struck out for want of leave under

Order II Rule 2 (2) and (3) of the Civil Procedure Code, [Cap.33 R.E 2019]. She contended that, by then the **Commercial Case No.110 of 2019** was not time barred.

She also contended that, even **Commercial Case No.53 of 2016** was filed well within time, shortly after the 1st Defendant started the problem of repayment of her loan and the 3rd Party Mortgagor's attempt to wriggle from his obligations, by filing Land Case No.74 of 2015, **M/s National Supplies Ltd vs. I & M Bank (T) Ltd** at the High Court of Tanzania (Dar-es-Salaam District Registry) seeking for permanent injunction, a case which was later marked withdrawn.

She concluded, therefore, that, if the Court takes into account all that which she had narrated in light of section 21(1), (2)(a), (b) and (c) of the Law of Limitation Act, [Cap.89 R.E 2019], it will find that, this suit was filed well within the 6years limitation period.

As regards the second objection which was about the issue of this suit being **res-judicata**, Ms Sheikh submitted that, this point of objection is non-starter because it was already decided upon by Hon. Mteule, J. in her ruling in **Misc. Commercial Appl. No. 99 of 2021**. She referred to this Court, the decision of its own, (Mteule, J.) and pointed at page 13 where the learned Judge stated that:

"Further it is not disputed this application is prompted by the Ruling of Hon. S.M Magoiga, Judge in Commercial

Case No.110 of 2019 which was struck out for being filed without leave of the Court as required by Order II Rule 2(2) and (3) of the Civil Procedure Code and this application is seeking for leave. I don't subscribe to the Respondent's argument that the matter is finally determined to the extent of being res judicata since Order II Rule 2(2) and (3) of the Civil Procedure Code gives room for the Applicant to sue for a portion of the claim left out in the previous suit upon obtaining leave of the Court."

In view of the above, Ms Sheikh concluded that, the very fact that this Honourable Court granted leave to the Plaintiff under Order II Rule 2(2) and (3) of the Civil Procedure Code, [Cap.33 R.E 2019], means that, this matter is not *res-judicata* as the Plaintiff who has been entitled to more than one relief for the repayment of the outstanding loan she had omitted to sue for all reliefs, except the one for 3rd Party Mortgage, in **Commercial Case No.53 of 2016**, can now sue for the remaining balance which could not be recovered under **Commercial Case No.110 of 2019** for want of leave to sue.

To further tighten her submissions, Ms Sheikh was vociferous that, the two provisions of law, section 9 of the Cap.33 R.E 2019 and Order II Rule 2 (2) and (3) of the same Code do not go together. She contended that, while section 9 of the Code caters for *res-judicata*, a situation where the matter between the same parties has been

“finally determined”, Order II Rule 2 (2) and (3) of the same Code provides for a situation where, a Plaintiff entitled for several reliefs for the same cause of action omits to sue for all such reliefs for some reason, and can only do so subject to there being leave of the Court.

In view of her submissions captured herein above, Ms Sheikh submitted that the cases of **Fikiri Liganga and Another vs. Attorney General and Another**, Misc.Civil Cause No.5 of 2017 and **Onesmo Olengurumwa vs. Attorney General**, Misc. Civil-Cause No.36 of 2019 are in applicable to this case.

To wind up her submissions, Ms Sheikh was of the view that, on the overall, the objections raised by the Defendant do not even fit to be termed as points of law because they are not self proven/evident but subject to proof by some material facts and evidence, particularly documentary evidence, such as the Deed of Settlement in **Commercial Case No. 53 of 2016**, ruling which struck out **Commercial Case No. 110 of 2019** and the Misc. **Commercial Appl.No.99 of 2019**.

To support her submissions, she banked on the the famous case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** [1969] E.A. 696, where the Court held, at page 700, that, a preliminary objection cannot be raised if any fact has to be ascertained or what is in the exercise of judicial discretion.

She also relied on the case of **NIC (T) Ltd and PSRC vs. Shengena Limited**, Civil Application.No.20 of 2007. She prayed, therefore, that, the two preliminary objections should be dismissed with costs.

From the above rival submissions, the issue which needs to be tackled by this Court is whether the two preliminary objections have any merit to warrant that I dismiss the suit as prayed by the Defendants' counsel or that they are of no merit and hence subject to dismissal as contended by the Plaintiff's counsel.

I will start by looking at the 2nd objection and the question to address is whether the suit is *res judicata* as contended. In my view, this objection is a hopeless case as correctly stated by the learned counsel for the Defendant. I hold it to be so because, there is no dispute that the Plaintiff filed this suit by virtue of the leave granted by this Court in **Misc. Commercial Appl. No. 99 of 2021**. That application for leave, was filed under Order II Rule 2 (2) and (3) of the Civil Procedure Code Cap.33 R.E 2019.

In my view, and as correctly submitted by Ms Sheikh, the two provisions of law, i.e., section 9 of the Cap.33 R.E 2019 and Order II Rule 2 (2) and (3) of the same Code, cannot tangle. Order II Rule 2 (1) (2) and (3) of the Code provides that:

" 2.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause

of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterward sue for any relief so omitted." (Emphasis added).

A quick glance to the above provisions will tell you that, as a general rule, if the Plaintiff is entitled to more than one relief for the same cause of action, s/he must sue for all such reliefs. However, if s/he omits to sue for any one of several reliefs, then s/he cannot bring another suit for claiming such relief unless she obtains the leave of the Court. The object behind Order II Rule 2 is to prevent the multiplicity of cases.

In principle, that was the basis for the striking out of **Commercial Case No. 110 of 2019** and the filing of Misc. **Commercial Appl.No.99 of 2019**. Now, once leave is obtained, a portion of the reliefs in respect of the same cause of action, which ought to have been litigated

together in a previous suit, can still be sought in a subsequent suit.

In my view, the granting of leave brings to the scene an exceptional circumstance which waters down the general rule. As such, the plea of *res-judicata* under section 9 of the Code does not apply, and, the cases of **Fikiri Liganga** (supra) and **Onesmo Olengurumwa** (supra) are inapplicable. For that matter, the 2nd objection should and is hereby dismissed.

As regards the first objection, the issue is whether the suit is barred by limitation of time or not. The Plaintiff has contended, and correctly so, that, a cause of action in contract accrues not on the day of execution of the contract but on the day of breach and, that is the very same day when time starts to run.

Ms Sheikh has submitted that, even if this Court is to make a finding that the cause of action accrued in 2015, still the suit will be subject to the reliefs granted under section 21(1), (2)(a), (b) and (c) of the Law of Limitation Act, [Cap.89 R.E 2019], and the Court will find, at the end of the day, that, this suit was filed well within the 6years limitation period.

She submitted that, on the basis of the time spent in Court, and taking into account that leave has been obtained, the days which the Plaintiff spent in Court

entitles the Plaintiff a right to have them excluded when the computation of time is carried out.

Section 21 of the Law of Limitation provides as follows:

"21.-(1) 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 **proceeding 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 **incompetent to entertain it.**

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or **other cause of a like nature**, is unable to entertain it.

(3) For the purposes of this section-

- (a) a plaintiff or applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
- (b) references to a plaintiff, defendant or other party to a proceeding

include references to any person through or under whom such plaintiff defendant or party claims;

- (c) **misjoinder of parties** or of **causes of action** shall be deemed to be **a cause of a like nature** with the defect of jurisdiction.”(Emphasis added).

In the first place, the above cited provision deals with exclusion of time of proceedings in a situation where a Plaintiff or an Applicant had in *bona fides* and diligently spent time prosecuting his/her case but before a Court which lacked jurisdiction to entertain the matter or due to mis-joinder of **parties** or **causes of action**. The provision demands that such time spent by the Plaintiff/Applicant prosecuting the remedy before wrong forum should be excluded.

If I may put it otherwise, there are at least three elements which one has to establish under section 21 of the Law of Limitation-Act, Cap.89 R.E 2019 if the section is to benefit that person. These are as follows, that:

- (a) the parties in the civil suit and in the subsequent proceeding (in which condonation is prayed for) must be the same;
- (b) the suit and the later proceeding must seek the same relief; and,
- (c) the Court where the earlier suit was filed was unable to entertain

it from defect of jurisdiction or other cause of a like nature.

Having looked at the Plaintiff's submissions here above, and taking into account the three factors above, I am satisfied that, the above factors does apply when one considers both the **Commercial Case No.53 of 2016** and the **Commercial Case No. 110 of 2019** and, finally, the subsequent **Misc. Commercial Appl. No.99 of 2021**.

Essentially, the cause which made the earlier case **Commercial Case No. 110 of 2019** to be struck out by this Court, and, which is now the basis of this suit following the granting of leave under the subsequent **Misc. Commercial Appl. No.99 of 2021**, was a cause of the "like nature" which made this Court unable to proceed with the suit and struck it out from the Court.

That will mean, therefore, that, as rightly submitted by the learned counsel for the Plaintiff the time spent in prosecuting the application and all such time spent in the Court when the Plaintiff was dealing with Commercial Case No 53 of 2016 and No.110 of 2019, is to be excluded from computation of the limitation period.


Having made such a finding, it follows that, even the first objection will succumb to failure and should be dismissed on the account that the suit is well within time.

In the upshot, this Court settles for the following:

1. That, the two preliminary objections are found to be without merit and are hereby dismissed with costs.
2. The suit is to proceed to its next stage of hearing on the date to be set by the Court.

It is so ordered




HON. DEO JOHN NANGELA
JUDGE
13/05/2022

ORIGINAL