

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 326 OF 2022**

ELIZABETH THOMAS OLOTU PLAINTIFF

VERSUS

MILTON LUSAJO LAZARO DEFENDANT

Date of last Order: 31/05/2023

Date of Ruling: 30/06/2023

RULING

I. ARUFANI, J.

This ruling is for the points of preliminary objections raised in this matter by the defendant that: -

- (a) The suit which is in respect of land is time barred by virtue of limitation.*
- (b) The subject matter of the suit, which is a joint venture, is a contract as such the suit is time barred by virtue of limitation.*

While the plaintiff is represented in the matter by Advocate Juvenalis Ngowi from Dentons EALC East Africa Law Chambers and Advocate Mpaya Kamara from Kamara & Associates, Advocates, the defendant is represented in the matter by Advocate John B. Tendwa from J. B. Advocates and Advocate Bernard Ngatunga, from GMK Attorneys. By consent of the counsel for the parties the foregoing points of preliminary objections were argued by way of written submission.

The counsel for the defendant (Hon. J. B. Tendwa) stated in his submission in relation to the first point of preliminary objection that, the suit before the court as stated at paragraph 3 of the plaint is in respect of land. He argued that, according to the provisions of the Law of Limitation Act, Cap 89, R.E 2019 (hereinafter referred as the LLA), the limitation of time for a suit for recovery of land is required to be instituted in court not later than 12 years from the time when the dispute arose.

He stated the plaintiff's claims against the defendant as averred at paragraph 3 of the plaint includes a declaratory order that, the land situated at Plot No. 121 Msasani Area in Dar es Salaam Region (hereinafter referred as the suit property) is jointly owned by the defendant and the plaintiff. He stated further that, as averred at paragraph 5 of the plaint, the plaintiff and the defendant executed a joint venture agreement (henceforth the agreement) on 3rd August, 2002. He submitted the plaintiff is relying on the stated agreement to argue the plaintiff's cause of action arose on the date of execution of the agreement which is 3rd August, 2002.

He stated that, from when the agreement was executed on 3rd August, 2002 to 14th December, 2022 when the instant suit was filed in the court it is beyond the limitation of time set by law which is 12 years as it was filed after the elapse of 20 years. He cited in his submission

section 9 (3) of the LLA which provides for when accrue of a right of action in cases of person interested in land arises. He submitted that, as the date of assurance of the joint venture took effect on the date of its execution, the plaintiff has contravened section 3 (1) of the LLA which states every proceeding instituted in court after the period of limitation prescribed in the schedule to the mentioned law shall be dismissed.

He submitted that, section 3 (1) of the LLA read together with item 22 at its column 2 of the schedule to the LLA shows the limitation of time to file a suit in court to recover land is twelve years. He supported his submission with the case of **Asha Ramadhani Hassan & Another V. Selemani Athumani Swai & Two Others**, Land Case No. 72 of 2019 HC Land Div. at DSM (unreported) where the court dismissed the suit for contravening the provisions of item 22 of the first schedule to the LLA read together with section 3 (1) of the LLA. He implored the court to dismiss the suit for contravening the above cited provisions of the law.

He argued in relation to the second point of preliminary objection that, the subject matter in the suit which is a joint venture agreement, is a contract. He submitted that, as the plaintiff is relying on the stated agreement to prove her case in respect of recovery of the suit property, then the suit is barred by limitation of time for matters relating to contract. He stated paragraph 11 of the plaint and annexure ET 02 which is joint

venture agreement shows it was executed on 3rd August, 2002. He stated further that, paragraph 5 of the plaint states the plaintiff entered into the agreement under which they jointly agreed to purchase the suit property.

He submitted that, as the joint venture agreement is a contract, the suit filed in the court on 14th December, 2022 contravened section 3 (1) and item 7 of part 1 of the schedule to the LLA which stipulates that, suit founded on contract not otherwise specifically provided for shall be instituted in court within six years. He cited in his submission the definition of the term "Joint Venture" and the term "contract" as stated in the **Black's Law Dictionary**, 11th Edition and stated that, the agreement entered by the plaintiff and the defendant has the hallmark of a contract which brings in application of the Law of Contract Act, Cap 345 R.E 2019.

He argued that, as the joint venture agreement forms the gist of the cause of action between the plaintiff and the defendant, the present suit ought to be filed in the court within six years as stipulated under section 3 (1) and item 7 of the first part of the schedule to the LLA. He submitted that, as the suit was instituted in the court on 14th December, 2022 while the agreement was executed on 3rd August, 2002 then the suit is time barred and ought to be dismissed with costs.

He supported his submission with the case of **Abdallah Anwardossa V. Road Force Limited & Another**, Civil Appeal No. 30 of 2022 HC at DSM (unreported) where the court quashed the lower court decision after finding the suit had contravened item 7 of part I of the schedule to the LLA. He also referred the court to the case of **Kishori Kalidas Pabari t/a High Land Motors V. Mbozi District Council**, Civil Appeal No. 21 of 2019, HC at Mbeya (unreported) where the issue of limitation of time in relation to contract was discussed at length and the court dismissed the suit which had contravened item 7 of Part I of the schedule to the LLA. He relied on the above submission and authorities to implore the court to dismiss the plaintiff's suit with costs.

In reply the counsel for the plaintiff stated in their submission that, the points of preliminary objections raised by the defendant are misconceived and baseless. They stated in relation to the first point of preliminary objection that, the counsel for the defendant has not specifically show when the cause of action in the instant suit arose so as to do the computation of time to establish whether or not the matter is time barred. They stated that, while they do not dispute that the agreement was executed on 3rd August, 2002 as pleaded in paragraph 5 and 11 of the plaint, but submitted the plaintiff's right of action did not arise on the date of executing the stated agreement.

They cited in their submission section 5 of the LLA which states the right of action in respect of any proceedings shall accrue on the date on which the cause of action arises. They stated it should be noted that, the right of action does not necessarily accrue on the date on which the contract is signed. They stated there are factors which must be fulfilled for the right of action to accrue. They argued that, submitting the cause of action in the present suit arose on the date of execution of the agreement suggests the breach of the agreement occurred on the date of signing of the agreement.

It was their submission that is a matter of evidence which makes the preliminary objection to base not on pure point of law. The counsel for the plaintiff submitted the cause of action arose on 17th January, 2016 as expressly pleaded in paragraph 29 of the plaint which states it is the date when the plaintiff became aware that the defendant had fraudulently transferred the suit property to himself in exclusion of the plaintiff. They stated that, there is no any other statement in the plaintiff's plaint showing when the cause of action accrued other than paragraph 29 of the plaint.

They argued that, in case the defendant contends or suggests another date for the arose of cause of action other than the one pleaded in paragraph 29 of the plaint it will lead into rival factual position which will require proof and determination as to when the cause of action arose.

They stated that will cause the purported objection to lack essential attributes of being preliminary objection stated in the case of **Mukisa Biscuit Manufacturing Company Limited V. West End Distributors Limited** [1969] EA 696 which states how and under what circumstances a point of preliminary objection may be raised.

It was further argued by the counsel for the plaintiff that, the facts of the present suit as stated at paragraphs 3, 5 and 29 of the plaint alleges the commission of fraud where by the plaintiff avers the defendant transferred ownership of the suit property to himself through fraudulent means. He submitted that, section 26 (a) and (b) of the LLA expressly provides that, the right of action in a proceeding based on fraud begin to run from when the plaintiff discovered the fraud or mistake. He stated the defendant never disclosed to the plaintiff that he had transferred the suit property to himself contrary to their agreement.

They stated the defendant continued to make the plaintiff is the co-owner of the suit property and continue to sign lease agreement in respect of the suit property until when she discovered the stated fraudulent transfer. They referred the court to the case of **Msae Investment Co. Ltd V. Exim Bank Tanzania Ltd**, Civil Case No. 191 of 2021, HC at DSM (unreported) where it was stated cause of action in the cases of fraud and mistake arose when the plaintiff discovers such fraud or mistake. They

stated that, as the plaintiff has averred in paragraph 29 of the plaint that she discovered the fraud on 17th January, 2016 and the subject matter is a land dispute, then as provided under item 22 of Part I of the schedule to the LLA the suit which was filed in the court on 14th December, 2022 is well within the period of limitation.

They further submitted that, section 9 (3) of the LLA cited by the counsel for the defendant as a provision of the law providing for limitation of time for a suit of this nature is not applicable to this particular case. They stated in any event that does not change the position that the right to sue in case involving fraud starts to run from when the fraud is discovered. They submitted that, section 3 (1) of the LLA is applicable only when a matter is filed in court out of the limitation period. They submitted further that, as the cause of action arose on 17th January, 2016 which is well within the period of twelve years the first limb of the preliminary objection should be dismissed.

The counsel for the plaintiff argued in relation to the second limb of the preliminary objection that, the issue is what is the subject matter of the joint venture agreement entered by the parties. They argued paragraph 5 of the plaint states the agreement was for the joint purchase of the suit property. They further argued that, paragraph 11 of the plaint states the agreement was to provide for contribution and extent of the

parties right in the suit property. They submitted it is not possible to distinguish the agreement creating rights of ownership of land from the land.

They stated that, from the pleaded facts the subject matter of the joint venture agreement is interest in land. They argued that, under that circumstances the matter before the court is a land matter and the cause of action involves fraudulent transfer of the suit property to the defendant himself contrary to the joint venture agreement. They submitted the cause of action arose when the plaintiff became aware of the fraud and therefore the matter was filed in the court within the time. They concluded their submission by stating the preliminary objection raised by the counsel for the defendant has no merit and prayed the court to dismiss the same with costs.

In their rejoinder the counsel for the defendant reiterated their submission in chief and stressed that, the cause of action arose on 17th January, 2016 when the agreement was executed. They stated it was the duty of the plaintiff to make follow up of her right after signing the agreement. They argued that, as the plaintiff's claim is basing on fraudulent transfer of the suit property to the name of the defendant, the plaintiff was required to join the original owner of the suit property who

was Air Tanzania Corporation and the Registrar of Titles who transferred the suit land into the name of the defendant.

As for the argument that the preliminary objection is not based on pure point of law, they stated the issue of limitation is a matter of law. They submitted the case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) is not applicable in the present case. They argued that, the defendant has averred in his written statement of defence that he is the sole owner of the land in dispute and there has never been a joint account by the plaintiff and the defendant. At the end they maintained their prayer that the plaintiff's suit be dismissed with costs.

After painstakingly considered the rival submissions from the counsel for the parties in relation to the points of preliminary objection raised in the matter by the defendant the court has found the issue for determination in this matter is whether the points of preliminary objection raised by the defendant deserve to be sustained. In determine the stated issue I will start with the first point of preliminary objection which states the suit which is in respect of land it is time barred. Thereafter I will proceed with the second issue which states as the suit is arising from joint venture agreement then it is arising from a contract which by virtue of the LLA is time barred.

Starting with the first point of preliminary objection the court has found as rightly argued by the counsel for the parties, paragraphs 3, 31 read together with the relief clause founded on the plaint shows the plaintiff's cause of action is based on land as one of her claims of the plaintiff is to be declared is a rightful joint and co-owner of the suit property with the defendant. That being the cause of action for the plaintiff's claims, the court has found the limitation of time for claim of that nature is governed by item 22 of part I of the schedule to the LLA which requires claim of land to be instituted in court within twelve years from when the cause of action arose.

The stated position of the law has been observed by our courts in various cases including the case of **Asha Ramadhani Hassan & Another** (supra) cited in the submission of the counsel for the defendant. Another case where period of limitation for instituting in court a suit relating to land was considered is **Barelia Karangirangi V. Asteria Nyalwambwa**, [2019] TLR 142 where the Court of Appeal held inter alia that, item 22 of Part I of the schedule to the LLA prescribes the twelve years limitation period within which to institute an action in court to claim back the land. The question to ask here is from when the stated period of twelve years is required to start running.

The court has found the counsel for the defendant argues the

provision of the law providing for when right of action in cases of person with interest in land arises is section 9 (3) of the LLA. After going through the stated provision of the law the court has found as rightly argued by the counsel for the plaintiff the stated provision of the law is not applicable in the present suit. The court has come to the stated finding after seeing part of the stated provision of the law which would have been said is relevant to the plaintiff's suit is providing for limitation of time for a person who has been assured, he is in possession of the land and there is no other person who has been in possession of the stated land by virtue of the assurance. It states the period of limitation of time is deemed to have accrued on the date when the assurance took effect.

The court has also come to foregoing finding after failing to see anywhere in the plaint filed in this court by the plaintiff stated the plaintiff has ever been assured the suit property is in her possession and it has not been in possession of any other person by virtue of assurance or otherwise than the joint venture agreement, she averred to have entered with the defendant to possess the suit property jointly. To the contrary the court has found the appropriate provision of the law which provides for when the cause of action of the claim of the nature of the claims of the plaintiff accrued is section 5 of the LLA which states as follows: -

"Subject to the provisions of this Act the right of action in respect

of any proceeding, shall accrue on the date on which the cause of action arises."

That being the date on which the plaintiff's cause of action is required to be counted it has begun to run, the court has found the crucial question to ask here is when the plaintiff's cause of action in the matter at hand arose. The court has found while the counsel for the defendant submits the cause of action arose on 3rd August, 2002 when the joint venture agreement was executed by the parties, the counsel for the plaintiff submits the cause of action arose on 17th January, 2016 when the plaintiff became aware the defendant had fraudulently transferred ownership of the suit land to himself.

The court has found that, as the claim of the plaintiff as stated at paragraph 29 of the plaint is based on fraud the court is required to see when the cause of action based on fraud is required to start running. The court has found as rightly argued by the counsel for the plaintiff section 26 (a) and (b) of the LLA states clear when the cause of action based on fraud begins to run. The cited provision of the law states as follows: -

"Where in the case of any proceeding for which a period of limitation is prescribed-

- (a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;***

(b) *the right of action is concealed by the fraud of any such person as aforesaid; or*

(c) *the proceeding is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered. [Emphasis added]

From the wording of the foregoing quoted provision of the law and specifically the bolded parts it is crystal clear that, when a proceeding is based on a fraud alleged to have been committed by the party against whom the proceeding is being prosecuted, the period of limitation begins to run from the date when the plaintiff discovers the fraud. The stated view of this court is getting support from the case of **Idrisa Ramadhani Mbondera V. Allan Mbaruku & Another** Civil Appeal No. 176 of 2020, (unreported) where the Court of Appeal held inter alia that: -

"..... in any claim for recovery of land, the 12-year limitation period prescribed under item 22 of part I of the said Act, starts running against the claimant when he gets knowledge of the disposition of the ownership"

The court has been of the view that, even if it will be accepted the period of limitation of time for the plaintiff's claim is governed by section 9 (3) of the LLA, then the limitation of time for the plaintiff's cause of action for the claim of recovery of land is supposed to start counting from 17th January, 2016 when she became assured that the defendant had

registered the suit property into his own name with exclusion of the plaintiff and not when the joint venture agreement was signed. As the plaintiff has averred at paragraph 29 of the plaint that it is on 17th January, 2016 when she discovered or became assured the defendant had fraudulently transferred the suit property to himself with exclusion of the plaintiff, the period of limitation for the plaintiff's suit is supposed to start being counted from when she became aware or assured of the alleged fraudulent act of the defendant which is on 17th January, 2016.

The court has considered the argument by the counsel for the defendant that the plaintiff's cause of action is supposed to be taken it accrued on 3rd August, 2002 when the parties executed the joint venture agreement but failed to see any merit in the stated argument. The court has come to the stated finding after seeing that, as rightly argued by the counsel for the plaintiff it will be ridiculous to say or think the plaintiff cause of action would have arisen on the date of execution of the joint venture agreement while there is nothing pleaded in the plaintiff's plaint showing the plaintiff would have discovered the defendant's fraudulent act in the joint venture agreement entered by them.

The court has considered another argument by the counsel for the defendant that the plaintiff had a duty to make follow up of her right from when she executed the joint venture agreement to the end but find the

issue as to whether the plaintiff was making follow up of her right or not is an issue which cannot be determined without requiring evidence from the parties. If determination of the stated issue requires evidence from the parties to determine the same it is obvious that, as held in the case of **Mukisa Biscuit Manufacturing C. Ltd** (supra) it cannot be said the first point of preliminary objection satisfies the qualification of being raised and determined as a point of preliminary objection.

Therefore, the court has come to the settled view that, the plaintiff's cause of action in the matter at hand arose on 17th January, 2016 when she discovered the fraudulent act of the defendant of transferring ownership of the suit property to himself in exclusion of the plaintiff and not on 3rd August, 2002 when the joint venture agreement was executed. After been satisfied the period of limitation of time for instituting in court a claim for recovery of land is twelve years from when the cause of action arose, the court has found from when the plaintiff alleged to have discovered the defendant had fraudulently transferred the ownership of the suit property to himself to when the present suit was filed in the court it is about six years and some months which had passed.

The stated finding moves the court to come to the settled finding that, as rightly submitted by the counsel for the plaintiff the first point of preliminary objection raised by the defendant that the plaintiff's suit is

time barred is misconceived and baseless as the suit was filed in the court well within the period of twelve years prescribed by the law for the claim of recovery of land.

Coming to the second point of preliminary objection the court has found it states that, as the subject matter in the present suit is based on a joint venture agreement then it is a contract which its period of limitation of time for being filed in court as provided under item 7 of Part I of the schedule to the LLA is six years. The court has found it is true that the basis for the plaintiff's allegation that she was in joint ownership of the suit property with the defendant is a joint venture agreement she averred she executed with the defendant. To the view of this court that is a contract which its period of limitation for being instituted in court is governed by the above stated provision of the law.

That being the position of the matter the court has been of the view that, as it has already found the cause of action in the present suit accrued on 17th January, 2016 when the plaintiff stated to have become aware of the fraudulent act of the defendant, then it would have been said the plaintiff's suit basing on the allegation of breach of the stated joint venture agreement was supposed to be filed in the court within six years from when the plaintiff became aware of the alleged breach of their agreement. If it will be counted from 17th January, 2016 to 14th December, 2022 when

the present suit was filed in the court it will be found the suit was filed in the court beyond six years as the suit ought to be filed in court not later than 16th January, 2022.

However, the court has found that, as correctly argued by the counsel for the plaintiff the stated joint venture agreement was to provide for the joint purchase of the suit property by the plaintiff and the defendant and the extent of the contribution and rights of the parties in the suit premises. That being the position of the matter the court has found that, the subject matter of the parties' agreement is interest on land which its period of limitation for being filed in the court is twelve years. To the view of this court the stated agreement cannot be separated from the land matter averred in the plaint and say the suit is time barred.

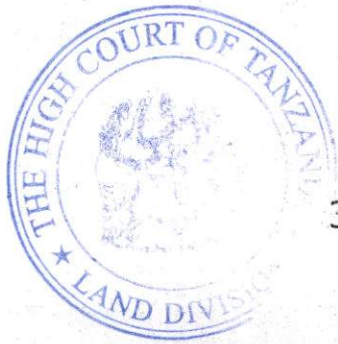
Even if it will be said the stated causes of action would have been separated but the court has found it is averred at paragraph 29 and 30 of the plaint that, after the plaintiff became aware of the alleged fraud she filed in the court a suit which was registered as Land Case No. 62 of 2016 which was well within six years for the suit relating to contract was supposed to be filed in the court. The stated case was withdrawn from the court on 7th, November, 2022 with leave to refile the same within thirty days from 14th November, 2022 and the present suit was filed in the court 14th December, 2022 which was well within the time given by the

court. That being the position of the matter the court has failed to see how it can be said the present suit is time barred.

The court has found the counsel for the defendant have raised in their rejoinder the issue of non-joinder of the Air Tanzania Corporation who was the vendor of the suit property to the parties in the matter and the Registrar of Titles who is alleged has transferred the suit property to the defendant in the present matter. The court has found this is a new point which was neither raised in the notice of preliminary objection raised by the defendant nor argued in his submission in chief. To the view of this court raising of the stated new point of preliminary objection in the rejoinder submission is improper and the court cannot entertain and determine the same in this ruling because the plaintiff has not been accorded chance of responding to the same.

Basing on the foregoing stated reasons the court has found both points of preliminary objection raised in the present suit by the defendant are misconceived and baseless as the plaintiff's suit has not violated any provision of the law of Limitation Act cited in the submission of her counsel. Consequently, the preliminary objections are hereby overruled for being devoid of merit and the costs to follow the event. The conduct of the matter to proceed on merit. It is so ordered.

Dated at Dar es Salaam this 30 day of June 2023.



I. Arufani
I. Arufani
JUDGE
30/06/2023

Court:

Ruling delivered today 30th day of June, 2023 in the presence of Ms. Saudia Kabora, learned counsel for the plaintiff and in the presence of Mr. John B. Tendwa, learned advocate for the defendant. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
30/06/2023