

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO.389 OF 2000

DIAMOND MOTORS LIMITED..... PLAINTIFF

VERSUS

**1. ZAKAYO DAUD MABULA T/A MAK
BROTHERS GENERAL ENTERPRISES..... 1ST DEFENDANT**

2. COL. DR. Y.D.M. BALELE..... 2ND DEFENDANT

RULING

MSUMI, JK:

The two defendants are sued for non performance of their respective obligations under the contract. On the guarantee of the second defendant, plaintiff sold a tractor to the first defendant who was to pay the purchase price by a number of instalments. Consequent to first defendant's failure to pay the instalments plaintiff filed this suit for recovery of defaulted purchase price. The first defendant is sued as the buyer of the tractor and second defendant is sued in his capacity as a guarantor of the first defendant.

Besides their joint written statement of defence, defendants have raised a preliminary objection against the suit.

1. That the claim for payment of 22 instalments in the sum of shs.7,465,150/= covering the period from April 1992 to January 1995

is hopelessly time barred.

2. That the Agreement upon which this suit is based is invalid and illegal.
3. That the second defendant has been wrongly joined in the suit.

Among other documents, the plaint is accompanied with a copy of the said sale agreement as annexure "MB-A" which provides, inter alia, that the purchase price of the tractor to be shs.13,029,800/= out of which shs.4,886,000/= had already been paid and the remaining balance was to be paid in 24 equal instalments of shs.339,325/= effective from April 1993. Paragraph 5 of the agreement further provides:

That the Debtor guarantor shall endorse this agreement to make the agreement valid.

The term Debtor in the agreement refers to the first defendant who is the purchaser of the tractor. In contravention of the agreement, first defendant defaulted payment of 22 instalments. As shown earlier, it is contended that the claim for payment of the 22 instalments is time barred. This suit was filed on 30/10/2000. Since this is a suit found on contract, the limitation period is six years. According to the defendants, this limitation period accrued from April 1993 when the first instalment was due to January 1995 which is the last instalment date.

It is noted that the amount of money claimed by the plaintiff is the total of

unpaid purchase price as stipulated under the terms of the contract. This amount of money was not due from the time when the first instalment defaulted but it became due from the time when the last instalment was due for payment. It is on this understanding that paragraph 6 of the agreement gives power to the plaintiff to seize the tractor if the debtor fails to pay full amount of the purchase price by due date which is March 1995. Before this date, plaintiff had no cause of action to sue for the full purchase money. Hence based on this argument, the cause of action for recovery of this sum of money accrued from march 1995. This ground of preliminary objection is therefore not sustainable.

The argument in support of the second and third grounds is substantially the same. The contentions that the contract is not legally enforceable and that the second defendant has been wrongly joined to the suit are based on the argument that the aforesaid provisions of the agreement require the endorsement of the debtor guarantor in order to make it valid. It is the stand of the defendants that this requirement has not been complied with because there is no such endorsement. Though the second defendant acknowledges his endorsement of the said agreement, he contends that he did so as a witness and not as a guarantor. In support of this contention, defendants are relying on the words "witnessed by" appearing under the endorsement in question. The plaintiff's response to this argument is that the words "witnessed by" were mere typing error because the

understanding of the parties was that second defendant endorsed the agreement as a guarantor because there is no provision in the agreement for endorsement of a witness. The plaintiff maintains that the fact that first defendant made part performance of the contract by paying the first two instalments indicates that defendants were satisfied that the agreement has been duly endorsed. And according to paragraph 5 of the plaint second defendant guaranteed orally repayment of the purchase money and consequently signed the agreement. Whether the second defendant signed the agreement as a witness or as a guarantor is, respectfully, a question of fact which is to be proved by evidence. Since it is a question of fact, this issue cannot be raised at this stage in a form of preliminary objection.

In conclusion the preliminary objection is accordingly overruled.


H.A. Msumi

JAJI KIONGOZI.

10/7/2001

For the applicant: Kilule

For the respondent; Fungamtama.