IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 1 OF 2020

(C/F Civil Case No. 7 of 2018 in the District Court of Hai at Boma ng'ombe)

THE REGISTERED TRUSTEES OF THE ISLAMIC SOLIDARITY CENTER ---------- APPELLANT

VERSUS

JAABIR SWALEHE KOOSA ---------- 1ST RESPONDENT
YAHYA ABDI MWASHA ---------- 2ND RESPONDENT
KADRI AROUN KIMARO ---------- 3RD RESPONDENT
HAJI ABUU KIMARO ---------- 4TH RESPONDENT
TWAHA SADALA URASSA ---------- 5TH RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant is appearing against the decision from Civil Case No. 7 of 2018 delivered on 29th January, 2020 (D. J. Msoffe - RM) by the District Court of Hai at Bomang'ombe.

Before the trial Court, the appellant prayed for a declaratory order that, the respondents had illegally and unlawfully trespassed and caused nuisance to the appellant's premises. Further prayed for a permanent

injunctive order against the respondents, their employees, workers and agents from entering the appellant's premises.

The appellant proceeded to pray for general damages to the tune of Tshs. 200,000,000/= or as the court may deem fit and just to grant and that the court awards costs of the case to be shouldered by the respondents jointly. Lastly, that the honourable court orders the respondents jointly to pay the appellant interest on the amount to be ordered by the court at the court's rate from the date of judgment to the payment in full.

The respondent disputed the claims, filed a written statement of defence and raised four points of law in a corresponding preliminary objection. One being that, the trial court had no jurisdiction to determine the suit. The honourable trial court magistrate sustained the objection and dismissed the suit on the ground that, the court cannot entertain the same as there were no specific damages pleaded that determine the jurisdiction of the court and the parties had not exhausted local remedies of settling the matter as per their constitution before going to court.

Aggrieved, the appellant preferred this appeal with four grounds as hereunder: -

1. That the learned trial magistrate erred in law and fact

in failing to understand that the matter is a tortious liability suit as the plaintiff sued for declaratory orders therefore it was not mandatory for the plaintiff to claim specific damages.

2. That the trial magistrate erred in law and in fact in failing to understand that the suit being a tortious liability the court had jurisdiction to determine the general damages even where there was no specific damage.
3. That the trial court magistrate erred in law and fact by using the evidence which is neither known by the plaintiff nor was it tendered in court to determine the preliminary objection.
4. That the trial court magistrate erred in law and fact in failing to understand and appreciate that District Court has jurisdiction to determine matters which the subject matter is incapable of being estimated at monetary value.

At the hearing parties agreed to dispose the appeal by way of written submissions. The appellant was represented by Mr. Edwin Silayo learned advocate whereas the respondents were jointly represented by Mr. Amon Ndunguru learned advocate.

Submitting by consolidating the 1st, 2nd and 4th grounds, Mr. Silayo argued that, the appellant's claim against the respondents is for declaratory orders that the latter has unlawfully trespassed into the former's institution and causing nuisance knowing that such acts are contrary to the law and constitution of the former. He added that, **section 7 (1) of the Civil Procedure Code, Cap 33 R.E 2002 (the Code)** gives jurisdiction to the trial court to try all suits of civil nature including the matter subject of this appeal.

He went on submitting that, since the appellant's claim was for declaratory orders and permanent injunction order therefore the suit was not open to objection hence the trial magistrate's decision was erroneously reached. He cited section 7 (2) of the Code (Supra) which provides that;

> *"No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether or not any consequential relief is or could be claimed."*

He further argued that, the trial court had jurisdiction to make a binding declaration that the respondents have trespassed into appellant's premises causing nuisance and issue a permanent injunction order which is to be issued alongside with consequential reliefs of general damages.

Submitting further, Mr. Silayo argued that the suit which was premised on tort, the trial court was in the event vested with jurisdiction to determine the general damages even where there was no claim of specific damages. To support his contention he cited this court's decision in the case of **Peter Keasi V The Editor, Mawio Newspaper & Another, Civil Case No. 145 of 2014, Dsm (unreported)** where it was held *inter alia* that, a suit of this nature should be instituted in either District Court or Resident Magistrates Court as they have competent jurisdiction to try the same.

It was Mr. Silayo's further argument **that Section 40 (2) (b) of the Magistrates Courts Act, Cap 11 R.E. 2019** provides;

> *"...In other proceedings where the subject matter is capable of being estimated at monetary value, to proceedings in which the value does not exceed two hundred Million Shillings."*

From the above provision he argued that, there are matters which are capable of being estimated at monetary value and those which cannot. Further that, those which are capable of being estimated, the pecuniary limit is two hundred million but those which cannot be estimated the court has no pecuniary limit over

the same. Therefore, the trial court had jurisdiction to entertain this matter. He also cited **item 1(c) (iii) of the Court Fee Rules, Number 247 of 2018 made under the Judicature and Application of Laws Act** which provides that;

> *"Where the claim is for a permanent injunction or declaration or declaration (other than a declaration of a title to property) or other order which cannot be valued in monetary terms:*
>
> *i. N/A*
>
> *ii. In a court of a resident magistrate/a district court-fee in Tshs. 40,000/="*

Lastly, Mr. Silayo argued on the third ground that, the trial magistrate determined the preliminary objection based on the evidence which was never tendered by either party as the same was only annexed to the amended plaint. He cited the case of **Abdallah Abbas Najim V Amin Ahmed Ali [2006] TLR 55** which held that;

> *"Annexture to the plaint are not exhibits in evidence, they cannot be relied upon as evidence and cannot be a basis of a decision"*

He therefore prayed the appeal be allowed and the file be remitted back to the trial court for determination.

Contesting the appeal, Mr. Ndunguru for the respondents on the other hand submitted, the issue of "tort" is a new concept and was never pleaded in the old or amended plaint hence the court cannot grant that which has not been pleaded in the pleadings. Further that, since the appellant has raised the issue of tort at the appeal level, the same ought to be rejected as was observed in the case of **Godfrey Wilson Versus The Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** that, the court could not consider new grounds in the second appeal since those grounds were not raised in the subordinate court.

He went on arguing that, the plaintiff claimed general damages of Tsh 200,000,000/= however the same cannot determine the pecuniary jurisdiction of the court as I was held in the case of **Ms Tanzania – China Friendship Textile Co. Ltd V Our Lady of Usambara Sisters (2006) TLR 70** that;

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

Further that, **Order VII Rule 1 (f) of the Code** provides the plaint must show that the court has jurisdiction. However, paragraph 13 of the amended plaint even in the original

plaint does not mention anything about a claim of tort thus the trial court was proper to dismiss it.

Mr. Nduguru contended that, clause 26.0 of the appellant's constitution provides that;

> *"The conflict of the ISC shall be resolved by the supreme council of organisations and institutions of Tanzania (BARAZA KUU), and or any Islamic Organisation that authorised for it by BARAZA KUU"*

From the above clause, Mr. Ndunguru submitted, the said constitution is a by-law which must be adhered to as the remedies provided therein should be exhausted first before embarking to law courts to resolve the dispute. It was hence proper for the trial court to consider the clause enshrined in the ISC constitution. He prayed this court dismisses the appeal with costs.

In rejoinder the plaintiff did not add much apart from maintaining that, the trial court had jurisdiction to grant all prayers pleaded in the plaint.

After going through the rival arguments as well as the trial court's records, the pertinent issue that needs this court's attention is whether the trial court had jurisdiction to entertain this matter.

The term **'Jurisdiction'** is defined in **Halsbury's Laws of England, Vol. 10, para. 314** to mean: -

> *"... The authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision.* ***The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.*** *(Emphasis mine).*

Any Court is duty bound to ascertain its jurisdiction before proceeding to entertain the matter before it. Once ignored or omitted, it can be raised at any stage of the hearing, even if not raised or considered at the trial level. In the appeal at hand the appellant claims that, the trial court had jurisdiction to entertain this matter hence had no reason to dismiss it for want of jurisdiction. On the other side the respondents claim that, the trial magistrate was at no fault in dismissing the suit as the same had no jurisdiction.

As rightly submitted by the Counsel for the appellant, they made no claim for specific damages nor were they pleaded. In other words, there was no substantive claim which could cloth the trial court with the pecuniary jurisdiction to try the matter. However it is worthy to note

and point out that, the claims were for declaratory and injunctive orders following a tortious act which logically cannot be quantified into monetary value so as to determine the jurisdiction. In that regard one is to turn to **Section 13 of the Code** which provides that;

> *"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purpose of this section, a court of a resident magistrate and a district court shall be deemed to be the courts of the same grade."*

The Supreme Court of this land in the case of **Ms Tanzania-China Friendship Textile (supra)** while dealing with the pecuniary jurisdiction of the courts and interpreting the provisions of section 13 of the Code, held *inter alia* that: -

> *"(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 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"*(Emphasis mine)*

In light of the above I am of the firm view that since primary courts have no jurisdiction to entertain matters of this nature which are rooted on matters of tort, the lowest court in such circumstances is the District or Resident Magistrates' court. The trial court therefore had jurisdiction to entertain the same. This answers the 1st, 2nd and 4th grounds of appeal.

The court has further considered the third ground of appeal where the trial honourable Magistrate is faltered for having used evidence (the constitution attached as Exhibit P1 to paragraph 3 of the plaint) to come to her decision. With due respect I defer with the appellant's counsel that despite the wording Exhibit "P1", it is far from saying that the same was evidence already tendered in court. The crust of the matter is that it was an annexture to the plaint forming part of the plaint. It was attached to give light to what the appellant's case against the respondents' entails.

In actual fact what the appellant was saying is that, they are bound by the constitution which is the association's by law. As decided by the trial court's magistrate, such constitution attached to the plaint forms part and parcel of the plaint. **See Peter Keasi (supra) and John**

Byombalirwa V. Agency Maritime Internationale (T) Ltd [1983] TLR.

Perusing through Clause 26.0 as quoted in the annexed constitution gives the appellant a mandatory condition to first resolve their disputes through the supreme council of the organisation (BARAZA KUU), and or any Islamic Organisation that is authorised by BARAZA KUU. This avenue was however not attempted by the parties, as there is no proof of the same. It was thus premature for the appellant to institute the said suit at the trial court.

In light of the foregoing it is the findings of the court that, the appeal is partially meritorious in the sense that the trial court had jurisdiction to entertain this matter, however the same was prematurely filed. Each party to bear own costs.

It is so ordered.

B. R. MUTUNGI

JUDGE

23/07/2020

Judgment read this day of 23/7/2020 in presence of Mr. Peter Njau advocate holding Mr. Edwin Silayo advocate's brief for the appellant and the 3rd respondent in person.

B. R. MUTUNGI

JUDGE

23/07/2020

RIGHT OF APPEAL EXPLAINED.