

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 118 OF 2022

ABDULKADIR ELIMANZI RASHID & 136 OTHERS APPLICANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE BOARD OF TRUSTEES OF

NATIONAL SOCIAL SECURITY FUND 2ND RESPONDENT

Date of last Order: 14/02/2023

Date of Ruling: 16/03/2023

RULING

I. ARUFANI, J

The plaintiffs herein filed the instant suit in this court against the defendants claiming the Hire Purchase Agreements entered between the plaintiffs and the second defendant in 2013 and 2014 for sale of the houses constructed by the second defendant at Mtoni Kijichi Area, within Temeke Municipality in Dar es Salaam Region were activated by fraud hence null and void. The plaintiffs pray the court to set aside the stated agreements and order the second defendant to refund all the monies paid by the plaintiffs under the agreements and the monies used by the plaintiffs to renovate or improve the purchased units and costs of the suit.

Upon the defendants being served with the claims of the plaintiffs, they filed in the court their joint written statement of defence and the first defendant raised points of preliminary objections quoted hereunder: -

- 1. That the suit is incompetent for being hopelessly time barred.*
- 2. That the suit is of the abuse of court process.*
- 3. That the court has no jurisdiction to determine the suit.*

When the matter came for hearing the quoted points of preliminary objections the plaintiffs were represented by Mr. Benitho Mandele, learned advocate and the defendants were represented by Mr. Erigh Rumisha, learned State Attorney. By consent of the counsel for the parties the points of preliminary objections were argued by way of written submissions.

The learned State Attorney argued in relation to the first point of preliminary objection that, section 5 of the Law of Limitation Act, Cap 89 R.E 2019 provides that, the right of action in respect of any proceedings, shall accrue on the date on which the cause of action arises. He argued further that, item 7 of Part I of the Schedule to the Law of Limitation Act states the limitation of time for the suits found on contract not otherwise specifically provided for is six years. He submitted that paragraph 6 of the plaint shows the cause of action in respect of the instant suit is found on fraudulent sale agreement arose in 2013. He submitted that being the

date on which the cause of action arose, the suit filed in the court on 8th May, 2022 was filed after expiration of six years provided under the law.

He referred the court to the case of **M & R Agency Limited V. Mwanza City Council & Another**, Civil Case No. 35 of 2021, HC at Mwanza, (unreported) where the suit basing on contract was filed in the court after expiration of six years and was dismissed for being time barred. He also referred the court to the cases of **R. B. Polies at Llyods V. Butler** (1950) 1 KB 76 at 81 or (1949) 2 All ER 226 at 230 and **Makamba Kigome & Another V. Ubungo Farm Implements Ltd & Another**, Civil Case No. 109 of 2005, HC at DSM (unreported) where various principles concerning the issue of limitation of time were stated.

He submitted that, as the suit is based on contract falling under item 7 of Part I of the schedule to the Law of Limitation Act which states the period for filing a suit basing on contract in court is six years from the date on which the cause of action accrued it is hopelessly time barred and should be dismissed under section 3 (1) of the Law of Limitation Act. He stated the plaint has not pleaded any fact showing exemption as required by Order VII Rule 6 of the Civil Procedure Code, Cap 33 R.E 2019 which is couched in mandatory term.

He also cited in his submission the case of **Barclays Bank Tanzania Limited V. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016, CAT at DSM (unreported), **John Cornel V. A. Grevo (T) Limited**, Civil

Case No. 70 of 1998 and **Alphons Mohamed Chilumba V. Dar es Salaam Small Industries Co-operative Society**, [1986] TLR 91 to support his submission that the suit filed in the court out of time is supposed be dismissed for being time barred.

In arguing the second point of preliminary objection he referred the court to the case of **Sospeter Kahindi V. Mbeshi Mashini**, Civil Appeal No. 56 of 2017, CAT at Manza (unreported) where determination of the issue of jurisdiction was stated is fundament and it can be raised at any stage of the case. He argued that, according to the terms of the agreements entered by the parties, they all agreed in case of any dispute or controversies arising in relation to their agreements and failed to settle the same amicably it should be taken to arbitration before resorting to other methods of dispute resolution. He stated that is in line with section 12 (1) of Arbitration Act, Cap 15, R.E 2020.

He went on arguing that, as there is a dispute resolution clause in the sale agreements entered by the parties then it binds the parties to submit their dispute to the dispute resolution process agreed by the parties before resorting to the court. He referred the court to the cases of **Tanzania Motor Service Ltd and Presidential Sector Reform Commission V. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005, CAT at DSM (unreported) and **Construction Engineers and Builders Ltd V. Sugar Development Corporation**, [1983] TLR 13

where requirement to abide with an arbitration clause embodied in an agreement was emphasized.

He referred the court to section 21 (1) and (2) of the Arbitration Act which deals with appointment of an arbitrator when it is not stated in the agreement of the parties and what should be done when one of the party refuses to cooperate in appointing an arbitrator. He stated that, the act of the plaintiffs to file the matter in the court while there is arbitration clause in their agreements requiring them to settle their disputes through arbitration is not proper and the court has no jurisdiction to entertain the matter. He stated that, if there was a default in appointment of an arbitrator the procedures provided under section 21 (1) and (2) of the Arbitration Act, Cap 15 R.E 2020 should have been followed. He submitted that the plaintiffs have not exhausted the available remedy before coming to the court and prayed the objections raised by the first defendant be upheld and the suit be dismissed with costs.

In his reply the counsel for the plaintiffs submitted that, the position stated by the counsel for the defendants in relation to the first point of preliminary objection is not correct. He stated that, the fraud in the sale agreement between the parties was discovered in the year 2015 when the CAG report for the year 2014/2015 was released and revealed facts showing the Hire Purchase Agreements entered by the parties were vitiated by fraud. He argued that, after the stated discovery the plaintiffs

immediately commenced fruitless negotiations with the second defendant and arbitration process in the same year.

He stated that, thereafter Land Case No. 225 of 2016 and Misc. Land Case No. 590 of 2016 between Agnes Kosia & Others V. The Board of Trustees, National Social Security Fund were filed in the court. He stated paragraphs 18, 19, 20, 21, 22, 23 and 24 of the plaint shows the plaintiffs have all along been actively involving in litigations with the defendants from 2015 to 2022. He argued that, the stated period is supposed to be exempted from the time of filing the suit in the court pursuant to Order VII Rule 6 of the Civil Procedure Code.

He also referred the court to section 21 (1) of the Law of Limitation Act which states in computing the period of limitation the time during which the plaintiff was prosecuting proceedings founded on the same cause of action ought to be excluded. He cited in his submission the case of **Yahya Anwar Dossa and 14 Others V. Mtemi Naluyanga & Another**, Civil Case No. 184 of 2021, HC at DSM (unreported) where the court found the time spent in active prosecution of another case with due diligence was supposed to be excluded. He stated that, as the plaintiffs were actively prosecuting another case from 2016 to 2022 the stated period of time ought to be excluded from the limitation of time the plaintiffs were required to lodge the suit in the court. He based on the

stated reason to urged the court to dismiss the first point of preliminary objection with costs.

He argued in relation to the second point of preliminary objection that, the stated preliminary objection is unfounded. He stated the alleged arbitration clause is vague for being unclear on the issue of arbitral tribunal which would have entertained their dispute. He quoted the stated arbitration clause in his submission and stated it is silent on the name of an arbitral tribunal/organ which can arbitrate their dispute. He stated in order to enforce the stated clause, parties were supposed to first agree on the tribunal or organ which can arbitrate their dispute so as to vest it with requisite jurisdiction. He stated the second step is for the parties to agree on the appointment of the arbitrator. He submitted that, the plaintiffs did everything to initiate arbitration of their dispute but the defendants neither acted on the suggestions made by the plaintiffs nor consented to the appointment of the arbitral tribunal made by the plaintiffs.

It was submitted by the counsel for the plaintiffs that, as the arbitration clause of their agreement does not specify the name of the arbitral organ it is necessary for the parties to agree and consent on the name of the arbitrating tribunal so as to vest the same with jurisdiction. He submitted that, it has become impossible to enforce their arbitration

clause because the defendants have refused to cooperate so as to make the arbitration clause capable of being performed or implemented.

He stated the defendants have filed in the court their written statement of defence and counter claim against the plaintiffs which by doing so they have submitted themselves to this court by taking step in the suit. To support his argument, he referred the court to the case of **Food Corporation of India & Another V. Yadaw Engineer & Contractor**, (1982) AIR 1302. He prayed the court to find the second point of preliminary objection is also unfounded and the same be dismissed with costs and the court proceed to hear the suit on merit.

Having carefully considered the contending submissions from the counsel for the parties the court has found that, although the points of preliminary objections raised by the first defendant are three, but the Attorney for the defendants abandoned the second point of preliminary objection and argued the rest of the points. That being the position of the matter the court has found the main issue to determine here is whether the points of preliminary objections raised and argued by the Attorney for the defendants deserve to be upheld.

Starting with the first point of preliminary objection which states the suit is hopelessly time barred the court has found as rightly argued by the defendants' Attorney limitation of time to initiate any proceeding in a court is governed by section 5 of the Law of Limitation Act which states the

right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises. The court has found the cause of action in the instant suit as pleaded at paragraph 6 of the plaint is based on fraudulent sale agreements entered by the plaintiffs and the second defendant.

That being the cause of action the court has found as rightly argued by the defendants' Attorney its limitation of time is the one provided under item 7 of Part I of the Schedule to the Law of Limitation Act which states suits found on contract not otherwise specifically provided for is six years. As also provided under section 3 (1) of the same law any suit filed in the court out of the limitation period provided in the mentioned law is supposed to be dismissed. The court has found it is averred at paragraph 4 of the plaint that the sale agreements entered by the plaintiffs and the second defendant were entered between the year 2013 and 2016.

It is also averred at paragraph 13 of the plaint that, after the plaintiffs effected the initial payments and took possession of the houses, they discovered the second defendant representation of the house was tainted with fraud. It is further stated at paragraph 15 of the plaint that, the audited account ending 2015 conducted by the CAG caused them to discover the price of the houses were inflated and the counsel for the plaintiffs stated in his submission the plaintiffs discovered the agreements were vitiated by fraud in 2015.

The court has found the position of the law as stated in the case of **Ramadhani Nkongela V. Kasau Paulo**, [1988] TLR 56 is that, the right of action begins to run when one becomes aware of the transaction or act which is complained of. That being the position of the law the court has found that, from what is pleaded in the plaint as demonstrated hereinabove it is not certain as to when exactly the cause of action alleged by the plaintiffs which is based on fraud arose. There is no clear fact showing the alleged cause of action was discovered in 2013 as argued by the defendants' Attorney or in 2015 as argued by the counsel for the plaintiffs. The court has found as the suit is based on fraud then as provided under section 26 of the Law of Limitation Act, the limitation of time for filing their suit in the court is supposed to be counted from when the fraud was discovered.

Since it is not stated anywhere clearly as to when the plaintiffs started to pay the initial payments and when they took possessions of the houses sold to them the court has found the limitation of time for the plaintiffs to institute their claims in the court can be taken it arose in 2013 as argued by the defendants' Attorney or from 2015 when it was stated the plaintiffs discovered the alleged fraud after the CAG report being released. If it will be taken the cause of action arose in 2013 when the plaintiffs purchased the suit land, their suit was supposed to be filed in the court not latter than 2019 and if it will be taken, they became aware of the alleged fraud

in 2015 their suit was supposed to be filed in the court not latter than 2021.

If other facts would have not been in dispute, then it would have been taken the plaintiffs' suit which was filed in the court on 18th May, 2022 was filed in the court out of six years provided by the law as argued by the defendant's Attorney. However, the court has found the counsel for the plaintiffs argued in his submission that, after discovering the alleged fraud, the plaintiffs commenced negotiations with the defendants without success. Thereafter they filed various proceedings in the court in relation to the same cause of action which were conducted from 2016 until 2022 when the last proceeding was dismissed.

After seeing the stated argument was not controverted by the defendants because there is no rejoinder filed in the court by the defendants the court has found as provided under section 21 (1) of the Law of Limitation Act and as rightly argued by the counsel for the plaintiffs the period within which the plaintiffs were diligently pursuing the stated suits in the court is required to be excluded from the period of limitation for filing their suit in the court. The court has also found exemption of the stated period is provided under Order VII Rule 6 of the Civil Procedure Code.

The court has found that, although the defendants' Attorney stated in his submission the plaintiffs have not pleaded facts showing the stated

period is supposed to be exempted from the period of filing their suit in the court but the court has found the stated fact is pleaded at paragraph 19 of the plaint. Therefore, it is not true that the plaintiffs have not pleaded in the plaint the fact showing they are entitled to get exemption of the period they were prosecuting another proceeding in the court against the defendants.

The above finding of this court is getting support from the case of **Yahya Anwar Dossa** (supra) cited in the submission of the counsel for the plaintiffs which states the time within which the plaintiff was prosecuting another proceeding in the court is required to be exempted from the limitation of time prescribed by the law. The court is getting more support from the case of **Salim Lakhani & Two Others V. Ishfaqe Shabir Yusufali** (As Administrator of the estate of the late **Shabir Yusufali**), Civil Appeal No. 237 of 2019, CAT at DSM (unreported) where the conditions for excluding period spent by a party when he was diligently prosecuting another suit in court provided under section 21 (1) of the Law of Limitation Act were stated.

The conditions stated in the above cited case are to the effect that; exemption of time will be accepted if the earlier proceeding was rejected for want of jurisdiction or other cause of a like nature; that the earlier and the current proceeding are found on the same cause of action and the previous proceedings was being conducted diligently and in good faith.

The court has found all the conditions stated in the above cited case have been met in the present suit. That being the position of the matter the court has found if the period within which the plaintiffs were prosecuting other cases in the court is exempted from the period of filing the suit in the court, then it is crystal clear that it cannot be stated the present suit is time barred.

Coming to the second point of preliminary objection which states the court has no jurisdiction to entertain the present suit as there is an agreement for the parties to refer any of the disputes and controversies arising out of their agreements to the arbitration the court has found it is not disputed there is a clause in the parties agreements requiring the parties to refer their disputes and controversies to the arbitration. The stated clause as quoted in the submission of the plaintiffs' counsel states as follows: -

"Any dispute and controversies arising out of or otherwise relating to this agreement shall, in the first instance be settled amicably between the parties and failing such amicable settlement, the parties hereto shall resort to arbitration which shall be conducted in accordance with the Arbitration Act, 15 R.E 2002."

After reading the above quoted clause the court has found our law and specifically the Arbitration Act, Act No. 2 of 2020 recognize the agreement for arbitration entered by the parties and show how the

agreement entered by the parties can be implemented under the mentioned law. That being the position of the law the court has found as the sale agreement entered by the parties had the above quoted arbitration agreement clause, then as rightly argued by the defendants' Attorney the parties were bound by the stated agreement clause. The requirement to abide to an arbitration clause contained in an agreement entered by the parties was emphasized in the case of **Construction Engineers and Builders Ltd** (supra) where it was stated that: -

"Where it is clear that the parties to a contract have agreed to submit all their disputes or differences arising under the contract to an arbitrator the disputes must go to arbitration unless there is good reason to justify the court to override the agreement of the parties."

Nevertheless, the court has found the counsel for the plaintiffs argued in his submission that, the arbitration clause in the agreement entered by the parties in the present suit is vague for being unclear and silent on naming of the arbitrating tribunal or organ upon which they could have referred their disputes or controversies. He stated in order for the arbitration agreement to be enforced the parties must first agree on the arbitral organ so as to vest it with jurisdiction and secondly to agree on the appointment of the arbitrator. The court has also found the defendants' Attorney referred the court to section 21 (1) and (2) of the

Arbitration Act which provides for the procedures to be followed where the arbitration clause in a contract does not provide for the arbitral tribunal to be used by the parties and one of the parties refused to appoint the arbitrator.

The court has found the counsel for the plaintiffs stated in his submission that the plaintiffs did everything necessary to initiate the arbitration process as provided under the law but the second defendant was not ready to cooperate and caused implementation of the arbitration process to become impossible. The court has found what was argued by the counsel for the plaintiffs is clearly pleaded at paragraphs 22, 23 and 24 of the plaint where it is stated that, the second defendant failed to cooperate and caused implementation of the arbitration process to be impossible. The court has also found the plaintiffs have annexed in the plaint a letter from the arbitral tribunal appointed by the plaintiffs to arbitrate their dispute which is "annexure I" which states the defendants had shown they had no intention of sorting out their matter through arbitration procedure.

That being the position of the matter the court has found that, although it is true that the parties agreed their disputes or controversies would have been determined by way of arbitration and the law requires an arbitration agreement entered by the parties to be implemented as agreed by the parties, but as stated in the case of **Construction**

Engineers and Builders Ltd (supra) the act of the defendants to fail to cooperate in putting the arbitration process in practice is a good reason to justify the court to find it has jurisdiction to entertain the parties' dispute. That is because it has been established the parties dispute could have not been settled through arbitration procedure as the defendants have failed to cooperate to make the arbitration practicable.

The court has been of the view that, if the defendants wishes their dispute to be settled through arbitration process, they have a chance of doing so pursuant to section 13 of the Arbitration which allows a proceeding commenced in court to be stayed to allow parties to go to arbitration for determination of their dispute. Since the defendants have already filed their written statement of defence in the court and they have not sought for the suit to be stayed for the purpose of taking their dispute to arbitration process, the court has found as stated by the counsel for the plaintiffs the defendants have no intention of taking their dispute to arbitral organ or tribunal. Under the stated circumstances the court has found there is nothing which shows the court has no jurisdiction of entertaining the present suit.

In the light of all what is stated hereinabove the court has found all points of preliminary objections raised by the first defendant are not meritorious hence they cannot be sustained. Consequently, all preliminary

objections are hereby overruled in their entirety and the costs to be within the suit. It is so ordered.

Dated at Dar es Salaam this 16th day of March, 2023



I. Arufani

JUDGE

16/03/2023

Court:

Ruling delivered today 16th day of March, 2023 in the presence of Mr. Benitho Mandele, learned advocate for the plaintiffs and in the presence of Mr. Mgeta Frank, learned State Attorney for the defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

16/03/2023