

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUGASHA, J. A., MWAMBEGELE, J.A and WAMBALI, J. A.)**

**CIVIL APPEAL NO. 179 OF 2016**

**R. S. A. LIMITED.....APPELLANT**

**VERSUS**

**HANSPAUL AUTOMECHS LIMITED**

**GOVINDERAJAN SENTHIL KUMAL.....RESPONDENTS**

**(Appeal from Judgment and Decree of the High Court of Tanzania,  
Commercial Division at Dar es Salaam)  
(Songoro, J.)**

**Dated the 20<sup>th</sup> day of April, 2016**

**in**

**Commercial Case No. 160 of 2014**

.....

**RULING OF THE COURT**

15<sup>th</sup> March & 6<sup>th</sup> April, 2021.

**MUGASHA, J.A.:**

In the High Court of Tanzania, (Commercial Division) the appellant sued the respondents claiming that they had infringed its copyright by manufacturing similar motor vehicles' bodies using the technical drawings designed and utilized by the appellant to make or manufacture the R.S.A Car Model Bodies. In that regard, the appellant prayed for Judgment and Decree and Orders against the defendants severally and jointly and sought the following reliefs:

- (a) *A declaratory order that the defendants have infringed the plaintiff's copyright in the engineering drawings to use to make RSA Safari Cruiser 7X; RSA Safari Cruiser 5X; RSA Safari Cruiser 5XE; RSA Safari Wagon N7X; and RSA Safari Wagon N5X;*
- (b) *A perpetual injunctive order to restrain the first defendant whether acting by its directors' officers, servants or agents, or any of them or otherwise howsoever from infringing the plaintiff's copyright in the engineering drawings used to make RSA Safari Cruiser 7X; RSA Safari Cruiser 5X; RSA Safari Cruiser 5XE; RSA Safari Wagon N7X; and RSA Safari Wagon N5X;*
- (c) *An order to prohibit the first Defendant from producing Hanspaul Land Cruiser 7SX, Hanspaul Land Cruiser 5SRX; Hanspaul Land Cruiser 5SX; Hanspaul Nissan 7SX; and Hanspaul 5SRX Nissan Y61;*
- (d) *Delivery up to the Plaintiff, or in the alternative, obliteration upon oath of all infringing copies of the Plaintiff's copyright works in the possession, custody and control of the first defendant;*
- (e) *An order restraining the first defendant from manufacturing, fabrication, sale and offering for*

*sale safari converted vehicles using or reproducing in any manner the plaintiff's engineering drawings;*

- (f) An order against the second defendant prohibiting him from passing over and/or disclosing the plaintiff's drawings to the first defendant;*
- (g) Payment of the sum of US\$, 689,352.31 being specific damages for the loss suffered as a result of loss of business occasioned by the defendant's act of infringement of the plaintiff's engineering drawings.*
- (h) Payment of the sum of US\$1,000,000; being loss of goodwill occasioned by the defendant's infringement of the plaintiffs' engineering drawings;*
- (i) Payment of the sum of US\$1,000,000; being general damages for the deliberate infringement of the plaintiff's copyright in the engineering drawings;*
- (j) Costs of this suit; and*
- (k) Any other relief(s) that this Honourable Court may deem fit and just to grant.*

In their written statements of defence, the respondents denied the claim having contended that the design of the motor vehicles bodies

manufactured by the 1<sup>st</sup> respondent were different from those of the appellant. In addition, it was averred that the appellant was neither assigned nor licensed by the manufacturers of Toyota Land Cruiser and Nissan Patrol Car Models in order to create its own model. As mediation of the parties bore no fruits, a full trial was conducted following which judgment was entered in favour of the respondents. Unamused, the appellant has preferred an appeal to the Court raising seven grounds. However, on account of what will be apparent in due course we shall not reproduce the grounds of appeal. The appeal was confronted with the following preliminary points of objection challenging the competence of the appeal on the following grounds;

- i. That the record of appeal is incurably defective as;
  - a. it is comprised of two contradictory decrees;
  - b. it is accompanied with a Judgment bearing a pronouncement date which does not correspond with the date of extraction of the purported Amended Decree.
- ii. That the supplementary record filed on 17<sup>th</sup> July 2020 is bad in law, unmaintainable and ought to be struck out for;

- a. it is making reference to the Judgment and decree dated 12<sup>th</sup> April 2016 while the original record of appeal is referring to the Judgment and decree dated 20<sup>th</sup> April, 2016.
- b. it is accompanied by a false document purported to be an amended decree signed by one M. N. NTANDU positioning and purportedly a Deputy Registrar of the High Court of Tanzania on 12/4/2016 the fact which is not valid.

***And in the alternative;***

2. That the Court has no jurisdiction to entertain and determine the present Appeal on merit as it is originating from the Judgment and Decree of the Court which acted with no Jurisdiction.

Following a brief dialogue with the Court, Mr. Salimu Mushi, learned counsel for the respondents abandoned the first set of the preliminary objection which was not objected to by Mr. Mpaya Kamara, learned counsel for the appellant. We thus marked the first set of preliminary objection abandoned.

Pertaining to the second point of objection, it was Mr. Mushi's submission that the Court has no jurisdiction to entertain and determine the appeal because it originates from the impugned decision of the High Court (Commercial Division) which had no jurisdiction to entertain and determine the dispute revolving on the respondents' infringement of engineering drawings of the appellant. He pointed out that, the adjudication of the dispute at hand is governed by the Copy Right and Neighbouring Rights Act [CAP 218 RE.2002] (the Copyright Act) whereby, whereas section 36 (1) prescribes civil remedies, under section 37 of the Act the injunctive remedies can only be sought in the District Court irrespective of the pleaded quantum of damages. As such, Mr. Mushi argued that, since the High Court commercial division wrongly assumed jurisdiction and thus, the trial proceedings and the resulting judgment are a nullity. On that account, he implored on the Court to nullify the trial proceedings and the impugned decision with an order for costs against the appellant. To support the propositions, he cited to us the High Court cases of **HAMIS MWIJUMA AND AMBWENE YESAYA VS TIGO COMPANY LIMITED**, Civil Case No. 38 of 2011 (unreported) and the Court's decision in **DIRECTOR OF PUBLIC**

## **PROSECUTIONS VS KISHINADIRI DEGESHI AND TWO OTHERS,**

Criminal Appeal No. 339 of 2015 (unreported).

When probed by the Court if the point of objection was initially brought to the attention of the trial court, apart from making a concession that it was raised in the final submissions of the appellant, he was of the view that it was inappropriately raised because the parties had already closed their case and as such, he urged the Court to determine the preliminary point of objection at this stage. Moreover, although the learned counsel admitted that the learned trial judge dismissed the point of objection without hearing the parties, yet he invited the Court to determine the preliminary point of objection raised because it is based on a point of law and qualifies to be raised at any time.

On the other hand, Mr. Kamara submitted that, although the general sub- registry of the High Court is not clothed with jurisdiction to entertain and determine disputes on infringement of copy rights, that is not the case with the Commercial Division of the High Court whereby in terms of Rule 5 of the High Court (Commercial Division) Procedure Rules, 2012, (The Commercial Court Rules) it is clothed with requisite

jurisdiction to entertain and determine commercial cases like the one at hand and a subject of this appeal. In this regard, he argued that the case of TIGO (supra) is distinguishable from the circumstances surrounding the matter under scrutiny. He added that, as the point of objection on the jurisdiction of the trial court was raised by the respondents in the final submissions, it was incumbent on the learned trial judge to invite and hear the parties before proceeding to dismiss the point of objection. On the way forward, he urged the Court to remit the case file to the trial court so that parties could be heard on the point of objection before determining the merits of the case.

In rejoinder, Mr. Mushi reiterated his earlier submission. That apart, he added that, in the wake of the Copyright Act which is a specific legislation stipulating that disputes on infringement of copyright must be filed in the District Court, the Commercial Court Rules being of general application in respect of commercial cases are not applicable in this matter.

After a careful consideration of the record and submissions of the parties, it is not in dispute that before the High Court the respondents in



their final submissions among other things, submitted as follows at pages 1297 – 1298 of the record of appeal: -

*"The plaintiff is suing for copyright infringement on what it claims to be its engineering drawings. Copyright infringement issues are governed by The Copyright and Neighbouring Rights Act. Cap. 218 R.E. 2002 ('Copyright Act'). The reliefs sought in the Plaint are obtained under Part V of the Copyright Act.*

*There is no dispute that a person who deems to have his rights under the Copyright Act infringed can approach the court for redress. However, in our humble observation the term 'Court' as used under section 4 of the Copyright Act means the District Court. In that regard the appropriate Court with original jurisdiction should have been the District Court.*

*Based on the provisions of section 2 (1) of the Judicature and Application of Laws Act. Cap. 358 R. E 2002 ('JALA') jurisdiction of the High Court is made subject to other written laws. That is to say in a situation where there is a law conferring original jurisdiction to courts other than the High Court, the High Court ceases to have jurisdiction. On the premises, since the Copyright Act places*

*original jurisdiction for copyright infringement in the district court, the High Court ceased to have jurisdiction to entertain the present case. For ease of reference, we shall reproduce the provisions of Section 2(1) of JALA as hereunder: Section 2(1) – Save as provided hereinafter or in any other written law expressed the High Court shall have full jurisdiction in civil and criminal matters. Emphasis added.*

*We are aware of the existence of the High Court (Commercial Division) Procedure Rules. GN. No. 250 of 2012 ('the Commercial Court Rules'). However, it is our humble view that the said Rules did not take away the jurisdiction of the District court as the court of first instance in respect of matters relating to copyright infringement.*

*Therefore, it is our humble view that this suit ought to be struck out and an order for costs be made against the Plaintiff”.*

In the course of composing the judgment the learned trial judge attended the point of objection raised in the following manner: -

*“...Also other issues to be determined are Defendants two preliminary objection on points of law, which were raised when the suit was reserved for Judgment. The two preliminary*

*objections raised by Defendants are that, the life span of the suit has expired and the jurisdiction of copy right cases like the present one, lies with the District Court therefore the suit is not maintainable and ought to be dismissed for lack of jurisdiction.*

*Turning to the two objections, I have considered both of them and find that they were not raised at appropriate time. It is a rule of practice that, preliminary objections must be raised at the earliest possible time. Moving on the two objections that, the life span of the suit has expired and Jurisdiction of the case lies with the District Court I find since both parties closed the cases, it is improper to reopen the case and allow the Defendants to pursue their objections. On the foregoing reasons, I hereby dismiss the Defendants objections”.*

It is glaring on the record that, the learned trial Judge dismissed the point of objection without according the parties an opportunity to be heard. While both parties were at one that the points of objection were dismissed without hearing the parties, they locked horns on the propriety or otherwise of issue in controversy being resolved in this Court. While Mr. Mushi urged the Court to determine the point of objection on the

jurisdiction of the High Court on ground that it can be raised at any time, on the contrary, Mr. Kamara urged the Court to return the matter to the High Court for it to determine the point of objection after hearing the parties.

It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gainsaid that it has to be determined first before proceeding to determine the substantive matter – See - **SHAHIDA ABDUL HASSANAL KASSAM VS MAHEDI MOHAMED GULAMALI KANJI**, Civil Application No. 42 of 1999 (unreported).

Thus, since the jurisdiction to adjudicate any matter is a creature of statute, an objection in that regard is a point of law and it can be raised at any stage. In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the close of the hearing. As such, it was incumbent on the part of the learned trial judge to re –summon and hear the parties. Therefore, it is disturbing that the parties were not given opportunity to be heard before the dismissal of the point of objection. On this, the Court in a plethora of decisions has emphasized that courts should not decide matters affecting rights of the parties without according them an

opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned without being heard. See - **TRANSPORT EQUIPMENT VS DEVRAM VALAMBHIA** [1998] TLR 89 and **MBEYA RUKWA AUTOPARTS AND TRANSPORT LIMITED VS JESTINA MWAKYOMA** [2003] T.L.R 253. In the latter case the Court observed at page 265 that: -

*"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part: -*

*(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."*

The Court held that: -

*"The Judge's decision to revoke rights of M/s Kagera and the appellant without giving them opportunity to be heard, was not only a violation of the rules of natural justice, but also a contravention of the Constitution, hence void and of no effect."*

Similarly, in another case of **ABBAS SHERALLY AND ANOTHER VS ABDUL SULTAN HAJI MOHAMED FAZALBOY**, Civil Application No. 33 of 2002 (unreported) the Court among other things, observed as follows:

*"The right of a party to be heard before adverse action or decision is taken against such party ... is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

[See also - **VIP ENGINEERING AND MARKETTING LIMITED AND OTHERS VS CITI BANK TANZANIA LIMITED**, Consolidated Civil References No. 5, 6,7 and 8 of 2008 and **SAMSON NG'WALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY**, Civil Appeal No. 86 of 2008 (both unreported). In the latter case, the appellant faulted the Tax Revenue Appeals Tribunal which had dismissed the appellant's appeal on ground that it had no jurisdiction without re-summoning the parties to address it on the matter which was raised *suo motu*. The Court allowed the appeal having among other things, held that:

*"...The Tribunal went against the rules of natural justice to raise the issue suo motu and determine it without first giving the parties an opportunity to address the Tribunal on the matter..."*

Thus, in the wake of settled law on the constitutional right to be heard and consequences of its violation, in the event the learned trial Judge came across the points of objection including that of the trial court's mandate to entertain and determine a dispute revolving on the copyright infringement, he ought to have initially re-summoned the parties to address it instead of dismissing the preliminary points of objection and proceeding to determine the merits of the case. The Court had a similar encounter in a most recent case of **THE INSPECTOR GENERAL OF POLICE VS THE ATTORNEY GENERAL**, Civil Appeal No. 40 of 2019 (unreported) whereby, the learned trial Judge had dismissed a suit on ground that it had no pecuniary jurisdiction on the matter it had raised *suo motu* while composing the judgment. The Court held:

*"Thus, consistent with the constitutional right to be heard as well as settled law, we are of the firm view that, in the case at hand, the adverse decision of the trial Judge to reject the suit on*

*account of lacking jurisdiction without hearing the parties is a nullity and it was in violation of the basic and fundamental constitutional right to be heard”.*

Thus, in view of what we have endeavoured to discuss, we are satisfied that the adverse decision of the learned trial judge to dismiss the points objection without hearing the parties is illegal as it was in violation of the fundamental constitutional right to be heard and the parties were prejudiced. This renders the entire judgment a nullity. Therefore, regardless of the dismissal which could have necessitated an appeal to the Court, we decline Mr. Mushi’s invitation to determine the matter under scrutiny by resolving the preliminary point objection raised here because the matter was initially raised before the trial court and the learned Judge of the High Court ought to have heard the parties before proceeding to dismiss the points of objection raised before it.

On the way forward, we invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, CAP 141 RE. 2019 to nullify the impugned judgment of the trial court. We direct the case file to be returned to the High Court for it to determine the points of objection raised after hearing the parties before proceeding to determine



the merits of the case. This should be expedited considering that the matter has been pending in courts for about seven years. We make no order as to costs.

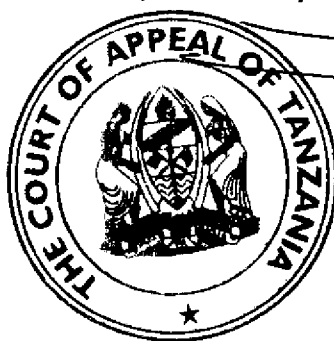
**DATED** at **DAR ES SALAAM** this 31<sup>st</sup> day of March, 2021.

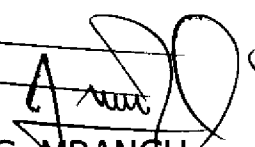
S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

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

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

This ruling delivered this 6<sup>th</sup> day of April, 2021 in the presence of Mr. Odhiambo Kobas holding brief for Mpaya Kamara learned counsel for the Appellant and Ms. Agnes Dominic learned counsel for the Respondents, is hereby certified as a true copy of original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**