

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: LILA, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 126/01 OF 2016

- 1. MWANANCHI COMMUNICATIONS LIMITED1ST APPELLANT**
2. THE EDITOR, MWANANCHI NEWSPAPER2ND APPELLANT
3. RICHARD KILUMBO3RD APPELLANT

VERSUS

- 1. JOSHUA K. KAJULA 1ST RESPONDENT**
2. SAMWEL BUKUKU 2ND RESPONDENT
3. THE ATTORNEY GENERAL 3RD RESPONDENT

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

(Bongole, J.)

Dated the 3rd day of June, 2016

in

Civil Case No. 182 of 2003

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JUDGMENT OF THE COURT

11th August, & 22nd October, 2020

KOROSSO, J.A.:

Mwananchi Communications Limited, the Editor Mwananchi Newspaper and Richard Kilumbo, the 1st, 2nd and 3rd appellants respectively have preferred an appeal to this Court against the decision of the High Court of Tanzania at Dar es Salaam (Bongole, J.) dated 3rd June, 2016 in Civil Case No. 182 of 2003 which was in favour of Pr. Joshua K. Kalua and Samwel Bukuku, the 1st and 2nd respondents.

A brief account of the background of the matter subject of the current appeal so as to facilitate better appreciation of the merit or otherwise of the appeal is that, in the year 2012, a person by the name Makete (a businessman) showed interest in purchasing land within the Adventist Church area of Kyela Town and communicated this interest through Mr. Edson, a doctor in one of the dispensaries in the area. Hendry Mwaikanda (DW1) a pastor of the Adventist church, refused the said offer arguing that it was in a blessed area which was also a place of worship. Mr. Edson was displeased with DW1's stance and subsequently sought audience of the church leaders of the Diocese, that is, the 1st and 2nd respondents who were at the time, the chairman and the secretary respectively, to get their stand on the offer on the table.

Soon after, the 1st and 2nd respondent travelled to Kyela to meet the purchaser and visit the respective area. When DW1 was queried on this issue, he denied knowing anyone interested in buying the area and stated that since no meeting had been conducted to approve the sale of the said area and at the same time being God's house, it cannot be sold. Consequential to the said discussions, DW1 was transferred from Kyela District to a new work station in Sumbawanga District and before

moving to the new station, he was summarily terminated as a pastor and prohibited to deal with any church business.

On the 13th September, 2013, the 1st appellant published an article titled; "***Waumini wagundua njama za kuuza kanisa***", unofficial translation is "*Believers/Worshippers discover conspiracy to sell church*". This article is what prompted the appellants to file a suit against the respondents in the High Court of Tanzania (trial court) and contended that being church leaders, the article was defamatory since the contents therein injured and lowered their reputation. The 1st respondent was a Bishop and the 2nd respondent also acted as the treasurer of the church. The 1st and 2nd respondents demanded for an apology from the appellants asserting that the contents of the article were untrue. The 1st appellant did not apologize as requested and this inaction on the part of the 1st appellant, prompted the 1st and 2nd respondents to institute the suit against the 1st, 2nd and 3rd appellants for defamation and claimed to be paid an amount in excess of Tshs. 150,000,000/-.

As stated earlier on, after a full trial the High Court Judge found in favour of the 1st and 2nd respondents and awarded each of them Tshs. 50,000,000/- as general damages.

The appellants jointly lodged a Memorandum of Appeal with six (6) grounds before this Court as follows:

1. The Honourable Judge erred in law in adjudicating the matter whose speed track had expired without extending the speed track first.
2. The Honourable Judge erred in law in that the court had no pecuniary jurisdiction to adjudicate the matter.
3. The Honourable Judge erred in law and fact in concluding that the article and the contents are false without regarding and without analyzing the evidence tendered.
4. The Honourable Judge erred in law in finding that the article was defamatory without establishing the elements of defamation.
5. The Honourable Judge erred in law in finding that the article was malicious and not a fair comment in a matter of public interest, without establishing the malicious elements in the first place.
6. The Honourable Judge erred in law in awarding TZS 50,000,000/= as general damages to each of the Respondents arbitrarily.

When the appeal was placed for hearing before us Mr. Frank Mwalongo learned Advocate, represented all the appellants whereas the respondents enjoyed the services of Mr. Jotham Lukwaro, learned

counsel. The counsel for the parties duly adopted their filed written submissions so as to be part of their overall submissions and prayed that the submissions be considered by the Court in determination of this appeal.

For reasons that will shortly come to light, having prudently considered the oral and written submissions together with cited references of the parties and the record of the appeal, we are settled that the fate of the appeal can be determined by addressing the 2nd ground of appeal that challenges the jurisdiction of the trial court to entertain the case giving rise to this appeal.

In amplifying the 2nd ground of appeal, Mr. Mwalongo submitted that the trial court had no jurisdiction to hear and determine the suit especially since the main relief sought was for general damages. He argued that a chain of decisions of this Court and the High Court have held that it is the substantive claims and not general damages that determine the pecuniary jurisdiction of a trial court. The learned counsel contended that while the High Court draws its jurisdiction from Article 108 of the Constitution of the United Republic of Tanzania 1977 (the Constitution), the said provision only sets the framework and does not particularize specificity of jurisdiction. A case decided by the High Court

was referred to us so as to persuade this Court to be in congruence with the appellants' position, that is, **Bernard Kabonde (suing as the Personal Representative of the Estate of Sophia M. Kabonde (deceased) and Lugano Kabonde (deceased) vs. Methusela Bundala and Suleiman T/A Mombasa VIP**, Civil Case No. 27 of 2011 (HCT-Mwanza) (unreported).

The appellants' counsel stated further that Article 108(2) of the Constitution articulates that the jurisdiction of the High Court comes into play where there is no court specified for that purpose and because the Magistrate's Courts Act, Cap 11 Revised Edition 2002 (the MCA) specifies the maximum limits for the District and Resident Magistrate's courts, it means there is a specified court to litigate the said case. This is where the High Court's jurisdiction to adjudicate the case is derogated to the amount specified. We were also informed that other legal provisions to consider when discussing the matter are sections 2 and 3 of the Judicature and Application of Laws Act, Cap 358 Revised Edition 2002 (the JALA) which vests the High Court with full civil and criminal jurisdiction and subjects the jurisdiction to written laws in force.

The appellants' counsel also made reference to Order VII rule 1(i) of the Civil Procedure Code, Cap 33 Revised Edition 2002 (the CPC) which

provides that the particulars of the plaint include a statement of the value of the subject matter of the suit for the purpose of determining which court has jurisdiction to try the matter and the requisite court fees. That this provision also recognizes the minimum pecuniary jurisdiction of the High Court in civil suits. He also alluded to the fact that section 40(1) of the MCA as it was then when the matter was determined, as amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 increased to Tshs. One hundred and fifty million (150,000,000/-) for movable properties. The counsel argued further that the immediate amount shown on pecuniary limits for the District and Courts of Resident Magistrate has always been taken as the minimum pecuniary limit of the High Court. That this was determined upon interpretation of Article 108(2) of the Constitution which vests the High Court with jurisdiction on the particular matter where there is no other court that has been vested with such jurisdiction by the Constitution or any other law.

According to Mr. Mwalongo, the respondents had the following prayers in their plaint *(i) General damages (ii) interest (a) above current bank rate from the day of filing the suit to the date of judgment. (iii) interest on the decretal sum at court's rate from date of judgment till*

payment in full, (iv) costs of the suit, (v) any other or further reliefs this Court may deem fit.

He therefore argued that in the aforementioned prayers indisputably none of them claimed for specific amount, and consequently the High Court lacked pecuniary jurisdiction to adjudicate the matter before it. To augment this position various decisions of this Court that observed that it is substantive claims and not general damages which are used to determine pecuniary jurisdiction were cited. These include, **Tanzania - China Friendship Textile Co. Ltd. vs Our Lady of the Usambara Sisters** [2006] TLR 70; **Rev. Christopher Mtikila and Yusuf Mehboob Manji and 9 Others**, Civil Case No. 86 of 2006 (HCT- Dar es Salaam); and **John Mome Morro vs Gratian Mbelwa and 3 Others**, Civil Case No. 80 of 2011 and **Tanzania Breweries vs Anthony Nyingi**, Civil Appeal No. 119 of 2014 (all unreported).

The applicant's counsel also contended that since this is a matter related to jurisdiction of the trial court, raising the matter at this stage of appeal is proper since matters challenging jurisdiction of a court may be raised at any time, grounding his arguments based on the holding of this Court in **Tanzania Revenue Authority vs Tango Transport Company Ltd.** Civil Appeal No. 84 of 2009 (unreported).

On the part of the respondents, when responding to this ground of appeal, Mr. Lukwaro informed the Court that a challenge on the jurisdiction of the court to try the matter was raised by the appellants (then the defendants) by way of a notice of preliminary objection which was later withdrawn by the counsel for the appellants then, and that the objection was thus not considered and determined by the trial court. He thus argued that at this stage, the appellants should be estopped from raising the same issue at this stage that they had withdrawn.

The counsel for the respondent, had occasion to also argue in the alternative where he stated that there are several decisions of the Court which have deliberated on the issue of the High Court's pecuniary jurisdiction and two school of thoughts have emerged on whether or not it is specific amount only which determines pecuniary jurisdiction of a court to try a matter. He conceded to being aware of the holdings related to the matter under scrutiny in the decisions cited by the learned counsel for the appellant such as, **Tanzania-China Friendship Textile Co. Ltd vs Our Lady of Usambara Sisters** (supra) that states that general damages should not be the basis for assessing damages claimed. He however urged the Court to also consider the fact that the cited cases did discuss the matter under scrutiny in its broader context,

and argued that the issue for consideration should be whether the suit was properly before the court notwithstanding the claims sought by the respondents. The counsel asserted that it is only the claims sought which should facilitate determination of whether or not the High Court is vested with the requisite jurisdiction.

Mr. Lukwaro cited cases he contended presented the other school of thought, this included **Anna Babu t/s E and L Catering Services vs Akiba Commercial Bank**, Commercial Case No. 68 of 2007 (HCT-Commercial Division) and he argued its where the decision of **Tanzania-China Friendship Textile Ltd** case (supra) was distinguished by stating that there was no distinction in the case between liquidated damages and general damages claimed in the suit although the amount claimed before the court was above the pecuniary threshold of the High Court's pecuniary jurisdiction. The counsel further argued that, **Tanzania-China Friendship Textile Ltd** (supra) decision which has been relied upon by various decisions as supporting the principle that general damages cannot be the basis for determining pecuniary jurisdiction of the High Court, should also be read in the context that in the said case the Court also stated that:

“But since general damages are awarded at the discretion of the court it is the court which decides which amount to award. In that respect normally claims for general damages are not quantified. But where they are erroneously quantified, we think, this does not affect the pecuniary jurisdiction of the court”.

The counsel argued that in May, 2012 the Court in **Peter Joseph Kilibika and Another vs Patrick Aloyce Mlingi**, Civil Case No. 37 of 2009 in addressing the same issue, the holding in **China-Tanzania Friendship Textile Ltd** (supra) was distinguished. The Court stating that the circumstances were different and there was no claim made to lead to a conclusion that the pecuniary value of the claim is not within the jurisdiction of the High Court. Another case cited was **Professor Ibrahim Lipumba and Zuberi Mzee** [2004] TLR 381, where this Court sitting in Zanzibar granted general damages where it was the only claims in the absence of specific or special damages claims. He also argued that Order VII rule 1 of the CPC outline particulars of a plaint and one of them is showing the amount and that, there was an amount claimed in the plaint as required, that is, stating in excess of Tshs. 150,000,000/- and this was in fulfilment of Order VII rule 1 of the CPC.

The rejoinder by the counsel for the appellants was brief and consisted of arguments that reiterated what was expounded in the submission in chief that cemented the same.

We have thoroughly scrutinized the submissions by the counsel for the parties on the ground challenging the jurisdiction of the High Court to adjudicate the case, the first realm of the argument was whether it was appropriate to raise this ground at this stage. The record of appeal show that the High Court did not deliberate on this issue during the trial since the notice of preliminary objection filed by the appellant's (defendants then) (found at page 127 of the record of appeal) which alleged that the court was not vested with jurisdiction to entertain the case was marked withdrawn by the trial court upon acceding to the prayer by the defendant's counsel to withdraw the notice of preliminary objection filed on the 14th of November 2013 (see page 71 of the record of appeal).

The respondent's counsel contended that it was the appellants' counsel who denied the trial court an opportunity to deliberate and determine the challenge on the jurisdiction of the trial court to try the suit and thus argued that the appellants' counsel should be estopped from raising the same matter at this stage. Indeed, while we

acknowledge that the said assertions have substance, we find the question before us is whether the said fact delimits the Court to deliberate on this issue having been raised as a ground of appeal.

The law is well settled that the question of jurisdiction may be canvassed at any stage even on appeal by the parties or *suo motu* by the court since it goes to the substance of a trial as held in **Michael Leseni Kweka vs John Eliafe**, Civil Appeal No. 51 of 1997; **Tanzania Revenue Authority vs New Musoma Textiles Ltd**, Civil Appeal No. 93 of 2009; and **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (all unreported) and in the last case the Court stated:

"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests".

We align ourselves to previous holdings on this issue by this Court in **Tanzania Revenue Authority vs Tango Transport Company Ltd** (supra) and **Tanzania China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sisters** (supra) which in effect pronounced that, an issue questioning or addressing the jurisdiction of a court is paramount and can be raised at any time even at the stage of appeal. The fact that the notice of preliminary objection which first raised this

issue at the trial stage was withdrawn, we find, does not by itself and under the circumstances of this case in any ways bar the issue being raised again as it was in this case. Regard should be to the fact that the trial court did not have the opportunity to consider and determine this issue. Thus, we are of the view that the assertion that such an issue cannot be raised at this stage is misconceived and lacks merit.

With regard to the second limb of the complaint, presented as the alternative argument emanating from the respondents' counsel submissions, whose gist was grounded on inviting the Court to be persuaded by the second school of thought found in those decisions that distinguished the holding in **Tanzania- China Friendship Textiles Co. Ltd case** (supra) that;

"... it is a substantive claim which determines jurisdiction and not general damages which determines jurisdiction as general damages are awardable at the court's discretion..."

Our scrutiny of the submissions by counsel shows that the respondents' counsel acknowledges the above principle enshrined in **Tanzania-China Friendship Textiles Co. Ltd case** (supra) but believes that the said position is distinguishable in that it is only the claims sought which should facilitate determination of whether or not

the High Court was vested with jurisdiction to entertain the matter in line with the holding in **Anna Babu t/s E and L Catering Services case (supra)**.

On our part, our stance is that matters challenging jurisdiction of a court are important and they should be disposed of as early as possible. That determination of such matters requires visiting a wide spectrum of legislations. The counsel for the parties made reference to Article 108(1) of the Constitution which established the High Court of Tanzania and provides that:

“There shall be a High Court of the United Republic of Tanzania (to be referred to in short as “the High Court” the jurisdiction of which shall be specified in this Constitution or in any other law”.

Article 108(2) of the Constitution reads:

“If the Constitution or any other law does not expressly provide that the specified matter shall be first heard by a court specified for that purpose then the High Court shall have jurisdiction to hear every matter of such type”.

Section 7(1) of the CPC we find is an important starting point when deliberating on jurisdictional issues, it provides:

“The Courts shall (subject to provisions herein contained) have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred”.

The above provisions in effect allude that the pecuniary jurisdiction of the court is determined by the substantive claims and not the general damages, since general damages are awarded where the court when exercising its discretion finds it is warranted upon consideration of the circumstances pertaining to the claims. As rightly submitted by the counsel for the parties, the holding in **Tanzania-China Friendship Textiles Co. Ltd** (supra) has been adopted or considered in various other cases such as **Tanzania Breweries Limited vs Anthony Nyingi**, Civil Appeal No. 110 of 2014 (unreported) whose holding was that it is the substantive claim and not the general damages which determine the pecuniary jurisdiction of the court and went on to state that:

“It is therefore clear from these provisions of JALA and the Constitution, that the jurisdiction of the High Court is subject to the provisions of other written laws. So, it was wrong for the learned trial judge to have decided the question of jurisdiction by looking at Article 108(2) of the

Constitution alone. In other words, Article 108 (2) of the Constitution should not have been read in isolation, without discussing whether or not such other written laws to the contrary exist”.

We have perused the plaint filed on the 2nd September 2003 relied upon by the respondents in their claims before the High Court, paragraph 15 reads:

“The defendants reside and work for gain in Dar es Salaam and the sum claimed is in excess of Tshs. 150,000,000/- and, therefore, this Honourable Court has jurisdiction to entertain this suit.

WHEREFORE the plaintiffs pray for judgment and decree against the defendants jointly and severally for:-

- a) general damages.*
- b) interest on (a) above at current bank rates from the date of filing this suit til (sic) date of judgment.*
- c) interest on the decretal sum at court rates from date of judgment til (sic) payment in full.*
- d) Costs of the suit.*
- e) any other or further relief(s) this court may deem fit.”*

It is obvious from the plaint that the claims were not for specific damages and thus fall under general damages. As expounded above, the position of the law as pronounced in various decisions is that it is the substantive claim which determines jurisdiction and not general damages as expounded hereinabove in our holding in **Tanzania-China Friendship Textiles Co. Ltd case** (supra). If this was to be considered, undoubtedly for the claimed amount, if the amount claimed was known, then for the plaint to clearly state the said amount as such and plead it as special damages as was held in **Tanzania Saruji Corporation vs African Marble Company Limited** [2004] TLR 155. This would also be in line with Order VII Rule 1 of the CPC, that every plaint has to state the value of the subject matter for two purposes, jurisdiction and court fees. At the same time ensure compliance with section 13 of the CPC that requires a suit to be filed in a Court with the lowest grade.

The learned counsel for the respondent has invited us to distinguish the decision in **Tanzania- China Friendship Textile case** (supra) from the current matter. The respondents' counsel relied heavily on the decision of **Anna Babu t/s E and L. Catering Services vs Akiba Commercial Bank** (supra) and **Peter Joseph Kilibika and**

Another vs Patrick Aloyce Mlingi, Civil Case No 37 of 2009 (unreported). In **Anna Babu t/a E & L Catering Services case** (supra), the High Court Judge (Massati, J.) refused the invitation to move away from the decision of this Court stating he was not competent to review the decision of this Court in **Tanzania- China Friendship Textile case** (supra) and went on to decide the matter considering the particular circumstances of the said case and thus it is incorrect to state that there was a departure from the same.

In **Peter J. Kibilika and another vs Partric Aloyce Mlingi** (supra), the major issue for determination by the Court was whether the High Court had jurisdiction to hear the respondent's suit and held that the circumstances of the case were different from those in **Tanzania- China Friendship Textile case** (supra) in terms of the principal claim which was below Tshs. 10,000/- while the specific claim was for Tshs. 8,136,720.0. In the present case there is no specific claim. There were only general claims that it is in excess of Tshs. 150,000,000/-.

The other argument by the learned counsel for the respondents' was that in the **Tanzania- China Friendship Textile case** (supra) the Court did also state that since general damages are awarded at the discretion of the court and decides the amount to award, that thus this

is why they are generally not quantified, but that where they are quantified erroneously this should not affect the pecuniary jurisdiction of the court.

We are aware of the above observation by the Court in **Tanzania-China Friendship Textile case** (supra), but it is noteworthy that immediately after making the above statement the Court observed as follows:

“In our view, it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the court”.

After pronouncing the above the Court proceeded to identify the substantive amount to be 8,136,720/- and deliberated whether the said amount was within the boundaries of the pecuniary jurisdiction of the High Court, having regard to the fact that the suit was filed in the Commercial Division of the High Court.

When deliberating on what was the pecuniary jurisdiction of the High Court then, the Court referred to sections 3 and 6 of the CPC and Section 40(2)(b) of the MCA where at the material time the pecuniary jurisdiction of the District Court or a Court of Resident Magistrate was one not exceeding 10,000,000/- on movable properties and found that by implication it meant that claims exceeding 10,000,000/- being higher

than that of the District and Resident Magistrates Court was therefore under the jurisdiction of the High Court though there is no specific law providing as such.

The most important matter for our consideration at this juncture under the current circumstances as deduced from the decisions of this Court referred above is that, in determining the jurisdiction of the High Court what should be considered is the specific claims and not the general damages claimed in considering the pecuniary jurisdiction of the High Court.

In the case which is the subject of the current appeal, the pleadings failed to highlight the specific claims and only had a general statement of claims, which thus means that there was no specific amount shown to facilitate determination of the pecuniary jurisdiction on the High Court where the suit was filed. The absence of such specification meant the suit should have been tried in the lower courts, that is, the District or Resident Magistrate's courts under section 40(2)(b) of the MCA. For the foregoing reasons, it is clear that the High Court erroneously crowned itself with jurisdiction in entertaining and determining the suit that it did not possess.

Accordingly, we allow the appeal and are constrained to declare the trial court's proceedings a nullity, and to meet the justice of the case, thus proceed to quash and set aside the entire proceedings, judgment, decree and orders of the High Court. Under the circumstances, each party to bear own costs.

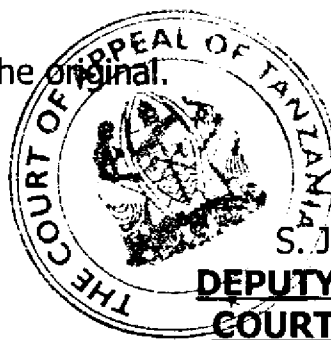
DATED at DAR ES SALAAM this 21st day of October, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 22nd day of October, 2020 in the presence of Mr. Imani Daffa, learned counsel holding brief for both Mr. Frank Mwalongo, learned counsel for the appellants and Mr. Jonathan Lukwano, learned counsel for the respondents is hereby certified as a true copy of the original.

The seal of the Court of Appeal of Tanzania is circular, featuring the national coat of arms of Tanzania in the center. The text "THE COURT OF APPEAL OF TANZANIA" is written around the perimeter of the seal.
S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL