

TANZANIA / JUDGMENT

lindi express ltd vs infinite estate limited

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IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM COMMERCIAL CASE NO. 17 OF 2021 LINDI EXPRESS LTD..... PLAINTIFF VERSUS INFINITE ESTATE LIMITED..... (DEFENDANT) Last order: 23rd June, 2021, Judgment: 13th August, 2021 ■ RULING NANGELA, J.; This case relating to alleged breach of lease agreements, the gist of the matter is that the Plaintiff concluded two lease agreements with the Defendant sometimes, 45 day of September 2014. Initially, the commencement date was 1st of December 2014. However, as per clause 1(c) of the lease documents, it seems there was a change of mind between the parties that the commencement date be amended to read 1st January 2015. The lease agreements required the Defendant to pay the Plaintiff, a monthly rental charges amounting to Page 1 of 13 USD 2847 and USD 1720 for each of the respective demised propriety. It is alleged that, throughout the agreed periods, the Defendant defaulted payment in each of the respective lease transaction, hence this suit. The Plaintiff is praying for Judgement and Decree against the Defendant as follows:

- (i) Payment of US\$ 60,557/- or equivalent of TZS 140,492,240/-, being rental fees due to the Plaintiff. (ii) Interest on the principal amount at the rate of 25% per annum from the date of the breach of the terms of the agreement (1st January 2015) To the date of filing this suit; (iii) Interest on the decretal amount at the rate of 25% for the date of filing this suit to the date of judgment; (iv) General damages for breach of contract as may be assessed by this Court;
- (v) Interest at Court's rate on the decretal sum from the judgment date to the date of full settlement (vi) Costs of this suit be borne by the Defendant, Page 2 of 13 (vii) Such further reliefs the Court deems just and fit to grant. In terms of representations, the Plaintiff enjoyed the legal services of Mr Gratian Mali, Advocate, while the Defendant was represented by Mr Jerome Msemwa, learned advocate. When the suit came for orders on 6th May 2021, Mr Mali noted that the Defendant had raised a preliminary legal issue regarding the competence of this suit. In particular, the legal issue raised by the Defendant was to the effect that, the matter was hopelessly time barred. On the material date this Court ordered the parties to dispose of the preliminary legal issue by way of filing written submissions. A schedule of filing such submissions was issued to the parties and the Court scheduled the

matter to be called on for orders on the 23rd June 2021. On that material date, it was observed that the orders of this Court dated 23rd June 2021 had been fully complied with. I thereby set the 13th day of August 2021 as the day for the delivery of the ruling of this Court. This ruling, therefore, is in respect of that preliminary legal issue. I will summarise the respective arguments made by the learned counsel for the parties shortly below and embark on their analysis before declaring the findings or the verdicts. Page 3 of 13

1 Submitting in support of the preliminary objection, it was Mr Msemwa's contention that, the Plaintiff is claiming from the Defendant a sum of US\$ 54,809.00 as arrears of rent arising from two lease agreements entered between the two over Basement Office No.1, 2, 3, 4 and 5 and another agreement for Mid Mezanine No.1 and No. 2. Mr Msemwa submitted that, both lease agreements were executed on the 15th day of September 2014 and commencement date, for both agreements, was on the 1st day of December 2014. < , j Mr Msemwa submitted,, relying on section 14 of the Law of Limitation Act, Cap.89 R.E. 2019 that, the period of limitation right of action in relation to any proceeding commences from the date on which the right of action for such proceedings accrues. To further cement that view, he relied on the case of CRDB (1996) Ltd vs. Boniface Chimya [2003] T.L.R 413. IL was Mr Msemwa's argument that, when such principle is applied to the case at hand, it makes it plain that the right of action accrued from the 1st of December 2014 when the lease agreements commenced. He relied on Clause 1(c) of the executed lease agreements alleging that it had stipulated that the commencing date was from the 1st day of December, 2014 to 30th day of November, Page 4 of 13

2015. He contended, therefore, that, the right to claim arrears of rent commenced on the 1st of December, 2014. Referring to Rule 13 Part 1 of the Schedule to the Limitation Act, it was Mr Msemwa's submission that, a suit to recover arrears of rent must be filed within six years from the date it was accrued. He contended that, the suit at hand was filed on 15th February, 2021 after a delay of about 77 days from the time when it ought to have been filed and, that, it was filed without there being an order of the Court extending time to the Plaintiff to file it out of time. Relying on the decision of the Court of Appeal in the case of Cresthale (UK) Ltd vs. Bondeni Seeds Ltd

[2000] T.L.R 1, as well as the case of Tanzania ■ Jill Harbour/Authority vs. Mohamed R. Mohamed,

- [2003] T.L.R, 76.' and others which I need not mention here, Mr Msemwa submitted and urged this Court to strike out the suit. On 3rd day of June 2021, the Plaintiff's learned counsel filed his written submissions. In his submission, the learned counsel contended that the Defendant's submission were out of context and unfounded. He argued that, the contract upon which the suit is based commenced on the 1st day of January 2015 following the Defendant's request to defer the commencement date Page 5 of 13 from December 1st 2014. He argued that, all the arrears claimed by the Plaintiff are, as per the invoices annexed to the Plaint, counted from the 1st day of January 2015. Mr Mali, the Plaintiff's counsel, maintained that, the Defendant retained the premises under the first contract

from the 1st day of January 2015 to 30th November, 2015, a time when the rental charges had reached USD 31,

317. Further that, the Defendant retained the premises in respect of the 2nd contract from January 2015 to 30 May 2016, when the rental charges amounted to USD 29,240. According to Mr Mali, the lease agreements upon which the claims are based were one-off transaction like a sale of commodity-agreement. Instead, he argued, the agreements were continuous in nature from the date of commencement of their expiry date. He contended that; during the subsistence of such agreements the parties' duties and obligations continued until the relationship came to an end and did not come to an end when the agreements were signed. It was submitted further that, while the Defendant was supposed to pay rental charges from the date of signing the tenancy agreements, such requisite rental charges were not paid. It was submitted, therefore, that, the Defendant's act of continuing to retain the premises Page 6 of 13 without paying the requisite charges amounted to a continued breach of the agreements. The learned counsel for the Plaintiff relied on section 7 of the Law of Limitation Act, Cap.89 R.E 2019 and the case of Thomas Ngawaiya vs. The AG and Others, Civil Case No. 117 of 2013 (un reported). In his further submission, Mr Mali was of the view that, the subsequent acts of the parties by implication, changed the terms of the contract and the time agreed for payment of rent changed from the date of signing to some other date when the plaintiff allowed the Defendant to occupy the premises without paying the agreed rent in advance. To support his position, the learned counsel for the Plaintiff relied, on the case of Erick John Mmari vs. M/s Herkin Builders Ltd, Commercial Case No. 138 of 2019 (unreported); (To conclude his submission, Mr Mali contended that, A since the breach by the Defendant was a continuous breach, The cause of action arises immediately upon termination of the parties' relationship. For such a reason, the Plaintiff prayed that the preliminary objection should be dismissed with costs. As per the Order of this Court dated 6th May 2021, the Defendant was to file a Rejoinder submission on or before 11th day of June, 2021. However, that was not Page 7 of 13 filed and, I will carry on my deliberations on the basis of what was available to the Court. From the rival submissions as narrated herein above, the issue that needs my attention is whether the suit at hand is indeed time-barred as contended by the Defendant. In principle, as it was stated in the case of Alcheraus Sephurine Mwesiga v Tanzania Portland Cement Company Ltd, Civil Case No.12 of 2019, (unreported), where a wrong continuing and its effects are seen, the cause of action does not extinguish. It is also worth noting, as it was held in 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) that, section 3 of the Law of Limitation Act which calls for a dismissal of a suit which is found to be time-barred, must be read together with section 7 of the same Act. In this matter at hand, the alleged cause of action as per the Plaintiff is breach of contract. According to Halsbury's Laws of England, 4th Edn., Vol.28 it is stated, in paragraph 662, 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 Page 8 of 13 f 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 provides a similar time limit as it prescribes that, claims relating to breach of contract to be brought within six years of the breach. According to section 5 of the Law of Limitation Act, the accrual date is the date when the cause of action arises. However, as I indicated herein above, it is also true that, when a particular breach is "a continuing breach of contract", that continuing breach has the effect of X; \ postponing the commencement of the limitation period. The question that follows/therefore, is whether the kind of breach alleged, to have been committed by the Defendant amounted to a continuing breach for it to benefit from the provision of section 7 of the Law of Limitation Act. In the case of Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Other, Commercial Case No.42 of 2020, (unreported), this Court, relying on the Indian Case of The Rehabilitation Plantations Ltd vs. P.S. Ansary, on 21 December, 2009, defined what constitutes a continuing breach. In that case it was stated that: "The term 'continuing breach' is intended to apply to contracts obliging one of the parties to adopt some given course of Page 9 of 13 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." Cases involving "continuing" or "successive breaches" include those cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance etc. In the case of a continuing tort, for instance, a fresh ^period, of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. In the Brookside case, (supra), this Court also referred to an old English Case of Holes v. Chard Union

[1894] 1 Ch.D. 293, in which it was stated that:

- "a continuing cause of action arises from x x \ the repetition of acts or omissions similar ', to those in respect of which action is X ^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 case of TABECO International Ltd v Attorney General and 3 others, (Civil Case No. 139 of Page 10 of 13

2019) [2020] TZHC 3561; (11 November 2020), this Court (Masabo, J) stated that: "Section 7 of the Law of Limitation Act, Cap. 89 R.E 2019 contemplates such cases where the party to the contract dishonours the promise but continues to enjoy the services rendered by the other party to the contract." The above cited case made a further elaboration reference being had to the decision of Dixon, J, (judge of the High Court of Australia) in the case of Larking vs. Great Western (Nepean) Gravel ? Ltd. (in Liquidation) (1940), 64,C.L.R./22i (HCA). In that case, the learned judge had the following to say, at p. 236 of that judgement of his, that: "If a covenantor undertakes that he will wi "WWW, do a-definite'act-arid-omits to do it within the time allowed for the purpose, he has broken1- his - covenant finally and his '- continued failure to do the act is nothing ■but a failure to remedy his past breach and not the

commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a Page 11 of 13 further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided." (Emphasis added). What needs to be well captured for our consideration in this case at hand, is that, it is trite law that, in the cases involving a continuing breach of contract, the day to be reckoned is the day on which the breach ceases. As I stated herein above, each successive breach, for each months when the respective rental charged remained unpaid, constituted a cause of action. That being said, even if we were to argue and agree with Mr Msemwa, that the lease agreements commenced on the 1st of December 2014, and not 1st of January 2015, still, since the rental charges were to be paid on a monthly basis, and, given that the last instalment was to be made payable on the 30th of November 2015, still Mr Msemwa's arguments would not have grabbed the trophy or made a headway in Court. The reason for the above finding is simple. Under the doctrine of continuing breach, which the Plaintiff rightly resolved that it applies to this case, this suit at hand was filed on 15th February, 2021. It means, Ir Page 12 of 13 therefore, that, the last cause of action was 30th November 2015 and, counting from that period to the time when the suit was filed, i.e., 15th February 2021, the Plaintiff was still well within time. It means that, the curtains were to fall on 30th November 2021. In view of the above observations and findings, this Court finds that the suit has been instituted well within time and section 7 of the law of limitation Act, Cap, 89 R.E 2019, does apply to this suit., \ In the upshot, this Court settles for 'the following

orders:

1. The preliminary , objection is hereby overruled with costs to jiw"- the Plaintiff;, \ z 2? The suit is to proceed to its next x ' stage of hearing as it may be \ \scheduled by the Court. ■ ' ' \ It is so ordered. DATED at DAR-ES-SALAAM, this 13th AUGUST 2021 Page 13 of 13

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