**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**MOROGORO SUB-REGISTRY**

**[AT MOROGORO]**

**CIVIL CASE NO. 12 OF 2023**

**TIB DEVELOPMENT BANK LIMITED ..... 1ST PLAINTIFF**
**ATTORNEY GENERAL .....2ND PLAINTIFF**

**VERSUS**

**UDZUNGWA SACCOS LIMITED ..... DEFENDANT**

**RULING**

14/03/2024 & 27/03/2024

**KINYAKA, J.:**

The Plaintiffs preferred the present suit claiming against the Defendant for payment of TZS 850,769,082.47 being outstanding loan amount and interests, penalty, and charges thereof as of 9th August 2023. The claim arose from the Credit Facility Agreement entered between the 1st Plaintiff and the Defendant on 16th March 2011.

It was alleged by the Plaintiffs that, by virtue of the Credit Facility Agreement, the 1st Plaintiff extended and the Defendant received and utilized, Credit Facility of TZS 967,485,000 comprising of a loan of TZS 72,800,000 for the purchase of one grab cane loader with implements to

facilitate agricultural activities of the Defendant's members; and term loan of TZS 894,685,000 for lending the Defendant's members to meet costs of sugarcane farms development and related activities.

The Plaintiffs prayed for declaration that the Defendant breached the terms of the Credit Facility Agreement; payment of outstanding loan of TZS 850,769,082.47; the plaintiffs to be allowed to exercise their rights under the Credit Facility Agreement; interest of 27% from the date of default to the date of judgement; interest of on decretal amount of 12% from the date of judgement until full and final payment; general damages; costs of the suit; and any other reliefs the Court may deem just to grant.

On 6th November 2023, the Defendant lodged her written statement of defence admitting to have failed to repay the loan on the ground of frustration due to impossibility of performance. According to the defendant it was upon the government's directives that they allowed importation of sugar from abroad that frustrated loan repayment. However, she refuted the rest of the Plaintiffs' allegations. Together with the written statement of defence, the Defendant lodged a separate notice of preliminary objection on points of law that:

1. That the suit is hopelessly time barred; and
2. The suit is premature for want of reference to the Registrar of Savings and Credit Cooperative Societies (SACCOS).

When the matter was called on for hearing of the preliminary objections on 14th March 2024, the Plaintiffs were duly represented by Ms. Elifrida Mutashobya assisted by Mr. Mzumbe Eliakim Machunda and Ms. Grina Aden, learned State Attorneys, while the defendant enjoyed the services of Mr. Marwa Masanda, learned Advocate. The objections were canvassed orally.

Arguing in support of the first point of objection Mr. Masanda relied on item 7 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019 (hereinafter, the "LLA") read together with section 3(1) of the LLA which provide for a period of limitation of six years in a cause of action for breach of contract. He pointed out that paragraph 5 of the Plaint states that parties entered into a contract on 16/03/2011. He contended that on page 3 of Annexure TID 1 which is the Credit Facility Agreement, provide for performance period of 36 months from the first draw down date. He contended further that the first draw down date was neither defined in the Credit Facility Agreement nor indicated in the plaint. He argued that the only

date that is on records for calculation of the period of limitation is 16/03/2011, when the contract commenced.

Mr. Masanda contended that the 36 months of performance was supposed to end on 15/03/2014 when the parties' obligations were supposed to come to an end. He argued that according to section 5 of the LLA, the Plaintiffs had a cause of action during the time of operation of the contract and that the period of limitation reckoned from end date of the contract which was on 15/03/2014. He contended that the six years ended in March 2020 from 15/03/2014. He argued that as the suit was presented on 23/08/2023, the Plaintiffs delayed for more than 3 years from 2020 to the date of filing the present suit on 22nd September 2023. He prayed for dismissal of the suit for lack of jurisdiction to entertain the suit that is time barred.

He further contended that the Plaintiffs failed to state and specify in the plaint, the grounds of exemption of the limitation period as required by Order VII Rule 6 of the Civil Procedure Code, Cap. 33 R.E. 2019 (hereinafter, the "CPC"). He cited the decision of the Court of Appeal in the case of **Uru Central Cooperative Society Limited v. Laitolya Tours & Safari Limited, Civil Appeal No. 204 of 2020** on page 16 of the decision where it was observed that in order to bring into play exemption under Order VII

Rule 6 of the Civil Procedure Code, the Plaintiff must state in the Plaint that his suit is time barred and state facts showing the grounds of exemption. He prayed for dismissal of the suit for being time barred.

On the second point of objection that the suit is premature for want of reference to the Registrar of Savings and Credit Cooperative Societies (SACCOS), Mr. Masanda submitted that in paragraph 3 of the Plaint, the Plaintiffs pleaded that the Defendant is a body corporate established in 2006 under section 27 of the Cooperative Societies Act, No. 6 of 2013, (hereinafter, the "CSA"). He contended that Regulation 83 of the Cooperative Societies Regulations, G.N. 272 of 2015, (hereinafter, "the Regulations") provides for dispute settlement mechanism where sub-regulation 1 require any dispute concerning the business of a cooperative society between the members of the society or persons claiming through them, or between a member or persons claiming and the Board, or any officer or between one cooperative society and another, to be settled amicably through negotiation or reconciliation. He submitted that Regulation 83(2) require reference of the dispute to the Registrar if an amicable settlement is not reached, and thereafter to the Minister as provided under Regulation 83(9) of the Regulations.

He claimed that the plaint does not plead any fact that the Plaintiffs referred the matter to the Registrar of the SACCOS, and what actually was the decision of the Registrar in accordance with the mechanisms mandated by the Regulations. He argued that in such disputes, the proper way to channel the same to the High Court was through a judicial review and not a fresh suit as the decision of the Minister is administrative one. He relied on the decision in the case of **Viongozi Kusure SACCOS Ltd. V. Godwin Mosses Mbise, PC Civil Appeal No. 18 of 2020**, in the last paragraph of 8 of the judgement, where the High Court observed that the law is very clear that any person aggrieved by the decision of the Registrar may appeal to the Minister, a decision which can only be challenged through judicial review. He blamed the plaintiffs for their failure to exhaust the remedies under Regulation 83 of the Regulations. He also cited the case of **Manager Majengo SACCOS v. Medrad Prosper Nyakulima, PC Civil Appeal No. 7 of 2020**, on page 4 of the decision where it was held that a premature suit against the SACCOS that did not comply with Regulation 83 bars jurisdiction of the court to entertain the matter. He prayed for dismissal of the suit with costs.

Opposing the first ground of objection, Ms. Aden, learned State Attorney submitted that Item 7 Part I and section 5 of the LLA provides for time limit of six years in respect of suits founded on breach of contract. However, she submitted, there was continuing breach of contract with the effect of postponing the commencement of the limitation period. She submitted that breach is supposed to accrue on the date of which the cause of action arises, but section 7 of the LLA provides that where there is a 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.

She contended that the Counsel for the defendant failed to distinguish between continuing breach which arises from the contract between the 1st plaintiff and the defendant of providing loan, and the defendant's promises to pay it and failed to pay until the time of filing the suit. She argued that, as the defendant benefited from the loan under the contract, the time limit could not stop as the loan continued to accrue interest and penalties hence the defendant was in continuing breach for her failure to fulfil his promise to pay as agreed through the credit facility, a scenario covered under item 7(1) of Part I of the LLA. She relied on the case of **Lindi Express Limited v.**

**Infinity Estate Limited, Commercial Case No. 17 of 2021**, HC Commercial Division (Nangela, J.), on page 10, paragraph 1, where it was 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.

Ms. Aden admitted that the tenure of the facility was to expire after 36 months counting from the date of first draw down, but she was of the view that failure by the defendant to service the loan within the prescribed time under the credit facility agreement, did not prevent the defendant from his obligation to continue to service the loan. She contended that as there were communications between the 1st plaintiff and defendant on the loan repayment after the expiry of 36 months, evidenced by the letters dated 06/10/2016 and 20/07/2021, the defendant was in continuing breach of the Contract. She prayed for the first preliminary objection to be overruled with costs.

In opposing the second ground of objection, Mr. Machunda, learned State Attorney relied on the Cooperative Society Act, the Regulations and the Savings and Credit Cooperative Regulations, G.N. No. 115 of 2015, (hereinafter, the "SCCR"). He submitted that the second point of objection

is misconceived as Regulation 83(1) of the Cooperative Society Regulations intend to govern the disputes between members of the society, or persons claiming through them, or between a member or person so claiming and the Board, or between one cooperative society and another. He contended that the wording of Regulation 83(1) of Cooperative Societies Regulations is repeated in Regulation 130(1) of the SCCR. Citing section 2 of the CSA, he submitted that the term 'board' is defined to mean the governing body of a registered society to whom the management of its affairs is entrusted; and the word 'member' includes a person or registered society joining in the application for registration of the society or admitted in membership after registration. He argued that the provisions of Regulation 83(1) of the Regulations and Regulation 130 of the SCCR do not apply in the present suit.

He submitted that the present suit is against a corporate body which is Udzungwa SACCOS Limited which by virtue of section 35(1) of the CSA, it is rendered a corporate body capable of suing and being sued upon registration. He contended that the procedure under Regulation 83 of the Regulations and the cases cited by the Counsel for the defendant do not apply in the present case involving a banking institution which is an independent body against a SACCOS which is a corporate body. He

concluded that the suit was properly filed and proper in the eyes of the law and before this Court, and prayed for the second point of objection to be overruled with costs.

In his rejoinder submissions, Mr. Masanda submitted that there is nowhere in the Plaint, the reasons of continuing breach and communications is pleaded. He submitted further that the plaintiffs failed to interpret and apply the provisions of section 7 of the LLA which applies where a breach of contract or a continuing wrong is independent of the contract. He contended that, a continuing breach should be differentiated from a continuing damage, and that in the present suit there was only one form of breach of contract, the defendant's failure to repay the loan within the agreed period of 36 months. He argued that what continued after that was not a continuous breach but a continuous damage. He relied on the case of **Lindi Express Ltd** (supra) cited by the plaintiffs, on page 9, last paragraph that referred to the previous decision of the High Court in the case of **Brookside Diary Tanzania Ltd v. Liberty International Ltd and Another, Commercial Case No. 42 of 2020** in which the Court differentiated between a continuing breach and a continuing damage. In the decision, the Court held that the term 'continuing breach' is intended to apply to contracts obliging

one of the parties to adopt some given cause of action during the continuance of the contractual obligation, but a continuing breach or wrong is different from a continuing damage as the former gives right to afresh cause of action. He pointed out that on page 11 of the same decision, the High Court incorporated the decision of the High Court of Australia in the case of **Larking v. Great Western (Nepean) Gravel Ltd**.

He argued that there was no continuing breach as the breach occurred only once at the end of 36 months in March 2014 which is a reckoning date when the cause of action arose. He submitted that there was no evidence from the pleadings that the facility agreement was renewed. He relied on the decision of the Court of Appeal in the case of **Uru Central Cooperative Society Limited** (supra) where on page 13, it was held that there was only one form of breach of contract, which is failure by the respondent to pay rent arrears within the agreed period, and that since there was no evidence of renewal of the lease, there was no continuing breach. He argued further that the ongoing communication do not make the breach continuous. He relied on the case of **Uru Central Cooperative Society Limited** (supra), where on page 15 the Court of Appeal held that negotiations, or communications

between the parties do not fall under the specified ground warranting exemption from limitation. He reiterated that the suit is time barred.

On the second ground of objection, he conceded that the 1st plaintiff and the defendant are corporate bodies and artificial persons in law, and have capacity to sue or being sued in their own names. He argued that the present suit concerns the business of a corporative society and that any decree in the present suit shall be executed against the business of the defendant, a cooperative society. He insisted that Regulation 83(1) is applicable in the present dispute between the parties and fits in the definition of a person claiming against the business of a cooperative society. He reiterated his prayer for dismissal of the suit with costs.

On conclusion of the parties' submissions, I now turn to determine whether the present suit is time barred and whether it was prematurely filed for want of reference of the dispute to the registrar of savings and credit cooperative societies. In the course of my determination, I will begin with the determination of the first point of objection, and if need be, I will then determine the second point of objection.

Parties are in agreement, in respect of the first point of objection, that the cause of action in the present suit is breach of Credit Facility Agreement dated 16th March 2011 (hereinafter, the "Contract"). The Contract was duly executed by the defendant on 21st March 2011 and the 1st plaintiff on 25th March 2011. Parties are also in agreement that the tenure of the Contract expired 36 months from the date of first draw down. It means that the 36 months period of the Contract started on the first date of withdrawal of money from the loan facility.

Notably, the date of first draw down was neither indicated in the Contract nor pleaded in the pleadings. However, in paragraph 7 of the plaint, the 1st plaintiff pleaded that she executed her contractual obligations by disbursing all credit funds as agreed in the Contract through making payments as requested by the defendant. In paragraphs 8 and 9 of the plaint, the plaintiffs alleged that the defendant defaulted payment of the loan despite several reminders, culminating to the 1st plaintiff's recall of the facilities and reminder *vide* letters to the defendant dated 6th October 2016 and 20th July 2021.

Although the date of first draw down has not been indicated, the loan statement attached as annexure TIB-4 in paragraph 12 of the plaint provide

for the period of the defendant's default of loan repayment. It is shown in the loan statement that by 4th January 2014, an amount of TZS 67,632,280.91 was not paid and a total default of TZS 291,303,530.91 was overdue arising from the previous actual disbursements (the value date) made as of 6th September 2012 (the draw down). Again, the 1st plaintiff disbursed some amounts as of 6th December 2023 creating a cumulative default amount of TZS 111,835,625 as of 4th January 2014. It is shown in the loan statement that by 6th March 2024, the defendant had defaulted to repay the loan with outstanding principal amount and interest of TZS 767,398,510.51. Thereafter, from 9th October 2015, the loan continued to accrue interests and penalties at the 1st plaintiff's rates and as 9th August 2023, the outstanding repayable loan together with interest and penalties was TZS 850,769,003.11. It is therefore imperative to state at this point that the defendant defaulted to repay the loan by 6th March 2024 or immediately thereafter, by 15th March 2014 upon expiry of the contract.

Reckoning from 6th March 2014 when the defendant breached to repay the loan, the six years expired on 5th March 2020. Again, counting from 15th March 2014 when the Contract expired after 36 months from the date of first draw down (assuming the date of draw down was 16th March 2011 when the

Contract was executed), the six years period ended on 14th March 2020. On the other instance, counting from any subsequent period of 36 months from the first draw down, which could not exceed 6th September 2012, the first value date (the draw down date) shown in the loan statement, the period of six years would end on 4th September 2021 from 5th September 2015 which is 36 months from 6th September 2012. It means that the present suit would have expired by 4th September 2021 under any of the above instances under Item 7 of Part I of the Schedule to the LLA.

However, it is the plaintiffs' stance that the breach was continuing based on the defendant's promises to repay the loan, the subsequent communications on repayment, and the defendant's failure to repay the loan until the time the present suit was filed. According to them, the breach was continuing and a fresh cause of action for breach of the contract arose every moment of the defendant's failure to repay the outstanding loan.

I should state at the onset that Ms. Aden's submission that there were promises to repay the loan made by the defendant subsequent to her default, is unsubstantiated. It is not pleaded anywhere in the plaint or written statement of defence or the attached documents that the defendant had

promised to repay the loan upon his default by 6th March 2004 or subsequently.

I have also seen the letters referred to in paragraph 9 of the plaint and attached collectively as Annexure TIB-3. They were authored by the 1st plaintiff and addressed to the defendant. Although in paragraph 3.0 of the letter dated 6th October 2016, the plaintiffs alleged that there were promises on part of the defendant to repay, there was no such evidence of promises made by the defendant to repay the loan, leave alone, any response to the said letters by the defendant. Even by assuming that there was such promises by the defendant prior or around October 2016, when the letter was written, it is almost 7 years from the said date to 22nd September 2023 when the present suit was filed in court.

Be as it may, I am not convinced by the plaintiffs' submissions that there was continuing breach arising from the defendant's continuing default to repay the loan. It is evident from the pleadings that the defendant defaulted to repay the loan on 6th March 2014, or 15th March 2014 or by 5th September 2015 under the instances stated above. To give the plaintiffs the benefit of doubt, the defendants breach would ensue by 5th September 2015, 36

months from 6th September 2012 when the first transaction/value/draw down date shown in the loan statement.

It means that the cause of action arose by 5th September 2015. The subsequent acts of non-repayment of the loan by the defendant did not constitute a fresh or new breach of the Contract as a fresh cause of action, but the continuing damages by way of interest and penalties arising from the breach already committed by the defendant by 5th September 2015. Her duty to repay the loan ended by 5th September 2015 when upon expiry of the 36 months period from the first draw down date which is assumed to be on 6th September 2012 or before. In holding on the difference between continuing breach and continuing damage, I am fortified by the case of **Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation) 1940), 64 C.L.R. 221 (HCA)** cited with approval in the case of **Lindi Express Ltd**. (supra) on page 11 in which it was held that:

> *"**If a covenantor undertakes that he will do a definite and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant**. His duty is not*

*considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided."* [Emphasis added]

Applying the above authority to the present matter, it would have been different if the loan was restructured and the period of repayment was extended to a subsequent period. Unfortunately, the pleadings are silent on whether or not the Contract was renewed or the loan repayment date was extended to a subsequent date. I subscribe to the decision of the Court of Appeal in the case of **Uru Central Cooperative Society Limited** (supra), where it held on page 13 of the decision that:-

*".....there was only one form of breach of contract, which is the failure by the respondent to pay rent arrears within the agreed period. Pursuant to paragraph 14 of the appellant's plaint reproduced above, the lease agreement was for a period of ten (10) years from January 1994. Since there is no evidence*

*on the record suggesting that the said lease was renewed, it is obvious that it expired in 2004, hence the issue of continuing breach, relied upon by Mr. Paul, does not arise....."*

Again, the plaintiffs' reliance on subsequent communications as constituting a fresh cause of action or further breach does not hold water. The communications which did not result to the loan repayment restructuring or commitment on part of the defendant to repay the loan on a subsequent date and with a consent of the 1st plaintiff, is nothing but mere correspondence. The same could not extend the period of limitation of the cause of action founded on breach of contract. I am fortified by the decision of the Court of Appeal in **Uru Central Cooperative Society Limited** (supra) which drew inspiration from the decision of the High Court in the case **of Makamba Kigome & Another v. Ubungo Farm Implements Limited & PDSC, Civil Case No. 109 of 2005** where it was held that negotiations or communications between the parties had no impact on limitation of time.

I agree with Mr. Masanda, learned Counsel for the defendant that the Plaintiffs did not state any ground of exemption in their plaint, leave alone the continuing breach, which would have been considered by this Court as

a ground of exemption of the time limitation under Order VII Rule 6 of the CPC. The Court of Appeal held in the case of **M/S P&O International Ltd. v. The Trustees of Tanzania National Parks (TANAPA), Civil Appeal No. 265 of 2020** [2021] TZCA 248: (9 June 2021: TanzLII), that in order to bring into play exemption under Order VII Rule 6, the plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds of exemption from limitation.

From the above findings, I hold that section 7 of the LLA invoked by the plaintiffs is not applicable in the circumstance of the present suit. I find that what was continuing was damage as opposed to breach of the Contract to repay the loan within the agreed period which the defendant committed to pay within 36 months from the date of the first draw down. In this case, the plaintiffs had to file their suit, latest by 4th September 2021. It means that the present suit was filed beyond the six years limitation period for about 2 years and 18 days.

Based on what I have analyzed above, I sustain the first ground of objection premised on the point of law that the present suit is time barred under section 3(1) of the LLA, read together with Item 7 of Part I of the Schedule

to the LLA for being filed out of the prescribed time of six years from the date the cause of action arose.

Having made such a finding, I do not find the essence of determining the second ground of objection for a reason that whether the ground will be sustained or overruled, it will not change the fate of a suit filed out of time.

In the upshot, the present suit is dismissed for being filed on 22nd September 2023 out of the prescribed time of six years from 5th September 2015 when the cause of action arose. Costs shall follow the course.

It is so ordered.

**DATED** at **MOROGORO** this 27th day of March 2024.

**H. A. KINYAKA**

**JUDGE**

**27/03/2024**

**Court:**

Ruling delivered in this 27th day of March, 2024 in the presence Mr. Nzumbe Machunda State Attorney or the Plaintiff and Mr. Marwa Masanda for the Defendant.

S.P. Kihawa

**DEPUTY REGISTRAR**

**27/03/2024**

**Court:**

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

S.P. Kihawa

**DEPUTY REGISTRAR**

**27/03/2024**