

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 355 OF 2020**

**BABITO LIMITED.....APPELLANT**

**VERSUS**

**FREIGHT AFRICA NV-BELGIUM.....1<sup>st</sup> RESPONDENT**

**TAHIR MURTZA VALJI.....2<sup>nd</sup> RESPONDENT**

**TOTAL FREIGHT SERVICES (T) LTD.....3<sup>rd</sup> RESPONDENT**

**(Appeal from the Ruling of the High Court of Tanzania at Moshi)**

**(Sumari. J.)**

**dated the 13<sup>th</sup> day of November, 2015**

**in**

**Civil Case No. 2 of 2015**

.....

**JUDGMENT OF THE COURT**

*29<sup>th</sup> August & 1<sup>st</sup> September, 2023*

**FIKIRINI, J.A.:**

The appellant sued the respondents in High Court Civil Case No. 2 of 2015, for the recovery of USD 71,400 or its equivalent in local currency. The claimed amount was with interest at 20% per annum from the date of judgment and interest at court's rate on the decretal amount from the date of decree to the date of final payment.

Before the hearing commenced, the respondents raised two preliminary points of objection: (i) that the suit is time barred and (ii) that the court lacked jurisdiction to entertain the matter. The trial Judge dismissed the second point of objection and sustained the first point of objection that the suit was time barred and struck out the suit. Dissatisfied with the decision, the appellant preferred this appeal consisting of five grounds as follows:

1. *The Honourable trial court wrongly held that the time limitation starts from 15<sup>th</sup> January, 2009 when the plaintiff wrote the demand notice to the defendants.*
2. *The Honourable trial Court erred in law and fact by considering unproved and prematurely written demand notice annexure P5, and in so doing, firstly, it contravened the principle of law that a right of action accrues on a date on which a cause of action arises and secondly, it altered the agreed terms and conditions of the date of payment of the amount due by the respondents.*
3. *The Honourable trial Court applied double standard in dealing with two preliminary objections raised by the defendants, as on one side, for the purpose of jurisdiction, the court held "the parties are bound by the terms of contract made" and, on the other side, the court disregarded the same terms and conditions under which, the defendants were obliged to pay only after the expiry of thirty (30) days credit period from the date of final invoice in determining the*

*accrual of right of action resulting in miscarriage of justice to the appellant.*

4. *The Honourable trial court erred by not considering the facts that the payment became due on 9<sup>th</sup> March, 2009 after the expiry of thirty (30) days commencing from the date of each final invoice as per the agreed conditions of payment. The contents of annexure P5 were disputed by the respondents vide paragraph 7 of the Joint Written Statement of Defence filed on 30<sup>th</sup> March, 2015.*
5. *The Honourable court erred in not applying the correct law laid in **Makamba Kigome and Gregory Mathayo v. Ubungo Farm Implement Ltd and PSRC**, Civil Case No. 109 of 2005 at Dar es Salaam High Court (unreported) to the facts of this case.*

The appeal was scheduled for hearing on 29<sup>th</sup> August, 2023 and Mr. Bharat B. Chadha, learned counsel, appeared for the appellant while Mr. Ndurumah Majembe, also learned counsel, appeared for the respondents. Both counsel for parties adopted their written submissions and the list of authorities relied on before starting to expound on their submissions. Glimpsed from the counsel's submissions, the only issue this Court is invited to determine is whether the trial Judge was correct in sustaining the preliminary point of objection that the suit was time barred depending on the plaint and its annexures.

The summary of the counsel's oral and written submissions starting with Mr. Chadha, runs as follows; that the preliminary point of objection raised and decided upon was of mixed facts and law, and could not therefore be categorized as a preliminary point of objection on pure point of law. He contended that the question as to when the time of limitation starts running required proof. According to him the time of limitation could not be determined based on the pleadings only, but it required evidence and investigation. He argued that the trial Judge arrived at the decision relying on the pleadings, its annexures and oral submission by the respondent's counsel, which was incorrect. To support his contention, he referred us to the case of **Ibrahim Abdallah (*the Administrator of the Estate of the late Hamisi Mwalimu*) v. Selemani Hamisi (*the Administrator of the Estate of the late Hamisi Abdallah*)**, Civil Appeal No. 314 of 2020 (unreported), in which the Court underlined that once there is a mixed facts and law in the preliminary point of objection raised, then such preliminary point of objection cannot be determined at that stage as it would require ascertainment of facts.

More to his submission, Mr. Chadha argued that the cause of action arose on 9<sup>th</sup> March, 2009, and that this was based on when the claimed amount became due, which in the present case was to be established from

the date on the tax invoice and thereafter the appellant had thirty (30) days to effect payment. Reliance on exhibit P5 was thus incorrect as it only reflects on the date of loading and not on when tax invoices were issued.

Besides, his oral submission Mr. Chadha in his written submission referred to a number of cases. Of particular interest is the case of **Makamba Kigome and Gregory Mathey v. Ubungo Farm Implements Ltd and PSRC**, Civil Case No. 109 of 2005 (unreported), in which the court concluded that the cause of action could only arise on the due date. As for the rest, Mr. Chadha invited us to go through his list of authorities from both initial and the supplementary list for guidance.

On the strength of his submission, he prayed for the appeal to be allowed with costs before this Court and the High Court.

Taking up from Mr. Chadha, Mr. Majembe in his brief but focused submission, prefaced his submission by acknowledging that the statutory demand notice – exhibit P5 issued on 15<sup>th</sup> January 2009 was neither a contractual document nor the date indicated and used to compute the date on when the cause of action arose, was correct. More to his submission was that it was not correct as argued by Mr. Chadha that exhibit P5 was written prematurely and it is a document which did need proof in

determining when the cause of action arose. Controverting the assertion, Mr. Majembe, contended that at most, exhibit P5 should have been read together with the road consignment note (rcn) - exhibits P2/1 to P2/8 found on pages 61 to 75 of the record of appeal. His explanation was that each one of the road consignment notes was a separate and independent contract of carriage with the terms and conditions stipulated on pages 62, 64, 66, 68, 70, 72, 74 and 76. Reading the terms and conditions, it was elaborately clear that payment was either by cash on delivery or if the payment was partial then the balance due was to be paid upon delivery. Under the circumstances, each road consignment note had its own accrual date on when a cause of action arose.

In addition, Mr. Majembe contended that considering that the final road consignment note was dated 11<sup>th</sup> December, 2008, it was obvious by 15<sup>th</sup> January, 2015, in all transactions, accrual of the date when the cause of action arose had already gone past the limitation period. And since all the documents were part of the plaint basically it was not necessary as he alluded above, for either investigation or proof that the suit was time barred by the time the suit was filed on 5<sup>th</sup> February, 2015, as the last road consignment note was delivered on 11<sup>th</sup> December, 2008. To fortify his submission, he cited to us the famous case **Mukisa Biscuit**

**Manufacturing Co. Ltd v. West End Distributors Ltd**, [1969] E.A.L.R. 700, in which the Court stressed that a preliminary point of objection must be on a pure point of law. And that in determining that point raised the court would depend on the pleadings, which are the plaint and annexures.

Admitting that not all suits fit the description or guideline in the **Mukisa Biscuit** (supra), Mr. Majembe referred us to the case of the **Attorney General v. The Board of Trustees of the Cashewnut Industry Development Trust Fund & Another**, Civil Application No. 72 of 2015 (unreported), where the Court stated that once the fact needs to be ascertained, then that is not a pure point of law, hence a preliminary point of objection raised is bound to fail. Distinguishing the **Makamba** case (supra) Mr. Majembe submitted that the facts were different from the facts in the present case.

Admitting that the question of jurisdiction was vital in any court proceedings since the court before it proceeds must satisfy itself is vested with jurisdiction and that the suit is within time. The court's move to entertain the preliminary point of objection was in that sense justified.

Mr. Majembe, also responded to Mr. Chadha's submission based on a violation of Article 13 (6) (a) of the Constitution of the United Republic,

when the court applied a double standard in determining the preliminary point of objection. He argued that the complaint had no bearing on the preliminary point of objection raised. Likewise, he countered Mr. Chadha's submission mentioned in item 28 of his written submission, questioning the speed and manner the court handled the matter. Countering the suspicion, he submitted to us that he was seriously offended, considering that the court was devoted to dispensing justice, yet its efforts were being doubted. It was the counsel's submission that Mr. Chadha should be reproached.

Finalizing his submission, Mr. Majembe implored us to dismiss the appeal with costs as the trial court correctly dealt with the preliminary point of objection and struck out the suit for being time barred.

Briefly rejoining, Mr. Chadha reiterated his earlier submission. However, adding a bit on the contract of the nature present in the suit before the trial court, which he did not dispute existed referred us to the case of **Kamagara Charles v. Uganda Railways Corporation**, Civil Suit No. 846 of 2005, that the consignment note is a *prima facie* evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the cargo by the carrier, the standard which is internationally observed.



Even with the above acceptance, Mr. Chadha disputed the assertion that it was the appellant who insinuated that the cause of action arose in January, 2015. He once again pressed us to allow the appeal.

We have gone through the rival submissions by the counsel for the parties and the list of authorities availed to us. Notably we are invited to determine the issue of whether the trial Judge correctly sustained the preliminary point of objection that the suit was time barred and struck it out. Whereas Mr. Chadha contested the decision as wrongly arrived at, Mr. Majembe on his part stood with the trial court's decision that the suit was time barred and consequently struck out as the correct decision, from which each party was ordered to bear its own costs.

In determining on the propriety of the sustained preliminary point of objection we had to satisfy ourselves if the raised objection was on mixed facts and law as contended by Mr. Chadha or was on pure point of law as vouched by Mr. Majembe.

Our guidance on the issue is drawn from the famous case of **Mukisa Biscuit** (supra) which has been referred by both counsel for the parties, albeit from different angles. Mr. Chadha disputes reliance by the trial Judge on the plaint and its annexures only contending that there were issues of

mixed facts and law. The court was therefore obliged to investigate and ask for proof, to ascertain those facts. In that sense the point of objection raised could not be said to be a pure point of law and pleadings and its annexures were not sufficient to answer that. In **Mukisa Biscuit** (supra) when the Court was discussing what amounts to a preliminary point of objection had this to say which supports Mr. Chadha's stance:

*"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. **It cannot arise if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion".*

[Emphasis added]

On the contrary, Mr. Majembe was of completely a different view, his disagreement is that in the present case, the pleadings and its annexures were sufficient to ascertain those facts and there was no need of investigation or proof to that effect. What is pure point of law has also been addressed in the **Mukisa Biscuit's** case (supra), that:

*"..., a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings,*

***and which, if argued as a preliminary point of objection may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

[Emphasis added]

Reading from the ruling it is discernable that the trial Judge relied on the pleadings and the annexures particularly exhibit P5. Exhibit P5 is a statutory demand notice issued on 15<sup>th</sup> January, 2009 and computing from that date up to when the suit was filed on 5<sup>th</sup> February, 2015, it totaled to about six (6) years and twenty (20) days, meaning the plaintiff was delayed for about twenty (20) days. We have assessed exhibit P5 and do not agree to the reasoning taken by the trial Judge in arriving at determining that on the basis of exhibit P5, the suit was time barred. On this point we associate and endorse Mr. Majembe's submission that the determinant factor of the cause of action were the road consignment note as shown on pages 61 through 76 which are exhibits P2/1 to P2/8. The exhibit P2/1 to P2/8 were to be read together with exhibit P5 and not P5 in isolation as did the trial Judge. With exhibit P5, the information contained only indicate the loading date whereas exhibits P2/1 to P2/8 give the delivery date. Each of

the road consignment note is a separate and independent contract, the fact which was not disputed by Mr. Chadha who even weighed in by citing a Ugandan case to that effect. See, **Kamagara Charles v. Uganda Railways Corporation** (supra), in which the court acknowledged that:

*“The consignment note is prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the cargo by the carrier”.*

It is thus undoubtedly correct that accrual of the date as when the cause action arose, varied. There was no way exhibit P5 in itself could have become a yardstick to determine the limitation of time. After all, by the time exhibit P5 was issued a right of action had already accrued.

Furthermore, in the contract entered between the plaintiff and Total Freight Services (T) Limited (the 3<sup>rd</sup> defendant) the conditions were clearly stipulated on pages 62, 64, 66, 68, 70, 72, 74, and 76 which reads as follows:

***“The transporter (BABITO LTD) terms of payment are cash on delivery or advance. The company shall detain all goods until the charges have been paid...”***

[Emphasis added]

If that is what is contained in the road consignment note, which we have concluded was the contract binding the parties, then thirty (30) days after each delivery is when the cause of action arose in respect of that particular road consignment note. The first road consignment was on 5<sup>th</sup> November, 2008 while the last one was on 11<sup>th</sup> December, 2008, therefore by 15<sup>th</sup> January, 2009, the thirty (30) days agreed had already elapsed from each road consignment note. Computing from 11<sup>th</sup> December, 2008 which was when the last road consignment note was delivered, the thirty (30) days end up on 10<sup>th</sup> January, 2009. Then from 10<sup>th</sup> January, 2009 up to 5<sup>th</sup> February, 2015 when the suit was filed it is six about (6) years and twenty five (25) days.

On assumption that all the facts pleaded in the plaint are correct plus its annexures as they *prima facie* state the plaintiff's case, reliance on that information by the trial Judge to determine cause of action and limitation in our view was appropriate.

Under the Law of Limitation Act, Cap. 89 (R.E. 2002; now R. E. 2019), specifically Item 7, Part One to the Schedule, the prescribed the time limitation for suits founded on contract is six (6) years. Similarly,

section 5 of the said law specifies as to when the cause of action accrues, which in this case is upon delivery of each road consignment note on the terms that payment is cash upon delivery or advance. We thus agree with Mr. Majembe that by the time exhibit P5 was issued, the plaintiff was already time barred. Endorsing that each road consignment note was separate and independent contract, with each having its date on when the cause of action arose.

In this particular instance we find the preliminary point of objection was on a pure point of law upon which the plaint and its annexures were adequate to determine it. We, in our considered view do not align with Mr. Chadha's contention that the preliminary point of objection was of mixed facts and law.

We have also endeavoured to look at the necessity or importance of raising a preliminary point of objection once the issue of jurisdiction is at stake. It is a settled legal principle that a question of jurisdiction is fundamental and has to be answered before the court proceeds with the conduct of the case. Stressing on this point, in our decision in **Faniel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 20 Others**, Civil Appeal No. 8 of 1995 (unreported) referred to us by Mr. Majembe, the

Court in underscoring the significance of determining if the court has jurisdiction or not, held that:

*“The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. **The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial...**It is risky and unsafe for the court to proceed with trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case’.*

[Emphasis added]

See also: **Richard Julius Rukambura v. Issack Ntwa Mwakanjila & Another** [2007] T. L. R. 91; **TRA v. Kotra Company Ltd**, Civil Appeal No. 12 of 2009; and **TRA v. New Musoma Textile Ltd**, Civil Appeal No. 93 of 2009 (both unreported), in which the Court elucidated and emphasized on the importance of the issue of jurisdiction and that it can be raised at any stage, even at the stage of appeal.

The trial court in the present instance like any other court dealing with a civil suit of this nature had to satisfy itself on two things: (i) that the

plaintiff has been able to establish a cause of action and (ii) when did a right of action accrue warranting the appellant having a cause of action against the defendants, leading to filing of the Civil Case No. 2 of 2015. And in determining the time limitation on the one hand and when the cause of action arose on the other, the court had to rely on the plaint and its annexures if any, only. By the nature of the case before us we say those documents sufficed. There is a long list of authorities in that regard, for example in **Jeraj Sharif & Co. v. Chotai Fancy Store** (1960) E.A. 375, the Court was of the view that a cause of action and plea on limitation is deduced from the pleadings and cannot go beyond that, whereas in **John Byombalirwa v. Agency Maritime Internationale (Tanzania) Limited** [1983] T. L. R. 1, the Court firmly stated that written statement of defence or reply by the defendant is not what determines the cause of action or in other words the court does not rely on the defendant's filed documents in determining the cause of action and time limitation. We thus do not agree with Mr. Chadha's assertion that an investigation and bringing proof was necessary, for the lining of reasoning exposed earlier on in this judgment. While we take note of the decision in **Makamba Kigome & Gregory Matheyo** (supra), we are mindful that it is not binding upon us,



only having persuasive effect, still we think does not appropriately fit in the present situation.

At this juncture we also want to point out that determination of such issues at the earliest stage in the proceedings save court's, parties and their counsel's precious time. We thus find that the trial court correctly relied on the plaint and its annexures in determining a preliminary point of objection raised. The preliminary point of objection was purely on the point of law and not mixed facts and law as alluded by Mr. Chadha.

In passing, we have thought important to comment on the concern raised by Mr. Majembe on Mr. Chadha's statement in his written submission on page 8 item 28 questioning the court's impartiality and the speedy manner it handled the suit. First and foremost, we wish to assure the counsel and parties that courts always strive to do all it can to see matters before the courts are disposed of timely, fairly and justly. We are therefore surprised why speed irked the learned counsel while fairness and justice were also observed. We wish to remind Mr. Chadha that despite owing duty to his client, he is, and always will be an officer of the court as long as he is in the Roll.

Secondly, Mr. Chadha has not raised anything specifically apart from a general statement. We however, take note.

On the application of Article 13 (6) (a) of the Constitution, on equality before the law, we find it apt to reproduce the Article:

*"6 To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*

*(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;"*

Unfortunately, Mr. Chadha was not explicit in his submission on what was exactly his criticism, we therefore cannot decipher if it was a complaint on a fair hearing or the right of appeal or other legal remedy and from there decide one way or the other on the complaint. And, if on assumption, he desired for the trial Judge to overrule the preliminary point of objection so as to pave way for substantive claim as indicated in the plaint to be considered, we do not think that was correct, since

raising a preliminary point of objection is, in our view, part of the proceeding in dispensation and attainment of justice. Otherwise, in the absence of a specific complaint, we are unable to thoroughly comment.

After the above discussion, in the end, we find this appeal lacks merit and hence dismiss it with costs.

**DATED** at **MOSHI** this 1<sup>st</sup> of September, 2023.

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 1<sup>st</sup> day of September, 2023 in the presence of Mr. Mussa Mziray holding brief for Mr. Bharat Chadha, learned counsel for the appellant also for Mr. Ndurumah Majembe, learned counsel for the respondents, is hereby certified as a true copy of the original.



*F. A. Mtaranja*  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**