

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

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 33 OF 2023**

**NCBA BANK TANZANIA LTD.....PLAINTIFF**

**VERSUS**

**SALVATORY LUBEKE MWANDU.....DEFENDANT**

*Date of Last Order : 05<sup>th</sup> July, 2023*

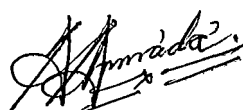
*Date of Ruling : 17<sup>th</sup> August, 2023*

**RULING**

**A.A. MBAGWA J.**

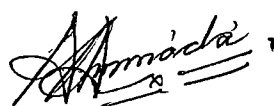
This ruling is in respect of preliminary objections on points of law raised by the defendant, Mr. Salvatory Lubeke Mwandu against the competence of the suit.

The plaintiff, NCBA Bank Tanzania Ltd is a limited liability company incorporated under the laws of the country and it is licensed to carry on lending business, among others. The plaintiff is a successor of the defunct Commercial Bank of Africa (Tanzania) Limited. On the adversary, the defendant is an individual person and a former employee of the erstwhile Commercial Bank of Africa (Tanzania) Limited (now known as NCBA BANK TANZANIA LIMITED). His employment was terminated on 13<sup>th</sup> day of December, 2016. It is alleged that during employment tenure, the



defendant took two loans namely, personal loan amounting to TZS 60,500,000/= via a credit facility letter dated 3<sup>rd</sup> July, 2014 and home loan amounting to TZS 30, 000,000 through a facility letter dated 21<sup>st</sup> September, 2015. According to the pleadings, the first loan was payable within 36 months at equal monthly installments of TZS 1,880,000.00 whereas the latter was payable within 72 months at equal monthly instalments of TZS 1, 022,940.39. However, before the said loans were fully repaid, the defendant's employment was terminated on 13<sup>th</sup> December, 2016. It is contended that at the time of termination, the outstanding loan stood at TZS 75, 385,285.64, being TZS 50,256,857.14 for personal loan and TZS 25, 128, 428.50 for a car loan. As both loans were being serviced through monthly deductions from the defendant's salaries, the defendant could no longer afford to repay loans immediately after termination.

Following the defendant's default, the plaintiff instituted the present case against the defendant seeking the following orders; a declaration that the defendant's failure to repay the outstanding loans in the facility letter dated 3<sup>rd</sup> July, 2014 and facility letter dated 21<sup>st</sup> September, 2015 amounts to breach of agreement, an order for the defendant to pay the entire outstanding amount of TZS 103,450,200.77 being principal sum and interest, also general damages and costs of the suit.

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Upon service, the defendant filed a written statement of defence along with a notice of preliminary objections to the following effect;

1. That, the plaintiff has no locus stand to sue the defendant.
2. That, this Honorable Court has no jurisdiction to entertain the suit to its finality.
3. That, the plaint is incompetent for contravening order VII rule (1) (e) of the Civil Procedure Code Cap 33 Revised Edition 2019.
4. That, the plaint is defective as it suffers from joinder of causes of action.
5. That, the suit is time barred.

On account of the preliminary objections, the Court was compelled to determine the objections before advancing to the next stage. As such, parties were ordered to dispose of the preliminary objections by way of written submissions which were duly filed in Court.

The plaintiff had the services of Dr. Onesmo Kyauke, learned counsel whilst the defendant appeared in person (unrepresented).

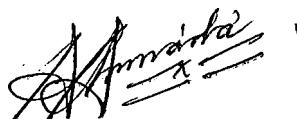
Submitting on the 1<sup>st</sup> preliminary objection, the defendant argued that plaintiff is a stranger to the contract (loan agreements) between the defendant and Commercial Bank of Africa (Tanzania) Limited. He said, all the documents (annexures to the plaint) indicate Commercial Bank of



Africa (Tanzania) Limited as the lender but, to his dismay, it is the plaintiff who was sued him. The defendant was of the strong view that the plaintiff is not privy to the contract and for that reasons she has no locus standi to sue him. In support of his argument, the defendant relied on the decision of the Court of Appeal in the case of **Austack Alphonse Mushi vs Bank of Africa Tanzania Ltd and Another**, Civil Appeal No.373 of 2020, Court of Appeal at Mbeya. He thus prayed the Court to find the preliminary objection meritorious and strike out the case.

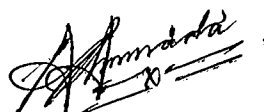
On the 2<sup>nd</sup> preliminary objection, the defendant submitted that this Court has no jurisdiction because the dispute is not commercial in nature. He contended that the defendant had employment relationship with Commercial Bank of Africa (Tanzania) Limited which is not commercial in nature. He explained that this court has no powers to entertain non commercial matters. He thus urged the court to strike out the suit.

Regarding the 3<sup>rd</sup> preliminary objection, the defendant had it that the plaint is defective for contravening the provisions of Order VII rule (1) (e) of the Civil Procedure Code. He elaborated that, the plaint, at paragraph 19, does not state as to when the cause of action arose. He continued that, however, upon reading the entire plaint in particular paragraphs 11,12,13 and 14, it becomes apparent that the default occurred on 13<sup>th</sup>

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day of December, 2016. The defendant stressed that the ailment to state the time when the cause of action arose is fatal and renders the proceedings a nullity. On this note, the defendant relied on the cases of **the Registered Trustees of Capuchin Friars Minor Province of Tanzania vs Joseph Mahala and 17 Others**, Land Case No.11 of 2021, High Court of Tanzania at Morogoro and **Joseph Luvanda vs Swaibu Salimu Hoza & 2 Others [2014] TLR 73.**

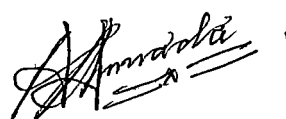
Coming to the 5<sup>th</sup> preliminary objection, the defendant submitted that the suit is time barred in terms of Section 3 read together with Item 7 of the Part I of the Schedule to the Law of Limitation Act. He said that the above provisions provide for time limitation of six years for institution of a suit founded on contract. The defendant elaborated that, upon reading the contents of paragraphs 10, 11, 12, 13 and 14 of the plaint, it is discerned that the default occurred immediately after termination of the defendant's employment. As such, the defendant submitted that the time for accrual of cause of action should be reckoned from 13<sup>th</sup> December, 2016. He explained that from 13<sup>th</sup> December, 2016 up to 5<sup>th</sup> day of April, 2023 when this suit was filed in court is more than six years as prescribed by law. In fine, the defendant prayed the Court to dismiss the suit for being time barred.



In rebuttal, the plaintiff contested all the preliminary objections stating that they are devoid of merits and therefore liable for dismissal.

Responding to the 1<sup>st</sup> preliminary objection, the plaintiff's counsel had it that annexure NCBA-A1 to the reply to written statement of defence sufficiently demonstrates the nexus between the plaintiff and the defunct Commercial Bank of Africa (Tanzania) Limited. The learned counsel said that the plaintiff was formerly known as Commercial Bank of Africa (Tanzania) Limited before it changed to NIC Bank (Tanzania) and now NCBA Bank Tanzania Ltd. He therefore dismissed the objection for being unfounded.

With respect to the 2<sup>nd</sup> preliminary objection, the learned counsel submitted that the loan agreements created contractual obligations which qualify to be termed as commercial transactions. The plaintiff's counsel said that Rule 3(d) of the High Court (Commercial Division) Procedure Rules, 2012 defines a commercial case to mean a civil case involving a matter considered by the Court to be of commercial significance, including any claim or application arising out of a transaction of trade or commerce but not limited to the liability of a commercial or business organization or its officials arising out of its commercial or business activities. He concluded that the agreements in dispute are purely commercial

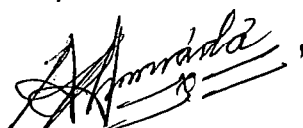


transactions and therefore this Court has jurisdiction to entertain this dispute.

On the 3<sup>rd</sup> preliminary objection that the plaint does not state as to when the cause of action arose, the plaintiff's counsel replied that on reading the plaint together with its annexures, it is clear that the facts disclose the time as to when the cause of action arose. The plaintiff's counsel referred to paragraph 14 of the plaint as the one containing information on the time when the alleged cause of action arose. He concluded that the objection is without merits.

On the 4<sup>th</sup> preliminary objection regarding misjoinder of cause of action, the plaintiff counsel submitted that as per annexure N-3 to the plaint, the two loans were consolidated together as such, the objection is meritless, the counsel submitted.

With respect to the 4<sup>th</sup> preliminary objection, the defendant assailed the plaint for combining two causes of action. He stated that the two facility letters dated 3<sup>rd</sup> July, 2014 and 21<sup>st</sup> September, 2015 create two distinct causes of action but the plaintiff unlawfully joined them in order to meet the threshold amount of pecuniary jurisdiction. He insisted the court to strike out the plaint for being defective.

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Coming to the 5<sup>th</sup> preliminary objection in relation to time limitation, the plaintiff's counsel was opined that the suit is within time. He submitted that the personal loan as per annexure N-2 to the plaint, was payable within thirty-six (36) months. As such, reckoning from 3<sup>rd</sup> July, 2014, the 36 month period was expiring on 2<sup>nd</sup> July, 2017. He clarified that counting from 2<sup>nd</sup> July, 2017 up to 5<sup>th</sup> April, 2023 when this suit was filed in Court, it is without dispute that the suit was within six years as prescribed by law.

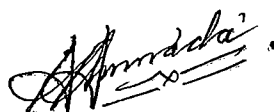
The plaintiff's counsel continued that the second loan, as per annexure N-3 to the plaint, was payable within 72 months from 21<sup>st</sup> September, 2015. He elaborated that the last payment date was therefore on 20<sup>th</sup> September, 2021. The learned counsel opined that computing the time from the last dates on which the loans were supposed to have been paid i.e., 2<sup>nd</sup> July, 2017 and 20<sup>th</sup> September, 2021, it goes without saying that when the instant suit was filed in Court on 5<sup>th</sup> day of April, 2023, the six year period had not lapsed. He urged the court to overrule the objection as well.

I have dispassionately read the pleadings and accorded to the deserving attention to the rival submissions. For the reasons which shall be apparent shortly, I will start my deliberations with the 5<sup>th</sup> preliminary objection.



Both parties are at one that the suit is founded on contract whose limitation period is six (6) years in terms of Item 7 Part I of the Schedule to the Law of Limitation Act. However, they part company as to when the period of limitation commenced. According to Section 7 of the Law of Limitation Act, the period of limitation commences when the right of action for such proceedings accrues. Furthermore, Section 5 LLA clarifies that the proceeding accrues on the date when the cause of action arises. On the one hand, the defendant contends that the cause of action arose immediately after termination of his employment on 13<sup>th</sup> December, 2016 as he could no longer service the loans. On the other hand, the plaintiff is of the views that the cause of action arose on the last dates on which the loans were supposed to have been fully paid (expiry dates of the loans).

At paragraph 10 of the plaint, it is stated that the two loans were being repaid through monthly deductions from the defendant's salaries. Furthermore, the plaintiff contends, at paragraph 14 of the plaint, that the defendant defaulted payment immediately after termination of his employment. From the two paragraphs, it is clear that the default started immediately after termination of the defendant's employment. This is because, as per the facility letters (annexure N-2 and N-3) read together

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with paragraphs 7 and 8 of the plaint, the personal and home loans were payable on equal monthly installments of TZS 1,880,000.00 and TZS 1,022,940.39. This is to say that failure to pay a single installment amounted to a breach of contract and therefore a cause of action arose from the time when the defendant defaulted monthly installment. See the case of **MM Worldwide Trading Company Limited and 2 Others vs National Bank of Commerce**, Civil Appeal No.258 of 2017, CAT at Dar es Salaam.

The law is clear that a cause of action arises when a right of the plaintiff is breached or infringed upon as result or on account of some act or omission of the defendant. See **Musangang'andwa vs Chief Japhet Wanzagi and Eight Others** TLR [2006].

From the above observations, it is my considered views that in the case at hand, the cause of action arose immediately after the defendant's termination of employment for that is the time when the default of monthly instalment payment started. This is gleaned from paragraph 14 of the plaint. It is a settled position of law that parties are bound by their own pleadings and no party is allowed to deviate from what he pleaded unless there are amendments properly made before the Court. See **Pravin Girdhar Chavda vs Yasmin Nurdin Yusufal**, Civil Appeal No.

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165 of 2019, CAT at Dar es Salaam and **James Funke Gwagilo vs. Attorney General** [2004] T.L.R. 161. The plaintiff at paragraph 14 of the plaint states that, the default started immediately after termination hence she cannot be allowed to state otherwise.

Now, reckoning the time from 13<sup>th</sup> day of December, 2016, the period of six (6) years which is available for suits founded on contract lapsed on 13<sup>th</sup> day of December, 2022. As such, on 5<sup>th</sup> April, 2023 when this suit was filed, it was out of time for three (3) months.

It is a settled position that delay even of a single day cannot be condoned without following a proper procedure. 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 described the law of limitation as a merciless sword. 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.'*

Furthermore, in the case of **NBC Limited and Imma Advocates vs Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, CAT at Dar es Salaam

at page 9, the Court of Appeal held that Courts lack jurisdiction to entertain matters for which litigation period has expired.

In view of the above, I am inclined to hold that this suit is time barred and therefore this Court has no jurisdiction to entertain it. According to Section 3 of the Law of Limitation Act, the remedy for a suit which is time barred is dismissal. See also **MM Worldwide Trading Company Limited and 2 Others vs National Bank of Commerce** (supra), **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.

That all said and done, I sustain the 5<sup>th</sup> preliminary objection and hold that the suit is time barred. Consequently, I dismiss it with costs. Since the 5<sup>th</sup> preliminary objection is sufficient to dispose of the suit, I will not delve into other preliminary objections.

It is so ordered.

The right of appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**17/08/2023**