

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

LAND CASE NO 46 of 2023

TANZANIA PORTLAND CEMENT PUBLIC

LISTED COMPANY.....PLAINTIFF

VERSUS

TANZANIA SOCIAL ACTION FUND1ST DEFENDANT

HON. ATTORNEY GENERAL2ND DEFENDANT

RULING

Date of last Order:10/08/2023

Date of Judgment:01/09/2023

K. D. MHINA, J.

This is the ruling regarding the preliminary objections raised by the defendants that the suit is time-barred.

The controversy between the parties in this suit is the plaintiff's claims against the first Defendant for vacant possession of the property located at Plot No. 2454/1/118, Malindi Wharf Depot at Dar es Salaam with Certificate of Title No. 48373, together with all rents due and owing, including interest, from September 2013 till January 2014 and from January 2014 till date of instituting this suit, amounting to TZS 4,374,422,803/=

The above claims triggered the plaintiff to seek relief from this Court. The plaintiff is now seeking Judgment and Decree jointly and severally against the defendants for the following declaratory orders;

- I. A declaration that the 1st defendant is in breach of the terms and conditions of the lease agreement;*
- II. Payment of unpaid rent from September 2013 to January 2014 and January 2014 until the date of filing of this Suit being TZS. 4,374,422,803/=*
- III. An order for vacant possession against the 1st defendant from the suit property;*
- IV. Payment of unpaid rent from the date of filing of this suit up to the date of judgment at the rate of TZS 2,000,000/= per month*
- V. Post-judgment interest on TZS 2,000,000 per month at the Court rate of 7% per annum;*
- VI. Payment of interest on the total amount of TZS 4,374,422,803/= from the date of judgment to the date of final satisfaction of the decree at the court rate of 7% per annum;*
- VII. The Defendants be Ordered to pay the costs of this Suit;*
- VIII. and Such further Orders and reliefs this Court deems just, equitable and convenient to grant.*

The defendants countered the allegations, and in their joint written statements of defence, they disputed the claims.

On vacant possession, the defendants allege that via letter dated 19 March 2014, the Treasury Registrar informed 1st defendant that the privatization of Tanzania Portland Cement Company Limited (TPCC) did not include the property that was owned by TPCC prior to its privatization. Since the said property was still under Government ownership, TPCC was not entitled to charge/impose rental fees because doing so would be against the law. After that, the 1st defendant refrained from paying rent. Therefore, the claim on vacant possession was disputed on that basis.

On the claims for rent, the defendants contend that on 1 February 2010, the plaintiff and the 1st defendant entered into a lease agreement for two years, which was then renewed on 01 February 2012. But for the period that commenced in January 2014, the lease agreement was not renewed after the 1st defendant refused to enter into another contract with the plaintiff after realizing that the Government owned part of the premises.

Moreover, despite countering the plaintiff's claims in the written statement of defence, the defendants confronted the plaintiff with a notice of a preliminary objection that canvassed only one ground, namely;

"This suit is hopelessly time-barred".

The preliminary objection was argued by way of written submissions.

The plaintiff was represented by Mr. Timon Vital, a learned advocate, while the defendants were represented by Mr. Daniel Nyakiha, Janeth Madulu and Fedrick Fungamtama, both learned State Attorneys.

Briefly, in support of P.O, the State Attorney submitted that the plaintiff's cause of action is for recovery of arrears of rent as per paragraph 4 of the plaint, which reads;

"That, the Plaintiff is the legal owner of landed property situated at Plot No. 2454/1/118, Malindi Wharf Depot at Dar es Salaam with Certificate of Title No.48377('the Property'). The Plaintiff claims against the First Defendant for vacant possession of the Property together with all rents due and owing, including interest from September 2013 till January 2014 and from January 2014 till date of instituting this suit, amounting to TZS 4,374,422,803 and costs of this Suit".

Therefore, there is no dispute over land ownership; instead, the claims are based on non-payment of rent arrears.

Further, they submitted that the period within which the cause of action arose (i.e. the period in which the plaintiff became aware of the 1st defendant's breach) can be ascertained in paragraph 6 of the plaint, which reads that:-

"Upon expiry of the term of the First Agreement on 31st January 2012, The Plaintiff and the First Defendant renewed the lease agreement for a further period of two years and was on similar terms which was to end in January 2014 (Second Agreement) On the Second Agreement the first defendant only paid the rent up to September 2013 ..."

Then they submitted that, from the quoted paragraph, September 2013 was when the 1st defendant made the last payment, thereby being the period from which time to bring an action for rent payments arose.

Furthermore, they submitted that according to Item 13 of Part I of the Schedule to the Law of Limitation Act, the time limit for the institution of suits for recovery of rent arrears is six years.

Therefore, the Plaintiff should have filed this matter on or before August 2019. However, this suit was filed on 01 March 2023, which is hopelessly out of time for more than 1271 days (3 years, five months, 22 days) after the period prescribed in the Act had lapsed.

On the way forward, they submitted that this suit should be dismissed under Section 3(1) of the Law of Limitation Act.

To bolster their argument, they cited the decisions of the Court of Appeal in *Hezron Nyachia vs. Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania Workers Union*, Civil Appeal No. 79 of 2001 (unreported), where at pages 9-10, it was held that;

"The Law of Limitation has a provision for the consequence where a proceeding is instituted out of time without leave of the Court. It is Section 3. Under that provision, that is, Section 3, the consequence is that, such proceeding shall be dismissed whether or not limitation has been set up as a defence".

And in *Yussuf Vuai Zyuma vs. Mkuu wa Jeshi la Ulinzi TPDF and two others*, Civil Appeal No. 15 OF 2009 (unreported) at page 6 where it was held that;

"We entirely agree with Mr. Malata. The Appellant did not institute the suit within the prescribed time of six months. By instituting the suit beyond the time allowed by law, the Appellant was time-barred. The courts below ought not to have entertained the matter. The lower Courts proceedings were a nullity."

In response, Mr. Vitalis submitted that the preliminary objection is misconceived based on the following points of law.

He submitted that paragraph 5 of the plaint indicated that the rent claimed by the plaintiff was and still is payable on a monthly basis. Every month the rent was not paid constitutes an independent breach of lease agreement, giving rise to a fresh cause of action in terms of 7 of the Law of Limitation Act. The section provides that;

"Where there is continuing breach of contract or a continuing wrong independent of a contract, a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be continues."

Regarding section 7 of the Law of Limitation Act, Mr. Vitalis submitted that the provision has been subject to interpretation in various cases. The Court of Appeal has consistently held that if the default is recurring, every default is independent and gives rise to a fresh cause of action. To bolster his argument, he cited **Lausa Athuman Salum vs. Attorney General** [2011] TLR 74 **Stanbic Bank Tanzania Limited v. M/S Tradexim Company Limited** [2022] TZCA 757 (30 November 2020) at page 15 and the case of **Zaidi Baraka and two others v. Exim Bank (Tanzania) Limited**

(19 October 2020) at p. 15. In the last two cases cited above, the Court of Appeal defined the phrase "*continuing breach*" in section 7 of the Law of Limitation Act as a recurrent breach that is not a result of a single act but rather a breach that continues to exist over several times. The breach in this suit continues every month. The rent is not been paid since September 2013 to date.

He further stated that, besides the above, paragraphs 4 and 16 of the plaint also show that the plaintiff claims a combination of reliefs. Therefore, he argued that in deciding whether the suit is time-barred, the court should look at the whole suit as framed, including the reliefs sought, because the suit can combine more than one cause of action or reliefs. Where more than one relief is pleaded in a suit, and only one or just some of the reliefs sought are time-barred, but others are not, it is wrong to dismiss the entire suit for being time-barred. He substantiated his argument by citing *Lausa Athuman Salum* (supra).

Therefore, he submitted that part of the claim, which is more than six years old, is the claim for rent from September 2013 to December 2016. The rest of the reliefs sought are claims for rent accruing from January 2017 to date and vacant possession of the suit property are within the prescribed period of limitation. Ergo, it would be wrong for the court to dismiss the

entire suit because part of the rent claimed, accrued between September 2013 and December 2016, is time-barred.

He submitted that since the default to pay rent was a continued breach that occurs every month, the suit is saved by section 7 of the Law of Limitation Act. The issue of time limitation could only affect the amount of rent accrued between September 2013 and December 2016. Therefore, it would be improper to dismiss the entire suit because part of the claim is time-barred.

In rejoinder, State Attorneys submitted that section 7 of the Law of Limitation Act is not relevant to this suit since the section is applicable where there is a continuing breach of contract or a continuing wrong independent of contract, a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong as the case may be, continues.

In the instant suit, the plaintiff emailed the defendant and asked about the renewal of the agreement and the defendant, on 12 January 2014, replied with no intention of renewing the agreement. And by that, there was no other contract between the parties.

They further stated that the plaintiff was fully aware of the rent that the defendant did not pay after the end of the second agreement, and he only

sent the notice in June 2017 to vacate the premises so he could lease to another person. Therefore, since the rent required to be paid was for the second agreement, from 2012 to 2014, there is no continuing breach.

To bolster the submission, they cited *Lindi Express Ltd vs. Infinite Estate Limited*, Commercial Case No. 17 of 2021 (Tanzlii), where it was held that;

"In an action for a breach of contract the cause of action is the breach. Accordingly, such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within the six years of action brought."

In addition, they submitted that, since the parties had no other agreement from 2014, the plaintiff could not rely on the continuing breach under section 7 of the Law of Limitation Act. On this, they cited *Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Other*, Commercial Case No.42 of 2020 (unreported), where the Commercial Court, relying on the Indian Case of *The Rehabilitation Plantations Ltd vs. P.S. Ansary*, when defined what constitutes a continuing breach. It was held that:

"The term 'continuing breach' is intended to apply to contracts obliging one of the parties to adopt some given course of action during the continuance of the contractual obligation. But a

continuing breach or wrong is different from a continuing damage.

The former gives rise to a fresh cause of action but not the latter."

Having considered the pleadings and the written submissions made by the learned counsel for the parties, the issues raised by the parties are as follows:

- i. Whether or not the suit is time-barred.
- ii. Whether there was a continued breach of contract of lease.
- iii. Whether there is more than one claim in this suit.

For clarity, I will determine the first and second issues jointly, and the entry point is Item 13 of Part I of the Schedule to the Law of Limitation Act, which provides that the time limit for the institution of a suit for recovery of rent arrears is six years.

According to the plaint and its annexures, the contractual relationship started on 1 February 2010, whereby the parties signed a lease agreement for two years, ending on 31 January 2012. On 31 January 2012, they renewed the contract for another two years until January 2014. However, the 1st defendant only paid the rent until September 2013 (paragraph 6 of the plaint).

After the expiration of that lease agreement in 2014, the 1st defendant declined to renew and sign another loan agreement.

That means the 1st defendant did not fully execute the second lease because he paid only until September 2013. Also, he did not sign another lease agreement after the expiration of the second lease agreement. That was why the plaintiff prayed for the payment of unpaid rent from September 2013 to January 2014 and January 2014 until the filing date of this suit.

The facts above caused the “tug of war” between the parties on whether the facts constitute a continued breach of contract or the claim is time-barred.

To start with the continuous breach of contract. This is a concept under the breach of contract. It occurs when a party remains in breach of a continuing obligation in a contract every day, and a new cause of action and corresponding limitation period arises.

In the cited case of *Lausa Athuman Salum (Supra)*, the Court of Appeal elaborated on the continuous breach of contract concept. It held that;

"One such continuous wrong, it has been held, as detinue. As Lord Diplock L.J of the Court of Appeal of England observed in General and Finance Facilities Ltd vs. Cooks Cars (Romford) Ltd (1963) 1 WLR 644; at p. 648:

.....is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up to the goods and continues until delivery up of the goods or judgment in action for detinue”.

Again, in the cited case of Zaidi Baraka (Supra), the Court of Appeal clearly defined and elaborated the term. It held that;

"Defining the expression to continue as used in section 22 of the Indian Limitation Act, 1963, which is similar to section 7 of our Law of Limitation Act, the learned author of the book Law of Limitation, 2nd Ed; 2012 Reprint, Modern Law Publishers, New Delhi. Alliahabab, states;

"This section speaks of a continuing breach of contract and a continuing tort without defining what those expressions mean. Therefore, one has to resort to the general law, where the expression means nothing more than that the breach or the wrong is not the result of neglect or default, which continues to exist over a number of days so that fresh neglect and defaults are deemed to occur every day giving rise to a fresh cause of action."

In the cited case of Lindi Express Ltd (Supra), this Court held that;

"Cases involving continuing or successive breaches include those cases in which there is a promise to pay periodically, as, for instance,

payment of rent, annuities, interest, maintenance, etc. In case of a continuing tort, for instance, a fresh period of limitation begins to run at every moment of the time during which the breach or tort, as the case may be, continues”.

Flowing from the above decisions, it is clear that there is no continuing breach of the agreement in this matter. This is because;

One, the 1st defendant breached the second agreement by not paying the rent as agreed in the contract. Instead of paying the rent until January 2014, he paid until September 2013. And that was the end.

Two, there was no lease contract between the 1st defendant and the plaintiff in 2014 after the expiration of the second lease agreement.

Further, the plaintiff was aware of the two issues above as when he communicated with the 1st defendant; it was clear that the 1st defendant declined to pay the remaining rent and refused to sign another lease agreement for the reason that the Government owned the premises.

The discussion above led me to find that;

First, there was no promise on the part of 1st defendant to pay the remaining rent or to enter into another lease agreement. I hold so because one of the characteristics of the continuing breach is the promise to pay periodically. See *Lindi Express Ltd (Supra)*.

Second, after the expiration of the second lease, the 1st defendant neither signed another lease nor paid the rent from January 2014. This automatically led me to hold that the second lease agreement was breached for failing to pay rent after September 2013. After that, in 2014, parties had never signed a lease agreement or created a periodic lease agreement under Section 82 (1) and (2) the Land Act, Cap 113 R: E 2019 [“the Land Act”].

The section reads;

*"82. (1) Where a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, **all the obligations of the lessee under the lease continue in force** until such time as the lessee ceases to be in possession of the land.*

*(2) A lessor who **accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired** is not, by reason only of that fact, to be taken as having given **consent to the lessee remaining in possession** of the land or as having given upon any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease but where the lessor continues for two months to accept rent from a tenant who remains in possession after the termination*

of the lease, a periodic lease from month to month shall be deemed to have come into force". [Emphasis provided]

Therefore, the breach in the instant suit does not qualify as a continuing breach as elaborated in *Lausa Athuman Salum, Zaidi Baraka and Lindi Express Ltd (Both Supra)* because there were no fresh defaults or breaches to give rise to the new causes of actions.

From above, section 7 of the Law of Limitation Act is not fit and applicable in the circumstances and facts of this suit. Therefore, as the counsel for the defendants had submitted, it cannot benefit the plaintiff since there was no lease agreement between the parties from 2014.

Having held as above, the applicable law here is section 5 of the Law of Limitation Act, which provides that;

"Subject to the provisions of this Act, the right of action in respect of any proceedings shall accrue on the date on which the cause of action arises".

As per the plaint, it is clear that September 2013 was the time when the 1st defendant made its last payment. Therefore, that is the period from which time to bring an action for payments of rent arises and time limitation starts to accrue.

Therefore, since the limitation to file claims for rent is six (6) years, then for the cause of action that arose in September 2013 in this matter, which was filed on 1 March 2023, the claims are time-barred for the reasons elaborated above.

On the way forward, the parties had a “battle” of arguments regarding the proper remedy. On his side, the counsel for the defendant submitted that the suit should be dismissed. On the other hand, Mr. Vitalis had submitted that since there are two claims, i.e., rent arrears and vacant possession, this Court should not dismiss the whole suit. Only the time-barred claim should be dismissed.

Mr. Vitalis based his argument on the cited case of **Lausa Athuman Salum** (supra), where the Court of Appeal held that where more than one relief is pleaded in a suit, and only one or some of the reliefs sought are time-barred, but others are not, dismissing the entire suit for being time-barred is wrong.

I agree with the argument raised by Mr. Vitalis. That is the principle enunciated in the cited case of Lausa Athuman Salum (supra). For ease of reference, I quote what was held by the Court of Appeal (at page 11)

"We accept this statement of the law as correct. It means that where, in a suit, there are more than one claim based on different causes of action, and one or some are found to be barred by limitation but others are not, it is wrong to dismiss the whole suit as time-barred".

The question is whether or not the claims of vacant possession are within time or not. In the submissions, while the counsel for the plaintiff submitted that the claims were within time, the counsel for the defendant did not submit anything regarding vacant possession.

On this, the claims for delivery of vacant possession are within the suit for recovery of land. The law is clear under Item 22 of Part I to the Schedule of the Law of Limitation Act, that the time limit to institute a claim is twelve (12) years from the date when the cause of action accrued.

As I alluded to earlier, the cause of action in this matter arose in September 2013; therefore, the claim with a limitation of twelve years means that claims are still within time.

Therefore, in this case, since the claim for vacant possession of the suit property is within the prescribed period of limitation, it would be wrong for the court to dismiss the entire suit.


From the above discussion, on the way forward, as per the cited case of **Lausa Athuman Salum** (supra), the claims for rent arrears are time-barred; therefore, I dismiss the same. On the other, since the claims for vacant possession are still within time, they are retained.

In conclusion, I expunge all paragraphs in the pleadings (relief sought inclusive) regarding the claims of rent arrears and retain the paragraphs regarding the claims for claims of vacant possession.

In the upshot, the preliminary objection raised succeeded to the extent elaborated above.

I order accordingly.




K. D. MHINA
JUDGE
01/09/2023