

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE No. 111 OF 2019

NASSOR MOHAMED MTAWAZI PLAINTIFF

VERSUS

TANZANIA REMIX CENTRE LTD DEFENDANT

RULING

12th May & 29th May, 2020.

E. E. KAKOLAKI J

The plaintiff in this suit who is a natural person is suing the defendant a limited liability company registered under Companies Act, Cap. 212 carrying on real estate business. The plaintiff's claims against the defendant is for the sum of Tanzanian Shillings Two Hundred Twenty Three Million Twenty Thousand Two Hundred only (Tshs. 223,020,200/= being specific damages, Tanzanian Shillings Eight Million only (Tshs. 8,000,000/=) being general damages, costs of the suit and 7% interest from the date of judgment to the date of final payment for breach of contract.

As per paragraphs 3,4,5,6,7 and 8 of the plaint the plaintiff on the 20/10/2015 entered into agreement with the defendant whereby the defendant agreed to pay him Tshs. 42,888,500/= as costs of his land

after the defendant had measured and sold the plaintiff's plot of land. The principal sum of Tshs, 42,888,500/= was to be paid in full by 30/11/2015. However, the defendant allegedly breached the contract and defaulted payment of the said amount for 39 months when this suit was filed, which amount attracts interest of 10% per month that makes a total of 180,131,700/= hence a grand total of Tshs. 223,020,500/=. The suit is contested by the defendant who also filed its written statement of defence in which preliminary points of objection was raised on two grounds/limbs.

It is important to mention at this juncture that this matter was presided over by my brother Mlyambina J, before it was re-assigned to me for the purposes of expeditious disposal of trial after being posted to this High Court Registry. I therefore took over the matter and informed parties accordingly. The plaintiff in this case is unrepresented whereas the defendant is represented by Mr. Adolf Wenceslaus Mahay learned advocate. The defendant having raised preliminary points of objections on points of law the same were to be disposed of first before embarking into other stages of the case. It was agreed to have them disposed by way of written submission and the filing schedule was issued and complied with by both parties.

The two points of laws raised in the objection were to the effect that:

- (1) The plaint is bad in law for containing a defective verification clause as it contravenes the provisions of Order VI Rule 15(3) of the Civil Procedure Code, [Cap. 33 R.E 2002].
- (2) This Honourable court has no pecuniary jurisdiction to try the instant case.

Submitting on the first limb of point of objection Mr. Mahay stated that the provisions of O. VI R. 15(3) of the CPC is coached in mandatory terms by using the word shall which by virtue of section 53(2) of the Interpretation of Laws Act, [Cap. 1 R.E 2002] implies that a function must be performed. That in the verification clause of the plaintiff's plaint the date and place in which the plaint was signed is missing, the omission which has the effect of rendering the whole plaint defective thus deserves to be strike out, Mr. Mahay observed. He urged this court to strike out the plaint.

On the second limb it was his argument that as per paragraph 5 of the plaint the agreed amount for the defendant to pay the plaintiff is Tshs. 42,888,500/= as the costs of his land after the defendants had measured and sold the plaintiff plot of land. That it is understood that pecuniary jurisdiction of the court is derived from substantive claims and not general damages. That, that position of the law is stated in the Landmark case of **M/s Tanzania-China Friendship Textile Co. Limited Versus Our Lady of the Mount Usambara Sisters** (2006) TLR 70 where the Court of Appeal held interalia that:

" It is a substantive claim and not damages which determine the pecuniary jurisdiction of the Court"

He also referred the court to the decision in the case of **Noel Dominic Mambo Versus Director General Consolidated Holding Corporation**, Civil Case No. 68 of 2007 (HC-Unreported) where this court refused to entertain the suit whose pecuniary jurisdiction was far below its jurisdiction as the same was to be entertained in the lowest court competent to try it. He submitted that as per section 40(2) of the Magistrates Courts Act, [Cap. 11 R.E 2002] as amended by Written Laws

(Miscellaneous Amendment) Act No. 3 of 2016 the pecuniary jurisdiction of this court is over Tshs. 300,000,000/=. And that the substantive claim as stated by the plaintiff is 42,888,000/= which amount is far below Tshs. 300,000,000/=. Mr. Mahay contended further that the plaintiff taking into account that position of the law he filed another suit with the same parties, subject matter and claims before the Resident Magistrate Court of Dar es salaam at Kisutu in Civil Case No. 53 of 2019. For the foregoing reasons he called this court to uphold this second limb of objection and proceed to dismiss the suit with costs.

In his response to the first ground of objection the plaintiff while conceding that the verification clause is missing date and place of verification was quick to add that the said omission or error is not fatal as it is curable by way of amendment under the provisions of Order VI Rule 17 of the CPC where the law allows amendment of pleadings. In support of his stance he cited the case of **JV Tangerm Construction Ltd and Another Versus Tanzania Ports Authority**, Commercial Case No. 117 of 2015 (Unreported) where the court held that when a verification clause is defective is curable by simple amendment of pleadings. Basing on that authority he prayed the court to allow him to amend the pleadings by virtue of Order VI Rule 17 of the CPC to cure the verification clause defect.

On the second ground of objection it was his averment that the defendant's submission on the point that this court has no jurisdiction to entertain the suit is misconceived as it does not qualify to be treated as a point of preliminary objection for not being a point of law. That the substantive or specific damages provided in the pleadings is not Tshs. 42,888,500/= as submitted by the defendant for the same is contested

in its written statement of defence thus requires evidential proof to establish it. Therefore it does not qualify to be termed a pure point of law. He therefore invited this court to overrule the objections with costs.

In his short reply to the plaintiff's reply submissions Mr. Mahay on the first ground almost reiterated what he had stated earlier save on the application of the case of **JV Tangerm Construction Company Ltd and Another** (Supra) which was relied on by the plaintiff. It was his response that the said case is inapplicable in the circumstances of this case as in the first place the issue was not failure by the plaintiff to state in his verification the date and place in which it was signed, instead in the said cases the issues were that the plaintiff had no any legal personality to sue the defendant and/or the plaintiff had no any cause of action against the defendant. On the second ground he was of the argument that what has been submitted by the plaintiff in response to the second objection is a total misconception of the law aimed at misleading this court. That in any case the question of jurisdiction of the Court when raised should be disposed of first before any step is taken into account. He cited the case of **Maisha Muchunguzi Versus Saab-Scania Tanzania Branch**, Civil Appeal No. 41 of 1998 (CAT – Unreported) to support his argument where the Court of Appeal stated that:

"we agree with the learned advocate that the issue of jurisdiction of a court is Sacrosanct and that issue takes precedence over every other issue in the proceedings when it is raised".

Basing on that position of the law he was of the view that the plaintiff's submission that the second limb of preliminary objection does not

qualify to be pure point of law is not correct. On the substantive claims disputed by the plaintiff in his submission he insisted that it was Tshs. 42,888,500/= which prompted him to institute the like case Civil Case No. 53 of 2019 in the Resident Magistrates Court of Dar es salaam at Kisutu as mentioned earlier the fact which was not disputed in his reply submission. Reiterating what he had submitted earlier Mr. Mahay prayed this court to uphold the second limb of submission and dismiss the suit with costs.

I have carefully gone through the submissions from both side, and for the purposes of disposal of the objections raised I have opted to start with the second limb of objection. In response to this limb the plaintiff submitted that the same does not qualify to be a pure point of law as the claimed substantive/specific damages which determines the pecuniary jurisdiction is contested by the defendant and therefore calls in evidential proof. Mr. Mahay is of different view contending that the plaintiff's assertion is misconceive aimed at misleading the court as the issue of jurisdiction is sacrosanct and when raised must be disposed off first. He cited the case of **Maisha Muchunguzi** (supra) to support his position. And that it is substantive damages that determines pecuniary jurisdiction and therefore the claimed specific damages by the plaintiff of Tshs. 42,888,500/= which is disputed is far below Tshs. 300,000,000/= which amount is within the jurisdiction of the lower court as that of this court is above that as per section 40(2) of the Magistrate Courts Act as amended in 2016. I fully associate myself with Mr. Mahay's contention that where the issue of jurisdiction is raised must be disposed of first and that the jurisdiction of the lower court in terms of pecuniary jurisdiction to immovable property as per section 40(2) of the Magistrates Courts Act as amended is limited to Tshs. 300,000,000/=. I

am also at one with him on the point that it is substantive damages that determines pecuniary jurisdiction as well stated in the case of **Our Lady of the Mount Usambara Sisters** (supra). Any attempt by the court to entertain any matter without jurisdiction has the effect of rendering the entire proceedings and decision thereto null and void. See the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda and Others**, Civil Appeal No. 8 of 1995 [CAT].

Section 13 of the Civil Procedure Code, [Cap. 33 R.E 2019] provides that every suit shall be instituted in the court of the lowest grade competent to try it. I am aware of the position of the law under the proviso of section 13 of the CPC as amended by Act No. 4 of 2016 that the High Court has unfettered jurisdiction to hear and determine any suit. In my opinion the enactment of section 13 of the CPC, the amendment notwithstanding was intended to make sure that every court reserves its pecuniary jurisdiction to try and determine cases. And more important cases to be tried at the lowest grade courts in order to let complicated ones to be tried by the higher courts with great experience. That intention is also manifested by the provision of section 40(2) of Magistrates Courts Act as amended as rightly observed by Mr. Mahay that sets pecuniary jurisdiction of the subordinate court to make sure that all cases which are filed in this court exceeds the pecuniary jurisdiction of the subordinate courts. To hold otherwise in my opinion would be going against the spirit of section 13 of the CPC and the settled position of the Court of Appeal in the case of **Ms Tanzania – China Friendship Textile Co. Ltd Versus Our Lady of the Usambara Sisters**, [2006] TLR 70 when dealing with the interpretation of section 13 of the CPC on pecuniary jurisdiction. The court held:

- (1) *It is the substantive claim and not the general damages which determine the pecuniary jurisdiction of the court.*
- (2) *Although there is no specific provision of the law stating expressly that the High Court had no pecuniary jurisdiction to entertain claims not exceeding 10,000,000/= according to the principle contained in section 13 of the Civil Procedure Code that every suit must be instituted in the court of the lowest grade competent to try it.*

In this case the claimed substantive/specific damages though disputed by the plaintiff is Tshs. 42,888,500/=. Even if we are to assume that the proper one is that pleaded in paragraph 3 of the plaint which is Tshs. 223,020,200/= still the same is far below the pecuniary jurisdiction of this court as it falls within the jurisdiction of the lower court which is a court of Resident Magistrate Court or District Court as per section 40(2) of the Magistrates Courts Act, [Cap. 11 R.E 2019]. It follows therefore that this court has no jurisdiction to entertain the suit. This limb of objection therefore has merit and is sustained.

That point having disposed the matter I see no pressing fact to cause me labour much discussing the first limb as doing so will be for academic purposes which serves no interest at the moment. I will now turn to consider the defendant's prayer with regard to the second limb of objection in which Mr. Mahay prayed to have the suit dismissed with costs. I am not prepared to grant the defendant's prayer in that. A matter is being dismissed when the court has heard and determined it to its finality on merits. Where the matter is abortive for being incompetent

before the court for either want of jurisdiction or any other reasons such as incurable defect then the right course is to strike it out. My opinion finds support from the Court of Appeal decision in the case of **Cyprian Mamboleo Hizza Vs. Eva Kiosso and Another**, Civil Application No. 3 of 2010 citing the decision by the Court of Appeal in Eastern Africa in the celebrated case of **Ngoni- Matengo Cooperative Marketing Union Ltd Vs. Alimahomed Osman** (1959) EA 577 where at page 580 an effort is made at distinguishing the meaning of "striking out" an appeal etc. and "dismissing" etc. thus:-

"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of "

Applying the same principle in this case where the findings have been made that this court has no jurisdiction to entertain the matter the finding which makes the suit incompetent before the court I am of the firm view that dismissal is not the right course to take instead the striking out order would be proper. However, I have considered the fact the this matter has been in this court since 28/06/2019 and that parties have spent resources in terms of money and time to prepare pleadings. To strike it out would mean to condemn parties to more expenses including requiring them to file fresh pleading in the lower court which in my view would be contrary to the spirit of the provisions of section 3A(1) of the CPC on overriding objectives of the Act which is to facilitate

the just, expeditious, proportionate and affordable resolution of civil disputes. The assertion by the defendant that the plaintiff instituted another suit of similar nature which is pending in the Resident Magistrates Court of Dar es salaam at Kisutu has not been proved by any evidence. I will therefore not consider the same. That being the position the right course to be applied in the circumstances of this case would be in my opinion to invoke the provisions of Order VII Rule 10(1) of the Civil Procedure Act. [Cap. 33 R.E 2019]. The same speaks as follows:

"10.-(1) The plaint shall, at any stage of the suit, be returned to be presented to the court in which the suit should have been instituted."

That said, and for the foregoing reasons, I hold that this court lacks jurisdiction to entertain this case for want of pecuniary jurisdiction and that the competent court to try and determine this suit is the subordinate court to this court. In the end I would invoke the provisions of Order VII Rule 10(1) of the CPC and return this case to the Resident Magistrate Court of Dar es Salaam at Kisutu, to be heard and determined there.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of May, 2020.


E. E. KAKOLAKI

JUDGE

29/05/2020

Delivered at Dar es Salaam today on 29/05/2020 in the presence of Mr. Paul Mkamanga, Legal Officer for the respondent and **Ms. Lulu Masasi**, Court Clerk and in the absence of the Plaintiff who is reported sick.



E. E. Kakolaki

JUDGE

29/05/2020