IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 107 OF 2022

PETROFUEL (T) LIMITED .....1ST PLAINTIFF

PETRO LOGISTICS LIMITED .....2ND PLAINTIFF

VERSUS

MA KHARAFI & SONS LIMITED.....DEFENDANT

RULING

Date of last order: 01/12/2022
Date of ruling: 24/02/2023

AGATHO, J.:

This ruling was triggered by the Preliminary Objections (POs) raised by the Defendant against the suit filed by the Plaintiffs. Upon being served with the plaint the Defendant preferred in her Written Statement of Defence to firstly include a notice of POs. These were:

(a) That the suit is bad in law for being hopelessly time barred.

(b) The Court does not have jurisdiction to preside over the suit.

(c) The suit is bad in law for failure to disclose the cause of action of the 2nd Plaintiff against the Defendant; and

(d) The Plaint is defective for contravening the provisions of Order VII Rule 1(f) of the Civil Procedure Code [Cap 33 R.E. 2019].

Before examining the rival submissions of the parties on the POs, it is pertinent to sketch a background of the suit. Briefly, the Plaintiffs filed this suit against the Defendant claiming for the immediate payment of USD 1,822,410.00 being a cumulative amount of unsettled debt of USD 1,158,878.00 and USD 632,918.00 for the 1st Plaintiff and second Plaintiff respectively, interest of 24% from the date of filing the suit , damages to the tune of USD 2,000,000.00 and costs of the suit.

Several paragraphs (including paragraph 5) of the plaint attest to fact that the suit is based on a contract. That is a business agreement for supply of fuel. The contract was concluded on 09/03/2012. It was agreed by the parties in their contract that the 1st Plaintiff will supply fuel(automotive gas oil that is Diesel) to the Defendant to enable her perform construction of Ndundu to Somanga Road about 60KM to bitumen standard following the Defendant's winning of TANROADS tender. The parties began to perform their obligations under the contract. The Plaintiffs supplied fuel and the Defendant paid or settled some of invoices raised and some were unpaid despite their agreed time for payment lapsing. Sometimes in 2014 in an attempt to press the Defendant to effect payment the Plaintiffs decided to stop supply of fuel while the project (road construction) was still ongoing. The TANROADS

intervened by pleading with the Plaintiffs to continue supplying the fuel to avoid derailing the road construction project. TANROADS assured the Plaintiffs that once the government of Tanzania disburse payment to the Defendant then she will assist in ensuring that the Plaintiffs' debts are paid by the Defendant. Following that the Plaintiffs resumed fuel supply service to the Defendant without payment.

While the service was progressing the Plaintiffs too never ceased to demand the payments. The Defendant kept promising payment and meetings and correspondences were done for settlement for partial or payment by instalments. The Plaintiffs allege that in May 2020 the parties entered into a settlement agreement following series of discussions and negotiations. Under the agreement the Defendant promised to pay in three instalments. The Defendant paid a small amount despite promising to pay substantial amount in instalments.

In November 2021 the Plaintiffs issued 21 days demand note. The Defendant never heed to it. The Government of Tanzania was also involved in that the Defendant claimed that she had dispute with the Government of Tanzania and negotiations for settlement were underway. Once the dispute is settled and her being paid then she will make payment to the Plaintiff. That promise was not fulfilled.

Another demand note was sent to the Defendant by the Plaintiffs in 2022. The Defendant's response was that the settlement with Government of Tanzania was on its advanced stage and the Defendant will be paid between May and June 2022 after the Plaintiff has been paid by the Government of Tanzania. Until July 2022 no payment was effected to the Plaintiff. The Plaintiffs were thus left with no other choice than suing the Defendant. Hence this suit filed on 21/09/2022.

The plaint also contained a clause citing Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E. 2019] on exemption from the Law of Limitation Act [Cap 89 R.E. 2019]. That upon the ground that the settlement agreement to the payment of the debt by the Defendant was varied from time to time per settlement agreement of May 2020, partial payment done in September 2020, the agreement by email date 10/05/2022 constitute a mutual, current and open account between the parties. The materiality or otherwise of this clause will be expounded in due course.

Having depicted the background of the suit, it is ideal to turn to the points of preliminary objections (POs). At this juncture the highlights will be on the submissions for and against the POs. While the POs raised were three but the first PO if found to have substance is enough to

dispose the case. For that reason, I will start to examine the PO that the suit is time barred.

The submission of the Defendant's counsel is founded on the Plaintiffs' plaint which points out that it was in 2014 (para 9 of the plaint) when the Plaintiffs could no longer tolerate the failure of the Defendants to pay the so-called debt (fuel purchase price). That constituted a breach of contract entered between the parties. To the Defendant the cause of action accrued in 2014. The suit is thus time barred because the period of limitation for suit based on contract is six years. This has been opposed by the Plaintiffs who claim that the cause of action arose in 2020 and 2022 when settlement was done and the Defendant acknowledged the debts as per the emails annexed as part of the pleadings. The Plaintiffs further referred to paragraph 18 of the plaint citating Order VII Rule 6 of Civil Procedure Code [Cap 33 R.E. 2019] a ground of exemption of period of limitation that there were mutual, current, and open account between the parties and that the Defendant acknowledged the debts. To cement their submission, the Plaintiffs cited Sections 5, 6, and 27(3)of the Law of Limitation Act [Cap 89 R.E. 2019]. I will analyse these provisions later.

As usual where PO is raised a starting point is **Mukisa Biscuits' case** which pinpointed conditions for determining a PO based on pure point of law. It is trite law that to substantiate a PO, evidence is not required. That does not mean that PO should not be substantiated by looking at pleadings and the law only. Therefore, glancing at the pleadings is permitted. What is disallowed is a kind of PO that will requires calling of evidence. That becomes a factual issue rather than the PO based on purely point of law.

Back to the PO (a) that the suit is time barred. The breach of contract as per paragraph 9 of the plaint occurred in 2014. It is not a continuous breach. The Plaintiffs also knew that the suit was time barred that is why they included paragraph 18 in the plaint which purports to be a ground of exemption of period of limitation as per Order VII Rule 6 of the CPC. It is the duty of the Plaintiff to substantiate that the suit is exempted from the provisions of the Law of Limitation Act. See **Thabit K.T. Abri v OILCOM (Tanzania) Ltd [2007] TLR 200**.

It should be noted that the promise by TANROADS is not part of the contract between the Plaintiffs and the Defendants. The failure of the Government of Tanzania to pay the Defendant is irrelevant or rather non-issue. The Plaint is disjointed in some facts, it is not clear what was

going on between 2014 to 2020. In the submission by the Plaintiffs' counsel, he added that in 2016 the Defendant effected some partial payment. But that is a submission from the bar and unfounded in the plaint.

Strange as it may seem, the Plaintiffs filed their suit in 2022 which is 8 years from 2014 when the cause of action arose. But for clarity, circumstances under which the period of limitation may be exempted will be explored.

It is trite that continuous correspondence between the parties cannot enlarge time of limitation that had otherwise lapsed. Therefore, the negotiations and purported settlement that was supported by the emails annexed to the plaint in my settled view were mere correspondences that cannot rewind the statutory period of limitation. That is the position in **Makamba Kigome and Another v Ubungo Farm Implements Limited and PSRC, Civil Case No. 109 of 2005**, Kalegeya, J. (as he then was) held:

> *"Negotiations or communications between the parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrongdoer, plunging him beyond the period provided by law within*

which to mount an action for actionable wrong does so at his own risk and cannot front the situation as a defence when it comes to limitation of time."

That position was also reiterated by my learned brother Ngigwana, J. in **Sarepta Network Investment (SANEICO) v Bukoba District Council & Attorney General, Civil Case No. 16 of 2021, HCT Bukoba District Registry**.

To echo a grave impact of the period of limitation, in **John Cornel v A. Grevo (T) Limited, Civil Case No 70 of 1998 HCT, Dar es salaam Registry** it was held that:

"However unfortunate it may be for the Plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught by its web."

It is bewildering that the Plaintiffs brought the issue of payment of the Defendant by the Government of Tanzania. The contract between the Government of Tanzania and the Defendant is not anyhow part of the contract between the Plaintiffs and the Defendants. Therefore, if the Defendant was paid in 2022 by the Government of Tanzania that does not change the fact that the cause of action arose in 2014.

As per paragraph 18 of the plaint, the Plaintiffs seeks to be exempted from period of limitation because there was settlement entered between the Plaintiffs and the Defendant in May 2020 as per paragraph 9 of the plaint, partial payment is claimed to have been effected in September 2020 and email agreement of 10/05/2022. While the Plaintiffs have rightly cited Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E. 2019], that provision does not provide specific the grounds of exemption of limitation period. It requires the Plaintiffs to show the ground of exemption of period of limitation. Therefore, mere citation of that Order is insufficient. The grounds of exemption are found in the Law of Limitation Act [Cap 89 R.E. 2019], which the Plaintiffs never cited in the plaint. It was the Plaintiffs' counsel submission from the bar that extensively covered the said law.

The Plaintiffs grounds constituting exemption of period of limitation set by the Law of Limitation Act [Cap 89 R.E. 2019] are the settlement agreement to the payment of debt by the Defendant that was varied from time to time per settlement agreement of May 2020, partial payment done in September 2020, the agreement by email dated 10/05/2022. According to the Plaintiffs these constitute a mutual, current, and open account between the parties. The plaintiffs are relying

on these to justify filing of their case in 2022. But this deserves a serious scrutiny of the pleadings.

I ask myself is the settlement purported to be by email and has not become a deed really a settlement in law? The purported acknowledgment of the debt is not in writing and not signed by the person acknowledging as required by the law under Section 28(4) of the Law of Limitation Act [Cap 89 R.E. 2019]. This was also reiterated in **Thabit K.T. Abri v OILCOM (Tanzania) Ltd [2007] TLR 200 at pages 202-204.** Indeed, one may argue that it was acknowledged by email, which is recognized by the Electronic Transactions Act, Act No. 15 of 2015 herein cited as ETA. That could constitute a legally valid acknowledgement of a debt in absence of other statute regulating the modality of the acknowledgment. I hasten to invoke the provisions of the ETA because Section 28 of the Law of Limitations Act has clearly stated in what format the acknowledgment of debt should be. The acknowledgment of debt which the Plaintiffs are claiming is in my opinion not acknowledgment of the debt for purpose of Section 28 of the Law of Limitation Act.

Another controversy is the Plaintiffs' claim that the Defendant was making payment in 2016 which constitutes partial payment. This

allegation is not found in the plaint. What is found in the plaint is year 2020 and 2022. In my view that does not make the cause of action being rewinding or continuing. It is plain in the plaint (paragraph 9) that the cause of action arose in 2014 and that is why paragraph 18 purported to contain ground of exemption of period of limitation.

I should remark that it is a misconception to think that once a party states in the plaint a ground of exemption of period of limitation then the other party (Defendant) is barred from raising a preliminary objection on the point of law such as this that the suit is time barred. See **Thabit K.T. Abri v OILCOM (Tanzania) Ltd [2007] TLR 200**where PO was raised the suit was time barred despite the plaint containing a clause that it is exempted from period of limitation as per Order VII Rule 6 of the CPC. The Plaintiffs are duty bound to substantiate the ground of exemption claimed in their pleadings.

I have also noted that the Plaintiffs are inviting the Court to consider Section 6(a) of the Law Limitation Act [Cap 89 R.E. 2019] providing for suit on account. It states that:

> *"...in a suit for an account, the right of action shall be deemed to have accrued on the date on which the last transaction relating to the matter in respect of which the account is claimed took place."*

The question is whether this is a suit for an account? In my view this is not a suit for an account. The plaint does not state that the suit is purely based on account. Further the Plaintiffs did not cite Section 6(a) of the Law of Limitation Act in their plant. I am of the view that the suit at hand is not a suit on account. Rather it is the suit based on a breach of contract as per paragraph 9 of the plaint. It is the law that parties are bound by their pleadings as held in **James Funke Gwagilo v Attorney General [2004] TLR 161**.

I have already ruled that Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E. 2019]does not in any way bar the Defendant from raising a PO on period of limitation. Moreover, the Plaintiffs did not mention in paragraph 18 of their plaint that the ground of partial payment of debt and acknowledgement of debt have the effect of reviving the cause of action as per Section 6 of the Law of Limitation Act [Cap 89 R.E. 2019].Intriguingly, that Section deals with accrual of rights of action in certain cases. And these cases do not include part payment or acknowledgement of debt.

I have read Section 6(f) of the Law of Limitation Act [Cap 89 R.E. 2019].It provides that:

"...in case of a suit for damages for inducing a person to break a contract the right of action shall be deemed to have accrued on the date of the breach."

The plaintiffs on paragraph 9 said that they stopped to supply fuel to the Defendant in 2014 because they were not paid. From this it means that the breach of contract occurred in 2014.

The Plaintiffs also used the words such as mutual, open, and current account which falls in the purview of Section 6(h) of the Law of Limitation Act [Cap 89 R.E. 2019]. That is the provision using these words. Nonetheless, the Plaintiffs forgot that the foregoing provision applies in case of reciprocal demands between the parties. Surprisingly, there were no reciprocal demands in this case. It is just the Plaintiffs who demanded the payment of the money for supplying the Defendant with fuel.

Since the Plaintiffs did not specify the exact subsection or sub paragraph of Section 6 of the Law of Limitation Act [Cap 89 R.E. 2019] they are relying on, while mindful of the content of the plaint, I took liberty to examine several paragraphs of that Section. Turning to Section 6 (h) of the Law of Limitation Act [Cap 89 R.E. 2019] it provides that:

"...in case of a suit for the balance due on a mutual, open and current account, where there have been reciprocal

demands between the parties, the right of action shall accrue on the last day of year in which the last item admitted or proved is entered in the account."

When one looks the plaint particularly at paragraph 3 of the claim there is a cumulative amount of admitted debt, interest and damages of USD 2,000,000,000. This Court is of the view that the combination of these claims shows that Section 6(h) of the Law of Limitation Act [Cap 89 R.E. 2019] does not apply as the said provision is not for a suit on damages, be it liquidated or otherwise.

All these solidify the PO that the suit is time barred because the suit honestly is based on the breach of contract that arose in 2014. Brutal as it may seem, that is the law.

To add salt to the wound, there is no deed of the purported settlement in the case at hand. What the Plaintiffs term settlement are e-mail correspondences between the parties through which settlement negotiations were done. Those correspondences cannot revive the period of limitation. They do not have effect of rewinding the period of limitation set by the Law of Limitation Act as held in **Consolidated Holding Corporation v Rajan Industries Ltd & Another, Civil Appeal No. 2 of 2003 CAT**, the CAT cited with approval the HCT decision in **Makamba Kigome & Another v Ubungo Farm**

Implements Limited & PSRC, Civil Case No. 109 of 2005. The latter case was also cited in **Sarepta Network (SANEICO) v Bukoba District Council & Another, Civil Case No. 16 of 2021 HCT Mwanza District Registry**.

As per the annextures to the plaint, the last email dated 19/05/2020 was not settlement agreement. They were ongoing negotiations. As already held, that cannot revive period of limitation prescribed by the Law of Limitation Act [Cap 89 R.E. 2019].

Before proceeding further let me remark on the relevancy of Court of Appeal decision in **Fortunatus Lwanyantika Masha & John Woshi Obongo v Claver Motors Limited, Civil Appeal No. 144 of 2019, CAT at Mwanza**. This case dealt with the application of Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E. 2019]. Unlike the present case in the **Obongo's case** the Appellants (former Plaintiffs) did not indicate or comply in their plaint with the provision of Order VII Rule 6 of the Civil Procedure Code [Cap 33 R.E. 2019]. It implies that the CAT did not deal with the interpretation of Order VII Rule 6 of the CPC. The CAT held at page 12 that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. In my view

that does neither mean that the Defendant is precluded from raising the PO on period of limitation nor does it enlist the grounds of exemption of period of limitation. The Court of Appeal did not assess the validity and substance of any ground of exemption of the period of limitation. For that matter citing of that case law to support the exemption of period of limitation in the present case is a misdirection.

The Plaintiffs also cited the provisions of Section 27(3) of the Law of Limitation Act [Cap 89 R.E. 2019] dealing *inter alia*with *accrual of right of action on acknowledgement of a debt and or part payment, and a person accountable therefore acknowledges the claim or makes any payment in respect of it, the right of action in respect of such debt shall be deemed to have accrued on and not before the acknowledgement or as the case may be, the date of last payment.*

The Plaintiffs forgot that Section 27 of the Law Limitation Act [Cap 89 R.E. 2019] should be read together with Section 28 of the same Act. See the case of **Thabit K.T. Abri v OILCOM (Tanzania) Ltd [2007] TLR 200**.Section 28(1) of the Law of Limitation Act requires acknowledgement under Section 27 of the same Act be in writing and signed by the person acknowledging the debt. In the present case the acknowledgement was neither in writing nor signed for purposes of the

Law of Limitation Act. They were mere email correspondences between the parties.

It is also interesting that Section 28(4) of the Law of Limitation Act [Cap 89 R.E. 2019] provides that:

> *"No acknowledgement or payment shall have effect for purposes of Section 27 if it is made after the period of limitation prescribed for the proceeding in respect of the right of action to which acknowledgement or payment as the case may be relates."*

I am of a considered view that the case at hand relates to the breach of contract whose limitation period is six years as provided for under item 7 of Part I of the schedule to the Law of Limitation Act [Cap 89 R.E. 2019]. In this case counting from 2014, the six years ended in 2020. The case is thus time barred. Hence, I find the PO that the suit is time barred to have merit. It is therefore sustained.

A considerable amount of time has been spent on the first PO on period of limitation. That was because the PO is fundamental and if substantiated it disposes of the suit.

As for the third point of preliminary objection which was couched thusthe Plaint is defective for failure to disclose the second plaintiff's cause of action against the Defendant. In my view the second Plaintiff is

equally a third party who is not privy to the contract between the first Plaintiff and the Defendant. The business agreement (clause 8 of annexture P-1 to the plaint and MAK-1) between the first Plaintiff and the Defendant confirms this. For that matter the second Plaintiff is a stranger to the parties' agreement. She does not have a cause of action against the Defendant. In other words, she lacks locus standi. Hence, the PO (c) is sustained.

In the strength of the above reasons on the previously preliminary objections I would not extend my energy to the next preliminary point number which reads, the Plaint is defective for contravening the provisions of Order VII Rule 1(f) of the Civil Procedure Code [Cap 33 R.E. 2019]. I am saying so because little will be done by PO(d) even if it is overruled to repair the destruction caused by the other POs to the Plaintiffs case.

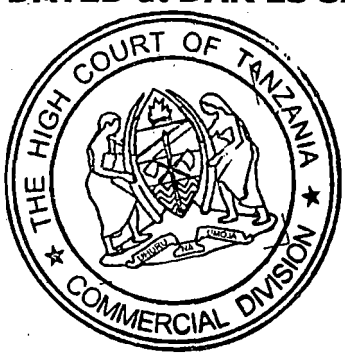
By way of obiter dictum I ask myself as to whether the Court is really seized with jurisdiction to entertain the matter or whether the matter was brought prematurely. Visibly, clause 18 of the Business Agreement that is the annexture P-1 and MAK-1 stipulates the applicable law and jurisdiction. It states that in case of dispute between the parties they shall refer the same to the Arbitrator first before referring it to the

Court. If they had not gone to arbitration this Court therefore could have lacked jurisdiction.

In addition to other POs that have been hereinabove sustained,the suit at hand is indeed time barred. Section 3 (1) of the Law of Limitation Act [Cap 89 R.E. 2019] is loud that where a suit is time barred it shall be dismissed. See also **Ngoni-Matengo Co-operative Marketing Union Limited v Ali Mohamed Osman [1959] EA 577.**The suit therefore is dismissed for being time barred. The Defendant shall have her with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th Day of February 2023.



U. J. AGATHO
JUDGE
24/02/2023

Date: 24/02/2023

Coram: Hon. U. J. Agatho, J.

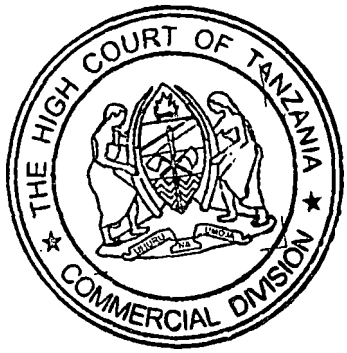
For Plaintiffs: Hilda Mavoa, Advocate

For Defendant: Absent

JLA: Opportuna

C/Clerk: Sania

Court: Ruling delivered today, this 24th February 2023 in the presence of Hilda Mavoa, counsel for the Plaintiffs, but in the absence of the Defendant.



U. J. AGATHO
JUDGE
24/02/2023