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

COMMERCIAL CASE NO.3 OF 2020
BETWEEN

SIKEM REAL ESTATE DEVELOPERS LIMITED.....PLAINTIFF
VERSUS

SERENGETI BREWERIES LIMITED.....DEFENDANT

RULING

Date of the last order :4/6/2020
Ruling delivered on this :17/7/2020

NANGELA, J.,:

This ruling is in respect of a preliminary legal issue raised by the Defendant, *Serengeti Breweries Ltd*, in objection to the hearing and determination of this suit. The suit was preferred by the Plaintiff who alleges that the Defendant breached agreed terms of a contract signed by the two parties. Apart from seeking for a declaration that the Defendant is in breach of the alleged contractual terms, the Plaintiff claims for payment of *TZS 4,491,887.91* as compensation for the losses suffered as a result of the Defendant's alleged breach.

In view of the above, the Plaintiff prays for the judgement and decree as follows:

(i) A declaration that the Defendant is in breach of the contractual terms between itself and the Plaintiff.

(ii) Payment of TZS 1,191,566,812.36 being specific damages suffered by the Plaintiff as further expounded in Para 10 of the Plaint.

(iii) Payment of TZS 1,056,000,000/= being specific damages suffered by the Plaintiff in terms of the bank guarantee, plus its penal interest, as pleaded under Para 14 of the Plaint.

(iv) Payment of TZS 2,244,320,3015.55 being accrued interest before the filing of this suit.

(v) Interest on the outstanding sum at the commercial rate of 21% per annum from the date of filing the suit until judgement.

(vi) General damages for breach of contract and plaintiff's suffering arising out of the defendant's acts as shall be assessed by this court.

(vii) Interest on the decretal amount at the court's rate of 7% from the date of judgement until full payment.

(viii) Costs of this suit.

The Defendant denied the Plaintiff's claims and, instead raised counterclaims against the Plaintiff, seeking for the following orders of the Court:

(i) a declaration that the Defendant breached the general condition of sale between the parties herein;

(ii) an order requiring the Defendant to pay TZS 276,017,844/= being an outstanding debt; interests on that sum at a commercial rate of 25% from the time when the debt became due to the date of judgment;

(iii) interest on the decretal amount from the date of judgement to the date of full settlement of the outstanding debt;

(iv) payment of general damages and costs of this suit.

Having filed its defence and the counterclaims, the Defendant raised a preliminary legal issue in objection to the suit. The legal issue raised was that: **"the Plaintiff's claims against the Defendant are time barred."**

On 2nd March 2020, when this suit was called on for necessary orders, the Plaintiff was represented by Ms Jacqueline Kulwa, learned Advocate, while the Defendant enjoyed the legal services of Mr. Geoffrey Paul, also a learned counsel. Upon taking the floor to address the Court, the Defendant's legal counsel submitted two prayers for which this Court' orders were warranted:

first, that, the Defendant be allowed to file a reply to the written statement of defence (WSD) to the counterclaim filed earlier and responded to by the Plaintiff.

Second, that, once the reply is filed, and since the pleadings will be complete, the court be pleased to set a date of the hearing of a preliminary objection raised by the Defendant.

The Court granted the prayers sought by the Defendant's legal counsel and made the following orders:

1. That, a reply to the WSD to the counterclaim be filed on or before 9th March 2020.
2. The preliminary legal issue be heard on 24th March 2020 at 9.00 am.

Unfortunately, the hearing of the preliminary legal issue raised by the Defendant's counsel could not take place on 24th March 2020. Instead, the hearing was rescheduled to take place on 4th June 2020 at 9.00 am. When the parties appeared before me on the appointed date, the Plaintiff was represented by Mr. Ngudungi and Ms Jacquiline Kulwa, learned advocates, while the Defendant enjoyed the services of Ms Elizabeth John, also a learned counsel.

In agreement with the parties, the preliminary legal issue was disposed by way of written submissions. In that regard, the Court issued the following schedule of filing of such submissions:

1. That, the Defendant should file its written submission on or before 10th June 2020.
2. The Plaintiff's written submission be filed on or before 18th June 2020.
3. Rejoinder submission by the Defendant, be filed on or before 25th June 2020.
4. Ruling on the P.O. to be delivered on 17th July 2020 at 11.00 am.

The parties adhered to the above schedule of filing duly. I will now consider their written submissions. To begin with, the Defendant submitted that, this Court lacks power to entertain this matter because the suit is barred by the statute of limitation and ought to be dismissed in accordance with what section 3 (1) of the *Law of Limitation Act, [Cap.89 R.E 2019]*.

In reference to the case of ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, the Defendant endeavoured to show what a preliminary objection is or how it should

be. The Defendant submitted that, according to *paragraph 7 (a)* of the plaint, the Plaintiff is complaining about the issue of pricing and, that, this dispute arose in 2011. The Defendant referred to an email dated 17th July 2011, which is attached to the plaint as "**NCA 3**". The Defendant submitted that, the Plaintiff's claim arising thereof, has been further enumerated under *paragraph 10 item (xv)* of the Plaint.

It is a further submission by the Defendant, that, *clause 7 (b) of the plaint* addresses the breach arising in 2011 and 2012 in relation to the issue of pricing and, that, *in clause 7(c)* the Plaintiff is complaining about the provision of products to stockists on credit basis and, the emails referring to it, attached as "**NCA5**" are dated November 2011. Besides, it is submitted, that, the claim arising from them is analyzed under *clause 10 item (ix)* of the plaint. The Defendant submitted that, clause 10 of the Plaint is for transactions audited for the period starting from June 2011 to March 2015.

On the basis of the above, the Defendant submitted that, a look at the plaint will show that the claims of the Plaintiff emanates from the year 2011. With such observations, the Defendant raised an issue regarding whether such claims by the Plaintiff are within the prescribed time under the law. Referring to section 4 of the *Law of Limitation Act*, Cap. 89 R.E.2019, the Defendant submitted that, the period of limitation in relation to any proceeding, commences when the right of action for such proceedings accrues.

The Defendant referred to this Court *item 7 of Part I to the Schedule of the Law of Limitation Act, Cap.89 R.E.2019* and, submitted that,

according to *item No.7 of the Schedule*, the life span for suits founded on contract not otherwise specifically provided for, is **six (6) years from the date when the cause of action occurred**.

As regards the consequences of filing a suit out of the prescribed period, the Defendant submitted that, section 3 (1) of the *Law of Limitation Act, Cap 89, R.E.2019*, calls for an outright dismissal of such a suit, whether or not limitation has been set out as a defence. The Defendant submitted that, the law has imposed a mandatory duty on the part of the Courts. In view of that, the Defendant called upon this Court to dismiss the suit in its entirety and with costs.

Further to the submissions, as summarized herein above, the Defendant submitted that, with regard to the earlier order of this Court in ***Commercial Case No.79 of 2015***, issued on 16th December 2019, under *Order XXIII Rule 1 (3) of the Civil Procedure Code, Cap.33 R.E.2019*, the order of the Court granted leave to the Plaintiff to withdraw the case and re-file a fresh plaint not later than 16th January 2020.

The Defendant submitted that, according to *Order XXIII rule 2 of the CPC*, the law is very clear on the aspect of limitation when it comes to a withdrawal of suits. The cited Rule by the Defendant provides that:

> "In any fresh suit instituted on permission granted under rule 1, the Plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."

The Defendant argued, therefore, that, even if there was a permission of this Court to re-file the suit, the Plaintiff is still bound

by the law of limitation and cannot shield himself or seek refuge under the leave granted by this Court to re-file the suit. On that reasoning, the Defendant prayed that the suit be dismissed pursuant to *section 3 (1) of the Law of Limitation Act, Cap.89 [R.E.2019]*.

In rebuttal to the Defendant's submission, the Plaintiff deplored the Defendant's objection to the suit as one that lacks merit in law. It was the Plaintiff's submission that, the Defendant has singled out the e-mails forming *Annexure 5* to the plaint, leaving out all other Annexures listed by the Plaintiff for the entire claim. The Plaintiff questioned the correctness of the Defendant's selective approach, which seeks to challenge three items in the plaint, *i.e., Clause 7 (a) to (c)* while leaving out the rest of the claims.

According to the Plaintiff, the claim is based on an on-going or continuous claims which, having been summed up, their total balance is what led the parties to embark on a reconciliation of all of their business transactions as stated in *Annexure 9* to the plaint which, read together with other supporting documents, forms the balance claimed in the plaint. Besides, the Plaintiff questioned whether the preliminary objection is indeed based on a pure point of law that needs no ascertainment of the facts before a decision is made.

Referring to the case of ***Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd***, [1969] EA, 696 at 701, the Plaintiff made an observation that, the Defendant's preliminary objection does not fit to be called an objection in law, simply because it is not a pure point of law, but one of mixed law and fact.

To further strengthen the point raised, the Plaintiff submitted that, whether an objection raised befits the proper definition of a preliminary objection was also an issue considered in the case of ***Karata Ernest & Others v Attorney General, Civil Revision No. 10 of 2010*** **(unreported)**. Referring to that case, the Plaintiff contended that, in that decision, the Court of Appeal of Tanzania held as follows, that:

> " Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

The Plaintiff submitted that, the reading of **Annexure NCA -9**, which forms the basis of the claim, shows that Annexure was executed on 29th January 2015. The Plaintiff submitted, therefore, that, in order to ascertain whether the breach arose in 2011 or 2015, that will be a matter of evidence.

It was a further Plaintiff's submission that, by inviting the Court to scrutinize the attachments to the plaint, it means that the objection does not qualify to be a pure point of law. Besides, the Plaintiff contended that, in this case, the goods were supplied on diverse dates and payments were made by the Plaintiff on account of the outstanding debt, hence, the reason why the Defendant demanded the execution of a bank guarantee in the first place before the agreement was performed.

The Plaintiff referred this Court to paragraph 6 and 14 of the Plaint read together with *Annexure 9 and 13*, and submitted, therefore,

that, on the basis of the averments in those paragraphs and the Annexures, one will find that it was after the reconciliation which was carried out on *29th January 2015* that, each party knew who was indebted to the other, and, hence the institution of this case.

In view of the above, the Plaintiff submitted that, the reckoning period should be the date when the reconciliation was executed as per **Annexure NCA 9,** which means that, counting from the 29th day of January 2015 to the 15th day of January 2020, the period is less than the six years' period.

Further to that, the Plaintiff referred this Court to *section 6 (a) of the Law of Limitation Act, Cap.89 [R.E.2019]* which provides that:

> "In case of a suit for an account, the right of action shall be deemed to have accrued on the date on which the last transaction relating to the matter in respect of which the account is claimed took place."

To further build up on the rest of the submission already made, the Plaintiff invited this Court to be persuaded by its own decision in the case of ***Edna John Mgeni v National Bank of Commerce, TLSR 2016***, at page 446 where it was held as follows, that:

> " Since the question of whether the Plaintiff's claim is based on time-barred debts requires not only putting the plaintiff (creditor) to proof of the fact that the debt is not time-barred but also scrutinizing books of accounts to ascertain when the debt arose and when it became payable, it does not qualify to be treated as a preliminary objection."

To wind up his submission, the Plaintiff made a brief remark on the submission made by the Defendant regarding the withdrawal

of *Civil case No.79 of 2015* and the order that its re-filing should be not later than 16th January 2020.

Concerning that submission, the Plaintiff made it clear that, the suit was not time barred because, counting from 29th January 2015 to January 15th, 2020, when this suit was re-filed as per the order of the Court, the suit cannot be said to be time barred. The Plaintiff argued, therefore, that, this was the reason why the Court fixed the deadline of re-filing the case to be 16th January 2020. On that note, the Plaintiff called upon this Court to dismiss, with costs, the preliminary legal issue raised by the Defendant.

On 25th June, 2020, the Defendant filed a rejoinder submission. He submitted that the preliminary objection raised in respect of this suit is a pure point of law as enumerated in the case of ***Mukisa Biscuits*** **(supra)**. The Defendant argued that, it is a trite law that pleadings include their Annexures. Besides, it was a further Defendant's rejoinder, that, the basis of the preliminary objection was the clear implications of the pleadings, *i.e., Clauses 7 (a), 7 (b) and 7 (c) of the plaint*, as they all focus on the breaches arising in 2011.

The Defendant rejoined further that, going through the Plaint, it is obvious that, the basis of the claim is not *Annexure 9* (*the Reconciliation Agreement dated 29th of January 2015*) as alleged. The Defendant assigned the following as reasons for such a submission of his:

(a) That, the claims are stated in **clause 3** of the Plaint where the Plaintiff states: "*The Plaintiff claims against the Defendant are for a*

declaration that the defendant is in breach of contractual terms and payment of Tsh.4.491,887,127.91 arising from the Defendant's breach of contract and its terms."

(b) That, **clauses 4 and 5** of the Plaint makes reference to the contractual document which is known as the key *distributorship agreement* annexed to the Plaint as *Annexure NCA-1a-b*, dated 28th June 2011.

(c) That, clause 6 (i) to (vii) of the Plaint makes reference to the clauses of the said Key Distributorship Agreement.

(d) That, clause 7 (a) to (f) provides an analysis of the breaches from 2011 in reference to the Agreement.

(e) That, the reference at the foot of the Plaint in item *(i)* are that, *"The Plaintiff prays for judgement and decree of the contractual (sic) against the Defendant that the Defendant is in breach of the contractual terms between itself and the Plaintiff."*

On the basis of the above, the Defendant maintained that, the basis of the Defendant's claims is the *Key Distributorship Agreement* executed in the year 2011, June 28th, and not the *Reconciliation Agreement* of 2015 which is only referred to in clause 9 of the Plaint. Therefore, the Defendant disputed the Plaintiff's submission that the cause of action accrued from 29th January 2015 when the *Reconciliation Agreement* was executed.

The Defendant rejoined further that, even without making reference to the Annexures, going through the Plaint one will find that the cause of action complained of arose in 2011.

Citing section 4 of the *Law of Limitation Act, [Cap.89 R.E.2002]* the Defendant's legal counsel contended that, the law is clear that, *"the*

period of limitation in relation to any proceedings commences when the right of action for such proceedings accrues".

The Defendant's legal counsel maintained, therefore, that, according to the Plaint, the cause of action arose in 2011 and the prayers sought are solely based on the breach of the 2011 Agreement. In his final point of rejoinder submission, the Defendant's legal counsel prayed for the dismissal of the suit with costs for being time barred.

I have considered the rival submissions of the learned counsel for the parties. As it may be gathered from these rival submissions, on the one hand the Defendant argues that, the suit is time barred because the cause of action, which is a breach of the terms of an agreement signed between the parties, accrued in 2011. On the other hand, the Plaintiff, denies that proposition by the Defendant arguing that, the cause of action accrued in 2015, and, for that reason, the suit is within the prescribed time limit. The Plaintiff contended further, that, in order to ascertain whether the breach arose in 2011 or 2015, that will be a matter of evidence.

From the parties' submissions, I find that the main concern in this immediate ruling is: *whether the objection raised by the Defendant is meritorious*. In responding to this issue, however, I will be obliged to look at other ancillary but important issues which build up to the main issue. One of them is: *whether the cause of action accrued in 2011 or 2015*. This is an important but ancillary issue and I will start with it.

Essentially, the principles for determining whether a plaint discloses a cause of action or not, are well settled. The legal position

is that, when deciding whether or not a plaint discloses a cause of action, one had to look at the plaint as a whole together with its *Annexures*, if any. The cases of *John M Byombalirwa v Agency Maritime [1983] TLR, 1*; *Musanga Ng'anda Andwa v Chief Japhet Wanzagi and Eight Others [2006] TLR 351* and *Lucy Range v Samwel Meshack Mollel and Others, Land Case No.323 of 2016* (unreported) confirm that legal position.

As I look at the plaint filed in this Court, I find no difficulty in ascertaining that the main claim in this suit is about a breach of the terms of a contract which governed the parties' relations, and thus, the Plaintiff seeks to be compensated for losses suffered as a result of the breach. Essentially, a breach of contract is a wrong, a failure to comply with legal obligations arising from the contract for which the innocent party has bargained for and provided consideration. Where a party to a contract repudiates or fails to perform one or more of his obligations under that contract, that repudiation or failure is what constitutes the breach of that contract.

Most authorities hold that a cause of action for breach of contract crystallizes *as soon as the breach has occurred.* One authority to that effect is the English case of ***Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd*** (No 2) [1997] 1 WLR 1627. In this English case, Lord Nicholls stated, at p. 1630B/C, that: "*In cases of breach of contract the cause of action arises at the date of the breach of contract.*"

In the instant case, however, the question that calls for my immediate attention is: *when was the contract broken? Is it the year 2011 (which will mean that the contract breached is the Distributorship Agreement) or*

the year 2015 (which means that the Agreement so far claimed to be breached is the Reconciliation Agreement)?

Looking at the plaint as a whole, I am of the view that the agreement alleged to have been breached is the *Distributorship Agreement* which the parties concluded in *June 2011* and not their *Reconciliation "Agreement"* dated 29th of January 2015. I hold that view because, looking at paragraph 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16 they all refer directly or indirectly to the June 2011 *Distributorship Agreement.* Paragraphs 4 and 5 of the plaint provide us with the background to the *Distributorship Agreement* in terms of when the offer and acceptance between the parties took effect.

Paragraph 6 of the plaint narrates in a nutshell, what were the terms of the Agreement. In that paragraph, the Plaintiff refers to a bank guarantee secured by the Plaintiff as one of the key components of the contract to secure payments of products by the Plaintiff to the Defendant.

On the other hand, paragraph 7 of the plaint, which is the key paragraph upon which the Defendant has pegged his argument in support of the preliminary objection, provides for particulars which alleges breach of the *Distributorship Agreement.* I will reproduce this particular paragraph hereunder:

> "7.That, soon as the contract took effect, the Plaintiff noticed that the Defendant started breaching some of the terms specifically with product pricing, the Defendant sold products directly to stockists instead of selling through the Plaintiff, the Defendant's staff not remitting payments of the products they

took from the Plaintiff, non-payment/refund of transport claims and expired stocks and arising from that the Plaintiff raised issues as follows:

(a) By an e-mail dated 17th July, 2011, the Plaintiff, through its Managing Director complained to the Defendant about pricing, which resulted into the Plaintiff not getting the agreed margins of sale. In its reply dated 18th July 2011, the Defendant admitted the mistake and promised to correct the same. The Plaintiff shall rely on the said e-mail whose copies are annexed herewith and collectively marked "NCA-3".

(b) The same issues of pricing and sale of products to stockist and the Defendant's ex-factory prices instead of the Plaintiff's prices were raised by the Plaintiff again through its Managing Director and Accountant, Lusajo Luvanda, in the emails dated 30th August 2011 and 28th June 2012 respectively. By the Defendant's email dated 29th June and 2nd July 2012, it became clear that the Defendant had indeed interfered with the issue of pricing which had adversely affected the Plaintiff. The Plaintiff shall rely on the said emails whose copies are annexed herewith and collectively marked "NCA-4".

(c) By its email dated 30th November 2011, the Defendant still required the Plaintiff to provide products to one stockist on a credit basis thereby affecting the Plaintiff's cash flow. The said stockist never paid their debts to date. The Plaintiff shall rely on the said email whose copy is annexed herewith and collectively marked "NCA-5".

(d) The Plaintiff raised the issue of expired stocks. By his e-mail dated March 11th, 2013, the Defendant's employee,

Lumuli Msika also raised the issue of expired stocks as well, which was again raised by the Plaintiff in its e-mail dated 19th March 2014. The Plaintiff shall rely on the said emails whose copies are annexed herewith and collectively marked "NCA-6".

(e) Non-remittance by the Defendant's staff of sale proceeds of products they took from the Plaintiff and supplied to the Defendant's appointed stockists. In its email dated 04th February 2015, the Plaintiff reminded the Defendant to clear the latter's staff debts. In emails dated 15th April 2015, the Defendant called on one of its staff to clear his outstanding balance on the account of the Plaintiff which has not been cleared to date. The Plaintiff shall rely on the said email whose copies are annexed herewith and collectively marked "NCA-7".

(f) The Defendant's failure to refund the Plaintiff transport expenses in terms of loading and offloading costs of the Defendant's products. By various email correspondences of 13th, 26th, 2013, July 21st, August 26th, and October 26th 2014, the Plaintiff raised the issue but was ignored by the Defendant. The Plaintiff shall rely on the said e-mails whose copies are annexed herewith and collectively marked "NCA-8".

In paragraphs 8 and 9 of the plaint, the Plaintiff refers to a continued worsening of his finances *in connection with the distributorship contract*, prompting for a call for a joint reconciliation of the Plaintiff's accounts which was carried out on 28th January 2015 to ascertain the status of stocks, financials, and related matters.

Paragraph 10 of the plaint, provides for information regarding the Plaintiff's request for data for the year 2011/2012 and a call for a second joint reconciliation which was not heeded by the Defendant. The paragraph, as well, provides information regarding the Plaintiff's own audit of all transactions connected with the Agreement from 2011 to 2015.

Paragraph 11 of the plaint reflects on business losses suffered by the Plaintiff from September 2014- to May 2015 and paragraph 12 provides information regarding the lowering of prices and subsequent unilateral termination of the contract by the Defendant in May 2015. Attachments connected with Paragraph 12 dates back to the year 2012, 2013 and 2014. Paragraph 13 of the plaint refers to the demand notice by the Plaintiff while paragraph 14 provides information regarding the Defendant's recall of the bank guarantee. Paragraph 15 of the Plaint provides as follows:

> "That, by the Defendant's refusal to conduct a joint reconciliation thereby financially stifling the Plaintiff and effectively pushing it out of business, the Defendant is in breach of the KD Distributorship agreement and has subjected the Plaintiff sufferings huge business loss necessitating the institution of this suit to claim the stated claimed damages and prays for general damages to be assessed by the court. The Plaintiff had initially instituted a *commercial case number 79 of 2015* which was withdrawn on 16th December, 2019 with leave to re-file. A copy of the Plaintiff's Board Resolution and the Court order are attached herewith and marked "NCA-14" collectively".

I have taken the liberty of navigating through the entire plaint since, the matter at hand, depends on when exactly did the alleged breach of contract took place (i.e., *when did the cause of action accrued*) so as to kick-start the wheel of limitation period. Such a question cannot be looked at selectively, but by holistically analyzing the plaint and its annexed documents.

In this instant case, the Plaintiff has lamented that the Defendant has singled out a handful of emails forming *Annexure* "**NCA 5**" to the Plaint as the basis of his objection to the suit, while leaving out all other Annexures listed by the Plaintiff for the entire claim. In so doing, the Plaintiff has questioned the correctness of the Defendant's selective approach challenging only three items in the plaint, *i.e.*, Clause 7 (a) to (c) while leaving out the rest of the claims.

In my view, the claims at hand, are not only spread under this paragraph and its sub-paragraphs, but also in the rest of the paragraphs of the plaint and its Annexures. For that reason, I am of a settled mind that, the Defendant's selective approach, is not legally correct. I hold so because, in the case of *Mr. Josephat Muniko v North Mara Gold Mine Limited, Commercial Case No.9 of 2019*, (unreported) this Court stated that, the contents of a plaint have to be read together in their totality including the *Annexures* attached thereto.

See also the earlier cited cases of *John M Byombalirwa v Agency Maritime [1983] TLR, 1*; *Musanga Ng'anda Andwa v Chief Japhet Wanzagi and Eight Others [2006] TLR 351* and *Lucy Range v Samwel Meshack Mollel and Others, Land Case No.323 of 2016* (unreported) all of which confirm that

legal position. It is my finding, therefore, that, in view of the above cited cases, the selective approach taken by the Defendant when reading the plaint filed by the Plaintiff is an incorrect legal approach.

There is yet another aspect connected with the selective approach which the Defendant has adopted when analyzing the plaint filed in this case. It is also clear from the submissions by the Defendant, that, this Court has been invited to invoke section 3 (1) of the *Law of Limitation Act, [Cap.89, R.E.2002]* and dismiss this suit. The premise upon which that invitation is made in paragraph 7 (a) to (c) of the plaint and the handful of the email communications, forming *Annexure* "NCA 5" to the plaint, all of which have been selectively adumbrated from the plaint. As I stated herein above, the selective approach is erroneous. The plaint has to be analyzed holistically, including its all other Annexures.

The Defendant's selective approach when looked at through the same lenses he has used to raise his preliminary objection, one will as well find it to be faulty. In doing so, however, it will perhaps be useful to reiterate what this Court stated in the case of ***Thomas Ngawaiya v The AG & 3Others, Civil Case No.177 of 2013 (HC, DSM) (unreported).***

In that case, some issues arose regarding limitation of time and *section 3 (1) of the Law of Limitation Act* came under scrutiny by the Court. In addressing the matter, the Court had the following to say:

> "[T]he law imposes mandatory obligation on the courts to dismiss the proceedings instituted after the prescribed period of limitation. However, in determining the question of limitation,

two principles must be considered. In the first place, the court must look at the whole suit framed, including the reliefs sought and see if the suit combines more than one claim based on different causes of action, as one of them may be found to be time barred while the others may not. In such circumstances, it is not proper to dismiss the whole suit as time barred. Second, the court, in interpreting the provisions of a law, should read in its context as a whole and not one section in isolation." (*Emphasis added*).

As it may be observed from the above paragraphs, it is clear to me that even when one is called upon to address the issue of limitation of time, a holistic scrutiny of the pleadings is a matter of necessity and one cannot adopt a selective approach. The court must, first and foremost, look at the whole suit framed, including the reliefs sought.

If the above approach is to be adopted in this instant case, which approach must in fact be adopted, it is clear to me that one will find that the breach complained about is *not a single act of the Defendant but a series of successive acts*, building up from 2011 to 2015 when they culminated into the reconciliation meeting that came up with Annexure "NCA-9". That means, therefore, that, to state exactly when the compounded acts culminated into a breach one has to carry out an investigatory journey, including going through the documentary evidence. If that be the approach, the validity of the preliminary point of law raised will be questionable.

Under paragraph 12 of the plaint, for instance, the Plaintiff refers to the Defendant's conduct of lowering prices and subsequent

unilateral termination of the contract in May 2015. This is a successive act of the Defendant alleged to be carried out in 2015 and which seems to be the last straw that broke the back of the camel. As stated in paragraph 15 of the plaint, after the Defendant's unwillingness to carry out a second round of reconciliation, the Plaintiff was forced to seek remedies from the Court. That act and such all others from 2011 to 2015 have a collective implication in ascertaining when exactly was the breach of the agreement accrued.

As earlier stated herein, even if paragraph 7 of the plaint indicate that incidents of breach started to resurface from 2011, the reading of the Plaint and its Annexures as a whole, does not indicate that the complained acts of the Defendant ended up there but, as it may be clearly noted in the Plaint when looked at as whole, the alleged breaches complained against were successive as the parties to the agreement continued with their relationship, while, at the same time, reconciling their differences and misgivings.

To my view, the above finding brings in an element of continuing breach, which, as this Court stated in the **Ngawaiya's case** *(supra)*, qualifies what section 3 (1) of the Limitation Act provides. The Court in that case had the following to say:

> "This brings me to the second principle of looking at the Law of Limitation Act in its context and as a whole. Although section 3 (1) of the Law of Limitation Act bars causes whose limitation period has expired, the said (*sic*) is clear that "subject to the provisions of this Act". That phrase was not a decorative luxury, but was inserted in the section purposely. It means that the section should not be used in isolation of other sections of the

same Act. As the law stands, there are other sections which qualify the working of other sections. For instance, there is section 7 of the Law of Limitation Act which stipulates that:

> *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.*

This, therefore, means that .... the application of section 3 (1) of the Act has, in the present case, been qualified by section 7 of the same Act."

The above observations means that, it is not necessarily true that, once a party pleads that a particular suit is time barred the Court will invoke section 3 (1) of the *Law of Limitation Act.* As the Court stated in **Ngawaiya's case** *(supra)*, the Section 3 (1) of the *Law of Limitation Act* cannot be invoked blindly as it is subjected to other provisions of the same law, and the law must be construed as a whole.

All the same, since it was not appropriate for the Defendant to adopt a selective approach of singling out paragraph 7 (a) to (c) of the plaint and mount upon it the basis for his objection, a due regard should be had to the fact that, apart from what the Plaintiff's enlists under paragraph 7 (a) to (c) of the plaint as breaches, as well the Plaintiff has alleged other successive series of breaches and defaults in the settlement of some debts, all of which mounts up to the year 2015, when the *Annexure NCA 9* was agreed by the parties, and the

subsequent alleged Defendant's unilateral act of terminating the agreement.

The above fact, coupled with what may be gathered from paragraphs 9 and 10 of the plaint and *Annexture "NCA 9"*, makes it is clear to me that, this suit does as well raise issues regarding *whether the Plaintiff's claims are time-barred debts*. With that fact in mind, it means to me, therefore, that, there will be, as well, a need for one to scrutinize the parties' accounts to ascertain, not only the nature of the debts, but also when exactly did they accrue.

Alluding to that fact, the Plaintiff has laboured to invoke *section 6 (a) of the Law of Limitation Act, Cap.89 [R.E.2019]*, arguing that, since the last act of reconciliation of the party's books of accounts was the year 2015 when they undertook a joint reconciliation, the claims should be reckoned from that period and be found to be within time.

I will not determine that point at this preliminary stage of this case since, in my view, the issues regarding reconciliation of accounts are as well matters calling for evidence. However, what I am convinced about, in the circumstances of this case, and looking at the Plaint and its Annexures as a whole, is that what was stated by this Court in the case of *Edna John Mgeni v National Bank of Commerce, TLSR 2016*, is useful and provide me with guidance. In that case this Court state as follows, at page 446, that:

> " Since the question of whether the Plaintiff's claim is based on time-barred debts requires not only putting the plaintiff (creditor) to proof of the fact that the debt is not time-barred but also scrutinizing books of accounts to ascertain when the

debt arose and when it became payable, it does not qualify to be treated as a preliminary objection."

In view of the above, and taking into account that the objection raised by the Defendant seems to be essentially and selectively premised on paragraph 7 (a) to (c) of the plaint and a handful of emails attached to it as *Annexures NCA 5*, while leaving out rest of the claims as contained in other paragraphs of the plaint, the objection raised cannot stand, the reason being what I stated earlier, that is to say, the plaint should have been read as a whole, together with its Annexures if any, and cannot be read in an isolated or selective manner.

Besides, it is trite that, where a defendant raises a ground of objection based on the fact that the suit is barred by limitation, such fact should be manifest from the mere reading of the plaint and its accompanying *Annexures*, if any. It should not be one that calls for any investigation into any fact at all as the case seem to be in this instant suit. If that is to be done, the objection ceases to be a pure point of law. Consequently, in order to find out whether the suit is barred by limitation and thus invites the application of section 3 (1) of the *Law of Limitation Act, 1971, [Cap.89 R.E.2002]*, the barred nature of the suit has to be manifest from the mere reading of the plaint and its Annexures and no amount of evidence can be looked into. Anything to the contrary will mean that the objection lacks merit.

On the basis of the above reasoning, the objection raised by the Defendant in this suit should fail, and as such, this Court settles for the following Orders:

1. *THAT, the preliminary objection is hereby dismissed with costs, and;*
2. *THAT, the suit should proceed to its next stage of conducting a first pre-trial conference.*

It is so ordered.

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DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
17 / 07 /2020

Ruling delivered on this 17th day of July 2020, in the presence of Ms Jacquiline Kulwa the Advocate for the Appellant and Ms. Beatrice Mutembei, Advocate for the Respondent.

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DEO JOHN NANGELA
JUDGE
High Court of Tanzania (Commercial Division)
17 /07/2020