

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF SUMBAWANGA)

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 8 OF 2019

*(Originated Civil appeal No. 2 of 2019 from High court of Tanzania at Sumbawanga
Original Civil Case No. 9/2017 from Rukwa Resident Magistrate)*

KALAMBO DISTRICT COUNCIL APPELLANT

VERSUS

AMRI SAID NYAMBELE RESPONDENT

RULING

28/07/2020 & 24/8/2020

W. R. Mashauri, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania filed by the applicant in this court Kalambo District Council against the decision of the High court of Tanzania Sumbawanga Hon. Mambi, J. in Civil Appeal No. 02 of 2019 originated from the decision of the Resident Magistrates' Court of Sumbawanga in Civil Case No. 09 of 2017.

According to the chamber summons drawn by Mr. Julius Augustino Tinga the Kalambo District Council Solicitor, this application has been brought before this under section 5(I) (c) of the appellate jurisdiction Act. 1979 [Cap. 141 RE. 2019].

The orders sought by the applicant from this court is to grant leave for the applicant to appeal to the Court of Appeal of Tanzania against the decision of this court in Civil Appeal No. 02 of 2019 Hon. Mambi, J. dated on 18/04/2019.

When this application came up for hearing on 25/2/2020, counsel for both parties prayed for leave of the court to dispose of the application by way of filing submission and the court granted them.

In support of the applicant's application solicitor Julius A. Tinga contended as well in he does in his affidavit that, the decision and orders of judgment and decree of the filed appeal to this court has material irregularity as the trial court determined the matter which is not vested with such jurisdiction as the trial judge misconceived as to how the specific damages is found, that, the appellate court judge while determining the merit of the case disregarded the issue as to whether clause 13 of the signed, tendered and admitted contract was done in the fulfilment or in breach of the contract. The matter was a contract but the trial court magistrate assessed the general damages basing on the tortious liability principles and that, the appellate court judge did not determine the issue whether the trial court magistrate was justified in her assessment of general damages by using the Tortuous liability case though the same was raised by the applicant during appeal.

Counsel for the applicant went on submitting that, even the trial court lacked jurisdiction to entertain the matter, hence Hon. Mambi's judgment was illegal. That, even the trial court which tried the matter had no

jurisdiction. Both in trial court and the appellate court were misconceived as to how the specific damages are determined.

That in its judgment, the appellate High court cited S. 40 of the magistrates' court Act as amended by section 22 of Act No. 3 of 2016 and held that, the counter-claim of Tshs. 118,873,300/= formed the pecuniary jurisdiction of the trial court. That, the said concepts are wrong. He challenged the Court of Appeal by saying that the trial court had no pecuniary jurisdiction as the trial judge misconceived as to how the specific damage is found.

That, the requirement is found under S. 13 of the CPC Cap. 33 RE: 2002 which provides that:

"Section 13 Every suit shall be instituted in the court of lowest grade competent to try it and, for the purpose of this section, a court of the Resident Magistrate and the District court shall be deemed courts of the same grade."

That, it is unshaken principle for this been not ever ruled that, it is the specific damages which determine the jurisdiction of the court. It has been held in the case of **Tanzania china friendship Textile Co. Ltd v/s our lady the Usambra sisters** [200] TLR 70 CAT that:

"It is the substantive claim and not general damages which determine the pecuniary jurisdiction of the court."

That, the plaintiff [Respondent] to substantiate this fact that he tendered the specific damages which were the secondary evidence of the receipts to the tune of Shs. 279,000/= being the loss he sustained. There are receipts

No. 110 204 Shs. 32,000/= receipt No. 695646 Shs. 68,000/=, receipt No. 092068 Shs 4,500/=, receipt No. 107334 Shs. 4,500/= receipt No. 21924173345 Shs 170,000/= which the plaintiff [Respondent] did not prove the same by primary evidence. For a prudent and a right thinking person, those receipts could determine the jurisdiction of a primary court. Which is the lowest grade competent to try civil debts arising out of contract as provide for under S. 18(I)(a)(iii)of the magistrate court Act Cap. 11 RE: 2002 which provides thus:

18(1) A primary court shall have and exercise jurisdiction:-

(a). In all proceedings of civil nature.

(iii) For the recovery of any civil debt arising out of contract, if the value of the subject of the suit does not exceeding shs. 50,000,000/= and in any proceeding by way of counter-claim and set of therein of the same nature not exceeding such value.

That, dispute of the amendment of Section 40(I) amended by the [Written Laws Misc. Amendments] Act No. 3 of 216 which increased the pecuniary jurisdiction of movable property or subject matter of the value from 30 million, to 300 million, the applicant still insist that, the 279,000/= shillings falls within the jurisdiction of the primary court.

It follows that the District court did wrongly entertained the case of which its specific damages fall below 30 mil.

That, in this matter both the trial magistrate and the appellate judge acted incurium. He further submitted that, specific damages must be the loss incurred by the plaintiff and which must be pleaded and proved clearly by primary evidence.

That, the counter-claim of the applicant Kalambo District Council of Shs. 118,873,300/= could not form the jurisdiction of the District Court. The said amount of Shs. 111,873,300/= is a result of the counter-claim of the Applicant as a result of non-performance of Respondent cardinal obligation under article 13 of the signed and admitted contractual instrument is a wrong conception and he wished to challenge the court of Appeal of Tanzania. It is the misconception to the principle the court used to use in determining specific damages.

That, jurisdiction cannot be increased or decreased by the court on a mere declaration or prayer. The jurisdiction of the court is determined by the loss sustained subject to prove by primary evidence pursuant to the provisions of Section 66 of the Evidence Act Cap 6 RE: 2002.

To back up his submission Mr. Julius Tinga State Attorney for the Applicant referred this court to the case of **Tanzania Saruji Corporation V/s African Morble Company Ltd** [2004] TLR 55 in which the court held that:

"...specific Damage need to be pleaded...because it can be measured with complete accuracy. The exact loss must be pleaded."

The State Attorney for the applicant further told the court that, the case of **Tanzania-China Friendship Textile Co. Ltd** [supra] cited by the Appellate

judge and Respondent is a misconception intended to mislead the court. The said case states in its abita inter-alia that:

"In respect, normally claims of General damages are not quantified, but where there are erroneously quantified, we think, this does not affect the pecuniary jurisdiction of the court."

The Appellate Judge misconceived for the Court of Appeal was dealing with the General damages which the Tshs. 118,873,300/= the respondent claimed to be specific damages. At page 12 of the typed judgment, the appellate judge wrongly contended that, the substantive claim which is used to establish the jurisdiction of the court Tsh. 118,873,300/=. That was a wrong conception of which the learned State Attorney for the applicant wished to challenge in the Court of Appeal of Tanzania.

In challenging the Court of Appeal of Tanzania, the learned State Attorney said that, at page 894 mulla states the ways in which specific Damages is pleaded. To him specific damages the plaint must State how it has jurisdiction. The plaint must aver all the facts showing how the court has jurisdiction. When proceedings are taken before the Tribunal the plaint must state how it has jurisdiction.

That, in this matter the plaintiff's [Respondent] plaint had a right to demand the specific damages to the tune of Shs. 279,000/= however, on General damages worth to Tshs. 200,000,000/= was pleaded.

Under this juncture, the learned State Attorney for the Applicant prayed leave of the High Court to appeal to the Court of Appeal of Tanzania

to determine this point of law of Trial court jurisdiction which entertained the suit which was below 30mil.

The second issue raised the learned State Attorney or the applicant is:- Whether the appellate court judge while determining the merit of the case directed his mind the issue whether clauth 13 of the signed, tendered and admitted contract was done in the fulfillment or in a breach of contract.

In determining this issue on his part the learned State Attorney for the Applicant, upon considered of the award of Tshs. 65,000,000/= awarded to the Respondent was of the view that, the award was awarded to the Respondent while there was no breach of contract recognized by law. That the trial magistrate and the appellate judge did read the contract document in isolation and not as a whole in sense that the contract Document had two clauses which one clause gave the Appellate to supervise and collect the revenue and the other clause giving power the Respondent to collect the revenue of the appellant.

It is provided under section 37 of the law of contract Act 1961[Cap. 345 RE: 2002] that:-

37-(I) The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions or this Act or any other law.

That, it was agreed and signed under clause 13 of the contract thus:-

13. MALIPO

Malipo yanatakiwa yafanyike kila mwisho wa mwezi.

IFAHAMIKE KWAMBA, vizuizi vyote vitasimamiwa na Halmashauri ya Wilaya Kalambo, na iwapo mzigo utakuwa haujatozwa ushuru, Halmashauri itawajibika kutoza ushuru na faini.

It was therefore a considered view by the applicant that, by collecting the produce, the Applicant was acting in the fulfillment of clause 13 cited above which the cardinal term of the contract was.

That, the two clauses were performed simultaneously and the contract was not broken or terminated and the 20% was paid to the Respondent timely. However, according to the Respondent in line with the appellate judge, the collection done by the applicant authorities was the breach of the contract, hence a misconception of the interpretation of clause 13 of the contract.

The 3rd issue raised by the State Attorney for the applicant is whether or not the trial court in assessing the General damages acted on a wrong principle of assessing General Principle, is answered by the learned state by submitting that, at page 13 of the typed judgment, the appellate judge concurred with the respondent argument that, even if the plaintiff claimed the damages at the tune of Shs 200,000,000/= and since the award of damages is rested on the discretion of the court, the trial court was still with jurisdiction to deal with such claims, that, in the trial court, the plaintiff tendered secondary evidence of the receipts to the total of Shs. 279,000/= being the loss sustained. The Shs. 279,000/= prudential specific damages cannot warrant the 200,000,000/= or 65,000,000/= for general damages

simply because, the general damage is on the discretion of the court. In his view the learned State Attorney said those awards are too remote from the specific damages. He cited the case of **Bank of Baroda (4) Ltd V/s Kamugunda** [2006] EA II in which the court held that:-

"Award of the interest by the court was discretionary and the discretion was to be exercised judicially..."

That the trial court and the appellate court awarded the 200,000,000/= million and the 65,000,000/= million respectively is a wrong principle of exercising of the discretion vested to the court.

Finally the learned State Attorney for the applicant submitted that, it is a wrong concept or principle to access the general damages in contract by using the tortious liability principle or cases. Done the same renders one to reach a wrong decision as is done in this case.

An award of Shs. 200,000,000/= or 65,000,000/= General Damages in contract while the prudent specific damages is 279,000/= is too remote to the specific damages.

Having so submitted, learned State Attorney for the applicant prayed this court to grant the leave to appeal to the Court of Appeal to determine and ascertain the legality of the High Court decision.

In reply to the submission by State Attorney for the applicant, Mr. Julius A. Tinga learned counsel for the respondent submitted that, the instant application lacks merit.

That, an application for leave to appeal to the court of Appeal is not automatic. It is within the jurisdiction of the court to grant or refuse leave. A leave to appeal will be granted where grounds of appeal raise issue of general importance or a novel point of law or where the ground show a prima facie of arguable appeal.

To buttress his point, he referred this court to many cases one of them being the case of **Kibelo Benjamin Ndongole T/A Kibelo Agro Suppliers Co. V/s Amos s/o Magaba** Misc. Civil Application No. 11 of 2018 High court Sumbawanga Registry [unreported] in which the High court held thus:-

"Needless to say, leave to appeal is not automatic. It is within discretion of the court to grant or refuse leave. The discretion must however be exercised judiciously ... Leave to appeal will be granted where the grounds for appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie of arguable appeal. Where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted."

That, in this application, the applicant has failed to reach the requirement as set above in the case of **Kibelo Benjamine Ndongole** [supra].

In respect of the jurisdiction of the trial court counsel for the respondent cited with approval what the trial court said in particular at page 12 to 13 of its typed judgment that:

"Even if the plaintiff claimed 200,000,000/=, still since the award of damages is vested on the discretion of the court. The trial court ought to deal with such claim"

That, he is aware that, it is the substantive claim and not general damages which determine the jurisdiction of the court, but where the general damage have erroneously quantified in the pleadings does not affect the pecuniary jurisdiction of the court.

To back up his submission, counsel for the Respondent cited the case of Tanzania-China Friendship Textile Co. Ltd V/s our lady of the Usambara Sisters [2006] TLR 70 where the Court of Appeal held that:-

"It is the substantive claim and not the general damage which determine the pecuniary jurisdiction of the court Normally claims of general damages is not quantified. But where they are erroneously quantified, we think, this does not affect the pecuniary jurisdiction of the court. But since the general damages are awarded at the discretion of the court, it is the court which decides which amount to award."

That, in this case, the substantive claim which used to establish of the court is Tshs. 118,873,300/=. According to paragraph 3 of the plaint dispute of claim for general damages of Tshs. 200,000,000/= the plaintiff was claiming a judicial declaration that, the plaintiff is not indebted by the defendant in any how the sum of Shs. 118,873,300/= alleged to be cereal levy collection from 11/03/2017 to 30/06/2017 but not remitted to the defendant.

That, according to S. 40(I) of the magistrate's court Act as amended by the written laws [Misc. Amendments] Act No. 3 of 2016 dated 7/07/2016, jurisdiction of the Resident Magistrates' court and the district court has been increased from 50mil. To 300mil. The amount of Shs. 118,873,300/= disputed by the plaintiff falls under the jurisdiction of the Resident

Magistrate's court and the District court. Hence the court has jurisdiction to entertain the matter.

Finally counsel for the respondent prayed the court to deny the applicant's leave to appeal to the Court of Appeal for failure to reach the requirements set in the case of **Britich Broad Casting Corporation v/s Eric. Sikua Mgimaro** Civil Application No. 133 of 2004 [unreported] cited together with the case of **Kibelo Agro Benjamin Mdongole T/A** Kibelo Agro Supplies Co. Ltd [supra] and dismiss the application with costs.

There is a rejoinder filed by the State Attorney for the applicant of which most of its contents is a tautology. He has raised again the issue of the trial court's jurisdiction, talking in respect of S. 13 of the CPC which required this case to be filed in a court of lowest grade competent to try this case of which its substantive amount claimed was Shs. 27 he raised another questions:-

Whether the trial and the appellate court directed their mind to the issue as to whether clause 13 of the signed, tendered and admitted contract was done in the fulfillment or in breach of contract the question which has he submitted a lot in his chief submission and other matters all which are related to that he submitted in chief submission. He has repeated a lot in respect of the award of Shs. 200,000,000/= and Shs. 65,000,000/= and cited new authorities in connection to the said awards of Shs. 200,000,000/= and 65,000,000/= awarded to the respondents by the trial court and the appellate court respectively all of which I think is enough to reach my

decision in this application for leave to appeal to the court of Appeal against the decision of this court and the following is my finding.

It is cardinal principle at law that, the grant of leave to appeal to the court of Appeal largely depends on the existence of arguable grounds for the determination by the Court of Appeal be it factual or legal.

It was held in the case of **Gaudensia Mzungu V/s IDM Mzumbe** Civil Application No. 94 of 1994 CAT [unreported] that:-

"Leave to appeal will be granted if prima facie there are grounds of meriting the attention and decision of the Court of appeal"

I have carefully gone the submissions by counsel for both parties in particular the submission by solicitor for the applicant and I am of considered opinion that, in this application there are arguable grounds for determination of the court of Appeal. According to the circumstances of this application, such grounds are jurisdiction of the trial court, assessment of general damages and/or specific damages by the trial court as well as the appellate court as termed by the parties together with the trial court and the appellate court.

On my part, would I have jurisdiction to go into merits I would have done it but, I have no jurisdiction.

It was expressed in the case of **Grupp V/s Jangwani See Breez** Comm. Case No. 93 of 2002 [unreported] Hon. Massati, J. [as he then was] as follows:-

"I have no jurisdiction to go into the merits or deficiencies or the judgment or orders of my learned judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal..."

It is clear therefore that, contrary to the submission by counsel and/or solicitor for the applicant that this court has no mandate to consider the prospects of success in an intended appeal which it is in the domain of the court of Appeal.

On the basis of the foregoing and all said and done, this application succeed. The applicant is hereby granted leave to appeal to the Court of Appeal as prayed in the Chamber Summons and in the submission in support thereof.

No order as to costs is made.



W. R. Mashauri
W. R. MASHAURI
JUDGE

Date: 24/8/2020

Coram: Hon. W.R. Mashauri, J

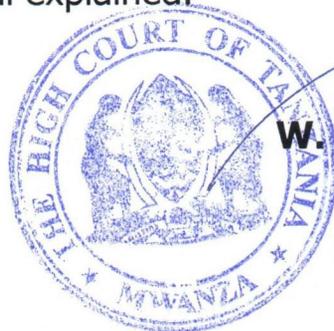
Appellant: Present

Respondent: Present

B/c: Felister Mlolwa, RMA

Court: Ruling delivered in the presence of all parties this 24/8/2020 through video conference.

Right of appeal explained.



W. R. MASHAURI
JUDGE

24/8/2020