IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A. And KITUSI J.A.)

CIVIL APPEAL NO. 89 OF 2017

ABDALLAH ALLY SELEMANI t/a
OTTAWA ENTERPRISES (1987) ..... APPELLANT

VERSUS

1. TABATA PETROL STATION CO. LTD
2. MOHAMED J. LARDHI ..... RESPONDENTS

[Appeal from the Ruling and Order of the High Court of Tanzania at Songea]

(Chikoyo, J.)

dated the 26th day of January, 2017
in
Civil Case No. 4 of 2016

JUDGMENT OF THE COURT

15th & 29th August, 2019

KITUSI, J.A.:

The appellant appeals against the decision of the High Court of Tanzania, at Songea, Chikoyo, J. (as she then was), striking out Civil Case No. 4 of 2016 on two grounds, that is, it had no jurisdiction and that the plaint had not been properly verified. This ruling was from points of preliminary objection which had been raised by the respondents and argued by both parties. The points of Preliminary Objection, hereafter POs were:-

1. *This Honourable Court is not vested with territorial jurisdiction to entertain the suit.*

2. *The plaint is fatally defective for offending the provisions of the Civil Procedure Cap 33 R.E 2002.*

The background of the matter is best told by reproducing relevant paragraphs in the plaint.

5. *That, sometimes on March, 2011 the Plaintiff entered into fuel supply agreement with the 1st Defendant whereby the 2nd defendant is the Managing Director of the 1st Defendant and where upon the 1st Defendant was a supplier and the Plaintiff was a customer of the fuel on credit basis.* ***Copy of the agreement is hereby attached and marked P1 leave of the court is craved for it to form part of this Plaint.***

6. *That, in the said Agreement, it was a requirement that the Plaintiff to deposit his certificate of title as security to the supplied fuel, whereby the Plaintiff deposited his certificate of Title No. 17139 MBYRL Plot 220 Block M seed farm within Songea Municipality on agreement*

that the said certificate of Title had to be handled back to the Plaintiff not more than January, 2014 and upon full payment. Copy of the title deed is hereby attached and marked P2 leave of the court is craved for it to form part of this Plaint.

7. *That, the defendants made a full delivery of the fuel as agreed and the plaintiff had successfully made full payment to the defendants. The copies of the said receipts for payment are hereby attached and marked P3 copies of the said receipts for payment are hereby attached and marked P3 and the leave of this court is prayed for them to form part of this plaint.*

8. *That on May, 2014 the second defendant without any justification apprehended the Plaintiff's Vehicle with Reg. No. T.536 CBC together with its trailer with Reg. No. T.523 CAK, the vehicle which was on transit transporting Coal from Ruanda within Mbinga District to Kimbiji Dar es Salaam city following the contract of transportation entered between the Plaintiff and the LAKE CEMENT CO. LTD. A copy of the Vehicles registration Card and the said Contract of transportation of coal from Ruanda – Mbinga*

to Kimbiji-Dar es Salaam is hereby attached and marked P4 and the leave of this court is prayed for them to form part of this plaint.

4. *That, the Plaintiff's cause of action against the Defendants jointly and severely is tort of conversion by denial of right to use his land having Certificate of Right of Occupancy with title no. 17139 Plot no. 220 Block M Seed farm area within Songea Municipal and Motor vehicle with Reg. T.536 CBC with its trailer Reg. T.523 CAK and interference with the performance of the Plaintiff's contract.*

The respondents disputed the allegations contained in the plaint and raised a counter claim alleging that the appellant had not made full payment for fuels delivered by them (respondents) and that they claimed a total of Tshs 236,380,300.00.

Arguing the first Preliminary Objection, Mr. Mosha, learned advocate who appeared for the respondent maintained that paragraphs 5,6 and 7 of the plaint clearly show that the relationship between the parties was contractual with a term that the respondent would supply to the appellant fuels on credit and the latter would surrender the certificate of title to his

land as security guaranteeing payment for those fact. The learned counsel submitted that the appellant's duty under the contract was to pay for the fuels and the respondent's duty was to supply the fuels and release the certificate upon full payment by the appellant.

It was further Mr. Mosha's argument that the respondents do not dispute being in possession of the certificate but that possession, he submitted, has nothing to do with any claim of ownership to the land or any dispute over its boundaries. To the learned counsel, the matter is purely contractual in that even the demand for the certificate would be maintainable under the contract as being an alleged breach by the respondents. He therefore submitted, the suit ought to have been filed either where the contract was executed or where the breach occurred or yet where the defendant permanently resides or works for gain. The contract was executed in Dar es Salaam, the alleged breach is in Dar es Salaam and so is the defendants' place of work and residence.

The learned counsel referred to sections 14 and 18 of the CPC and submitted that the holding of the certificate was not meant to claim ownership but only to get the appellant perform its duty under the contract.

A brief reply by Mr. Kasale, learned advocate for appellant on the first point was that the plaint is clear that the cause of action is conversion, a tort, and that the claim against the respondents was denial of the right on the part of the appellants to use the land. Then again the conversion of the motor vehicles was done at Songea. Counsel maintained that the High Court of Tanzania at Songea had the requisite territorial jurisdiction.

Turning to the second PO, Mr. Mosha submitted that the plaint does not have a paragraph that states the value of the subject matter so as to say that the High Court Songea District Registry has jurisdiction and that such omission is a violation of Order VII Rule 1 (i) of the CPC.

Mr. Kasale's response was that the suit is based on tort and that not in every tort may the plaintiff state the value of the subject matter. He concluded by submitting that it was not necessary, in this case, to state the value of the subject matter.

In determining the first PO the learned High Court Judge, after appreciating the meaning of the term jurisdiction and the principles that govern determination of the same, went on to apply the principles to the case before her and got satisfied that it is not enough for a party to state

that the court has jurisdiction but he must satisfy that court that it has powers to decide questions at issue. She cited the case of **Official Trustees vs Sachindra Nath**, AIR 1969 SC 823 (1969) 3 SCR 92. In that regard she held that the suit is based on contract a copy of which was annexed to the plaint and that under section 18 of the CPC the suit was supposed to be filed in Dar es Salaam.

On the second PO the learned High Court Judge took the view that the provisions of Order VII Rule 1 (i) of the CPC are couched in mandatory terms because of the use of the term "shall". She noted that under paragraph 17 of the plaint the specific value of the claim is stated as being Tshs. 2,070,400,000/= however, that paragraph of the plaint that states the value had not been verified and hence that was akin to not having the jurisdictional paragraph.

For those two reasons the High Court struck out the suit with costs.

The appellant seeks to assail that decision by a Memorandum of Appeal comprising four grounds as follows:-

1. *That the trial court erred in law and fact to sustain the preliminary objection to the effects that the High Court of Tanzania at Songea had no territorial jurisdiction to*

entertain this matter the defendants resides at Dar es Salaam without considering other factors that the disputed land was at Songea and the concerted motor vehicle were in transit from Songea to Dar es Salaam.

2. *That the trial court erred in law and fact to determine the territorial jurisdiction by relying on contract annexed in plaint which was not tendered in court.*

3. *That, the trial court erred in law and fact to hold that the High Court of Tanzania at Songea lacked territorial jurisdiction because the contract was executed at Dar es Salaam while the matter at issue was tort of conversion of Certificate of Right of Occupancy of the land situated at Songea.*

4. *That, the trial court erred in law to dismiss the suit for failure to verify one paragraph instead of rejecting the Plaint.*

Mr. Dickson Ndunguru, learned advocates argued the appeal on behalf of the appellant, in effect holding on to the view that the High Court of Tanzania, Songea District Registry has territorial jurisdiction over the matter because the suit is based on a tort of conversion of a certificate of title to a piece of land located within Songea.

Arguing the first ground of appeal Mr. Ndunguru submitted that nowhere in the plaint is it stated by the appellant that the suit was based on contract, the point that was relied upon by the High Court in striking out the suit. He pointed out that the suit is based on conversion of certificate of Right of Occupancy of a piece of land, Title No. 17139 Plot 220 Block 'M' Seed farm area within Songea Municipality and a Motor vehicle Registration No. T 536 CBC which, though impounded in Dar es Salaam, was being driven from Songea. The learned counsel further submitted that had the trial High Court Judge considered sections 14(d) and 17 of the Civil Procedure Code (CPC) she would not have concluded that she has no jurisdiction.

In respect to ground 2 of Appeal the learned counsel faulted the High Court Judge for basing her decision on an annexture to the plaint while it had not been exhibited yet. He cited the case of **COTWU (T) Ottu Union and Another vs. Hon. Iddi Simba, Minister of Industries and Trade and Others** [2002] TLR 88.

Mr. Ndunguru also raised the point that the Preliminary Objections which led to the striking out of the suit were not Preliminary Objections as

per **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors**, [1969] EA 696.

As for the 3rd ground of appeal, counsel repeated his argument that since the suit is based on the tort of conversion, the High Court Judge should not have determined the matter on the basis of the fact that the contract was concluded in Dar es Salaam.

Turning to the 4th ground of appeal Mr. Ndunguru submitted that the consequences of failure to verify some of the paragraphs in a plaint is to strike out the offending unverified paragraphs or order amendment or still to reject the plaint. The case of **Kiganga and Associates Gold Mining Co. Ltd v. Gold UNL** [2002] EA 134 was cited.

Mr. Steven Mosha, learned counsel who appeared for the respondents commenced his response with ground 4. The learned advocate submitted that the order striking out the suit for failure to verify the plaint was correct because the Judge had the discretion to do so and that the consequences of rejection which is being suggested by Mr. Ndunguru are the same as those of striking out. He wondered why has counsel not advised his client to file a fresh suit which is an option available

to him whether the suit was rejected or struck out. Mr. Mosha underlined the point that the unverified paragraph involved the jurisdiction of the court which is basic and ought to have been established.

Turning to ground 1, Mr. Mosha submitted that Section 18 of the CPC which requires suits to be filed at the place of residence of the defendant was violated. He further submitted that an action based on tort is governed by the CPC under which the place of suing would be in Dar es Salaam where the defendants live and also the contract which forms the basis of the parties' relationship in this case was executed in Dar es Salaam.

Further, Mr. Mosha submitted, the suit is not a land matter in that there is no dispute over its ownership or boundaries, neither is there allegation that the title has been changed or that the respondent had converted the land to his own ownership. He went on to point out that while paragraphs 5, 6 and 7 of the plaint relate to contract, there is no paragraph alleging dispute over the piece of land.

On the alleged error on the part of the High Court to base its findings on the annexed contract, Mr. Mosha submitted that the said document being part of the plaint was rightly considered in determining the

jurisdiction of the Court. He added that the case of **Mukisa Buscuits** (supra) has been cited out of context. The learned counsel submitted that even the alleged conversion of the motor vehicle was done in Dar es Salaam.

In a rejoinder, Mr. Ndunguru submitted that no provision has been cited to support Mr. Mosha's contention that the High Court Judge had the discretion of either striking out the suit or rejecting the plaint. He insisted that the suit was based on section 14 of the CPC because jurisdiction of the Court is not solely derived from Section 18 of the CPC.

Further that as regards the conversion of the motor vehicle which was on transit, the plaintiff had an option under S. 17 of the CPC to file the case either in Dar es Salaam or in Songea.

Arguing the alleged error in using annextures Mr. Ndunguru pointed out that the aspect of contract was brought about by the respondents not the plaintiff. He insisted that the case of **Mukisa Biscuits** was applicable in the circumstances of this case.

When probed by the Court Mr. Ndunguru submitted that the conversion complained of relates to the certificate of title but clarified by

submitting that in order to establish his interest on the land, he was going to do so by providing the certificates as evidence. We take this argument as suggesting that even though the cause of action is not based on land, conversion of the certificate of title affected his interest on the land which is in Songea.

Our take off point in determining the issues before us is to restate the law that jurisdiction of courts, which is the chief bone of contention in this case, is a creature of statute. [See **Edwin Fabian Tallas & Mohamed Ally Masha Vs Republic**, Criminal Appeal No. 285 of 2014 (unreported)]. In this regard the jurisdiction of the court is, as rightly submitted by Mr. Mosha and not disputed by Mr. Ndunguru, controlled by the Civil Procedure Code and both learned counsel have relied on provisions of that procedural law to advance their respective positions in the matter.

Under the Civil Procedure Code, the provisions governing the jurisdiction of courts fall under Part I, specifically from section 13 under which there is a title of *"Place of Suing"*. The appellant argues that his suit was instituted at Songea on the basis of the provisions of section 14 of the

CPC. For easy appreciation we shall reproduce that provision as hereunder:-

> *"14. Subject to the pecuniary or other limitations prescribed by any law, suits:-*
>
> *"(a) for the recovery of **immovable** property with or without rent or profit;*
>
> *(b) for the partition of **immovable** property;*
>
> *(c) for foreclosure, sale or redemption in the case of a mortgage of or a charge upon **immovable** property;*
>
> *(d) for the determination of any other right to or interest in, **immovable property**;*
>
> *(e) for compensation for a wrong to **immovable** property; or*
>
> *(f) for the recovery of movable property actually under distraint or attachment,*
>
> *Shall be instituted in the court within the local limits of whose jurisdiction the property is situate."*

On the other hand the respondent's contention is that the suit was governed by section 18 of the CPC because the same was based on tort,

not a claim for ownership of/or establishing interest in any immovable property. Again we shall reproduce section 18 of the Civil Procedure Code as thus:-

> *"18. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:-*
>
> *(a) the defendant, or each of the defendants where there are more that one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;*
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution."*

In considering the two provisions in the light of the competing views of the learned advocates, we shall be guided by our decision in the case of

Director of Public Prosecution Vs. Li Ling Ling, Criminal Appeal No. 508 of 2015 (unreported) where we held that two provisions of the same statute cannot be in conflict but must be complementary of one another. In that case, citing a book titled, **Principles of Statutory Interpretation**, 12th Ed Lexis Nexis Butterworths, Nadhwa Nagpur, we reproduced the following principle with approval:-

> *'The provisions of one section of a statute cannot be used to defeat those of another 'unless it is impossible to effect reconciliation between them', the same rule applies to sub sections of sections."*

Our reading of the provisions of section 14 which the appellant's counsel maintains that he relied on, as well as section 15 of the Civil Procedure Code, leaves us in no doubt that these provisions relate to immovable property. We deliberately underscored the word "immovable" in section 14 of the CPC to demonstrate what we consider to be a misconstruction by the learned counsel for the appellant. In Mr. Ndunguru's own submissions, there is no controversy that the suit was based on tort. Again our reading of section 18 of the CPC clears our vision as to which suits fall under it, and these are, any suits other than those

mentioned under sections 14, 15, 16 and 17. This is because the marginal note to section 18 reads: -

> *"Other suits to be instituted where defendant resides or cause of action arises."*

Mr. Ndunguru has also submitted that section 17 of the CPC is relevant in his claim for the alleged wrongful seizure of the appellant's motor vehicle. With respect to the learned advocate, there is no way the suit based on tort could be maintained based on section 14 of the CPC which principally governs suits for immovable property. Nor could the alleged seizure of the motor vehicle be challenged in Songea under section 17 of the CPC when it was pleaded by the appellant that the seizure took place in Dar es Salaam.

We think there is only one cause of action for purposes of determining the jurisdiction of the Court and the appellant was bound by his own pleadings, that it is tort. In his submissions Mr. Ndunguru submitted that the tort complained of is that of converting the certificate of title and that of seizing the vehicle. We are conclusively decided that both took place in Dar es Salaam.

We are further fortified by what our predecessors stated in the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998 (unreported) that claims based on the same cause of action cannot be severed. They stated:-

> *"There is no room for separating the claims based on the same cause of action. To sever or separate the claims as the courts below did in this case was not, in our view, the intention of the legislature in its wisdom. It was the intention of the legislature to allow certain claims based on the same cause of action to be entertained by the civil courts, it would have stated so in the law."*

We firmly think that only suits for immovable property were meant to be filed within the local limits in which such properties are situated. Any other suits as provided under section 18 of the CPC are to be filed where the cause of action arose or where the defendant resides or works for gain. The suit alleging conversion falls under this provision.

We also think and so decide that the appellant could not eat his cake and have it. He could not allege tort as the cause of action, then maintain

that the suit has something to do with land. That would be separating the claims based on the same cause of action, an unwelcome approach.

We uphold the learned High Court Judge in her conclusion that the High Court of Songea had no jurisdiction on the matter. We endorse the learned Judge's reasoning that it is not enough for a party to state that the court has jurisdiction, rather the court has the duty to ascertain that indeed it has the jurisdiction stated. This is mainly because, as we have earlier stated, jurisdiction is conferred by statute so that even if the parties agree, they cannot confer jurisdiction to a court that does not have it. We also find no merit in the appellant's complaint that the Judge erred in relying on the annexture to the plaint. This argument, as well as the submission that the question of contract was raised by the respondents, are both strange because paragraphs 5 and 17 of the plaint, stated that there was a contract a copy of which was annexed.

We have considered it unnecessary to pronounce ourselves on the effect of failure to verify the paragraph as to the jurisdiction of the Court. This is uncalled for because in view of our determination on the question of

academic. Consequently, we dismiss the appeal with costs.

DATED at **IRINGA** this 28th day of August, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 29th day of August, 2019 in the presence of Mr. Moses Ambindwile for Mr. Dickson Ndunguru, learned counsel for the Appellant and Mr. Moses Ambindwile for Mr. Stephen Mosha, learned counsel for the Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL