

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL No. 112 OF 2019

MIC TANZANIA LIMITED.....APPELLANT

Versus

HAMISI MWINYIJUMA.....1st RESPONDENT

AMBWENE YESAYA.....2nd RESPONDENT

JUDGMENT

13/ 10/ -20/11/2020

J. A. DE-MELLO;

Through its **Advocate Rosan Mbwambo**, the Appellant preferred ten (10) grounds of appeal, accruing from findings from the **District Court of Ilala in Civil Case No. 17 of 2012**, namely:

- 1. That, the learned Trial Magistrate erred in law by entertaining the matter before him while the trial court was not seized with pecuniary jurisdiction.**
- 2. That, the learned Trial Magistrate erred at law in proceedings with the trial involving Third Party without issuing directions on the procedures to be adopted at the hearing.**
- 3. That, the learned Trial Magistrate erred at law and fact by entertaining a suit while the Plaintiffs/ Respondents had no Locus Standi to sue under the law.**

4. That, the learned Trial Magistrate erred at law and fact in not holding that the Plaintiffs/Respondents are not owners of the copyrighted works.
5. That, the learned Trial Magistrate erred at law in holding that, alleged infringed works were not registered as required by the law and as such could not be infringed under the law.
6. That, the Trial Magistrate erred in law and, in fact in holding that the Appellant infringed the respondents' copyrights while there was no evidence to prove the infringement.
7. That, the learned Trial Magistrate erred at law and, fact in holding that the Appellant infringed the respondent's copyrights while there was evidence that the Appellant secured the songs from a third party.
8. That, the learned Trial Magistrate erred at law and, fact in deciding the case against the appellant without making any findings on the third-party proceedings before him thereby exonerating the third party from liability without assigning any reason and despite evidence that the third party supplied the disputed songs and was duly paid by the appellant.
9. That, the learned Trial Magistrate erred at law and fact in awarding the 1st and 2nd Respondents a colossal sum of TZS2,160,000,000/= as special damage without any proof and or strict proof as required by the law.
10. That, the learned Trial Magistrate erred at law and fact awarding general damage at the tune of TZS

25,000,000/= without any justification and or evidence to support such an award.

Written submissions were preferred by both, **Rosan Mbwambo** and, **Albert Msando** for the Appellant and, Respondent, respectively. Submitting on the first ground, Counsel is of the view that, much as the issue of jurisdiction had been decided by this Court in **Civil case No. 28 of 2011** between the same parties, the trial Court did not address adequately. It is **section 6, 7(1)** and, **13, Order VII Rule 1 (1)** of **Cap. 33 R.E. 2002 CPC** read together with **section 40 (1) (b)** of **Magistrate Court Act Cap. 11** as well as **section 36** of the **Act** which settles for pecuniary jurisdiction of Courts. To back up his contention **Counsel Mbwambo** shared a list of cases to include those of **M/S Tanzania-China Friendship Textile Co. Ltd vs. Lady of Usambara Sisters, Civil Appeal No. 84 of 2002, Rev. Cristopher Mtikila vs. Yusuph Manji and, 9 Others, Civil Appeal No. 86 of 2006, Packaging and, Stationers Manufacturers Ltd vs. Dr. Steven Mworja and Another, Commercial Case No. 52 of 2010**. It is his prayer therefore for nullification of the Decree and, Judgment of the Trial Court. Arguing on the **2nd** and, **8th** grounds jointly, Counsel stated that for not giving direction to third party, consequentially liabilities were not determined, hence contrary to **Order 1 Rule 18 (1)** of the law (supra). With reference to rounds **4** and **5**, it is Counsel's observations and, firm view that, the purported works were not registered with **COSOTA**, and, further that, the Respondents are not owners of the **Ring Back Tone** allegedly to have been used without their consent. As gathered, there is no any tangible evidence in support of the contention as per **Regulation 6** of the **Copyright and Neighboring Rights (Registration of**

Members and their Works) Regulations, 2005, considering that, membership to **COSOTA** and, registration of artistic works are two things directly associated and, dependent. The need to prove **COSOTA** membership was more important due to the fact that, the third Party had gallantly pleaded that, the songs used in procuring contentious **RBT's** were procured from **SONY** and, not from the Respondent, he alludes. **Exhibit P1** tendered by the Respondents proves reception of a musical composition work in line with **Regulation 13** of the **2005 Regulations**. With regard to grounds **6** and, **7**, and, since the Respondents are not owners of the alleged artistic works, they cannot claim that, their works have been infringed. Failure to produce performance license, the Respondents absolved themselves from any right of the same, as they similarly failed to establish loss of multi-millions performance contract as the result of infringement, same as failure to prove injury as the result of the claimed infringement. Addressing ground **3**, he is if a firm position that, the law requires **COSOTA** to sue and, or defend all cases, involving infringement of copyrights of which it did not only did for this case but, worse even not summoned any a witnesses, contrary to **Regulation 15** of the **Copyright and Neighbouring (Production and Distribution of Sound and Audi-visual Recordings) Regulations, 2006**. Contending on ground **9** and **10**, Counsel states that, it was wrong for the Trial Court to award special damages to a tune of **TShs. 2,160,000,000/=** without any proof as required by the law, for, neither documentary evidence nor corroborating evidence was adduced during hearing. The law requires specific pleading with proof for specific damages in the pleadings, as it was held in **Zuberi Augustino vs. Anicet Mugabe [1993] TLR 228; Rugarabamu Mwombeki vs. Charles**

Kisigha, [1984] TLR 350; Bamprass Star Service Station Limited vs. Abercrombie and Kent (T) Limited, Civil Application No. 21 of 2001 Court of Appeal of Tanzania at Dar Es salaam. It is Counsel's conclusive remarks that, Respondents failed to discharge their duty of proof as required by **section 110, 111, and 112 of Cap. 6** and, with the absence of infringement, neither specific nor general can accrue therefrom.

Albert Msando learned Counsel for the Respondent had in answering the issue of jurisdiction, referred the Court to the case of **Hamisi Mwinyijuma and Ambwene Yesaya vs. MIC Tanzania Ltd., Civil Case No. 38 of 2011** at High Court of Tanzania at Dar Es Salaam alleging that, Counsel for the Appellant is backtracking from their earlier position, which settled that, the High Court had no Jurisdiction to entertain copyright matters. This, renders that Court incompetent to revisit the issue that, has been is decided between the same parties, making it a different ruling rather, an issue to be settled by the Court of Appeal. Before amendment of **Copyrights and Neighbouring Right Act, 1999 by Written Laws (Miscellaneous Amendments) Act (No. 3) of 2019**, jurisdiction of Copyrights cases under **section 4** of the **Act** was is **District Court**. After amendments the definition of the word "**Court**" changed to mean Court of competent jurisdiction, hence rendering the District Court with no jurisdiction to entertain copyright matters, despite pecuniary limits. With regard to the cases cited, Counsel consider them all distinguishable, for reference in this Appeal. They are applicable, he believes. Submitting for grounds **2** and **8** similarly jointly, **Counsel Msando** finds nothing framed as issues in respect of the Third Party, in which the Respondent not party to the contract, any claim if there by the

Appellant, can be dealt with in a separate suit, if he so wishes. What actually happened and, failing to apply before the Court for the date to give direction by the Appellant, it found it worth to proceed to determine the case following failure by the third party to attend to the matter. Counsel resisted Appellant's submissions poised in ground **4** and **5**, praying for dismissal, as no issue was there for the Court consider and, determine. Raising it at this stage is as an afterthought, he retorts. However, he narrates that, the Respondent's' songs "**DAKIKI MOJA** and, **USIJE MJINI**" were registered at COSOTA in as far as and, **exhibit P1** refers. **Section 36 (1) of Copyright Act** entitles anyone to claim a right which is violated to every artist even if not a member of the society, he reiterates. In as far as ground **3** is concerned, Counsel finds it lacking in merit, since the Principal Act under **section 36 (1)** requires any person whose rights are in danger of being infringed or have being infringed may institute proceedings. On grounds **9** and, **10**, similarly as above, that, the Appellant had a duty to disclose their accounts to prove that, they did not earn profit from the infringement of the Respondents' rights. Since the Appellant sold the songs of the Respondents for **ninenty (90) days** without their consent, left the Respondents with nothing from their works but with the right to claim for special damages.

In a rejoinder, **Counsel Mbwambo** reiterated the need for revision considering failure to address sections **6, 7 (1)** and, **13** and, **Order VII Rule 1 (1)** of **Cap. 33 R.E. 2002** read together with **section 40 (1)(b) of Magistrates' Court Act, Cap. 11 R.E. 2002** as well as **section 36 (1) of Copyrights and Neighbouring Rights Act, 1999**. The 2019 **Amendment of section 4** of the Act as per Respondents Counsel's submission did not change anything material on the issue of jurisdiction,

he believes. The Trial Court failed to give direction as to how the claims against the third party would be tried contrary to the provisions of **Order 1 Rule 18 (1)** of **CPC**. Further that the duty of framing issues is vested with the Court and failure to do so is fatal, following filing of third party filing his Written Statement of Defense, calling for framing of issues relating thereto . Stressing on the essence of **Regulation 3,4,5,6,7(2)** and **8** of **Copyrights and Neighbouring Rights (Registration of members and their works) Regulations, 2005** and the first schedule to it, the letter exhibit P1 was wanting. As far as grounds 6 and 7, failure to produce performance license the Respondents absolve themselves from any right of the same. On ground 3, the Respondents contravened **Regulation 15** of the **Copyrights and Neighbouring (Production and Distribution of Sound and Audio-visual Recordings) Regulations 2006** made under **section 45** of the Act, as he prayed for adopting the submissions in chief in respect of **ground 9** and, **10** bringing the Court to the attention of admission on the part of the Respondent for failing to plead and prove loss in terms special damages.

Having considered the rival and, well researched submissions by these two Counsels I find compelled to address the first ground of appeal, that of pecuniary jurisdiction. Reading loudly from the Respondent's submissions, it is claimed that, the issue has already been determined in **Civil case no. 38** between the same parties at the lower trial Court. It is the cardinal principle of law and, certainly so as have been decided in number of cases, that, the question of jurisdiction can be raised at any time. In **Mis Tanzania - China Friendship Textile Co. Limited s Our Lady of the Usambara Sisters, Civil Appeal No. 84 of 2002** (Unreported) on page 10 where it said: .

"But since it is about jurisdiction of the Court, it can be raised at any stage even before this Court. "

Jurisdiction is a creature of law and, important for the Court's to satisfy themselves of its powers to determine matters firstly and prior to attempting them, lest it finds itself addressing a nullity. In the event of lack of jurisdiction, determination of matters whichever the outcome the whole proceedings and, findings a nullity. Uncertain as to whether this was addressed or else but, again whether duly resolved, the Respondents contention to have been decided upon by the Trial Court is misplaced. What the Appellant's Counsel sternly submits is, improper addressing of the provisions which establishes the jurisdiction of courts particularly, District Court citing **sections 6, 7 (1) and, 13, and Order VII Rule 1 (1) of Cap. 33**, together with **section 40 (1) (b) of MCA Cap. 11**. Having a different view, Counsel for the Respondents asserts that, before amendment of **Copyrights and Neighboring Right Act, 1999 by Written Laws (Miscellaneous Amendments) Act (No. 3) of 2019** District Court had jurisdiction to entertain copyrights matters despite pecuniary jurisdiction by virtue of **section 4 of the Act**. His further submissions is that, since **section 4** of Copyright Act defined the Court to mean District Court, it has exclusive jurisdiction to determine Copyright matters at its original jurisdiction, regardless of their pecuniary value. With due respect to **Counsel Msando** this is misconceived and, essentially the fact that, jurisdiction is a creature of statute and, cannot conferred by construction or inference. The law under **section 6 of Cap. 33** is very clear on the question of pecuniary jurisdiction;

"Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits

the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction”.

Section 40 (1)(b) of Cap. 11 R.E. 2002

A District Court shall have and exercise original jurisdiction-

(a) N/A

(b) in all such other proceedings under any written law for the time being in force (other than subsection (2) of this section) in respect of which jurisdiction is conferred on a district court by any such law;

From the above provision of Magistrate Courts Act (supra), it is clear that, a written law may confer jurisdiction to a Court with limitation, meaning, without going beyond the statutory jurisdiction. **Section 4 of Copyrights and Neighbouring Rights Act, 1999** conferred jurisdiction of Copyright matters to a **District Court** subject to the pecuniary limitation. This is because sub-ordinate Courts are Courts of limited jurisdiction, while only the High Court with general jurisdiction. That the District Court for Ilala had no pecuniary jurisdiction to try the matter under **section 4 of Copyrights and Neighbouring Right Act, 1999** as the said provision does not provide for pecuniary jurisdiction of District Court, with due respect, this I will differ. Looking on the facts and, nature of the claim of this case, there is no doubt this is a commercial dispute which the Trial Magistrate ought to have consider and, opine properly. In the case of **Zanzibar Insuance Corporation Limited vs. Rudolf Temba, Commercial Appeal No. 1 of 2006**, the Court defined what constituted a commercial case saying;

" The liability of a Commercial or business organization or its Officials arising out of its Commercial, or business activities".

Being purely commercial, the Trial Court ought to have directed its mind to the law applicable to be able to establish that it had no pecuniary jurisdiction to try it and, at the earliest opportune time. Vividly and, so glaring, the specific damage of over four (4) billion is undoubtedly over and, above the pecuniary jurisdiction of the District Court by any standards. In every suit that is before any Court, the need to establish and ascertain jurisdiction is paramount lest a nullity is entertained. It will not be understood if the case of **Fanuel Mantiri Ng'unda vs. Herman M. Ng'unda & Others [CAT] Civil Appeal No. 8 of 1995** settling that;

"The question of jurisdiction for any Court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different nature. **The question of jurisdiction is so fundamental that Courts must as a matter of practice on the face of it, be certain and assured of their jurisdictional position at the commencement of trial. It is risky and unsafe for the Court to proceed on the assumption that the Court has jurisdiction to adjudicate upon cases"**.

It can even be raised at any stage, even at Appeals. See the case of **Richard Julius Rukambura vs. Isaack N. Mwakajila & Another [CAT] Civil Appeal No. 3 of 2004**. In **Baig & Batt Construction Ltd. vs. Hasmati Ali Baig [CAT] Civil Appeal No. 9 of 1992**, it can be raised **Suo Motu** in appeals as well and at times without hearing parties.

In the event, I hold that, the Trial Court erroneously crowned itself with jurisdiction which it didn't have, in entertaining and determining the suit not within its mandate. With this alone and, quite paramount, the rest of

the grounds have no legs to stand upon, lest I entertain a nullity myself,
as I allow the Appeal with costs.

The proceedings and Judgment are nullified set aside, respectively.


J. A. De-Mello

Judge

20/11/2020