IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CASE NO.138 OF 2019

MR ERICK JOHN MMARI.....PLAINTIFF

VS

M/S HERKIN BUILDERS LTD .....DEFENDANT

RULING

20/03/2020 & 11/05/2020

NANGELA, J:,

The Plaintiff herein claims from the Defendant, a limited liability company, registered as a Class One Contractor, payment of specific damages in the sum of **TZS 398,842,534.03**. Besides, he claims for general damages, as well as costs. I will briefly narrate the facts of this case.

It all started on or about 6th December, 2010 when the Plaintiff and the Defendant entered into a construction agreement. The agreement had obligated the Defendant to construct a one storey residential house, with three bedrooms, bathrooms, lounge, dining,

kitchen, store, etc. It was concluded in consideration of **TZS 324,196, 436/=** as the **contract price**.

According to the pleadings, the house, was to be erected on Plot No.17, Block 1, Mtoni Kijichi Area, Temeke Municipality, Dar-Es-Salaam. The initial contract price was later revised and agreed to be **TZS 318,303, 000/=** and the Plaintiff had obtained a building permit since 19th October 2009.

It is alleged that Clause 3 of the Agreement, stipulated that construction works were to commence 14 days upon receipt of instructions to commence the works and the entire project was to be completed within one calendar year, i.e., 5th February 2012. According to the Plaintiff's averments, the Defendant took possession of the relevant construction site (Plot No.17, Block 1, Mtoni Kijichi Area, Temeke Municipality, Dar-Es-Salaam) on 6th February 2011.

It is further alleged that, the Defendant received the first payment for mobilization, fencing, etc., on the same day and was instructed to commence the project. However, due to a number of unforeseen events, it was mutually agreed between the two parties that, the construction period was extended to December 2013. However, by December 2013, the construction had not been completed.

On or about January, 2014, the contract's completion period was further extended to 15th November 2014, a day appointed that the Defendant would hand over the works to the Plaintiff. It is averred that, up to July 2013 the Plaintiff had paid the Defendant a total sum of **TZS 277,000,000/=.** When the hand over date approached, the Defendant was yet to complete the works and the parties were drawn into arguments and correspondences regarding the way forward as the works at the site remained uncompleted.

It is averred that, on the 10th day of October, 2015, the Defendant submitted to the Plaintiff a soft copy of an Interim Valuation and a **Claim No. 4**, claiming for a sum of **TZS 147,284,625.94.** However, the Plaintiff claimed that, shortly before, he had inspected the site and found it to be at a standstill, while some works were carried out below acceptable standards of construction. Whereupon the Plaintiff directed the Defendant to rectify the anomalies, submit her bill for settlement in two weeks and handover the construction site and completed works.

The Plaintiff avers that, despite the call for the Defendant to complete the works, up to 18th October 2015 nothing was done and no progress was registered. On 16th July 2016, the Plaintiff lodged a complaint with the Contractors Registration Board, ("**the Board**")

requesting the Board to mediate between the two parties and dissolve their standoff.

Upon meeting with the parties, the Board resolved that an independent consultant funded by both parties should assess the work progress and advise the way forward. At the Plaintiff's Costs, *M/s LM Construction Management Ltd*, was engaged and carried out the assessments which involved work progress and financial appraisal. It is averred that although a report was submitted to the Board, the Defendant refused to share the costs of the assessment carried out by *M/s LM Construction Management Ltd.*

It is further averred that, at the instance of the Board and on a desire to have a Technical and Engineering/Structural Investigation report of the entire project carried out, on 6th January 2017, the Plaintiff engaged, Ms. S.W. Msambaza Design Consult, to carry out a thorough and detailed technical engineering/structural, electromechanical and architectural finishes Investigation of the standing structure on the Construction Site. A report to that effect was submitted on 28th March 2017.

It is averred that, upon receipt of the two reports, the Board ordered that they be fused and a consolidated financial report be produced. Such a report, it is stated, was produced in August 2017 and

was submitted to the Board on 27th October 2017. It is averred that, a series of meetings, to deliberate the consolidated report, ensued, and, on 27th April 2018, minutes of such meetings were prepared for signing by the parties, but the Defendant refused to sign them.

Pursuant to the investigation reports commissioned by the Board, currently the adjusted Contract sum stands at **TZS 423,440,690.01,** and the current cost of completion of the contracted works, extensive rectifications and re-doing of various works which are to be carried out by the Defendant, is set to a sum of **TZS 165,787,898.53,** which is part of what the Plaintiff claims from the Defendant.

From such delayed completion of the works and the handing over of the site to the Plaintiff, the Plaintiff claims to have suffered loss in the form of lost opportunity to derive rental income from the said residential house which was the subject of the construction contract, from December 2014 to the current rate of US$ 1,500.00 (net of taxes) per month which makes a total of US$ 87,000.00 or TZS 200,100,000 up to September 2019.

Moreover, the Plaintiff claims to have incurred costs of making unscheduled travelling (*safaris*) from Cairo/Nairobi/Khartoum to Dar-Es-Salaam to attend the various meetings and site visits, accommodation in

Dar-Es-Salaam as well as other expenditures totalling US$ 3,805.00 or TZS 8,750,989.00.

He also claims to have engaged the services of various consultants, all of whom he paid a total of TZS 22,089,046/=, and that, he was inconvenienced to the extent of securing a loan of US$ 125,000.00 to finance the incomplete house, which loan he is forced to service without seeing the fruits thereof.

On 28th August 2019, the Defendant handed back the construction site to the Plaintiff and on 2nd October 2019 the Plaintiff terminated the contract. On 20th November, 2019, the Plaintiff filed this suit claiming for a sum of **TZS 398,942,534.03** from the Defendant. the Defendant filed their Written Statement of Defence (WSD) on 3rd March, 2020. In its **WSD**, however, the Defendant raised a preliminary point of law, to the effect that, **the suit is hopelessly time barred**. On 18th March, 2020, the Plaintiff filed a reply to the WSD.

On 20th March, 2020, the parties appeared before me for ascertainment of the status of the pleadings and issuance of directives of the Court regarding the matter before it. The Plaintiff was represented by Mr. Evans Tumwesige, holding brief for Mr. Elvaison Maro, learned advocates, while Mr. Alfons Nachipiangu, learned counsel, appeared for the Defendant.

Since the pleadings filed were now complete, and, there being a preliminary legal issue attracting the attention of this Court, it was agreed that, the parties should argue the preliminary point of law by way of written submissions.

Consequently, the parties were directed to file their written submissions in the following order:

1. The Defendant to file its written submission on or before 26th March 2020;
2. The Plaintiff to file his reply to the Defendant's written submission on or before 2nd April, 2020.
3. The Defendant to file its rejoinder (if any) on or before 9th April 2020.
4. Ruling on the Preliminary Objection to be delivered on 11th May 2020.

The parties filed their written submissions dutifully as directed by the Court. In his submission, the learned counsel for the Defendant submitted, that, according to item 7 of part 1 of the Schedule of the Law of Limitation Act, Cap.89, the limitation to file a suit founded on contract is six years.

It was argued that, since the contract was executed on **6th December 2010**, and the same had to be concluded on **5th February,**

2012, then, by failure to perform the contract within the agreed time, the cause of action automatically arose since the 5th of February 2012.

As such, the learned counsel for the Defendant argue, that, by filing the suit on 26th November 2019, the Plaintiff was out of time **for almost 18 months**. The learned counsel for the Defendant submitted further, that, the contract agreed between the parties had a specific duration in terms of the completion of the assignment contracted for. He argued, that, there is no any other contract which varied the earlier contract as regards its duration of performance.

It was further argued, that, whatever arrangements which transpired after 5th February 2019, such were done outside the contract period and the Plaintiff, forfeited his right to file the suit immediately after the breach, instead he was busy sorting out the breach.

Referring to section 14 to 30 of the Law of Limitation Act, Cap.89 [R.E.2002], the learned counsel for the Defendant submitted that, those provisions provide for exceptional circumstances in computing the time limitation prescribed by the law. However, he argued that, the Plaintiff cannot benefit from the exceptional circumstances provided under the law of Limitation Act as he lacks the reasons regarding why he did not file the suit immediately after the breach.

The learned counsel for the Defendant invited this Court to consider and adopt its own decisions in the cases of **Total Tanzania Ltd v IPTL**, Commercial Case No. 152 of 2016, HC, Commercial Division, DSM (unreported); **Pangolin Traders Ltd v NIC & 2 Others**, Commercial Case No. 32 of 2004, HC, Commercial Division, DSM (unreported); and **Thorton & Turpin (T) Ltd v NIC (T) Ltd & Another**, Commercial Case No. 20 of 2002, HC, Commercial Division, DSM (unreported).

The learned counsel for the Defendant submitted that, although the Plaintiff attempts to indicate that the cause of action accrued on 15th November 2014, the contract executed between the Plaintiff and the Defendant was to be completed on 5th February 2012 as pleaded in paragraph 6 of the Plaint. As such, it was argued that, the averments in paragraph 37 of the Plaint, regarding when the cause of action arose, are erroneous and designed to pre-empty the time limitation as indicated in the contract. Consequently, the learned counsel for the Defendant prayed that, in terms of section 3 (1) of the Law of Limitation Act, Cap.89 [R.E.2002], the suit should be dismissed with costs.

On 2nd April 2020, the learned counsel for the Plaintiff filed his written submissions in opposition to the preliminary objection. He branded the objection as being wearied, inept and mischievous. He

argued that the objection is not founded on the pleadings as the Defendant has not pleaded breach of contract or failure to perform the contract as submitted by the Defendant's learned counsel.

Referring to the famous case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] E.A 696, at page 701, he submitted that, as a matter of principle, a preliminary objection must be premised on a point of law and be based on the disputed facts pleaded and not calling for proof.

To buttress his point, the learned counsel for the Plaintiff referred this Court to the Court of Appeal decision in the case of **The Soitsambu Village Council v Tanzania Breweries Ltd and Another,** CAT, Civil Appeal No.105 of 2015 (unreported). He contended, therefore, that, the preliminary object raised does not meet the test of a legal preliminary objection at all. I think this is not correct and will not address this point further as the objection has raised a valid point of law worth to be considered by this Court.

The learned counsel for the Plaintiff further argued that the Plaintiff is not blaming the defendant for breach of contract or failure to perform as of the 5th February 2012. Instead, it is argued,

what the Plaintiff states in paragraphs 6 to 8 of the Plaint is that, there were unforeseen events which made it impossible for the Defendant to complete the work within the stipulated time frame.

He referred to this Court a definition of what amounts to a cause of action, citing ***Mulla, The Code of Civil Procedure*, 18th Edn, Vol.1, LexisNexis 2014** and the case of **Mashado Game Fishing Lodge Ltd and 2 Others v Board of Trustee of Tanganyika National Park** [2002] TLR 319.

In the **Mashado's case** (supra), the Court held that:

> "a person is said to have a cause of action against another where that person has a right and the other has infringed or breached that right with the result that the person with the right suffers material loss or any other loss."

In view of the above, the learned counsel for the Plaintiff submitted that, as of 5th February 2012 there was no cause of action against the Defendant. Instead, the learned counsel for the Plaintiff argued that, the contract completion period was mutually extended from 5th February 2012 to December 2013 and again to 15th November 2014, even though such facts are being disputed by the Defendant.

Referring this Court to what amounts to an extension of an agreement, the learned counsel for the Plaintiff, quoting from the Blacks Law Dictionary, 6th Edn, 1990, at page 583 noted, that, the term:

> "**Extension**" means "*an increase in length of time specified in contract (e.g., of expiration date of a lease or due date of a note.*" **Extension of Agreement** : *Those agreements which provide for a further time in which performance of the basic agreement may be performed.*"

To elaborate more on the above quoted definitions by relating it to the case at hand, the learned counsel for the Plaintiff submitted that, the consequences of the extension of the performance period *vis-a-viz* the limitation period is that, once a contract is restored with a fresh time frame, one cannot sue on the previous breach since the contract is now in force and there will be no actionable cause of action.

Referring to **Mitra, B.B., *Limitation Act*, 12th edn, Eastern Law House, New Delhi (1998)** at pp.194 and 164, the learned counsel for the Plaintiff submitted, that, the section on limitation of time cannot apply where the cause of action is cancelled by subsequent events; such cancellation of the cause of

action wipes out the time which has run and a fresh period of limitation starts on the revival of the cause of action from the date of revival.

At page 641, the author writes, concerning continuing breaches that:

> "Although the general rule is that the cause of action accrues upon the date of the breach of contract, it may be possible to extend the time within which an action may be brought by establishing that, after the original breach, the relationship between the parties subsisted such that there may be found to exist a continuing duty under the contract to rectify the original breach".

To further bolster his submissions, the learned counsel for the Plaintiff referred to this Court the decision in the case of **Kisunda v Akunaay and Another,** (1972) HCD 125.

It was submitted, therefore, that, if the Plaintiff will be able to prove that the initial contract was extended and the Defendant failed to complete the construction within the agreed time, that failure constitutes a fresh cause of action. Consequently, the learned counsel for the Plaintiff argued that, the cause of action

accrued on 16th November 2014 and the limitation period will end on 15th November 2020.

The learned counsel for the Plaintiff distinguished the cases relied upon by the legal counsel for the Defendant, arguing, and I agree with him, that, such cases did not deal with a situation where a contractual period was extended by the parties. For all such reasons, he prayed for the dismissal of the preliminary objection with costs as being without merits.

In a brief rejoinder, the learned counsel for the Defendant reiterated his submission in chief. He only added that, since the contract in question has been attached to the plaint, as part of the pleadings, the objection cannot be disposed without perusing the said contract. He maintained that, a perusal of such nature does not amount to ascertainment of proof.

Furthermore, it was submitted that, the case of **Soitsambu Council** (supra) is not applicable in the instant case, and, that, there is no any other contract annexed which varied the terms of the contract dated 6th December 2010.

I have given careful considerations to the rival submissions made by the learned counsels for the parties herein and, I find that, the question which I am called upon to address is: **whether the preliminary objection raised by the learned counsel for the Defendant is meritorious**.

However, before I embark on that issue, it is worth noting, first, that, if one is to determine whether a defaulting party's obligation in contract is indeed a continuing obligation or not, one has to construe the contract itself. Second, it is also important to note that, statutes of limitations provide a restriction on the period during which a party may sue on a particular cause of action. Thus, as a general rule, a suit can no longer be brought when such applicable period come to an end.

In the case at hand, the bone of contention is that, the suit at hand has been stale. It is argued that, it has been brought out of time since it ought to have been brought within six years from the date when the cause of action accrued.

Further still, the learned counsel for the defendant argued that, the cause of action arose from the time when the Defendant

failed complete the construction of the Plaintiff's house, which, as per the contract, was 5th of February 2012. As it may be noted, the contract between the parties was a fixed term contract, meaning that it had a fixed completion date.

As I stated herein above, to entangle the current quagmire, one has to go back to the contract and construe its terms. According to the copy of the contract annexed to the Plaint, the contract was entered on 6th December 2010. It was agreed that, the work shall commence 14 days after receipt of instructions to commence the work and completion period was agreed to be twelve (12) months from the date of commencement.

According to the Plaintiff, the works commenced on 6th February 2011. Since the contract duration was for twelve months from the commencement date, it means that, the works ought to have been completed by 5th February 2012. However, the same could not be finalized by that date.

It is from that point, therefore, that, the learned counsel for the Defendant argues that the cause of action arose from the date

when the contractor failed to handover the construction site as agreed in the contract, i.e., the 5th of February 2012.

In my view, the legal counsel for the Defendant is right on that point. Legally, if nothing else was to happen, the cause of action accrued on the day of the breach. Support for such a legal position can be found in the English case of **Bell v Peter Browne & Co. [1990] 2Q.B. 495**. This particular case involved a breach of a contract, and an objection to the effect that the cause of action was time barred, having been brought outside the six years' limitation period.

In the course of deciding the Appeal, the Court of Appeal of England noted that, section 5 of the Limitation Act 1980:

> "precludes the bringing of an action founded on simple contract after the expiration of six years from the date on which the cause of action accrued. Ascertaining that date involves identifying the relevant terms of the contract and also the date on which the breach relied on occurred.

In **Murphy v Joe O'Toole & Sons Ltd & Anor [2014] IEHC 486**, at para 41, the judge stated that:

> "In light of the authorities, it is clear to me that **the cause of action in contract must be the date on which a breach**

occurs and not the date when the contract is made. There may of course be incidents when these dates or times are coterminous as was found in the Supreme Court decision of Gallagher v ACC Bank [2012] IESC...In that case the court held as a matter of fact that the cause of action accrued at the date on which the transaction was entered into, the date on which the financial product was sold."

As I stated earlier, in this present case, the Defendant's arguments that the cause of action accrued initially on the 5th February 2012, is correct. However, there is more to say on that as I shall shortly explain later.

As observed from the pleadings, there is no doubt that, there was a delayed performance. A "delay", in the construction context, can be specifically defined as any failure to complete a specific construction activity within the time planned for it. In law, where a party to a contract does not perform its obligation on time, in accordance with the time frames required by the contract, that constitutes a breach of that contract.

However, what then are the effects of the subsequent discussions alleged to have continued between the parties to rectify the breach? Were they or did they vary the initial contract, and, if

so, will the date when the cause of action accrued remain as it was before? Did they constitute a new contract altogether? These questions are fundamental in deciding whether the preliminary objection will stand or fall.

As observed in the pleadings, after the expiry of the initial contract on 5th February 2012, it seems that the parties mutually agreed to extend the completion period, first to December 2013 and secondly to 15th November 2014. I find this to be so, because, looking at **Annex.C-3**, a copy of an Addendum Schedule for Construction of the proposed residential house on Plot No.17 Block 1, at Kijichi, the same was issued by the Defendant showing that the works were to be completed by November 2014. This means that, despite of the breach, the parties continued with their relations and set out new completion dates.

Essentially, these new dates set for completion of the contract, were not variations of the earlier contract because it had already expired on 5th of February 2012. In fact, in the eyes of the law, once a contract has expired, it no longer exists. As such, anything done post the expiry date amounts to a new arrangement

which many constitute a new contract impliedly under the same old terms. This is because, once a contract has expired, it cannot be varied.

The legal counsel for the Plaintiff has argued that, the contract was a continuing one. To strengthen his submission, he cited **Mitra, B.B., *Limitation Act*, 12th edn, Eastern Law House, New Delhi (1998)**, who, at page 641, writes, concerning continuing breaches that:

> "Although the general rule is that the cause of action accrues upon the date of the breach of contract, it may be possible to extend the time within which an action may be brought by establishing that, after the original breach, the relationship between the parties subsisted such that there may be found to exist a continuing duty under the contract to rectify the original breach".

Indeed, in this case, there is no doubt that the relationship of the Plaintiff and the Defendant continued **post** the initial breach. However, the continuation did not arise out of a continuing duty under the expired contract. Instead, the continued relations came from their new arrangements regarding when the contracted assignment was to be completed.

To that end, while it may be argued that the Plaintiff had forfeited his right to sue under the old (expired) contract when he failed to sue upon noticing the breach thereof, under the new arrangements, a new the cause of action accrued afresh on 15th November 2014 when the Defendant failed to hand-over the site and the completed works as agreed.

It is important to note that, even if there may be no expressly new written contract as argued by the learned counsel for the Defendant, it is a well accepted legal position that, subsequent actions, as well as words of the parties, may create a new contract after the expiry of the earlier one. In essence, the key to establishing such a fact is to look at the conduct of the parties, judging them objectively and with an eye to find out how consistent their conduct is with the terms of the old contract.

The contract, as I noted earlier, was a fixed term contract. Its performance continued post expiry date upon mutual discussions of the parties as evidenced by their subsequent conduct. Certainly, it is not an uncommon incident for the parties to continue to work together even after the expiry of a fixed term

contract, especially where there is a fixed term for the agreement and that termination date comes and passes. Such incidents do occur.

However, if performance of an expired contract has continued, and the conduct of the parties may be interpreted as affirming this post-expiration contractual relationship, it may as well be argued that, a new contract had supplanted the expired one, and, the fact that the parties continued to perform, is an evidence that such a new contract existed. And, even if it may not be express, an argument could be made validly that such new contract is implied.

To borrow a leaf from other jurisdictions, in the case of **CSR Limited v Adecco (Australia) Pty Limited [2017] NSWCA 121 (CSR Limited)** McColl JA, referring to the body of law relating to implied contracts had this to say:

> "'Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. ... There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired.'"

Furthermore, in the case of **Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd [2002] VSCA 150,** the Victorian Court of Appeal considered the terms of an expired agreement which operated as follows:

> "The evidence, fairly sparse though it is, warrants the finding that after 3 April 1993 ....the parties operated under a standing agreement under which all the procedures and, importantly, the remuneration were exactly the same as they had been under the written agreement."

In the above case, one term which clearly stood out was **the date of termination**. Given the termination date on the expired agreement had passed, the court considered how the agreement may be terminated. In that regard, the Court indicated, that:

> *"the parties proceeded as though still governed by the terms of the original agreement* (**save that, since it had already expired, either could terminate** *the substitute arrangement* **on reasonable notice.**)"

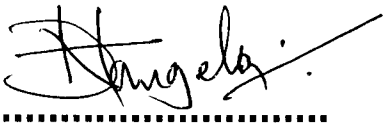
In our instant case, the parties were even well aware that the completion date had lapsed and arranged for a new completion schedule and date twice. To me, this is a clear indication that, impliedly, they entered into a new contract and the cause of action

based on the old contract was forfeited by the innocent party. That being the case, I am fully convinced that any new cause of action will have arisen under the new and not the old arrangements.

In view of the above reasoning, I am in full agreement with the learned counsel for the Plaintiff that the cause of action arose not on the 5th of February 2012 but under the new arrangement, it accrued on the 15th November 2014. This conclusion means, therefore, that, the time limit in respect of this cause of action started to run from 15th November 2014 and will come to an end on 15th November 2020.

All said and done, this Court finds, that, **the preliminary objection is therefore without merit and is hereby dismissed with costs**. The parties will have to proceed with the main case as on the date to be scheduled by the Court.

It is so Ordered.



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DEO JOHN NANGELA
JUDGE,

High Court of Tanzania (Commercial Division)
11 / 05 /2020

Ruling delivered on this 11th day of May 2020, in the presence of the Advocate for the Appellant and the Advocate for the Respondent.

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DEPUTY REGISTRAR,
High Court of Tanzania (Commercial Division)
11/ 05 /2020