

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL CAUSE NO. 46 OF 2020

RADEGUNDA MOSHA1ST APPLICANT
GIDEON LIGATE2ND APPLICANT
FLAVIA STEPHEN3RD APPLICANT
NEEMA GERALD4TH APPLICANT
MICKIDAD CHAKINDO5TH APPLICANT
JANE CHARLES6TH APPLICANT
AURELIA KAJUMULO7TH APPLICANT
JULIUS POJUNGA8TH APPLICANT
JUVENTUS SIMON9TH APPLICANT
SIBILINA WERIA10TH APPLICANT
GODFREY GABRIEL11TH APPLICANT

VERSUS

ORBIT SECURITIES COMPANY LIMITED1ST RESPONDENT
GERASE KAMUGISHA2ND RESPONDENT

RULING

B.K. PHILLIP, J

This ruling is in respect of points of preliminary objection raised by the learned advocate Robert Rutaihwa who appears for the 2nd respondent, to wit;

- i. That the application is hopelessly time barred.
- ii. The verification clause is incurably defective for failure to specify what particular facts are based on the deponents' own knowledge and what are based on beliefs.

The applicants are represented by the learned advocate Tumaini Shija. They lodged this application under the provisions of section 121(1)(a), 121(2) 121(3) of the Companies Act No. 12 of 2002 and section 95 of the Civil Procedure Code, Cap 33 R.E. 2019, (Henceforth "the CPC"), praying for the following orders;

- i) That this honourable Court be pleased to issue orders declaring the applicants lawful holders of shares in the 1st Respondent.
- ii) That this honourable Court be pleased to issue orders directing the 1st respondent to establish a members' register.
- iii) That this honourable Court be pleased to issue orders directing the 1st respondent to enter the applicants into its members' register.
- iv) That this honourable Court be pleased to issue orders directing the 1st respondent to issue share certificates to the applicants.
- v) That this honourable Court be pleased to issue orders lifting the 2nd respondent's caveat.
- vi) That this honourable Court be pleased to issue orders directing the Registrar of companies to register the Applicants as shareholders of the 1st respondent.
- vii) Costs of this Application.
- viii) Any other and further order(s) or directions which the honourable Court shall deem just to grant.

In their joint affidavit in support of this application, the applicants stated that they are lawful shareholders of the 1st respondent and are listed as shareholders of the 1st respondent in its annual financial statements for the year ending 2016, 2017 and 2018, and also received dividends for the year 2019.

Moreover, the applicants deponed that, the 1st respondent has failed and/or neglected to give them their share certificates ,update its records of shareholders with the Registrar of Companies and establish a register of members, and enter their names in that register as members of the 1st respondent.

Now, back to the points of preliminary objections, I ordered the same to be disposed of by way of written submissions. In his submission in support of the first point of preliminary objection, Mr. Rutaihwa submitted that since the applicants' cause of action arose in 2016 when they were listed as shareholders of the 1st respondent, as per what they have deponed in the affidavit in support of this application, then this application is filed out of time. Citing the provisions of section 4 of the law of Limitation Act, Cap 89 R.E. 2019, (Henceforth "the law of Limitation Act") and item 21 part III of the schedule thereto, Mr. Rutaihwa submitted that the application of this of nature has to be filed within sixty (60) days from the date the cause of action arose. He insisted that since this application is made under the provisions of Section 95 of the CPC and the provisions of section 212(1) (2) and (3) of the Companies Act, 2012, then, the provisions of the Law of Limitation Act cited herein above are applicable in this application. Relying on the case of **Loswaki's Village Council & another Vs Shiblish**

Abebe, AR-Civil Application No. 23 of 1997 (CA) (unreported), he contended that it is mandatory for parties to lodge their matters in court within the time prescribed by the law. He also referred this court to the case of **NBC Limited and Another Vs Bruno Vitus Swalo, Civil Appeal No. 331 of 2019 (CA)** at Mbeya (unreported) in which the court said the following ;

"The reason for considering this issue first is simple. It is that, courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which limitation period has expired".

In rebuttal, the learned advocate Tumaini Shija submitted that, the provisions of item 21 part III of the schedule to the Law of Limitation Act is not applicable in the instant application.

Referring this Court to the provisions of section 7 of the Law of Limitation Act, Mr. Tumaini submitted that in this matter there is continuing breach which makes a fresh period of limitation to start to run every moment of time during which the breach or the wrong continues. To cement his arguments he referred this court to the case of **Alicheraus Sepherine Mwesiga Vs. Tanzania Portland Cement Company Limited, Civil Case No. 12 of 2019** (unreported). Furthermore he submitted that under S. 82 of the Companies Act, 2002, a company is under duty to issue share certificates, failure to comply with that provision of the law renders the

company and its officers liable to pay default fine, so the company is relieved from that duty once share certificates are issued. Thus, until such time the company performs its aforesaid duty there is continuing wrong against the beneficiaries ("the shareholders"). He contended that the case of **NBC Limited and another** (supra) cited by Mr. Rutaihwa is distinguishable from the case in hand as in that case there was no continuing wrong. He invited this court to dismiss the point of preliminary objection.

In rejoinder Mr. Rutaihwa reiterated his submission in chief and distinguished the case of **Alicheraus Sepherine Mwesiga** (supra) cited by Mr. Tumaini, on the ground that the same was about problems of flowing water which had escaped causing continues destruction to the other party, thus in that case there was really continues wrong. He insisted that, the register of members is established once. The right of the applicant to be listed in the register of members begun immediately upon their alleged agreement and after being included in the 1st respondent's financial statement in the year 2016. To cement his arguments he cited the provisions of section 115(4) of the Companies Act which provides that where a company makes a default for fourteen (14) days in complying with the requirement of registering a member in the register of members or establish the same, the Company and every officer of the Company who is in default shall be liable to a default fine and the case of **Brookside Dairy Tanzania Ltd Vs. Libernity International Ltd & another, Commercial Case No. 42 of 2020** (unreported).

Having analyzed the submissions made by the learned advocates as well as read the cases referred to this court, I have noted that, it is not in dispute that the provisions of the Law of Limitation Act, in particular item 21 of part III to the schedule thereto is applicable to the application of this nature, except where it is established that there is continues breach. The issue that I need to determine here is whether or not in this matter there is continues breach. In other words, is section 7 of the Law of Limitation Act applicable in this matter as far as establishing the date on which the applicant's caused action arose is concerned?

For ease of understanding let me reproduce the provisions of section 7 of the Law of Limitation Act hereunder since it is the one which provides for the doctrine of continuing breach in our laws.

S. 7

"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".

The interpretation of S. 7 of the Law of Limitation Act quoted herein above is simple, that is, for any continuing wrong, the cause of action arises every moment the breach continues.

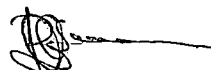
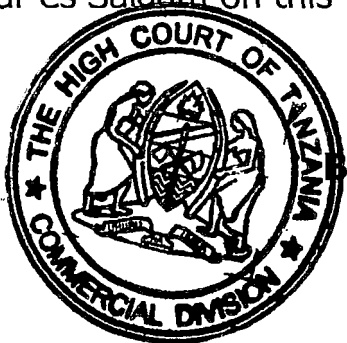
Coming to our matter in hand, it is not a dispute that, the applicants have pleaded that since 2016 they were supposed to be registered in the register of members and be issued with the shareholder's certificates.

Now, the question is, upon the 1st respondent's failure to discharge its duty under the provisions of Section 82 and 115 of the Companies Act, in

2016 , as alleged by the applicants, was there any continuing wrong committed by the 1st respondent thereafter ?. My answer to this question is "No". I am in agreement with Mr. Rutaihwa that the company's failure to discharge its duty aforesaid happened once and under the circumstances, thereafter, there was no any continuing breach or commitment of any wrong. The applicant's cause of action accrued in 2016. The provision of section 5 of the Law of Limitation Act provides that, *the right of action in respect of any proceedings shall accrue on the date the cause of action arises*. In this case when the applicants were listed as shareholders in the 1st respondent's financial statement in 2016, that is when their cause of action arose. As from that date, they were supposed to be registered into the company's register of members and be issued with the share certificates, not any other date thereafter.

From the foregoing, I hereby uphold the 1st point of preliminary objection, that is, this application is filed out of time and since it disposes of this matter, it is obvious that I cannot proceed with the determination of the 2nd point of preliminary objection. Thus, this application is hereby dismissed with costs.

Dated at Dar es Salaam on this 12th day of July, 2021.



B.K. PHILLIP
JUDGE