

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

COMMERCIAL CASE NO.42 OF 2020

BROOKSIDE DAIRY TANZANIA LTD.....PLAINTIFF

v

LIBERTY INTERNATIONAL LTD.....1st DEFENDANT

JOHN KEYENKUNGU..2nd DEFENDANT

*Last Order: 10th March 2021
Date of Judgment: 30th April 2021*

RULING

NANGELA,J:

When this suit was filed in this Court, the 2nd Defendant raised a counter-claim against the Plaintiff claiming for alleged unpaid remuneration amounting to USD 384,000/, a declaration that the 2nd Defendant is entitled to a 10% of all the issued shares in Plaintiff's company (1st Defendant to the Counter-claim), interests

at the commercial rate of 12% p.a, general damages, costs and any other reliefs the court shall deem fit to grant in the circumstance.

The Plaintiff filed its written statement of defence to the counter-claim and raised preliminary points of law in objection to the counter-claim. Specifically, the points made by the Plaintiff (1st Defendant to the Counterclaim) are to wit, that, the counter-claim is bad in law for:

- (a) being time barred;
- (b) lacking a cause of action;
- (c) misplacement of cause of action; and
- (d) mis-joinder of parties.

This ruling, therefore, results from the above preliminary points raised in objection to the Counter Claim. On 9th September 2020, this Court made an Order that the matter be disposed of by way of filing written

submissions, hoping that, that approach would fast track the process of hearing the matter.

However, for reasons which were disclosed to the Court in its order dated 15th December 2020, the 2nd Defendant (Plaintiff in the Counter-claim) was unable to file its written submission timely and sought for time to do so, a prayer which I granted in the interest of justice.

Submitting on the preliminary points, Ms Hadija Kinyaka, the learned counsel for the Plaintiff, consolidated grounds (b) and (c) and abandoned ground (d), and, she finally urged this Court to dismiss the counter claim with costs. In her submission, she contended that, the counter-claim was hopelessly time barred. She argued that, the alleged claims arises from a contract (**Annexure JK**) dated 2nd April 2004 and that, the alleged breach is said to have occurred in 2007.

It Ms Kinyaka's further submission that, as according to paragraphs 21 and 24 of the counter-claim,

the alleged breach of "**Annex JK**" arose in 2004, immediately after the execution of the contract.

However, the counter-claim was filed on 9th July 2020, about 16 years, assuming the breach arose in 2004, as alleged under paragraph 24 of the counter-claim, or 13 years if the breach occurred in 2007, when the 2nd Defendant issued its demand letter as stated under paragraph 25 of the 2nd Defendant's counter-claim.

Ms Kinyaka submitted that, as per section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2019, read together with Item 7 of Part I of the Schedule to the Act, the prescribed time limit for claims arising from breach of contract is limited to six (6) years.

Relying on the decision of the Court of Appeal of Tanzania in the case of **Director General NSSF v Consolata Mwakisu, Civil Application No.329/01/2017**, Ms Kinyaka urged this Court to dismiss the counter-claim with costs for being time-barred.

As regards the second consolidated ground of objection, Ms Kinyaka submitted that, the 2nd Defendant's counter-claim is bad in law for lack and misplacement of cause of action against the Plaintiff (the 1st Defendant in the counter-claim).

In her submission, Ms Kinyaka contended that, the original suit by the Plaintiff (1st Defendant in the counter-claim) is for recovery of the advanced payments extended to the 2nd Defendant (the Plaintiff in the counterclaim) and Liberty International Ltd, for payment of various government fees, charges and taxes on behalf of the Plaintiff (1st Defendant to the counter-claim), under a contract which was between the 1st Defendant to the counter-claim, the 2nd Defendant (Plaintiff in the counter-claim) and Liberty International Ltd.

However, according to the counsel for the Plaintiff (1st Defendant in the Counter-claim), the 2nd Defendant (the Plaintiff in the counterclaim) is suing the Plaintiff herein for claims alleged to have arisen from the contract

executed in 2004 between parties with different subject matter.

In other words, Ms Kinyaka contended that, as opposed to the counter-claim, the Plaintiff's (1st Defendant to the counter-claim) original suit is based on a distinct and separate contract unrelated to the 2nd Defendant's counter-claim and the alleged contract on which the counter-claim is based. In view of that, Ms Kinyaka contended that, there is a misplacement of the 2nd Defendant's counterclaim and, thus, there is no cause of action against the Plaintiff (1st Defendant to the counterclaim).

Reliance was placed on **Order VIII Rule 9 (1) of the Civil Procedure Act, Cap.33 R.E.2019**. She contended that, as per the law, the counterclaim is to be set in respect of a cause of action arising from and in relation to a transaction alleged in the suit by the Plaintiff (1st Defendant in the Counterclaim). As for her, it was erroneous on the part of the 2nd Defendant to prefer a

counterclaim with different cause of action from the original suit instituted by the Plaintiff (1st Defendant in the Counterclaim).

To strengthen her submissions, Ms Kinyaka referred to this Court the cases of **Musanga Ng'anda Andwa v Chief Japhet Wanzagi and 8 Others [2006] TLR 351** and **Jeraf Shariff and Co. v Chotai Fancy Stores [1960] EA 374** concerning how to deal with an allegation that a Plaintiff fails to disclose a cause of action.

Ms Kinyaka contended that, although paragraphs 21, 22, and 23 (including **Annex. JK-1**) of the 2nd Defendant's counterclaim had alleged that there is a breach of contract on the part of the Plaintiff (1st Defendant to the counterclaim), by failure to appoint the 2nd Defendant as its local director as well as not paying him remuneration of not more than USD 2000 per month, and failure to issue him 10% of the issued shares in the Plaintiff's company, the reading of "**Annex.JK**" tells a different story.

In particular, she contended that, Clauses 8.1, 8.3 and 9.1.1 of "**Annex.JK**", do not clearly state that the Plaintiff herein (1st Defendant to the counterclaim), had obligations to perform the alleged claims. As such, she argued that, the 2nd Defendant cannot allege breach of contract against the Plaintiff as he has done in the counterclaim. With all that, she urged this Court to uphold the objections and dismiss the counterclaim with costs.

On 15th December 2020, the 2nd Defendant filed its written submission having obtained the leave of the Court to do so out of time. In his submission, Mr Dereck Kahigi, the learned counsel for the 2nd Defendant (Plaintiff in the Counterclaim) contended that, the objections should be overruled with costs.

It was the submission of Mr Kahigi, that, the alleged breach by the 2nd Defendant in the counterclaim is not time barred because, reading from paragraphs 21 and 25 of the counterclaim, the alleged breach is a "**continuing breach**" and starting from the year 2004. Referring to



section 7 of the Law of Limitation Act, Cap.89 R.E 2019, Mr Kahigi submitted that, where the breach is continuing, the period of limitation runs at every moment of time during which the breach or the wrong continues.

To buttress that point, reliance was placed on the case of **Josephat Muniko s/a Mwita Mkindya and Another v North Mara Gold Mine Ltd, Commercial Case No.9 of 2019, HC (Unreported)** where this Court noted that, section 3 of the Law of Limitation Act must be read together with section 7 of the same Act.

Reliance was also placed on the case of **Alcheraus Sephurine Mwesiga v Tanzania Portland Cement Company Ltd, Civil Case No.12 of 2019, (unreported)** where this Court held that, where a wrong is continuing and its effects are seen, the cause of action does not extinguish.

Mr Kahigi contended further that, in as much as the 2nd Defendant remains entitled to 10% shares and remuneration of USD 2000 which has never been paid,



the very moment such remains unpaid refreshes the time of limitation and the breach remains as the perpetual succession of the company continues.

Mr Kahigi contended further that, the contention that section 3 (1) of the Law of Limitation Act read together with Item 7 of the Part I of the Schedule to the Act should apply, is tantamount to a failure on the part of the Plaintiff's counsel to apprehend the factual matrix of the counterclaim.

To Mr Kahigi's understanding, such provisions do not apply to the counterclaim and, for that matter, he distinguished the case **Director General NSSF v Consolata Mwakisu, Civil Application No.329/01/2017**, which was earlier cited by Ms Kinyaka arguing that, the Court of Appeal's decision was to the effect that the Law of Limitation Act does not apply in the Court of Appeal.

Besides, Mr Kahigi submitted that, a counterclaim being a suit in itself, is also to be governed by Order VII

Rule 6 of the Civil Procedure Act, Cap.33 R.E 2019. He was of the view that this provision requires a party pleading to state the grounds of exemption from the law of limitation and, one of the grounds here, is the issues of continuing breach.

As regards the consolidated issue on cause of action, Mr Kahigi submitted that, the submissions by Ms Kinyaka are without merit since the objection does not meet the test for a preliminary objection as it calls for scrutiny of evidence. He asserted that, the learned counsel for the Plaintiff fails to grasp what the counterclaim is all about and that, what the 2nd Defendant has raised as a counterclaim is based on the alleged breach of contract.

To conclude, Mr Kahigi contended further, that, the parties are the same since one is the subsidiary of the other. He maintained, therefore that, there was a cause of action and Order VIII Rule 9 (2) of the CPC is clear, that, a counterclaim is a cross-suit.



In a rejoining submission, the learned counsel for the Plaintiff reiterated the earlier position that, the counterclaim is time barred. She challenged the assertion that the breach alleged is a continuing breach. Reference was made to the decision of this Court, (Masabo,J) in **TABECO International Ltd v Attorney General and Another, Civil Case No.139 of 2019 (unreported)** with an argument that, the 2nd Defendant has not shown whether the Plaintiff continued to enjoy services despite the alleged breach.

Having summarised the rival submission as I have done herein above, the issue I am called upon to address is whether the preliminary objections have any merit.

It is worth noting, as rightly stated by the learned counsel for the 2nd Defendant, that, a counterclaim is a cross-suit. It could be initiated on its own. Whether it discloses a cause of action or not, the pleadings and all that may be attached to it must be scrutinised. 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.

In this instant case, the contention floated around by the Plaintiff is that, the counterclaim is time-barred and, the 2nd Defendant's pleadings constituting the counterclaim do not disclose a cause of action against the Plaintiff. Is that a correct view? This will invite me to examine the counterclaim and the annexure to it, in particular **"Annex. JK-1."** In so doing, the relevant paragraphs of **the counterclaim** are paragraph 21, 22, 23, 24 and 25, which I will reproduce them here under as follows:

"21. That the Plaintiff's claim against the Defendants jointly and severally is for a declaration for breach of contract for failure to appoint and notify the Registrar of Companies his appointment (sic) as a local Director of the 1st Defendant as a subsidiary company to the 2nd Defendant; declaration that the Plaintiff is entitled to be paid his remuneration as per the contract from year



2004 to date, which is approximated at USD 384,000; declaration that the Plaintiff is entitled to 10% of all issued shares of the 1st Defendant by virtue of an agreement executed in 2004; general damages as the court shall assess, interests at the commercial rate of 12% from the date of agreement to the date of payment ; costs of the suit and any other reliefs the court may deem fit to grant in the circumstances.

22. That, the Plaintiff entered and executed an agreement with the Defendants who were to pay the loan owed by Social Action Fund to M/s New Northern Creameries Ltd. Further and among other things, the Plaintiff agreed with the Defendants, in consideration for the facilitation services to perfect the deal under the contract, to appoint the Plaintiff as the Local Director of the 1st Defendant. In furtherance, (sic) the parties agreed to allocate 10% of issued shares of the 1st Defendant to the Plaintiff as a local Director.

23. That, it was further agreed for the 1st Defendant to pay (sic) remuneration equivalent to but no more than USD 2000 per month, the fact which was agreed and confirmed by the Defendants jointly. Annexure JK1 is a copy of the agreement to which the Plaintiff craves leave to refer the same as part of this claim.

24. That, ever since the execution of the agreement, the Defendants has (sic) never honoured their part despite their operation in the country. Further, that, the Plaintiff despite several demands both verbal and written one (sic), the Defendants kept on endless promises.

25. That, the Plaintiff through his former Advocate REX ATTORNEYS, wrote a letter to the Defendants requiring them to honour their obligations under

the contract but the Defendants to date have kept mum with empty and endless promises. Further that, since 1st Defendant is in operation in the country despite non-performance of the agreement, the Defendants have been in continuous breach of the agreement. Annexure JK-2 is the copy of the said letter to which the Plaintiff craves leave to refer the same as part of this claim."

In my view, and upon reading the annexure to the counterclaim, i.e., **Annex.JK-1** and **JK-2** together with the above cited paragraphs of the counter-claim, I see no hesitation to hold that they disclose a cause of action as alleged by the 2nd Defendant (Plaintiff in the Counterclaim). The cause of action here is breach of the agreement (**Annex.JK-1**). As such, the preliminary point of law to the effect that the counterclaim does not disclose a cause of action is unmerited and I hereby overrule it.

The next question, however, is a more pertinent one, in my view. It asks whether the alleged claim regarding breach of contract, even if it does exist, has been raised within the agreed period of limitation.

According to clause 4.1 of **Annex.JK-1**, the commencement of the agreement was 1st of April 2004. **Annex.JK-2** was raised as a red flag on the 28th of August 2007, three years from the time when the contract was executed by all parties to **Annex JK-1**. In her submissions, Ms Kinyaka, the learned counsel for the Plaintiff, contended that, referring to paragraph 24 of the counterclaim, the alleged breach occurred from the time when the agreement was executed, and in the alternative, from the time when **Annex. KJ-2** was raised as a red flag demanding performance.

If that is the position, Ms Kinyaka has contended, that, the counter-claim which was filed on 9th July 2020, was about 16 years late, assuming the breach arose in 2004, as alleged under paragraph 24 of the counter-claim, or 13 years late, if it is to be assumed that the breach occurred in 2007, when the 2nd Defendant issued **Annex.JK-2** to the Plaintiff as stated under paragraph 25 of counter-claim.



By all standards, if one was to take the position of Ms Kinyaka, the conclusion would be that the counterclaim was raised in a belated hour warranting the application of section 3(1) of the Law of Limitation Act, Cap.89 R.E 2019 read together with the Item 7 of the Schedule to the Act. If so, that would surely justify the conclusions that it is unproductive to have plaintiffs bringing suits many years after the event.

However, was it so? The learned counsel for the 2nd Defendant has contended that, what Ms Kinyaka asserts was not the case given that the breach alleged to have been occasioned by the Plaintiff, as per the counterclaim, was "***a continuing breach***" which, for the purposes of the application of the limitation of time, is exempted under section 7 of the Law of Limitation Act Cap.89 R.E 2019.

According to **Halsbury's Laws of England, 4th Edn., Vol.28** in **paragraph 662**, it is stated that:

"In an action for a breach of contract the cause of action is the breach. Accordingly such an



action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within the six years of action brought."

Under our law, Item 7 of the Schedule to the Law of Limitation Act, Cap. 89, prescribes that, claims relating to breach of contract to be brought within six years of the breach. The accrual date as per section 5 of the Law of Limitation Act is the date when the cause of action arises. However, it is also true that when a particular breach is a continuing breach of contract, that continuing breach has the effect of postponing the commencement of the limitation period.

This is to say that, in a case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. This is centuries old rule (see the 1858 case of **Brown v. Trumper 26 Beavan 11, 53 E.R. 800**, as an early example of a case establishing that principle which is now



codified in our section 7 of the Law of Limitation Act, Cap.89 R.E 2019).

With that in mind, the immediate question that ensues for my consideration in relation to the instant case at hand is whether indeed the alleged breach of contract constituted "*a continuing breach*" as contended, for which exceptions are to be taken under section 7 of the Law of Limitation Act Cap.89 R.E 2019.

Definition of what constitutes a continuing breach may be obtained from the Indian Case of **The Rehabilitation Plantations Ltd vs P.S. Ansary, on 21 December, 2009**, where Mr Justice Thomas, P. Joseph had the following to say:

"The term 'continuing breach' is intended to apply to contracts obliging one of the parties to adopt some given course of action during the continuance of the contractual obligation. But a continuing breach or wrong is different from a continuing damage. The former gives rise to a fresh cause of action but not the latter."



One may also refer to an old English case of **Holes v. Chard Union [1894] 1 Ch.D. 293**. In this case, the Court was of the view that:

"a continuing cause of action arises from the repetition of acts or omissions similar to those in respect of which action is brought. Lindley, L.J. Said, "What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."

In the instant case, the complaints alleged to constitute the breach of the agreement between the parties (Annex JK-1) include failure on the part of the Plaintiff to appoint the 2nd Defendant a director in the Plaintiff's company as well as failure to pay him a monthly remuneration to a tune of USD 2000. Can these incidents be terms as repetitive of acts or omissions of the same kind as that for which the action was brought?

Looking at the crux of the matter, in my view, the answer is no. The appointment of the 2nd Defendant as a director in the Plaintiff Company is or ought to be a one

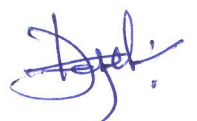
time off event which would thereafter entitle him to be paid USD 2000 as remuneration.

Failure to appoint him as agreed was, indeed, a breach but this took place way back in 2004, some 16 years ago (and not even in 2007 when the demand letter was raised as a red flag). I do not even think this can be a case falling under section 7 of the Law of Limitation Act, Cap. 89 R.E.

In **TEBECO's case (supra)**, this Court stated that:

"Section 7 of the Law of Limitation Act, Cap. 89 R.E contemplates such cases where the party to the contract dishonour the promise but continues to enjoy the services rendered by the other party to the contract."

In my view, looking at the instant case at hand, I find that the 2nd Defendant's counterclaim has not fulfilled the requirements which would entitle this court to invoke section 7 of the Law of Limitation Act and declare the alleged breach a continuing breach. Nothing shows that the Plaintiff continues to enjoy services rendered by the



2nd Defendant or that, the relationship between the parties subsist in such a way that there may be found to exist a continuing duty under the contract to rectify the original breach.

With such observations, I tend to agree with the learned counsel for the Plaintiff's objection that, although there was a breach of contract, that cause of action was not pursued within the timeframe stipulated by the Law of Limitation Act. Since the cause of action arose in 2004, it ought to have been pursued within six years from that time, which means that, the limitation period ended in 1st April 2010. Beyond this period no claims based on the breach can be entertained.

It is unfortunate, therefore, and as stated in **John Cornel v A. Grevo (T) Ltd, Civil Case No.70 of 1998 (HC) (unreported)**, that:

"the law of Limitation of actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all who get caught in its web."



The above excerpts means that, once a litigant is outside the realm of permissible period within which he can bring his action, the law of limitation will roll down its curtains. Consequently, and pursuant to section 3(1) as read together with Item 7 of Part I of the Schedule to the Act, Cap.89 R.E 2019, the counterclaim is found to be time barred and it must succumb to the fate of dismissal.

The first limb of the Plaintiff's objection is, for that matter, upheld and, in the final analysis, the 2nd Defendant's counterclaim is hereby dismissed with costs.

It is so ordered.

Right of Appeal Explained

DATED at DAR-ES-SALAAM this 30th April, 2021.



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DEO JOHN NANGELA
JUDGE