

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

DC. CIVIL APPEAL NO.13 OF 2019

(Originating from Civil Case No.5 of 2017 from Masasi District Court)

MKARAMANI AMCOS.....APPELLANT

VERSUS

SAID ABDALLAH.....1ST RESPONDENT

GENEROSA JAMES.....2ND RESPONDENT

HADIJA SIMBA.....3RD RESPONDENT

SHABANI CHIUKA.....4TH RESPONDENT

JUDGMENT

9 & 25 March, 2021

DYANSOBERA, J.:

This is an appeal against the decision of the District Court of Masasi delivered on 11.5.2018 whereby the appellant herein was aggrieved by the impugned judgment hence he has decided to enter into second temple of justice.

The brief facts of the case leading to this appeal are as follows: On 14.7.2016 the appellant faced economic hardships. The respondents being the former board members and leaders of the appellant, convened

a board meeting of the appellant. Through that meeting, the respondents acting on behalf of the appellant, agreed to take a loan from Mr. James Michael at a tune of Tshs.6,000,000/= as matter of the practice of the appellant. According to the evidence adduced by PW1 (Khadija Simba), PW2 (Said Abdallah Mkungeita), PW3 (Generosa James) and PW4 (Shaban Mohamedi Chiuka), the said loan was used to buy agricultural inputs of the appellant. Unfortunately, on 04.8.2016 the former appellant's board was dissolved and a new board came in. Thereafter, the old Board members handed over to the latter Board members properties including one tractor, stationery, three weighing bridge, furniture and the debts. In addition, the old Board members of the appellant told Mr. James to introduce himself to the new Board members of the appellant. The Board refused to recognise the debt of Mr. James. Seeing this, Mr. James reported the matter to the police station at Masasi whereby the new members of the board were remanded. The cooperative officer intervened in the matter. Since the appellant did not recognise the debt of Mr. James, the respondents decided to pay Mr. James via exhibit P2. After a settlement meeting with the appellant, the appellant agreed to pay the respondents the money they paid Mr. James on behalf of the appellant. However, the appellant, later, refused to pay the respondents on the ground that their Member of the Parliament ordered them not to pay the respondents.

Seeing that, they filed a civil suit in the trial court claiming against the appellant for a specific damages of money at a tune of Tshs.6,000,000/= being amount borrowed by the appellant from James Michael and paid by the respondents on behalf of the appellant. The appellant also claimed for general damages to the tune of

Tshs.15,000,000/= for the loss of use of the income that would have been derived from unpaid money, reputation, injury, psychological torture, failure to engage in economic activities, failure to provide social services to their children and costs of the suit.

Before trial commenced, four issues were framed by the trial court for determination, namely; **one**, whether the loan of Tshs. 6,000,000/= procured by the plaintiffs was lawfully obtained, **two**, whether the defendant is legally bound to pay or compensate the plaintiffs the sum of Tshs.6,000,000/=, **three**, whether the act of Tanzanian police force apprehending and keeping in police custody the plaintiff was the results of the failure of the defendant to make good the sum of Tshs. 6,000,000/= purported to have been borrowed by them as the capacity of board members of the AMCOS and, **four**, the reliefs to the parties were entitled.

After a full trial involving four witnesses for the respondents and four witnesses for the appellant, the court decided in favour of the respondents.

The appellant was thereby aggrieved and appealed to this court on the following grounds:-

- i. The Trial Magistrate of Masasi District Court erred in law and in fact by entertaining and hearing Civil Case 5 of 2017 while knowing or having reasons to know that it had no Jurisdiction to do the same.

- ii. The Trial Magistrate of Masasi District Court erred in Law and in Fact failure to evaluate the evidence properly.
- iii. The trial Magistrate of Masasi District Court erred in Law and in Fact by failing to give a due gravity to the defence case of the Appellant.
- iv. The Trial Magistrate of Masasi District Court erred in Law and in Fact by awarding Specific Damages to the Respondents.

During the hearing of this appeal the appellant enjoyed the services of Mr. Robert Dadaya, learned Advocate of the RD Law Chambers. The respondents appeared in person and were unrepresented.

On 15.9,2020 this Court ordered the hearing to be conducted by way of written submissions.

Supporting the appeal, Mr. Robert Dadaya, learned counsel for the appellant submitted on the first ground of appeal only that the respondents filed their suit in the trial court claiming Tshs.6, 000,000/= being the specific damages as a loan and Tshs.15, 000,000/= general damages for the loss of business. According to him, the principal amount claimed is Tshs.6, 000,000/= which was below the required amount for the suit to be filed in the District Court. Relying on section 13 of the Civil Procedure Code Cap 33 R.E. 2002 read together with Order IV Rule 1(3) on the requirement that every suit to be instituted in the court of the lowest grade competent to try it and on account that the principal amount given in the plaint of the respondents is Tshs.6,000,000/=

which falls under the pecuniary jurisdiction of the primary court far below the normal pecuniary jurisdiction of the trial court, learned Counsel pressed that the District Court had no jurisdiction. The case of **Tanzania Breweries Ltd. V. Anthony Nyingi** (2016) TLS LR 99 was cited in fortification of the argument.

He further maintained that the District Court usurped the powers of the Primary Court to entertain the suit explaining that in 2016 prior to lodgement of the impugned suit at the trial court, already the Parliament had amended section 18(1) (a) (iii) of the Magistrates' Court Act Cap 11 R.E. 2002 vide section 20(b) of the Written Laws (Miscellaneous Amendment Act) No.3 of 2016 which uplifted the pecuniary jurisdiction of the primary court and the District Court/Resident Magistrates' Courts.

Mr. Dadaya clarified that the pecuniary jurisdiction of the Primary Court was risen up from Tshs.3, 000,000/= to Tshs.30, 000,000/= for movables. The learned counsel for the appellant was of the view that the claimed sum was below Tshs.30, 000,000/= thus the suit ought to be instituted in the Primary Court and not in the District Court. In addition, Mr. Dadaya submitted that there is a settled principle that loss of business and general damages cannot be used to constitute or rather to quantify the pecuniary jurisdiction of the court as it was stated in the case of **Tanzania China Friendship Textile Co. Ltd. Vs. Our Lady of Usambara Sisters** [2006] TLR at page 70 where the Court held that general damages do not determine jurisdiction of the court.

He was of the view that if the court lacked jurisdiction but proceeded to determine the suit, the same will ultimately be quashed either on appeal or revision and therefore the whole process will be declared a nullity. Reference was made to the case of **Maisha Mchunguzi vs. Subscania (T) Branch**, Civil Appeal No.41 of 1998(unreported) which was referred in the case of **Sinoma International Engineering Co. LYD vs. DB Shapriya Ltd.**, Civil Case No.5 of 2014 (unreported) at p.5.

It was his further submission that the parties cannot by agreement or otherwise confer jurisdiction upon a court and he referred to decision of this court in the case of **TanESCO vs IPTL and Others**, Civil Appeal No.19 of 1999 and 27 of 1999 Court of Appeal of Tanzania (unreported).

In further clarification, the learned counsel for the appellant contended that the court has consistently maintained the position that the District Court cannot in anyway adjudicate a suit whose pecuniary value squarely falls within the ambits of the primary court. To fortify his argument, learned counsel for the appellant cited the case of **Litehu Amcos vs Hassan Maulid Mussa**, Dc. Civil Appeal No.2 of 2018.

In his conclusion, the learned counsel for the appellant submitted that this court in the case of **Denja John Dotto & 2 Others vs Umoja wa Wafanya Biashara Ndogo ndogo Mailimoja**, Civil Appeal No.157 of 2018 (unreported) Hon. Mugeta J. at page 9 hold that "the trial court entertained the suit without jurisdiction as a result nullified the whole proceedings and set aside the trial court's judgment and decree. He prayed the court to sustain the first ground of appeal, nullify, quash and

set aside the judgment and decree of the trial court dated on 11.05.2018 with costs.

On their part the respondents, in their joint reply to the written submission, acknowledged the existence of the sections, orders and the case laws cited by the appellant but argued that the cited authorities are irrelevant to and distinguishable from the case at hand. According to them, section 13 and Order IV Rule 1(3) of the Civil Procedure Code 1966 Cap 33[R.E. 2002] are not applicable to the Primary Courts in view of section 3 of the CPC which provides for the meaning of the court and excludes the primary court. They maintained that the cited authorities are not applicable in the circumstances of this case.

In his rejoinder, learned counsel for the appellant re-iterated his submission in chief and in view of the detailed discussion of the said submission as indicated above I need not make a repetition.

After considering the rival contentions and after perusing the material on record, I am in no doubt that it is settled position that conferment of jurisdiction is a legislative function and cannot be conferred by mere acquiescence or consent of the party. I entirely agree with Mr. Robert Dadaya that jurisdiction of a court is sacrosanct that the issue takes precedence of every other issue in the proceedings when it is raised and that in the proceedings the first thing the court has to determine before adjudicating on any matter is its jurisdiction. Indeed, this is the position of the law as enunciated by the Court of Appeal, the highest court of the land whose decisions are binding on this court. The said position was clearly stated in a number of cases including **Maisha**

Mchunguzi v. Sabscania (T) Branch, Civil Appeal No. 41 of 1998 and **Sinoma International Engineering Co. LYD v. DB Shapriya Ltd**, Civil Case No. 5 of 2014 cited to me by Mr. Robert Dadaya at page 3 of the applicant's written submission in chief.

Likewise, this court, in **Litehu Amcos v. Hass**

'As the wording currently stands, the general rule is that, subordinate courts cannot entertain civil suits where the value of the subject matter is within the pecuniary jurisdiction of primary courts'.

In this appeal and as far as the ground of appeal is concerned which is the sole ground carrying the whole appeal, it was the forceful submission of learned Counsel for the appellant, Mr. Robert Dadaya, that the trial Magistrate of Masasi District erred in law and in fact by entertaining and hearing Civil Case No. 5 of 2017 while knowing or having reason to know that it had no jurisdiction to do the same. According to him, the amount claimed was Tshs. 6, 000,000/= being specific damages as a loan and Tshs. 15,000,000/= general damages for loss of business. In his view, the principal amount of Tshs. 6,000,000/= was below the amount required for cases which should be filed in that District Court. Reliance was placed on the provisions of section 13 and Order IV rule 1 (3) of the Civil Procedure Code, 1966, Cap 33 R.E.2002 which make a legal requirement for every suit to be instituted in the court of the lowest grade competent to try it.

The main issue for consideration is whether the Civil Procedure Code, Cap 33 R. E.2002 now 2019 applies to the Primary Courts.

In the first place, as correctly submitted by the respondents, section 3 of the Code, an interpretation section which defines the word 'court' excludes a primary court. It enacts thus:-

"Court" except in the expression "foreign court, "means the High Court of the United Republic, court of a resident magistrate or a district court.

Likewise, section 4 of the Code on the subordination of courts, the primary court is excluded. The section provides that every court of a resident magistrate and every district court is subordinate to the High Court and every district court is subordinate to the court of the resident magistrate. There is no mention of the primary court being subordinate to either the district court or a court of the resident magistrate.

Moreover, the Court of Appeal had occasion to comment on the non-applicability of the Civil Procedure Code to the primary courts in the case of **Agness Simbambili Gabba v. David Samson Gabba**: Civil Appeal No. 26 of 2008 at p. 6 (unreported) that:

In any case, even if, for the sake of academic argument, it were assumed that the pending suit was the probate matter from the Primary Court, then section 79 of the CPC would not have applied because the CPC does not apply in matters arising from Primary Courts.

Second, of more importance is section 7 which is on the jurisdiction of Courts. The said section provides:-

7,-

- (1) Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred.'

These provisions received interpretation by this court in the case of **Gaming Management Tanzania Ltd v. Gaming Board of Tanzania**, Commercial Case No. 12 of 200 (unreported) in which it was held:-

"The general principle is that there is a strong presumption that civil courts have jurisdiction to decide all questions of a civil nature. So, exclusion of jurisdiction of such courts is not to be readily inferred. The exclusion must be explicit or clearly implied. There is no doubt, however, that the legislature is competent to curtail the jurisdiction of civil courts and confer the same on any other tribunal or authority. It is therefore a question of construction in each case whether a particular statute expressly or by necessary implication ousts the jurisdiction of the civil courts."

There was an argument on part of the appellant that the District Court usurped the powers of the Primary Court. This argument was pegged on some provisions of the Magistrates' Courts Act [Cap.11 R.E.2019], section 18 (1 (a) (iii) as amended in particular.

With due respect, I am not persuaded that the said provisions ousted the jurisdiction of the District Court to try the suits like the present one where the pecuniary jurisdiction is within the Primary Court. IN my firm but considered view, the law, the Magistrates' Courts Act provided for a maximum pecuniary jurisdiction, and not minimum and where the court tries a case whose value does not exceed its pecuniary limits, it cannot be said to lack jurisdiction. That is, I think, the gist of section 7 of the Civil Procedure Code and the *raison d'etre* of the decision of this court in the case of **Gaming Management Tanzania Ltd (supra)**.

It is my finding that the cases of **Sinoma International Engineering Co. Ltd (Tanzania) v. D.B. Shapriya** (supra) and **Litehu Amcos** (supra) are distinguishable and inapplicable to the circumstances of this present matter. This is partly because, in the case of Sinoma International Engineering Co. Ltd (Tanzania), the issue was on the jurisdiction of the High Court vis a vis that of the District Court or Resident Magistrates Court as reflected at p. 8 of the typed judgment where the provisions of section 13 of the Civil Procedure Code were applied.

With the respect to the case of **Litehu Amcos**, the decision should be confined on its own peculiar facts taking into account the court did not consider the applicability of the Civil Procedure Code to the Primary Courts.

Even if, for the sake of argument, the issue that the District Court lacked jurisdiction was properly argued, still such argument is misplaced

because, as the record shows, although the issue of jurisdiction was raised at the trial court, the same was withdrawn on 8th day of May, 2017 by Mr. Myovela, learned Advocate who was representing the appellant. The trial court did not, therefore, make any finding on it.


In my view, an appellate court generally will not reverse based on an argument that was not presented in the lower court. Why? Lower courts adjudicate issues in the first instance, and their decisions should be reversed only when they make a mistake in assessing what is presented to them. If the lower court was not given the chance to pass on the argument, it is hard to claim that it made a mistake.

Consequently and for the reasons I have adumbrated, I find the appeal lacking in merit. I dismiss the same with costs to the respondents.

Rights of appeal explained.

It is so ordered.





W.P. Dyansobera

Judge

25.03.2021

This judgment is delivered under my hand and the seal of this Court on this 25th day of March, 2021 in the presence of Mr. Robert Dadaya, learned Advocate for the appellant and in the presence of the respondents.




W.P. Dyansobera

Judge