**IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAAM**

**CIVIL APPEAL No. 22 of 2019**

**DUNIA JUMA KITUNDU.....1st APPELANT**

**IDRISSA MOHAMED.....2nd APPELLANT**

**AYUBU ALMAS .....3rd APPELLANT**

Versus

**KASSIMU NASSIRO AVILI.....RESPONDENT**

**JUDGMENT**

13th February - 14th May, 2020

**J. A. DE-MELLO J;**

This Appeal finds its genesis from **Kisarawe District Court** ordering the Appellants jointly to pay the **Respondent TShs. 3,300,000/= (Three Million, Three Hundreds Thousands)** as **Specific Damages, TShs. 4,000,000/= (Four Million)** as **General Damages**, let alone costs of the suit.

To cut the long story short, it was alleged that Appellant destructed the **Respondent's eleven (11)** Six grounds of Appeal have been preferred jointly by the Appellants, as hereunder;

1. **That the trial court erred in law and fact to entertain and adjudicate the matter it had no pecuniary jurisdiction.**

2. That the trial court erred in law and fact to hold that mediation of the case was marked failed while the same was never conducted let alone marked failed.
3. That the trial magistrate erred in law in fact to hold that the defendants/appellants destroyed the plaintiff's /respondent's beehives while there was no adequate evidence adduced to that effect.
4. That the trial court erred in law and fact to hold that the plaintiff/respondent herein had suffered damages as a result of purported destruction of beehives while no any evidences tendered and or reduced to that effect.
5. That the trial Magistrate erred in law and fact to hold that the Plaintiff/Respondent had specifically proved damages to the tune of Tsh. 3,300,000/= and thus entitled to the same while he had not proved at all.
6. That the trial court erred in law and fact to award the Plaintiff/Respondent with General damages to the Tune of Tsh. 4,000,000/= without any justification at all.

Order for written submissions as scheduled has been compliance. The Appellants were jointly represented by **Derick P. Kahigi** learned Advocate from **Mshumba & Co. Advocates,** while the Respondent enjoyed the services of **Edson Kilatu** from **Divina Attorney**. Submitting on the **1st ground of Appeal**, challenged the jurisdiction the **District Court** to entertain the matter in its original nature in **Civil Case No. 1of 2017** for a claim of **TShs. 7,600,000/=** based on the fact and, law imposing, **Thirty (30) millions for** movable properties as its the **pecuniary jurisdiction.** This is in as far as **section 20** of the **Written Law Miscellaneous Amendments) Act No. 3** of **2016 which amended section 18** of the **Magistrate Court Act (MCA) Cap. 11 R.E 2002,** increased from **five (5) million** to **fifty (50) million** for **immovable properties and three (3) million** to **thirty million** for **movable properties.** In that same vein is **section 22** of the **same Act** increased the pecuniary Jurisdiction of the **District Courts** from **one hundred fifty million (TShs. 150,000,000)** to **three hundred Million (TShs. 300,000,000/=)** for immovable and **one hundred Million (TShs. 100,000,000/=)** to **Two hundred Million (TShs. 200,000,000/=)** for movable properties. That, and considering that the **Civil Case No 1** of **2017,** subject of this Appeal, was instituted on **21st November, 2017** after **Act No. 3** of **2016** was already in force,

the suit was misplaced and ought to have been lodged in the Primary Court. He cited the cases of **Mantiri Ng'unda** vs. **Herman M Ngunda, Civil. App No. 8 of 1995, CAT, TLR 155, M/S Tanzania China Friendship Textile Co. Ltd.** vs. **Our Lady of Usambara Sisters [2006] TLR 70** and **Shyayam Thank And Others** vs. **New Palace Hotel [1971].** He safely prayed this Court to allow this Appeal. On the second ground of Appeal, **Counsel Kahigi,** averred that, the Trial Magistrate never conducted mediation as required by law, claiming not to have another Magistrate in Court, but surprisingly recorded mediation to have failed. This is unacceptable as the Trial Court contravened **Order VIIIA Rule 3 (1)** of the **Civil Procedure Code Act Cap. 33 R.E 2002** whose compliance is mandatory interpreting the same via **section 53 (2)** of the **Laws of Interpretation Act, Cap. 1.** Without prejudice to the foregoing the need for compliance being mandatory several cases and, list of authorities are in support to include the case of **Ashura Abdulkadil** vs. **The Director of Tilapia Hotel, Miscellaneous Civil Application No. 2** of **2005, CAT (Unreported).** Through this ground, renders the Trial Court were nullity. Arguing on the 3rd ground, he insisted that there was no direct evidence tendered during trial to vindicate the Appellants, irrespective of it all being purely hearsay, contravening **section 62 of the Evidence Act CAP 6.** The 4th, 5th and 6th on

Damages awarded to the Respondent bearing no proof, oral or documentary, again against the rule of the game that demands specific damages to be specifically pleaded and, proved. Cases of **Future Century Limited** vs. **Tanesco Civil Appeal No. 5** of **2009 (unreported), Zuberi Augustino** vs. **Anicet Mugabe [1995] T.L.R 132,** and **Cooper Motors Cooperation (T) Ltd** vs. **Arusha International Conference Center [1991 TLR 165.** With regard to General damages, Counsel reiterated that, they were even not justified, being wrongly quantified. Alternatively, he prayed this Court to allow this Appeal with cost.

Responding, Counsel **Edson Kilatu**, refreshed the Court that the claim was based on damage to property, of whose jurisdiction remains the same as prescribed under **section 18(1) (ii)** and **(iii)** of the **MCA** as opposed to the amendment achieved by **Act No, 3 of 2016** the **MCA**, which is confined to Civil debts and not customary damage to property. To backup his contention, Counsel shares his view that the original suit falls in the group of common law Tort which falls in the **pigeon hall of the common law Tort** in which the Primary Court has no jurisdiction. He referred to the case of **Walimu Jilala** vs. **John Mongo, [1968] HCD,81** to back this argument. Submitting on the 2nd ground of Appeal, he firmly stated

that, the current jurisprudence on statutory interpretation has changed drastically whereby even the word **"shall"** does not always implies a **mandatory.** He substantiated his argument via the case of **Bahati Makeja** vs. **R, Criminal Appeal No. 118** of **2006, Court** of **Appeal** of **Tanzania at Bukoba (Unreported)** in which the Court **declined to** accept that the word **"shall"** always implies mandatory. Admitting to the skipping of mediation, but all in quest of timely dispensation of justice, more so when there was no other Magistrate to take on that. On the 3rd ground he further insisted that the suit was proved to standards required by the law, with no hearsay evidence admitted. Concerning the 4th, 5th and 6th grounds, Counsel wondered the, allegations considering that, the Appellants specifically pleaded and proved by oral evidence, the special damages which as is as good as documentary evidence. He Conclusively prayed for dismissal of this Appeal with costs.

The rejoinder is in the Court records, reiterating the submissions in chief.

After having heard from the both side, I would like to remark and **suo motu** so that, the matter criminal in nature is not only pecuniary misplaced but, a nullity. To my understanding, the matter was supposed to start with **Criminal proceedings** under section **326 (1)** of the **Penal Code CAP 16** to establish the criminality of the wrongdoing before any

damages and in civil nature could proceed. I am saying so being guided by section **326 (1) of CAP 16** provides as follows;

**"326 (1) Any person who willfully and unlawfully destroys or damages any property commits an offence and except as otherwise provided in this section, is liable to imprisonment for seven years."**

I will therefore refrain myself to entertain a nullity as I Suo Motu observe this and allow the Appeal wholesale notwithstanding the glaring err as highlighted in the grounds of Appeal.

I so order.

**J. A. DE-MELLO**

**JUDGE**

**14/5/2020**