

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 24 OF 2023

VISION CONTROL AND SUPERINTENDENCE

LIMITED.....PLAINTIFF

VERSUS

MSK REFINERIES LIMITED..... DEFENDANT

RULING

A.A MBAGWA J.


This ruling is in respect of preliminary objections raised by the defendant's counsel against the competency of the present suit. The preliminary objections are to the effect that;

1. The suit is time barred.
2. That there was a non -joinder of parties.

Briefly, what is obtaining in this suit may be recounted as follows;

The plaintiff instituted the present suit praying for judgment and decree against the defendant in the following orders;

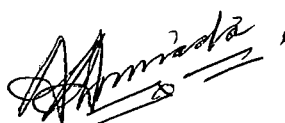
- (a) That the defendant be ordered to pay to the plaintiff USD 35,000
the equivalent of Tanzania shillings 80,500,000/=



- (b) That the defendant be ordered to pay the plaintiff interest on the principal sum at the rate of 22% per annum from the date when cause of action accrued to the date of judgment.
- (c) Interest on the decretal amount at the court rate of 7% from the date of judgment to the date of full satisfaction.
- (d) That the defendant be ordered to pay general damages to the plaintiff to the tune of Tanzania shillings Two Hundred Million (TZS 200,000,000/=).
- (e) That the defendant be ordered to pay costs of this suit.
- (f) Any other reliefs as this Honourable Court may deem fit and just to grant.

Hitherto, the plaintiff had filed in this Court Commercial Case No. 10 of 2021 which was before Hon. Agatho J. However, the said suit was on 23rd day of February, 2023 withdrawn with leave to refile. Banking on the leave of the Court to refile the suit, the plaintiff has instituted the present case.

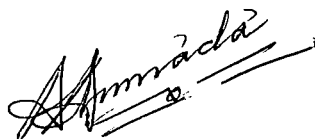
Upon service, the defendant filed a written statement of defence along with a notice of preliminary objections as hinted above. As the rule of the thumb requires, this Court was enjoined to dispose of the preliminary objection before delving into the merits of the matter.



When the matter was called on for hearing Mr. William Fungo, learned advocate appeared for the plaintiff whilst Mr. Gabriel Simon Mnyele, learned advocate represented the defendant. Both counsel adopted their skeleton arguments which they had filed in Court and added a few comments orally.

Submitting in support of the 1st preliminary objection, Mr. Mnyele argued that the suit is time barred. Referring to paragraph 6 of the plaintiff, the defendant's counsel submitted that the latest invoice was issued on 25th December, 2016 as such, the time for filing a suit lapsed on 24th December, 2022. He lamented that on 9th March, 2023 when this suit was instituted in Court it was already time barred. While referring to the cases of **Edna John Mgeni vs National Bank of Commerce Limited and Another** [2016] TLR 446 and **Tanzania Cotton Marketing Board vs Cogecot Cotton Company S.A.** [2004] TLR 132, the defendant's counsel candidly submitted that the consequence of filing a suit out of time is dismissal.

The defendant's counsel further submitted that the plaintiff cannot rely on the order of the court dated 23rd February, 2023 to savage the situation. He explained that under Order XXIII of the Civil Procedure Code, where a matter is withdrawn, it is not necessary for the Court to specify

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Regarding the 2nd preliminary objection, the defendant's counsel submitted that the plaintiff has no cause of action against the defendant. He contended that the plaintiff has not pleaded any fact which makes the defendant liable to pay her under contract. The learned counsel elaborated that according to clause 10.1 of annexure VCSL-01 to the plaint, it is the duty of the Financing Bank to wit, Tanzania Investment Bank to pay fees to the plaintiff. On this note, he beseeched the Court to strike out the suit.

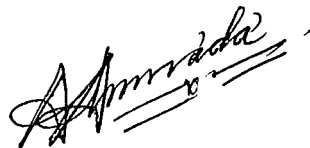
The plaintiff's counsel mainly relied on the court order dated 23rd day of February, 2023. The counsel said that the Court granted a prayer to withdraw the suit with leave to refile within fourteen (14) days subject to payment of fresh filing fees. The counsel continued that the plaintiff complied with the court order as she refiled the suit within fourteen (14) days. He further contended that in granting the order, the Court was cognisant to the overriding objective principles which is couched in mandatory terms under section 3A of the Civil Procedure Code. It was the

plaintiff's submission that since Commercial Case No. 10 of 2021 which was withdrawn with leave to refile it within fourteen (14) days and since it was refiled on 9th day of March, 2023 which was within 14 days, it goes without saying that the present suit was filed within time. He clarified that the time was to lapse after fourteen (14) days which was granted by the Court.

Furthermore, the plaintiff's submitted that the Court is now *functus officio* on the order issued by Hon. Agatho J in Commercial Case No. 10 of 2021 dated 23rd February, 2023. On this, he cited the case of **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser**, Civil Application No. 33 of 2012, CAT at Dar Es Salaam.

In the alternative, the plaintiff argued that if this Court finds that its order dated 23/02/2023 was erroneously issued, then it should consider it as mistake done by the court which should not be used to penalise the plaintiff. To support his contention, he cited the case of **Indo-Africa Estate LTD vs District Commissioner for Lindi District**, Civil Application No. 12/07 of 2022 CAT at Mtwara. On the above submission, the learned counsel implored the Court to dismiss the objection with costs.

Concerning the 2nd preliminary objection, the plaintiff's counsel dismissed it on the ground that it requires proof and for that reason it lacks legal

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requisite of being a preliminary objection. He supported his argument by citing the decision in **Mukisa Biscuits Manufacturing Company LTD vs West End Distributors LTD** (1969) EA 696.

Besides, the plaintiff's counsel, while citing Order I Rule 9 of the Civil Procedure Code, elaborated that a suit should not be defeated by reason of misjoinder or non-joinder of parties in so far as the Court may deal with the matter in controversy before it. He also cited the case of **Juliana Francis Nkwabi vs Laurent Chimwaga**, Civil Appeal No. 531 of 2020, CAT at Dodoma, where the court held as follows;

'That upon the Court making a determination that a necessary party was not joined in the suit, the matter should be referred back to trial for the party to be joined'

Notwithstanding the above, the plaintiff's counsel maintained that the plaintiff has a cause of action against the defendant in that the dispute emanated from the defendant's inaction to pay the plaintiff and the said TIB Bank was to pay the plaintiff on behalf of the defendant. As such, non joinder of the Bank cannot render the decree inexecutable, the learned counsel submitted.

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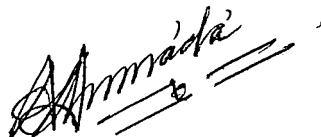
In the upshot, the plaintiff's counsel insisted that both preliminary objections are devoid of merits and, implored the Court to overrule them with costs.

I have keenly gone through the pleadings and the attending annexures as well as the rival submissions.

To start with the 1st preliminary objection on whether the suit is time barred, there is no dispute that the original time for instituting the suit lapsed on 24th December, 2022. The plaintiff's argument is that since the previous suit namely, Commercial Case No. 10 of 2021 was instituted within time and withdrawn on 23rd February, 2023 with leave to refile it within fourteen (14) days, the present case cannot be said to be time barred for it was filed on 9th March, 2023 which was within fourteen (14) days provided by the Court.

On the adversary, the defendant's counsel submitted that once the matter is withdrawn, its refiling is subject to limitation of time prescribed by law. He further argued that the leave to refile the suit did not include extension of time.

I have read the contested order of this Court by Hon. Agatho J. dated 23rd day of February, 2023. The order is as follows;

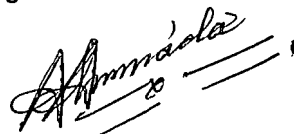
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'The prayer by the plaintiff's advocate to withdraw the suit is granted with leave to refile it within 14 days subject starting from today subject payment of appropriate filing fees. And since the matter was at hearing stage which is advanced stage of trial the plaintiff is condemned to pay costs to the defendant.

The suit is marked withdrawn.

It is so ordered.'

From the above order, it is clear that upon withdrawal of Commercial Case No. 10 of 2021, there was no pending suit as such, the matter had to start afresh. Did the above order extend time for filing a suit? My quick answer is no. What was granted was leave to refile the suit within 14 days but this did not waive time limitation. In addition, this Court could not extend time limitation for institution of a fresh suit because it does not have such powers. Those powers are vested to the Minister in terms of section 44 of the Law of Limitation Act. Indeed, the plaintiff was granted leave to refile the suit within fourteen (14) days but subject to time limitation. Although, the trial Judge did not indicate the provision under which the order was made, it is obvious that the powers to withdraw the suit with leave to refile are provided under Order XXIII of the Civil Procedure Code. For purpose of clarity, I find it fit to reproduce the provisions of rule 1(1) & (2) and 2.

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1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the court is satisfied-

(a) that a suit must fail by reason of some formal defect; or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

3. In any fresh suit instituted on permission granted under rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

The above provisions in particular sub rule 3 is very clear that leave to refile the suit does exclude application of limitation period. The plaintiff's counsel ought to consider the legal consequences of his prayer before moving the Court.

It is unfortunate that where the suit is time barred, the Court has no means to remedy it no matter how painful it might be. The only legal course is to dismiss it. In the case of **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016, CAT at Dar Es Salaam, the Court quoted with approval the holding of Kalegeya J, as



he then was in case of **John Cornel v. A. Grevo (T) Ltd**, Civil Case No. 70 of 1998 to the following effect;

'However unfortunate it may be for the plaintiff, the Law of Limitation, on actions, knows no sympathy or equity. It is a merciless sword that cuts across and deep into ail those who get caught in its web.'

In a similar vein, I am unable to savage the plaintiff's case in the prevailing circumstances. Suffice it to say that I find the 1st preliminary objection meritorious hence I sustain it. Since the 1st preliminary objection is sufficient to dispose of the suit, I see no reason to venture into the 2nd preliminary objection.

That said and done, it is my findings that the 1st preliminary objection is meritorious and therefore I uphold it. Consequently, this suit being time barred, it is hereby dismissed with costs.

It is so ordered.

The right of appeal is explained.




A. A. MBAGWA

JUDGE

07/08/2023