IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MSOFFE, J.A.)

CIVIL APPEAL NO. 2 OF 2003

BETWEEN

CONSOLIDATED HOLDING CORPORATION ..... APPELLANT

AND

1. RAJANI INDUSTRIES LIMITED ..... 1ST RESPONDENT

2. BANK OF TANZANIA ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Bubeshi, J.)

dated the 15th day of November, 2002
in
Civil Case No. 364 of 1996

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This appeal arises from the decision of the High Court (Bubeshi, J.) in High Court Civil Case No. 364 of 1996.

Briefly stated, the background giving rise to the case is as follows: The 1st Respondent, Rajani Industries Limited, had set about expanding and modernizing its mill producing cooking oil by the name of Rajani. Towards that end, the 1st Respondent embarked on the project by creating new structures and installation of new

machinery and technology aimed at a production capacity of 150 tons a day.

For the supply of the new machinery, the 1st Respondent negotiated and entered into an agreement with Servotech Engineers Private Limited of Bombay India (the Supplier). The Supplier was to supply the machinery by way of deferred term of payment of 15 equal instalments for a period of 8 years. On the part of the Supplier, the deferred payments were based on two conditions. First, that the 1st Respondent would furnish a bank guarantee from the appellant. Second, that a letter would also be furnished by the 2nd Respondent, the Bank of Tanzania (BOT), undertaking that the appellant would be permitted to externalize the money in foreign exchange on the due dates in terms of clauses 4.3 and 4.4 of the Agreements.

On such terms and understanding, contracts I, II and III forming one Turnkey Project were signed between the 1st Respondent and the Supplier. In respect of contracts I and II, letters of guarantee addressed to the Supplier were signed by the appellant on 13.12.1979 and 16.5.1981 respectively. In these letters the supplier was assured that remittance of the instalments would

promptly be made in Indian Rupees in terms of the contracts. It was the 1st Respondent's case that in accordance with the terms of the contracts the appellant initially remitted to the supplier 5% down payment and also supplied letters of credit and guarantee. Consequently, the Supplier promptly started shipping the machinery in terms of the provisions of the contracts I and II. As no letter of guarantee was furnished with regard to contract III no shipment of any machinery was made in connection with contract III.

In readiness for the installation of the machinery, the 1st Respondent embarked on the programme of constructing supportive infrastructures to accommodate the machinery to be supplied. It was also claimed by the 1st Respondent that although it had paid the instalments, in local currency, the appellant failed to remit the money to the Supplier in India on the due dates. That as a result of failure on the part of the appellant to remit the money to the Supplier, the Supplier did not supply to the 1st Respondent all the machinery required under the contracts. Consequently, the project collapsed resulting in considerable loss to the 1st Respondent which instituted the suit in the High Court seeking the following reliefs:

(i) Reimbursement of Indian Rupees 15,222,000, equivalent of T.Shs. 258,893,000/=

(ii) Reimbursement of Indian Rupees 5,196,310, equivalent of T.Shs.88,337,270 interest on the sums paid to the appellant;

(iii) Payment of a total sum of T.Shs. 10,333,500/= compensation for the buildings, infrastructure and utilities built for the expansion project.

(iv) Payment of T.Shs. 930,480,000/= compensation for workers, staff and other suppliers that the 1st Respondent had to employ, train, develop and sustain for the running of the project;

(v) Payment of Indian Rupees 20,425,310 the equivalent of T.Shs. 347,230270 interest on principal sums set out in (i) and (ii) above;

(vi) Payment of T.Shs. 2,349,648,725/= compensation for the loss of expected business and income for the period of ten (10) years;

(vii) Compensation for the loss of good will and reputation.

Upon consideration of the case, the learned trial judge awarded the 1st Respondent the reimbursement of Indian Rupees 15,229,000 equivalent of T.Shs. 258,893,000/= claimed under relief (i) in the

plaint, payment of Indian Rupees 5,196,310 interest payable in Tanzanian Shillings on sums claimed under (1), 18% interest on sums claimed under (1) and (ii) from the date of filing the suit to the date of judgment and 50 Million T.Shillings claimed under relief (iv) compensation for workers and staff employed for the expansion of the project. Other claims were disallowed.

The appellant was dissatisfied, it has preferred this appeal. At the outset, it is to be observed that the appeal has taken fairly long time. The first time the appeal came on for hearing on 10.8.2004, the hearing took the whole day until late in the evening when it was adjourned to a date convenient to the Court and the parties for continued hearing. On 22.9.2004, hearing of the appeal was resumed followed by sessions in Arusha, Dar es Salaam and Zanzibar.

Mr. Mbuna, learned counsel for the appellant, filed five grounds of appeal. From these grounds, it is apparent that the issue pertaining to the cause of action and limitation of time has been raised on appeal under ground four. In the amended written statement of defence paragraph 1, the question whether the suit was time barred and if the 1st Respondent had a cause of action against

the appellant was raised by way of preliminary objection. At the commencement of the trial, the learned trial judge heard submissions by counsel for both parties on the preliminary objection raised. The learned trial judge overruled the preliminary objection on the ground that as the case involved was complex, it should proceed to full hearing. As the question raised in this ground is not only fundamental but is also centrally a matter of law going to the root of the case, we wish to deal first with this ground.

The first limb in the ground was whether the 1st Respondent had a cause of action in instituting the suit against the appellant. On this, Mr. Mbuna, learned counsel, strenuously contended that on the basis of the contracts I and II as well as the letters of guarantee which laid the foundation of the suit for breach of contract, the 1st Respondent could not sue the appellant for breach of contract. In other words, he said there was no cause of action disclosed. In elaboration, he stated that the alleged breach of contract by the appellant for failure to remit funds to the Supplier Servotech Engineers Private Limited in India, was based on contracts I and II together with the letters of guarantee Annexures "B1" and "B2" to the plaint. These documents were signed by the Supplier on one

hand and the 1st Respondent on the other. As for the letters of guarantee "B1" and "B2", the signatory was the National Bank of Commerce (NBC), the predecessor to the appellant and the Supplier.

In that situation, Mr. Mbuna contended that with regard to the contracts and the letters of guarantee, the 1st Respondent could not institute the suit against the appellant for breach of contract. If anything at all, it was the Supplier which could sue the 1st Respondent for breach of contract, he stressed. Likewise, with regard to the letters of guarantee "B1" and "B2" which were addressed to the Supplier and signed by the appellant, the 1st Respondent could not institute the suit against the appellant for alleged breach of contract based on the guarantee. As there was no cause of action disclosed, the plaint should have been rejected, he contended. The proceedings and decision in the case having proceeded from a suit in which there was no cause of action disclosed, were of no legal consequence, Mr. Mbuna concluded his submission on this ground.

For the 1st Respondent, Mrs. Rwebangira, learned counsel, appeared together with Mr. Mark Bomani, learned counsel. She strongly countered Mr. Mbuna's submission. First, she said as the

issue regarding the cause of action and period of limitation did not feature in the judgment of the High Court, it should not be subject of the appeal. In elaboration Mrs. Rwebangira submitted that this issue was not dealt with by the learned trial judge because it was deemed to have been withdrawn after the intended appeal against the High Court ruling on the preliminary objection was not pursued. For this reason, counsel further submitted, the learned trial judge cannot be faulted in not dealing with this aspect in the judgment. She also submitted that if the appellant was not satisfied with the ruling on the preliminary objection an appeal should have been preferred there and then. At that time, she said, the law regarding appeal against preliminary or interlocutory orders had not been amended. Mrs. Rwebangira also contended that the appellant having opted not to pursue the appeal notice of which had duly been filed and leave to appeal obtained, cannot now be heard on appeal complaining against the ruling. However, she conceded that the Court has power to look into the legality of the matter at this stage on appeal.

The issue whether the plaint disclosed a cause of action has engaged our minds considerably. As observed earlier, it is a matter of law which goes to the root of the matter. Here, the pertinent

question is whether the issue raised and decided on the preliminary objection can be entertained at this stage on appeal as urged by Mr. Mbuna.

At this juncture, it is desirable to examine briefly whether the intended appeal was deemed to have been withdrawn under rule 84 (a) as Mrs. Rwebangira contended. It is common ground that the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002 came into effect on 14.12.2002. As a result of the amendment, section 74 of the Civil Procedure Code, 1966 was amended such that no appeal shall be made in respect of any preliminary or interlocutory decision or order of the High Court unless such a decision or order has the effect of finally determining the suit.

In this case, as the law had not been amended at the time the suit was instituted, can it be said that the notice of appeal was deemed to have been withdrawn under rule 84 (a)? We do not think so. First, no details in this case are given regarding the requirements for the institution of the appeal in terms of rule 83 (1). Two, it is doubtful in our view that the provisions of rule 84 (a) are applicable to the circumstances of this case. Three, and more important, we do

not think that the provisions of section 71 of the Civil Procedure Code, 1966 are applicable in this case. Section 71 provides:

> Where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Under Section 3 of the Civil Procedure Code, 1966, "Decree" is defined as follows:

> "Decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89 .....

From the above definition of "decree" it seems clear to us that the decision of the High Court overruling the preliminary objection did not conclusively determine the rights of the parties. Secondly, the decision did not result in the rejection of the plaint. Therefore, the decision of the learned trial judge in the preliminary objection does

not fall within the parameters of the definition of decree as defined. It follows, therefore, that as the decision, subject of the appeal is not a decree, the provisions of section 71 of the Code would not apply to the instant case. Therefore we think it could properly be raised on the appeal preferred from the final decree. In the circumstances, we are, with respect, not in agreement with Mrs. Rwebangira, learned counsel, that the issue pertaining to the cause of action and period of limitation cannot be raised in this appeal. We are settled in our view that the matter can be entertained on appeal and that it is not being raised for the first time. It was in issue at the trial.

We shall next deal with counsel's submission on whether the plaint disclosed a cause of action. We have given anxious consideration to these submissions. From the submissions by counsel for both parties and the pleadings, it is not disputed that the suit was based on contracts I, II, III as well as the letters of guarantee. It is also common ground that the contracts were signed by the Supplier and the 1st Respondent and that the letters of guarantee addressed to the Supplier were signed by the appellant. In neither of these documents is there direct agreement signed by the appellant and the 1st Respondent. This is also evident from the averment of the 1st

Respondent, the original plaintiff in the plaint. If the appellant was not a party to the contracts and the 1st Respondent was not a signatory to the letters of guarantee, what was the legal basis upon which the 1st Respondent instituted the suit against the appellant for breach of contract.

In the circumstances, the central issue is whether there was privity of contract in so far as the appellant and the 1st Respondent were concerned in relation to contracts I, II and III and the letters of guarantee. The issue was raised at the commencement of the trial in the High Court by way of a preliminary objection. With respect, it seems to us that in overruling the preliminary objection, the learned judge did not conclusively resolve the issue one way or the other. She took the view that as the matter involved was complex, the case should proceed to full hearing. Even after conclusion of the trial, the judgment in favour of the 1st Respondent did not address the issue.

Although the learned trial judge seems to have addressed her mind to paragraphs 14, 15 and 16 of the plaint as relevant to the alleged breach of contract, we think, with respect, she fell into the error in not finding that the appellant was not a party to the contracts and that the letters of guarantee were not signed by the

appellant. Had she addressed this issue properly, it is our view that she would have found that the appellant was not privy to the contracts as well as the letters of guarantee. The appellant was, as it were, a stranger to the contract. Stated differently, there was no privity of contract between the appellant and the 1st Respondent. The principle enunciated under the doctrine of the privity of contract was aptly described by the distinguished author William R. Anson in his book THE LAW OF CONTRACT 27th Edition, at page 408, the learned author sets out the modern view on the principle of the doctrine of the privity of contract that no stranger to the consideration can take advantage of a contract, although made for his benefit. The distinguished author cites Lord Haldanes formulation of the modern rule in **Dunlop Pneumatic Tyre Co. Ltd. v. Selfrige and Co. Ltd.** [1915] A.C. 847 at page 853 wherein it was stated:

> [I]n the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred on a stranger to a contract as a right to enforce the contract *in personam.*

Applying this principle in the instant case, we are increasingly inclined to the view that the appellant not being an immediate and direct party to the contract could not be sued by the 1st Respondent for breach of contract.

In this case, the question is whether a glance through the plaint showed that it disclosed no cause of action. As already shown, paragraphs 14, 15 and 16 of the plaint plainly indicate that the suit against the appellant was based on alleged breach of contract on the basis of the letters of guarantee to which the 1st Respondent was not a signatory. With respect, the learned judge dealt with this specific issue rather scantly. Overruling the preliminary objection, she stated, inter alia:

> Here we are dealing with a situation where the Plaintiff deposited money with the defendant so that the latter transmits it to the supplier. The defendant, it is claimed, failed to repatriate the payments made by the plaintiff. In my view the plaintiff can sue for the breach committed by the defendant.
> ..... This indeed is a complex matter to which I feel a full hearing is necessary in order to determine each party's rights and obligation.

Had the learned trial judge closely addressed the issue in relation to the above named paragraphs of the plaint (14, 15 and 16), we think it would have been clear to her that the 1st Respondent could not institute the suit against the appellant for breach of contract based on the letters of guarantee as well as contracts I, II or even III. The issue pertaining to the cause of action being fundamental going to the root of the case, it was imperative for the judge to deal with and resolve it when it was raised as a preliminary objection or at the conclusion of the full trial. As happened, the learned trial judge merely lamented that the case was complex and that it was necessary to have a full hearing to determine the rights and obligation of the parties.

It is common knowledge that the rights, obligation and other remedies of the parties in a suit can only be determined after the court has satisfied itself that the plaint has disclosed a cause of action. See for instance, **Mukibi v. Bhavsar** (1967) E.A. 474. This is a case from Uganda in which a preliminary objection was raised that the plaint did not disclose a cause of action. The High Court of Uganda sustained the preliminary objection and ordered the plaint to be rejected under Order 7 Rule 11 of Uganda Civil Procedure Rules

which is in pari materia with Order VII Rule 11 (a) of the Tanzania Civil Procedure Code, 1966.

It is now settled law in Tanzania that where the plaint does not disclose a cause of action, it shall be rejected. The provisions of Order VII Rule 11 (a) of the Civil Procedure Code, 1966 are to this effect. In **John M. Byombalilwa v. Agency Maritime Internationale (Tanzania) Limited**, (1983) TLR 1, a preliminary objection was raised in the written statement of defence that the plaint did not disclose a cause of action. This Court, among other things, held that where the plaint discloses no cause of action, the court should reject it. The Court also held that for purposes of deciding whether or not the plaint discloses a cause of action the plaint and not the reply to the written statement of defence should be looked at.

In the circumstances, with respect, we think that a diligent close look at the plaint would have glaringly shown that the plaint did not disclose a cause of action. We are therefore satisfied that the learned trial judge erred in finding that the 1st Respondent had a cause of action against the appellant. In that regard, as the plaint did not disclose a cause of action, it should have been rejected under

Order VII Rule 11 of the Civil Procedure Code, 1966. Consequently, the subsequent proceedings and decision of the High Court having proceeded from a suit in which no cause of action had been disclosed were of no legal consequence.

This ground alone is sufficient to dispose of the appeal. However, there is another important legal issue which was also raised in the second limb of ground four. This relates to limitation of time in which the suit was instituted. We desire to deal with it briefly. As happened with regard to the cause of action, the issue pertaining to the period of limitation was also raised at the trial by way of preliminary objection. Overruling the objection in this regard, the learned trial judge held that the suit was not time barred having regard to the time taken in the negotiation for a settlement out of court.

Mr. Mbuna strongly criticized the learned judge in holding that the suit was not time barred because to hold otherwise would not accord with the bank/customer relationship. According to him, the breach of contracts I and II together with the letters of guarantee "B1" and "B2", took place on 14.12.1989 and 16.5.1990 respectively. He further submitted that as the suit was based on breach of

contract, it was time barred under paragraph 7 of the First Schedule to the Law of Limitation Act, 1971 (the Act). Under the provisions of the Act, suits founded on contract should be instituted within six (6) years from the date of the breach. In this case, he said, the suit was instituted on 2.12.1996. He also contended that the negotiations that took place for settlement did not check the statutory period of limitation prescribed under the law. In support of this proposition Mr. Mbuna referred to the 5th Edition of the book on the Law of Limitation by the distinguished author **J.K. Rustomji** at page 23. The learned author among other things states that the statute is not defeated or its operation retarded by negotiations for a settlement pending between the parties.

Mrs. Rwebangira, learned counsel for the 1st Respondent maintained that the suit was timeously instituted. First, she said some of the instalments were paid and accepted in 1994 by the Supplier and secondly, negotiations for settlement had been going on until sometime in 1996 when they broke down.

There is no gain saying that under the provisions of contracts I and II read together with the letters of guarantee Annexures "B1" and "B2", the last instalments were due by 14.12.1989 and 16.5.1990

respectively. On this, apparently, counsel for both parties were agreed as the dates when the right of action for proceedings accrued in this case under the contracts. However, counsel part company as it were, on the issue whether the time taken in negotiating for a settlement should be excluded in computing the period of limitation. As indicated earlier the learned trial judge took the view that having regard to the time taken in negotiating for a settlement, it would not augur well with customer/bank relationship for the defendant, the appellant, to raise the defence of limitation. The learned judge stated inter alia:

> "It may not be on the nature of cordial/bank relationship for the defendant to come to court at this stage and plead limitation."

With respect, it seems to us that in holding so the learned judge did not address the law as it stands in Tanzania under the Act. Under the provisions of sections 20 to 23 of the Act, the time for exclusion in computing the period of limitation is specified. It is apparent that under these provisions, the time taken in negotiating for a settlement is not one of the categories of instances in which time is excluded in computing the period of limitation. It is, however,

curious that the legislature expressly made provision for the exclusion of the time taken by the plaintiff prosecuting in another civil proceeding against the same party but no similar provision was made for the time taken negotiating for a settlement. To us, this does not accord with logic and common sense. In arriving at the conclusion that the suit was not time barred, the learned trial judge was apparently alive to this aspect of the law. It is common knowledge that however unsatisfactory a piece of legislation may be, it is a cardinal principle of the rules of interpretation that statutes should as far as possible not only be given their natural and ordinary meaning but should also be effected.

In this case, the statutory provision under section 3 (1) of the Act is that every proceeding described under the First Schedule which is instituted after the period of limitation prescribed is time barred, shall be dismissed. In this regard, the contention that it does not augur well with bank/customer relationship to plead limitation in view of the time taken in negotiating, is untenable. We are supported in this view by the learned author **K. J. Rustomji** (supra) in his book **The Law of Limitation, 5th Edition, Vol. I** at page 23. The distinguished author among other things stated:

> "The statute is not defeated or its operation retarded by negotiations for a settlement pending between the parties."

In similar vein, with respect, we think the learned trial judge was wrong in holding that the suit was not time barred because of the time taken in negotiating for a settlement. As articulated by the learned author, the clear provisions of the Act had to be given effect. The instant suit based on contract instituted on 2.12.1996, a period well beyond six years prescribed under the Act, was time barred.

There is yet another dimension in this matter. Although as already indicated, the dates for the payment of the last instalments were 14.12.1989 and 16.5.1990, respectively, it was contended that as some of the instalments were paid and accepted as late as September 1994, the suit was not time barred. The parties had, by conduct, consented to waive the statutory period of limitation, it was urged. We need not be delayed in this aspect, the applicable legal position is crystal clear. It is common ground that the time within which rights may be enforced being fixed by the statute, it is not open to the parties by agreement to alter such time or to waive and contract themselves out of the operation of the statute – See K.J.

Rustomji (supra) at page 24. The period of limitation in this case is six years (6) as provided under the Law of Limitation Act, 1971. It could not be waived by consent of the parties. Consequently, the suit being time barred should have been dismissed.

To recapitulate, ground four of the memorandum of appeal raises a fundamental point of law whether the 1st Respondent had a cause of action against the appellant and whether the suit was time barred. The issue was raised at the trial by way of preliminary objection which was not sustained. Upon close examination of the matter, we are satisfied that the learned trial judge erred in holding that the suit was not time barred and that the 1st Respondent had a cause of action. The alleged breach of contract related to contracts in which the 1st Respondent was not a party. Therefore, there was no basis upon which the 1st Respondent could institute the suit against the appellant for breach of contracts I and II. Consequently on account of failure to disclose a cause of action, the plaint should have been rejected under Order VII Rule 11 (a) of the Civil Procedure Code, 1966.

Furthermore, the suit based on contract was instituted outside the period prescribed under paragraph 7 of the First Schedule to the

Law of Limitation Act 1971. It is trite principle of law that if a suit which is time barred is decreed by the trial court and the appellant has properly instituted the appeal against the whole case and not a particular point, the appellate court must give effect to the appellant's contention on limitation – See 1875, 1 ALL34 (F.B.) 1895, 21 Bom. 392 and **Rustomji** (supra) at p. 32. In this case the appellant has appealed against the whole judgment in favour of the 1st Respondent contending among other grounds, the issue of limitation of time and cause of action. Once the defence of limitation is accepted, the suit has to be dismissed.

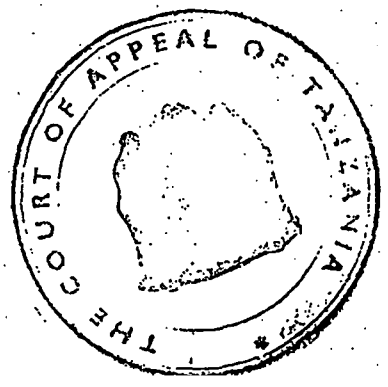
For the foregoing reasons, we are constrained to allow the appeal and set aside the judgment and decree of the High Court with costs.

As ground four is sufficient to dispose of this appeal, it becomes unnecessary to deal with other grounds in which we had very well researched and powerful submissions by learned counsel for both parties to whom we are grateful.

Finally, there is the cross appeal lodged by the 1st Respondent. Consequent upon the appeal being allowed the cross appeal is dismissed with costs.

DATED at DAR ES SALAAM this 24th day of February, 2005.

D. Z. LUBUVA
JUSTICE OF APPEAL



J. A. MROSO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S. A. N. WAMBURA)
SENIOR DEPUTY REGISTRAR