IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.130 OF 2020

SCI (TANZANIA) LTD.....PLAINTIFF

VERSUS

GULAM HUHAMEDALI PUNJANI.....1ST DEFENDANT

PRISTINE PROPERTIES LIMITED .....2ND DEFENDANT

Last Order: 14/09/2022
Date of Ruling: 20/10/2022

RULING

NANGELA, J.:

What is a contract novation? If a contract was novated can a plea of limitation of time be raised in respect of the original contract? What are the effects of contract novation to an original contract in a situation where such original contract is alleged to have been breached? These are matters considered in this ruling. The ruling emanates from an objection based on the Law of Limitation Act, Cap.189, R.E 2019.

Before I proceed to consider the crux of the matters besetting the relations of the parties herein, let me give a brief account of the nature of this suit. The Plaintiff herein filed this

suit seeking for judgement and decree against the Defendants as follows:

1. A refund of United State Dollars Three Hundred Thousand ($300,000).
2. Commercial interest on the above sum at a rate of 22 % from the date of filing this suit to the date of judgement.
3. Interest on the decretal sum from the date of judgement to the date of full recovery.
4. Court interest at the rate of 12% from the date of judgement to full satisfaction of the Decree.
5. General damages.
6. Costs of this suit; and
7. Any other relief that this Court may deem fit and just to grant.

As it is customarily expected, the Defendants filed a Written Statement of Defence (**WSD**) in response to the claims made by the Plaintiff. In their **WSD**, however, the Defendants

raised a point of law to wit, that, the suit is, under the Law of Limitation Act, Cap.189 R.E 2019, time barred.

Let me point out, however, that, ordinarily and, as a matter of proper practice, an objection like the one raised by the Defendant, ought to have been filed as a "Notice to the Court", either within the **WSD** or as a separate document accompanying the **WSD** for the purposes of alerting the Court and the other party, instead of lumping it together with other paragraphs responding to the claims raised in the Plaint, and worse enough in the mid of the **WSD**.

Doing so aligns well with the principle that, preliminary objections need to be disposed of at the earliest possible time. Notwithstanding such observations, since the point raised is one of great significance, as it touches on the jurisdiction of the Court as well, I am bound to tackle it first, instead of proceeding with the earlier plans to commence the hearing of this suit. On the 14th September 2022, therefore, I gave audience to the learned advocates appearing for the parties to address me. I will summarize their oral submissions before I consider the merits or otherwise of the legal issue raised by the Defendant.

In his submission in support of the objection, Mr Ashiru Lugwisa, learned Counsel for the Defendant who was assisted by Mr Wallace Mfuko (Advocte), submitted that, the Plaintiff's cause of action as disclosed in paragraph 4 of the Plaint, is based on breach of contract. He contended that, according to Item No.7 of the Schedule to the Law of Limitation Act, Cap.189 R.E 2019, the span of time for suit based on contract lapses within a period of 6 years only.

Mr. Ashiru submitted that, according to paragraph 6 of the Plaint, the cause of action in this matter arose sometime in 2011/ 2012 when the Plaintiff deposited USD ($) 300,000/ in the 1st Defendant's Account and thereafter immediately notifying the 1st Defendant. He submitted that, the 1st Defendant's promise was to execute a contract with the Plaintiff within a period of 1 year, i.e., by 2012. As such, he contended that, the cause of action accrued in the year 2012 when the parties failed to execute that contract as agreed.

To that effect, and relying on what section 6 of the Law of Limitation Act, Cap.189 R.E 2019 provides, Mr. Ashiru contended that the cause of action accrued on that date of breach. He

submitted that, since the present suit was instituted on the 10th of December 2020, it was way beyond the limitation period since it ought to have been filed the latest in 2018.

Mr. Ashiru submitted, therefore, that, given the above facts, section 3 of the Law of Limitation Act, Cap.189, R.E 2019, will have to be brought to its operation and the suit be dismissed for having been filed out of time. He contended further that, even if the Plaintiff is stating that he became aware in 2014, still the suit will fall outside the prescribed time, because the 6 years would have lapsed by the year 2019. He therefore urged this Court to dismiss it forthwith.

For her part, Ms. Winjaneth Lema and Mr. Shehzada Walli, learned advocates for the Plaintiff responded to the submissions made by Mr. Lugwisa. It was Ms. Lema's view that, the submissions made by Mr. Lugiswa and, the objection in general, were out of context. She conceded that, indeed the agreement between the parties was effected in 2011 when the Plaintiff deposited USD 300,000.00 in the Defendant's account, as a performance of what they had agreed.

Ms. Lema submitted that, the parties had agreed on a project which is undisclosed and the agreement was of April 2011 and the monies in question, (i.e., USD ($) 300,000/) were deposited on 21st April 2011. She submitted that, based on that oral agreement, the project was to be accomplished within 12 months, which means by April 2012.

She contended, however, that, the Defendant did not manage to perform what was agreed and failed to refund the Plaintiff the amount paid but offered the Plaintiff an alternative compensation and the two parties agreed that the Defendant would allocate to the Plaintiff a four board-room apartment equal to a 260m^2, at Plot. No. 2406/5 located at Seaview Area. Ms Lema submitted that, the property was and is to date, still under construction. She submitted that, that agreement was made in 2012 and the building was expected to be completed in 2013.

Ms Lema submitted that, the compensation for the monies earlier received by the 1st Defendant, was to be made in a form of an apartment in another project under construction and, it would not have been a sufficient consideration if the apartment

was to be handed over the Plaintiff before the completion of the construction project.

According to Ms. Lema, under paragraph 15 of the written statement of defence, the 1st Defendant, even acknowledged that the apartment promised to be given to the Plaintiff remains available and that, the construction project nears completion. She contended that; these were facts made out in the year 2021 by the Defendants.

Ms Lema contended that, from the 2012 oral agreement in respect of what will be a compensation for the monies received by the 1st Defendant in 2011, one may notice that, the agreement was not a one-off transaction, but one with a continuity nature as the parties continued to be in communication regarding when the object of compensation was to be completed and handed over.

In a further submission, and relying on what paragraph 9 of the **WSD** states, Ms Lema was of the view that, the agreement that the Plaintiff was to be compensated was to be fulfilled in 36 months from 2012. She contended, therefore, that, the parties' conduct towards that transaction was of continuity nature and

there cannot be breach even after the expiry of the expected time when the project was expected to be completed.

She submitted that, as conceded in paragraph 11 of the WSD, in the year 2017, the parties' representative went to inspect the apartment which was the subject of the compensation agreement. In that regard, she maintained that, to conclude that there was a breach one has to look at what was agreed by the parties and what were their respective obligations and subsequent conduct until when their obligations came to an end by the Plaintiff in 2019.

Ms Lema submitted that, when the Plaintiff communicated the demand notice to the 1st Defendant, the later made several other oral promises/ agreements which were not executed but the 1st Defendant kept on promising to complete the project. According to Ms. Lema, those facts, are part of the annexures to the Plaint.

In that regard, and relying on section 7 of the Law of Limitation Act, Cap.189 R.E 2019, she argued that, there has been a continuing breach all along, so if the Defendants was supposed to hand over the apartment, the cause of action arose

when the Plaintiff decided to terminate the agreement in 2019 as there was no tangible results and indication as to when the project was going to be completed.

To support her submission regarding the applicability of section 7 of the Law of Limitation Act, Cap.189 R.E 2019, Ms. Lema referred this Court to its own decision in the case of **Lindi Express Ltd vs. Infinite Estate Ltd**, Commercial Case No. 17 of 2021. She contended that, by implication, the subsequent actions of the parties changed the terms of the earlier oral agreement to some other future date, subject to the Defendant being able to compensate the Plaintiff. She maintained therefore that, there had been a continuing breach.

On the other hand, and in effort to complement what Ms Lema submitted, Mr. Walli, submitted that the nature of this agreement was oral. He also pointed out that, several promises were made throughout the years which kept on altering the nature of the initial oral agreement. He contended that; it is also not disputed that the Defendants have admitted that the construction project is still on-going.

In that regard, it was his submission that, it is only after the failure of the Defendants to act on their last promise as per Annexure S-2 to the Plaint that the Plaintiff gave the Defendants a last chance of redemption, failure of which the Plaintiff instituted this suit. He contended that, by virtue of all such acts and omission and several promises, they all constituted a continuing breach and the objection raised is a mere means of avoiding their obligations to act on the promises they made having pocketed the **USD ($) 300,000.00**.

In a brief rejoinder, Mr Lugwisa submitted that, the Law of Limitation has a purpose to serve and that purpose is to discourage laxity. He contended that; the law touches on the jurisdiction of the Court since the Court cannot act on a stale matter. He distinguished the **Lindi Express case** (supra) noting that, although it has sound principles, the only departure is that they do not apply to the facts of this case.

Mr. Lugwisa refuted the alleged continuing breach as argued by Ms Lema and Mr. Walli and maintained that, the cause of action accrued in 2012, thus, urging this Court to uphold the objection and dismiss the suit with costs.

I have given due consideration to the submissions made by the learned counsels for the parties herein. The issue which I am called upon to consider is whether the objection raised by Mr. Lugwisa has any merit. Before I respond to that issue, however, I find it pertinent to state some basic principles in the law of contract which are relevant to the case at hand.

Ordinarily, in the law the word "contract" is defined to mean a legally binding agreement made between two or more parties, which outlines the rights and obligations governing their relationship. Agreements can be created either orally or in writing. Importantly, however, regardless of the form that a contract may take (e.g., oral versus written), a contract can usually be modified at a future date.

A contract modification, therefore, refers to a situation where the contracting parties agree to alter the earlier terms of their original agreement. Understandably, an alteration of a contract may happen for various reasons including those which may be outside of the parties' control. If such alterations take place, they may take place in whole or in part.

It is also trite law that, once a written contract is concluded between two or more parties, it cannot be varied, changed or amended unless expressly agreed and/or consented by the parties thereto. Worth noting, however, is that, if a contract will require major changes, the contract may need to be renegotiated or possibly replaced by a new contract.

In our jurisdiction, section 62 of The Law of Contract Act, Cap. 345, R.E 2019, governs such a situation. It provides that, that:

> "Where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

The above cited provision embodies what is also referred to in law as the doctrine of novation. The traditional, accepted understanding of novation is that, one original contract is extinguished and replaced by a new one. However, one must also note, as it was stated by Sinha, J (as he then was) in the Indian case of **Babu Kameshwar Prasad Singh And ... vs. Shahamat Mian And Ors.** AIR 1958 Pat 162, that:

> "The question of novation of contract comes in for consideration when the original contract is substituted by another contract but in cases where the original contract stands and is merely reinforced by a subsequent agreement, there can be no question of novation of contract."

Having laid down the above framework, let me now consider the merits of the objection raised by the Defendant and, which necessitated the composition of this ruling, in light of the principles I have laboured to establish hereabove, while also taking into account the facts of this present suit.

In the first place, it is an undisputed fact that, the kind of relationship which existed between the Plaintiff and the Defendant was in the form of an oral contract which was concluded sometime in the year 2011. In that contract, the parties agreed to a partnership venture to develop a multi-storey building project as Seaview Area, in Ilala Dar-es-Salaam.

It is further an undisputed fact that, in consideration of their partnership venture the Plaintiff made a deposit of USD ($)

300,000/- in the 1st Defendants Account. The amount was, therefore, deposited as an investment money or consideration for the purposes of executing their agreed project.

There is as well no dispute that, upon there being such a deposit into the 1st Defendant's account, the 1st Defendant promised to reduce the parties' agreement into writing and the project's papers works were in their final stages and were to be ready for viewing and execution within 12 months. Up to the year 2014, however, nothing was executed and the Plaintiff was not notified.

Owing to those facts, it was the submissions of Mr Lugwisa, the learned counsel for the Defendants, that, what was to be executed in writing within a 12 month's period was the written contract. I think that is not a correct view given the facts stated in paragraph 5, 6 and 7 of the Plaint.

In my view, much as there was a promise to reduce "**the oral investment agreement"** into writing, what were to be made ready for "**viewing and execution within a period of 12 months**" as it may be gathered from paragraph 7 of the Plaint, were the project's paper works which were yet to be

finalised and within such a period, the project's construction works was to be executed. And, since the oral agreement was never reduced into writing, it remained an oral agreement throughout. But the pertinent question that follows is: was that oral agreement breached and, if so, when or at what time?

Before I respond to the above, I also find it more pressing to address the following question: far beyond the fact that there was a deposit of USD ($)300,000.00 as consideration for the parties' oral agreement, what were the terms of that oral agreement? What was its specific timeline or duration?

Unfortunately, it may not be easy to respond to those questions because, looking at the Plaint and the annexures to it, all do not shed light to those questions. I hold so because, as I stated, what is stated in paragraph 7 of the Plaint is a post agreement activity which reveal to me that, there were some preparatory works to be accomplished within 12 months when the works would have been ready for "viewing and execution." Nothing, however, is stated in that paragraph as to whether the parties had agreed at what time was the project to be accomplished and how both were to benefit from it.

In view of the above, I find it difficult to even come to terms with the submissions by Mr. Lugwisa that, the completion time for the parties' agreed project was the year 2012 and, thus, that, the alleged breach accrued in that year. On the other hand, as one tries to establish when exactly the alleged breach accrued for purposes of limitation of action, there is yet another more pertinent question to ask.

The question which calls my attention, as I look at the whole factual matrix canvassing this suit, is: whether the original contract remined intact or got somehow altered or novated at some point in time. As I stated earlier, herein above, regardless of the form that a contract may take (whether oral or written), a contract can usually be modified at a future date. Looking at Annexure SC-1 and what paragraphs 7 and 8 of the Plaint reveals, it is my finding that facts as disclosed which are to the effect that, sometimes in 2014 the Plaintiff discovered that the works had not been executed by the Defendant, and, upon such discovery, the parties modified their initial oral contract by yet another contract.

In my humble view, the new contract was neither a continuation nor reinforcement of the first oral contract for which USD ($) 300,000/= was paid but rather a completely new twist of the whole trajectory which the parties were treading on.

As paragraph 8 of the Plaint indicates, under the new oral agreement concluded in the year 2014, the Defendant agreed to compensate the Plaintiff for the USD ($) 300,000. The agreed term under that new oral arrangement was that, the Defendant was to transfer to the Plaintiff's ownership of a prime apartment in another high-end multi-storey apartment building along Sea View Road, in Sea View Area, Ilala District in Dar-es-Salaam Region.

Further, as per the 8th paragraph to the Plaint, it was an agreed term under that new oral contract, that, the apartment to be transferred to the Plaintiff, and which was expected to be completed within a period of thirty-six (36) months, would attract no additional charges. The facts disclosed by the Plaintiff under paragraph 8 of the Plaint are that, the Defendant's proposal was accepted, meaning that, a new contract was concluded.

As I stated earlier hereabove, (see the case of **Babu Kameshwar** (supra), the question of novation of contract comes in for consideration when the original contract is substituted by another contract which made the relationship between the parties to continue.

In the case of **Mr. Eric Mmari vs. M/s Herkin Builders Ltd**, Commercial Case No.138 of 2019 (unreported ruling dated 11th May 2020), this Court considered a somewhat situation where an initial contract lapsed but was supplanted by another contract and the parties went ahead with their relations under the new arrangements. This Court stated as follows:

> "In this case, there is no doubt that the relationship of the Plaintiff and the Defendant continued post the initial breach. However, the continuation did not arise out of a continuing duty under the expired contract. Instead, the continued relations came from their new arrangements …. To that end, while it may be argued that the

> Plaintiff had forfeited his right to sue under the old (expired) contract when he failed to sue upon noticing the breach thereof, under the new arrangements, a new cause of action accrued afresh on 15th November 2014 when the Defendant failed to hand-over the site and the completed works as agreed."

In this present suit as par the 8th paragraph of the Plaint, it is apparent that the original oral contract concluded in 2011 was substituted by a new agreement brought about in 2014 by the Defendant in form of a proposal for compensation whereby the 1st Defendant's was to transfer ownership of an apartment to the Plaintiff. In view of that, the Plaintiff, having accepted the new proposed arrangement; one cannot to revert to the original contract whether there had been breach of it or not, as no cause of action can be mounted on that previous transaction.

As it may be gathered from section 62 of the Law of Contract Act, Cap. 345, R.E 2019, where the parties to a contract agree to substitute a new contract for the original, the original

contract need not be performed. The original contract ceases and attention will, consequently, be set on the performance of the new arrangement.

In the case of **Ram Singh vs. Tek Chand-Niamat Rai**, AIR 1933, for instance, "**X**" had executed a bond for a debt due by "**Y**". Thereafter, the parties entered into a settlement by which "**Y**" was to pay part of debt in certain instalments and executed a mortgage for balance and in default "**Y**" was to continue to be liable as before.

"**Y"** dutifully paid some instalments but failed to carry out the terms of settlement. Upon being sued, the Court held that, under the terms of the settlement, that **X'**s liability under the bond was absolved by the settlement and, that it was not revived on **Y**'s default as there was no term in the settlement to that effect.

In the present suit, therefore, focus cannot be on the original contract but the new contract concluded in 2014. If that is the case, and in fact it is, was the present suit filed out of time? Looking at the Plaint and its annexures, the new contract's completion term was for a period of thirty-six (36) months after

which the promised apartment was to be transferred to the Plaintiff at no additional costs. From that fact, it means, therefore, it would be that, by December 2017, the apartment ought to have been completed and failure of that would amount to breach.

In paragraph 9 of the Plaint, however, the Plaintiff has alleged that in December 2017, the time when the Defendant undertook to compensate him through ownership of the promised apartment, the Plaintiff became aware that the project had stalled and was yet to be complete.

In my view, therefore, taking into account the facts as disclosed herein above, the cause of action, if at all was to be established, accrued on that point, i.e., on 31st December 2017 and not in 2014 as argued by Mr. Lugwisa.

From the foregoing facts, can it be said this suit is time barred under Item No.7 of the Schedule to the Limitation Act, Cap.189 R.E 2019 as contended by the Defendants? As it may observed from the facts and the submissions of the parties, this suit was instituted on the 22nd October 2020.

Since the purported breach if any would have arisen in the year 2017 and not 2012, and given that, the limitation of actions based on contract is a six (6) years' period, the argument that the suit is time barred cannot stand. In view of that, this Court settles for the following orders:

(i) That, the preliminary objection raised by the Defendants lacks merits and is hereby dismissed with costs.

(ii) The main suit is to proceed as per the date to be arranged by the Court.

It is so ordered.

DATED AT DAR-ES-SALAAM, THIS 20th DAY OF OCTOBER 2022

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DEO JOHN NANGELA

JUDGE