

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 9 OF 2023

BRIGHTON SHEDRACK KANSARI PLAINTIFF

VERSUS

ABDALLAH JUMA MWERI (Administrator of the estate

of the late **MWERI ISMAIL JUMA1ST DEFENDANT**

AMINA SHOKO 2ND DEFENDANT

RULING

22nd June 2023 & 12th July 2023

L. HEMED, J.

The plaintiff filed this suit praying for judgment and decree against the defendants jointly and severally as follows: -

*" a. An order compelling the defendants to physical hand over premises on Plot No.321 registered under Certificate of Title No.105402 situated at **Kurasini Area Temeke Municipality**, in Dar es Salaam unconditional or alternately;*

b. An order for reimbursement of the sum of Tanzania Shillings Two Hundred Twenty Million (TZS 220,000,000.00) being the advance rent paid by the plaintiff to the defendants failure;

c. Compensation of the loss of use of the premises to the tune of **Tanzania Shillings One Hundred Fifty Million (TZS 150,0000.00)**;

d. An order compelling the defendant jointly and severally to pay interest on item (b) herein above at the rate of 21% from 25th of April, 2017 till date of physically hand over the premises on Plot No. 321/14 registered under Certificate of Title No. 105402 situated at **Kurasini Area in Temeke Municipality**, in Dar es Salaam;

e. Payment of General Damage to be assessed by Court;

f. Payment of interest on the decretal sums at the Court rate of 12% p.a from the date of Judgement to the date of fully and final satisfaction of the decree;

g. Costs of the Suit;

h. Interest on costs at the rate of 7% per annum from the date of Judgement till fully and final payment thereof **AND**

i. Any other reliefs, as this Honourable Court deems fit, proper and just."

The 2nd defendant disputed all the claims through her written statement of defence (WSD). In her WSD, she raised a preliminary objections on the point of law to the effect that: -

" i. The jurisdiction of this court is ousted by clause 4 of the lease agreement between the plaintiff and the 1st defendant, dated 28/09/2016 (i.e Annexure PL – 1.

ii. In the view of paragraph(s) 8.0, 14.0 and 15 of the plaintiff's plaint, this suit is time barred."

The preliminary objections were heard by way of written submissions. Parties promptly filed the submissions pursuant to the schedule directed by the court. At all the material time, **Mr. Innocent Tairo**, advocate represented the plaintiff while the 2nd defendant enjoyed the service of **Mr. Gabriel M. Maros**, advocate.

Submitting in support of the first limb of the preliminary objection, Mr. Maros argued that, the jurisdiction of this court is ousted by clause 4 of the lease agreement between the plaintiff and the 1st defendant, which makes it mandatory for parties in the lease agreement to attempt to resolve the dispute amicably between them. He stated that, the plaintiff has not shown any information or proof of his attempt of

referring this matter to the arbitration prior to coming to this court, contrary to section 7(1) of the Civil Procedure Code, [Cap. 33 R.E 2019.] To bolster his argument, he cited the case of **Aque Associates Limited vs Bahari Beach Hotel, Civil Case No.127/2016, High Court (Dar Es Salaam District Registry) Unreported** and prayed for the matter to be struck out with costs.

On the second limb of preliminary objection, Mr. Gabriel submitted that, this suit emanates from the lease agreement. He stated that, the cause of action arose in 2016 while this matter was filed in this court on 06/01/2023, that is, about 7 years. He averred that, since the suit is based on breach of contract, this suit is time barred as per Item 7 of Part I of the Law of Limitation Act [Cap 89 RE 2019.] He prayed that the suit be dismissed with costs.

Arguing in response to the first point of preliminary objection, Mr. Tairo referred to section 15(1) and (3) of the Arbitration Act [Cap 15 R.E 2022] and submitted that, the 2nd defendant ought to have applied to this court for stay of proceedings pending reference to arbitration and not to raise the preliminary objection. He argued that, the 2nd defendant through his counsel has appeared to this court several times and has already taken step by filing the Written Statement of Defence and

accordingly his right to raise this preliminary objection has been extinguished. To cement his argument, he cited the case of **Independent Power Tanzania Limited Vs Vip Engineering and Marketing Limited** [2004] T.L.R 372.

He stated that, the ouster clause cannot in anyway oust powers of the court provided there is a due procedure to be followed as per the Arbitration Act. To buttress his argument, he cited the case of **Jovet Tanzania Limited Vs Bavaria N.V**, Civil Appeal No.207 Of 2018 and **Scova Engineering S. P. A And Another Vs Mtibwa Sugar Estates Limited and Three Others**, Civil Appeal No.133 Of 2017 (Unreported).

Regarding the second point of objection, Mr. Tairo submitted that, this suit is not time barred. He referred to paragraph 17.0 of the plaint and stated that the dispute arose sometime in October 2017 when the defendants refused to vacate and hand over the suit premises. He stated that the plaintiff filed this suit on 6th day of January, 2023, which is well within prescribed period of six years.

Further, Mr. Tairo contended that, the assertion as to when the right to sue accrued in this case is a matter of evidence hence requiring evidence. He was of the view that the objection is not on point of law contrary to the principle laid down in the case of **Mukisa Biscuits**

Manufacturing Company Ltd Vs West End Distributors Ltd,
(1969) EA 696.

The learned counsel for the plaintiff invited this court to consider the principle of overriding objective as provided for under sections 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019] to avoid technicalities. To bolster his argument, he cited the case of **Israel Malegesi & Another vs Tanganyika Bus Service**, Civil Application NO.172/08 OF 2022.

In his rejoinder, Mr. Maros submitted that, the 2nd defendant was not a party to lease agreement, therefore she could have neither issue notice to the plaintiff and apply for stay of proceedings nor refer the matter to arbitration. As to the point of the suit being time barred, he reiterated his submissions in chief that the cause of action arose in 2016 when the defendants failed to hand over the vacant possession, as pleaded in paragraph 8.0 of the plaint.

Regarding the application of the overriding objective and the decision in **Israel Malegesi & Another vs Tanganyika Bus Services** (*supra*), he submitted that they do not hold water as the overriding Objective does not apply on matters of jurisdiction and time limitation.

I have carefully followed the rival arguments by the parties and in my considered opinion, it boils down to one issue and that is *whether the preliminary objections are meritorious*. In the course of determining the merits of the raised objections, I am inclined to start with the objection that the suit is hopelessly time barred.

I have gone through the pleadings and the rival submissions and wish to state at the outset that in civil suits, it is through pleadings parties establish their cases before adjudication. In that context therefore, pleadings are road map which should show the destination the parties intend to reach. As it is a trite law that parties and courts are bound by pleadings. Therefore, preliminary objection must be construed from what parties have pleaded and not otherwise.

Upon having carefully gone through the Plaint, I found that the cause of action revolves around paragraphs 7.0 and 8.0. I wish to reproduce the verbatim hereunder:-

"7.0 That is was agreed that immediately upon the Plaintiff paying the sum of Tanzania Shillings Two Hundred Twenty Million (TZS.220,000,000 as rent for the entire period all the occupants in the premises on Plot No.No.321/14 registered under Certificate of Title No.105402 situated at Kurasini Area within Temeke Municipality in Dar es Salaam

they were to vacate and handover vacant possession for the premises to the Plaintiff. (sic)

*8.0 That sequel to what is stated herein above in paragraph 7.0, the **Defendants since 2016 failed to handover physical possession of the said property so as the Plaintiff can continuing using the premises as contracted notwithstanding several and repeated demand to hand over vacant possession.** (sic)"*

(Emphasis added)

From the above quoted paragraphs, it is unequivocally clear that the cause of action on the Lease Agreement arose in 2016 when the defendants failed to hand over and or vacate the suit property as alleged. This suit being founded on contract of lease, the period within which to institute a suit is 6 years as provided in Item 7 to Part I of the Schedule to the Law of Limitation Act, [Cap.89 RE 2019]. It is provided thus:-

"...Suit founded on contract not otherwise specifically provided for...six years..."

I have noted that the instant suit was presented for filing on 6th January 2023. From the year 2016 to January 2023 it is seven (7) years. Therefore, the matter being founded on contract it is hopelessly time barred.

The learned counsel for the Plaintiff urged the court to evoke the principle of overriding objective. I am of the firm view that the principle applies only in procedural matters, however, which do not violate the mandatory provisions on the procedural law, which go to the very foundation of the case. In other words, overriding objective principle cannot be extended to limitation of time as time limitation touches the jurisdictional issues of the court. The Court of Appeal in **Yusufu Khamis Hamza vs Juma Ali Abdalla, Civil Appeal No.25 of 2020**, held that: -

"We are alive with the settled position of the law that time limitation goes to the jurisdiction issue of the Court and it can be raised any time."

The Court further observed in **Mondorosi Village Council & 2 Others vs Tanzania Breweries Limited & 4 Others**, Civil Appeal No.66 of 2017, that:-

" Regarding the overriding objective principle, we are of the considered view that the same cannot be applied blindly against the mandatory provisions on the procedural law which go to the very foundation of the case".

From the foregoing, I find merits in the preliminary objection, the 2nd limb in particular. Since the second limb of the objection alone disposes of the suit, I see no reason of canvassing the other limb of objection, for it will only be an academic exercise. The question is what is the remedy of the suit found to be time barred?

The answer is found under section 3(1) of the Law of Limitation Act, [Cap.89 RE 2019. Which provides thus:-

*"...Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, **shall be dismissed** whether or not limitation has been set up as a defence."*(Emphasis Added).

In view of the above provision, the only remedy for the suit which is time barred is dismissal. I hereby dismiss the entire suit with costs. It is so ordered.

DATED at DAR ES SALAAM this 12th July, 2023.



L. HEMED
L. HEMED

JUDGE