

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO 79 OF 2013**

**ACCES MICROFINANCE BANK TANZANIA LIMITED .....PLAINTIFF  
VERSUS**

**PROSPER PAUL MASSAWE ..... 1<sup>ST</sup> DEFENDANT**

**HILDA JOHN MUSHI ..... 2<sup>ND</sup> DEFENDANT**

**WILERICK PAUL MASSAWE ..... 3<sup>RD</sup> DEFENDANT**

*Date of the Last order: 24/5/2022  
Delivery of the Ruling: 25/5/2022*

**RULING**

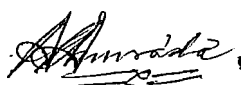
**A.A. MBAGWA, J:.**

This ruling is in respect of preliminary objections raised by the plaintiff, **ACCES MICROFINANCE BANK TANZANIA LIMITED** against the counter claim filed by 1<sup>st</sup> defendant, Prosper Paul Massawe. Thus, for the purpose of this ruling, the 1<sup>st</sup> defendant, Prosper Paul Massawe shall be referred to as the plaintiff to the counter claim whereas **ACCES MICROFINANCE BANK TANZANIA LIMITED** shall be referred to as the 1<sup>st</sup> defendant to the counter claim.



The plaintiffs to the counter claim, while replying to 1<sup>st</sup> defendant's claim in the main suit, filed a written statement of defence along with counter claim containing the following prayers;

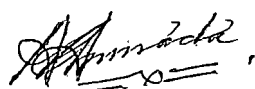
- (a) Declaratory orders that the 1<sup>st</sup> defendant has no any claim against the plaintiffs,
- (b) Declaratory orders that the seizure and confiscation of plaintiffs' goods was (sic) unlawful for wants of notice, the same was not pledged as a chattel transfer or pledged as a security for the loan, and no public auction has been conducted.
- (c) An order that the whole loan as alleged advanced and its interest have been offset through sale of the confiscated goods of the plaintiff.
- (d) An order for the discharge of a certificate of title on Plot No. 7 Block C, Mapinga area, Bagamoyo District.
- (e) An order for payment of shillings one billion ninety one million four hundred sixty five thousand two hundred (Tshs. 1,091,465,200/=) being value business of goods seized and confiscated by the defendants.



- (f) 5% monthly compound interest on the value of the business goods seized
- (g) Award of general damages for the loss of business.
- (h) Costs of the case
- (i) Interest on the decretal sum at a court rate of 12% from the date of judgment to the date of payment in full
- (j) In the alternative, the defendants be ordered to return the confiscated physical goods on its newly state and marketable manner to the plaintiffs.
- (k) The 5% monthly compound interest on the value of the business goods, damages for the loss of business.
- (l) Interest on the value of goods i.e., 18% from 21<sup>st</sup> June 2013 to the date of judgment.
- (m) And any other reliefs as the court may deem fit.

Upon being served with the counter claim, the 1<sup>st</sup> defendant to the counter claim raised two preliminary objections to the following effect;

1. That, the plaintiff's claims contained in the counter claim are hopeless (sic) time barred.
2. That the suit herein was improperly instituted.



As the practice requires, this Court was enjoined to dispose of the preliminary objections before going into the merits of the main suit.

When the matter was called on for hearing of the preliminary objections, the plaintiffs to the counter claim had the services of Thomas Brash assisted by George Ngemela, learned advocates whilst the 1<sup>st</sup> defendant to the counter claim was represented by Burton Mayage assisted Haward Msechu, learned advocates

Starting with the first preliminary objection, it was Advocate Mayages' contention that as the suit between the Defendants and Plaintiffs emanates from contractual relationship, the suit was supposed to be filed within six years from the date of default.

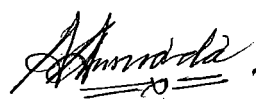
To bolster his argument, Advocate Mayage referred to Item 6 of the 1<sup>st</sup> Schedule to the Law of Limitation Act [Cap 89 R.E. 2019] which provides for a period of six years for institution of suits founded on contract. Further, he cited section 6(f) of the Law of Limitation Act and submitted that it spells out clearly that the right of action is deemed to accrue on the date of breach.

It was therefore his submission that since the matter was filed in 2022 whilst the cause of action accrued in 2013, it goes without saying that it



was instituted after six years and for that reason it is as good as there is no suit before this Court. To reinforce his position, the counsel sought reliance on the decision of this Court in the case of **Kishore Komaldas Pabari t/s Highland Motors vs Mbozi District Council**, Civil Appeal No. 21 of 2019 HC at Mbeya.

With regard to the second preliminary objection, Mr. Mayage submitted that the counter claim was improperly instituted. He prefaced his submission by inviting the court to take a judicial note that the subject matter in the counter claim was once adjudicated by this Court via the case of **Thobias John Macha vs Access Bank Tanzania Limited and another**, Civil Case No. 151 of 2013, HC Dar es Salaam. Mr. Mayage said that the Court held that the confiscated goods, which are the subject matter in the counter claim, were the lawful properties of Paschal John Mwacha. The counsel was thus opined that the plaintiff ought to file a revision and not a fresh suit by counter claim, if he intended to challenge the decision of the Court in **Thobias John Mwacha**. In the end, the counsel prayed the Court to sustain the preliminary objections and consequently dismiss the counter claim with costs.



In reply, Mr. Thomas Brash strongly opposed the preliminary objections for being baseless. He submitted that the alleged preliminary objections did not deserve to be called preliminary objections in the eyes of law. Mr. Brash argued that for a point to be referred as preliminary objection, it has to be on pure point of law which does not call for the court to go further and search for evidence. To support his position, he referred the Court to the cases **Rashid Juma Ali vs Peoples Bank of Zanzibar Limited and Another**, Civil Case No. 15 of 2008, CAT at Zanzibar at page 5 paragraph 2 and 3, **Eusto Ntagalinda vs Tanzania Fish Process LTD**, MZA Civil Application No. 8 of 2011, CAT at Mwanza and **Olais Loth vs Moshono Village Council**, Civil Appeal No. 95 of 2012, CAT at Arusha.

Mr. Brash made reference to paragraphs 21, 36, 37 and 38 of the counter claim and submitted that the said paragraphs are quite elaborate on reasons for failure to file a counter claim in time. As such, Mr. Brash was of the views that since the reasons for delay are clearly pleaded, the matter falls under what he called automatic waiver of time limitation. To buttress his point, Mr. Brash referred this Court to the cases of **Ms. Safia Ahmed Okash vs Ms. Sikudhani Amiri and 82 other**, Civil Appeal No. 138 of 2016, CAT at Arusha at page 23 and **Registered Trustees of the**

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**Marian Faith Healing Centre @ Wanamaombi vs The Registered Trustees of the Catholic Church Sumbawanga Dioces**, Civil Appeal No. 61 of 2006, CAT at Dar es Salaam at page 16.

The plaintiff's counsel concluded that the counter claim is not time barred and for that reason the 1<sup>st</sup> preliminary objection is devoid of merits.

With regard to the second preliminary objection, Mr. Brash submitted that the objection needs evidence hence lacks essentials required for preliminary objection. The counsel lamented that the judgement in Thobias Mwacha's case did not list items which the Court declared to be the assets of the said Paschal John Mwacha. As such, Mr. Brash opined that there is a need of proof as to which properties were the subject matter in the said case. Mr. Brash further submitted that the value, number and types of items that were confiscated from the plaintiff can conveniently be determined through the evidence. Consequently, the counsel was opined that since the determination of the issue requires examination of evidence, it cannot be disposed of as a preliminary objection.

With regard to filing revision against the decision of this Court in **Thobias John Macha** (supra) as suggested by the defendant's counsel, Mr. Brash




argued that his client had no interest to file the revision and therefore he cannot be compelled to take that course.

In the event, Mr. Brash beseeched the Court, on the basis of submissions above, to overrule the objections.

In his rejoining submissions, Advocate Haward Msechu maintained the position that the automatic waiver of time limitation is not applicable in the case at hand. He insisted that the plaintiff was supposed to apply for extension of time. Besides, Msechu distinguished the case of Safia (supra) on the ground that in Safia's case there was no counter claim.

In addition to Mr. Msechu's rejoining submissions, Mr. Mayage cited section 3(1) of the Law of Limitation Act which directs for the time bared matters to be dismissed. As the Plaintiff did not dispute to file his counter claim out of time, he prayed the same to be dismissed. He maintained that the plaintiff was supposed, under section 44 of Law of Limitation Act, to seek leave of the Minister before instituting the case.

With respect to the second preliminary objection, Mr. Mayage, quite professionally, conceded that it needs evidence hence it does not deserve to be a preliminary objection.





I have keenly gone through the rival submissions from both counsel and thoroughly read the contents of counter claim. Given that the second preliminary objection was constructively withdrawn during rejoinder, this court will deliberate on the 1<sup>st</sup> preliminary objection only.

Throughout the pleadings and submissions, there is no dispute whatsoever that the breach of contract from which the plaint and counter claim arise occurred in 2013. Further, there is no gainsaying that the counter claim under discussion was filed in this court on 5<sup>th</sup> day of April, 2022. This is to say that the counter claim was filed nine (9) years after the cause of action accrued.

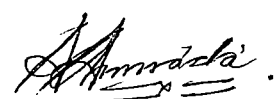
Whereas the defendant's counsel argued that the matter is time barred, Mr. Brash was of the opinion that the principle of automatic exclusion applies to this case as the reasons for delay are stated under paragraphs 21, 36, 37 and 38 of the counter claim. Furthermore, Mr. Brash argued that much as the reasons for delay have been pleaded by the plaintiff and denied by the defendant, it implies that the Court needs to examine further evidence in order to decide on the issue

Having canvassed the rival arguments, it is my opinion that there are two germane issues for determination of first preliminary the objection namely,

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**one**, whether the suit (counter claim) falls under automatic exclusion of time limitation and **two**, whether, it needs further evidence for this Court to establish whether the suit is time barred.

To start with the first issue, under paragraphs 21, 36, 37 and 38 of the counter claim, the plaintiff contextually, pleads that he was pursuing Civil Appeal No. 39 of 2014 which the 1<sup>st</sup> defendant filed as a summary suit against him hence a delay in filing the suit (counter claim). Mr. Brash was opined that this ground sufficed to warrant automatic exclusion of time. He cited **Ms. Safia Ahmed Okash (supra)** to support his contention. I have gone through the case of **Ms Safia Ahmed Okash** but I found it distinguishable from the present case. In **Okash case**, the main controversy was on the time when the cause of action arose. Whereas the plaintiff pleaded that the time started to run in 2011 when he discovered the fraud and therefore, he was entitled to exclusion of time under section 26 of the Law of Limitation Act, the same fact was disputed by the by the defendant. Unlike in this case there no dispute that the right of action accrued in 2013 and that the counter claim was filed beyond the prescribed time of six years. What is pleaded by the plaintiff under paragraphs 21, 36, 37 and 38 of the counter claim, in my view, fit more as grounds for



extension of time but do not warrant the plaintiff automatic exclusion. It is noteworthy that automatic exclusion of time must be clearly and statutorily provided. In this case, however, Mr. Brash could not cite any provision of law which excludes time taken in prosecuting another case from computing the period of limitation.

In the case of **Consolidated Holding Corporation vs Rajani Industries and Another**, Civil Appeal No. 2 of 2003, while discussing automatic exclusion of time, the Court of Appeal said;

***"It is apparent that under these provisions, the time taken in negotiating for settlement is not one of the categories of instances in which time is excluded in computing the period of limitation"***

In view of the foregoing, I disagree with the learned plaintiff's counsel that the plaintiff is entitled to exclusion of time taken in allegedly pursuing Civil Appeal No. 39 of 2014.

In the premises, I am of unfeigned findings that the counter claim does fall under the automatic exclusion of time limitation.

Coming to the second issue, it is a settled law that preliminary objection should be on a point of law which can be disposed of based on information

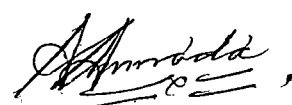


provided in the pleadings. In the famous case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors** [1969] EA 696 it was held;

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*

Furthermore, in the case of **Ali Shabani & 48 others vs Tanzania Roads Agency (TANROADS) & Another**, Civil Appeal No. 261 of 2020, CAT at Tanga, the Court of Appeal held

*"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstracts without*

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***reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence. Under the circumstances, we are satisfied that the learned trial judge rightly held that the preliminary objection was based on a pure point of law and dismissed the suit for being time barred".***

On the strength of the two decisions above, it is common cause that plea of time limitation can be raised as preliminary objection based on the facts provided in the pleadings without requiring further evidence as Mr. Brash wants this Court to believe. As I indicated herein above, throughout the pleadings and submissions, it is clear that the cause of action in respect of the counter claim ascended in 2013 while the instant counter claim was filed in 2022. This is to say that it was filed beyond prescribed time of six years contrary to Item 6 of the 1<sup>st</sup> Schedule to the Law of Limitation Act [Cap 89 R.E. 2019]. This, in my considered opinion, does not require any evidence for this court to conclude that the matter is time barred.

That said and done, I uphold the first preliminary objection that the suit/counter claim is time barred. Consequently, I dismiss it with cost.

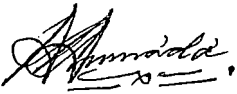
It is so ordered.

  
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**Hon. A.A. Mbagwa**  
**JUDGE**  
**25<sup>th</sup> day of May, 2022**

**Court:** Ruling has been delivered in the presence Thomas Brash assisted by Gerorge Ngemela, learned counsel for the plaintiffs and Mr. Haward Msechu, learned counsel for the defendant this 25<sup>th</sup> day of May, 2022.



  
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**Hon. A.A. Mbagwa**  
**JUDGE**  
**25<sup>th</sup> day of May, 2022**