

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT TANGA

LAND CASE NO. 1 OF 2020

ACRAM AHMED MUSHI (As Administrator of the Estate of the late AHMED MUSHI @ MAALIM AHMED AMAN T/A MOMBO HIGH WAY PETROL STATION)..... **PLAINTIFF**

VERSUS

THE REISTERED TRUSTEES OF THE NORTH EASTERN DIOCESE (NED) OF THE EVANGELICAL LUTHERAN CHURCH IN TANZANIA (ELCT)1ST DEFENDANT

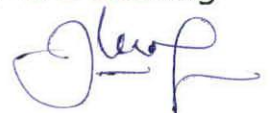
VERSUS

ABDALLAH RASHID MZIRAY T/A MZIRAY OIL MAGUZONI FILLING STATION.....2ND DEFENDANT

RULING

MKASIMONGWA, J.

The Plaintiff one Agram Ahmed Mushi (As the Administrator of the Estate of the late Ahmed Mushi @ Maalim Ahmed Aman t/a Mombo High Way Petrol Station) sues the Registered Trustees of the North Eastern Diocese (NED) of the Evangelical Lutheran Church in Tanzania (ELCT) and Abdallah Rashid Mziray t/a Mziray Oil Maguzoni Filling Station (First and Second Defendants, respectively) for claims from which they are seeking



for declaratory orders and in the alternative as against the First Defendant for payment of Tshs. 300,000,000/= as general damages.

The claims are disputed by the Defendants. In that respect, the defendants severally came up with Written Statements of Defence through which they again, notified the court of their intention to raise preliminary objection on points of law. As for the first defendant, the ground for the preliminary objection is as follows:

1. That the honourable court does not have jurisdiction to entertain in the suit.

On his part the second defendant had four limbs of the preliminary objection. They are that;-

1. The plaint is defective that the matter is incurable res-judicata.
2. The plaint is incompetent and bad in law for being accompanied by defective paragraphs which contain submission and arguments.
3. The plaint is defective for it does not contain a statement of value of the subject matter of the suit for the purposes of determining the pecuniary jurisdiction of the court.
4. The Plaintiff has no locus stand to sue the Defendants.



The Plaintiff did not concede to the objections which necessitated hearing of the same. When the matter came for hearing before me, Mr. Richard Giray, Mr. Patrick Maligana and Mr. Albert Lema, learned advocates, appeared on behalf of the first defendant, second defendant and plaintiff, respectively.

When was invited by the court to argue the preliminary objection, Mr. Giray contended that; throughout the plaint, the plaintiff did not have any paragraph under which he shows, that this court has jurisdiction to entertain and determine this suit. Indeed, in the alternative the plaintiff claims for a sum of Tshs. 300,000,000/= being general damages. Getting support of the principal well stated in the case of **M/S Tanzania China Friendship Textiles. Co. Ltd v. Our Lady of the Mount Usambara Sisters**: Civil Appeal No. 84 of 2002, CAT (Unreported) Mr. Giray contended that it is a substantive claim and not the claim for general damages which determines the pecuniary jurisdiction of the court. As the pleaded amount is shown to be for general damages this court does not have jurisdiction to entertain this suit. As such the suit deserves an order dismissing it. Mr. Giray hence prayed the court that it dismisses the suit.



On his part Mr. Maligana upon being invited to agree to his case he, in the first place, sought to abandon the first and third limbs of the preliminary objection. He retained the second and fourth grounds which turned to be the first and second grounds, respectively. He submitted that the plaint filed by the plaintiff is incurably defective for it consists of paragraphs which contain arguments, conclusion, prayers and points of law. To be specific, Mr. Maligana, referred the court to paragraphs 4 and 5 (i) – (v) of the plaint which contain submission and arguments. As the plaint is defective from the reason above, the suit before the court deserves an order striking it out. Mr. Maligana cemented his argument by citing the decision in the case of **MMG. Gold Limited v. Hertz Tanzania Ltd:** Misc. Commercial Cause No. 118 of 2015, HCT – Commercial Division (Unreported) and **Omari Maulidi v. Iddi Salehe:** Misc Land Case Appeal No. 9 of 2012, HCT (Land Division) Tanga.

As regards to the second limb of the Preliminary Objection, Mr. Maligana contended that, the Plaintiff has no locus stand to sue the defendants nor has he a cause of action against the second defendant. He said the Plaintiff sues the Defendants on a lease argument in respect of Mombo High Way Filling Station executed between the parties. The



contract was terminated by performance sometime on 30/06/2020, and that the plaintiff was required to vacate from the suit premise after termination of the contract. As such, Mr. Maligana prayed the court that it dismisses the suit now at hand.

On the other hand Mr. Lema made submission in response to those of the counsel for the Defendants starting with those advanced by Mr. Maligana. In his submission Mr. Lema distinguished the two cases referred to by Mr. Maligana in his submission. He said that in the **MMG Gold Limited** case, the court dealt with defective affidavit, different from this matter where the defendants fault the plaintiff. Mr. Lema contended that whereas affidavits are governed by the provisions of Order IXX of the Civil Procedure Code, plaintiffs are governed by Order VII of the code. Again Mr. Lema stated that the **Omari Maulid** case dealt with a Petition of Appeal which is not the case in the instant case. Looking at Paragraph 4 of the Plaintiff Mr. Lema contended that there is nothing but summary of the claim by the plaintiff and that paragraph 5 clearly shows the summary as to how the suit premise was owned.

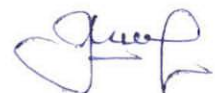
As regards to locus stand, Mr. Lema contended that, the Plaintiff sues as an Administrator of the estate of the late Ahmed Mushi @ Maalim



Ahmad Aman who traded as Mombo High way /Petrol Station. The suit was timely instituted and that the fact that the lease period had expired as it is alleged by Mr. Maligana, did not deny the Plaintiff suing on the contract.

As for the cause of action Mr. Lema contended that in his submission Mr. Maligana stated that the plaintiff has no cause of action against the second defendant. This, Mr. Lema submitted, is defeated by what is stated under paragraph 18 of the Plaint under which it is clearly shown that the second defendant has interest in the disputed premises. As such the later was properly sued.

As far as the jurisdiction of the court is concerned, Mr. Lema stated that in terms of Order VII Rule 1 (i) of the Civil Procedure Code, it is not necessary that in every suit, there shall a claimed sum be stated or pleaded. In the case at hand, the plaintiff substantively claims for declaratory orders. In that premise Order VII Rule 1 (i) of the Civil Procedure Code was never faulted and it cannot, under the circumstances, be said that the court is deaced with jurisdiction to entertain and determine this sit, as again the principle enunciated in the case of **M/S Tanzania China Friendship Textile Co. Ltd** case does not apply.



In a brief rejoinder Mr. Giray stated that his learned friend counsel for the plaintiff admits to have not pleaded any specific damages in terms of money in the premise therefore, he reiterated his arguments that this court has no powers to admit and adjudicate in this suit. The suit should therefore be struck out.

On his part Mr. Maligana stated by way of rejoinder that, the law governing pleadings is the same. Since the authorities he had cited are in respect of pleadings, they do apply to the pleadings in the case at hand. The case is therefore not distinguishable from those cited. In the premise the plaintiffs counsel's submission should be dismissed.

I have considered the submission and the record as a whole. It is important to note here that the High Court of the United Republic of Tanzania, is a creature of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (Constitution). Article 108 (1) of the Constitution provides as follows:

"There shall be a High Court of the United Republic (to be referred to in short as "the High Court" the jurisdiction of which shall be as specified in this constitution or in any other law"



Going by the Article, the jurisdiction of the High Court is derived from the Constitution and the law. Article 108 (2) of the Constitution reads as follows:

"If this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for the purpose, there the High Court shall have jurisdiction to hear every matter of such type. Similarly the High Court shall have jurisdiction to deal with any matter, which according to legal tradition obtained in Tanzania, is ordinarily dealt with by high Court"

Going by the above provisions of the Constitution, essentially, the High Court has unlimited original jurisdiction. The same has powers to adjudicate on all issues of Criminal or Civil Nature. However a High Court exercises its original Civil and Criminal Jurisdiction only if the subordinate courts are not authorized by law to try such matters for lack of pecuniary or territorial jurisdiction. Section 13 of the Civil Procedure Code, provides for courts in which suits may be instituted. Prior to the amendment of the section made under by Section 9 of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016, the section was reading as follows:



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

Based on the above provision of the law our Supreme Court in the case of **M/S Tanzania China Textile Co. Ltd** (Supra) after it held that it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the court and upon finding that the substantive claimed sum fall within the jurisdiction of the subordinate court had the following to say:

"This in our view although we could not come across a specific provision of law stating expressly that the High Court has no pecuniary jurisdiction to entertain claims not exceeding Tsh 10,000,000/= yet under the principle of this provision of law it is our considered opinion that, at the material time, in ordinary monetary claims, the High Court has no pecuniary jurisdiction to entertain claims not exceeding Tshs. 10,000,000/=. We say "in ordinary monetary claims" because we are aware that, there are some monetary claims which can only be adjudicated upon by a High Court even if the amount involved is below Tshs. 10,000,000/=."

The amendment to the section brought about by Act No. 4 of 2016 added a proviso to the section. The provision reads as follows:



"Provided that the provision of this section shall not be construed to oust the general jurisdiction of the High Court"

The proviso is in my view, self-explanatory that despite provisions of Section 13 of the Code, the High Court is not denied of its unlimited original jurisdiction to entertain and determine on suits for which subordinates have jurisdiction to try. The amendment, clears doubt the Court had in the case of **M/s Tanzania China Friendship Textiles Co. Ltd** (Supra) and as of now, the principle therein, in my view, remains no a good law. All in all this Court had jurisdiction to try this matter. However, it is caught by the administrative requirement of the law under Section 13 of the Civil Procedure Code which requirement sounds mandatory that:

"Every suit shall be instituted in the court of the lowest grade competent to try it"

It is clear from the plaint that as a substantive claim, the plaintiff seeks for declaratory orders. Secondly as the general damages are grantable at the discretion of the court and that it is not a proper practice to quantify the claim for general damages in the plaint, the subordinate court is not denied by law to grant the same, this court remains not of the lowest grade competent to try it. Hence the suit ought not to have been instituted in this court.



In event, since this is not the court of the lowest grade to try this matter, I find it proper to order for transfer of the suit to the court of the Resident Magistrate for Tanga Region. This is by virtue of section 21 (1) (a) of the Civil Procedure Code [Cap 33 R.E 2019] which reads as follows.

"21 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

(a) transfer any suit or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same."

With the above approach of the matter I will not endeavour to deal with the other grounds of the Preliminary objection. No order as to costs is made.

DATED at TANGA this 28th of April, 2021.




E. J. Mkasimongwa

JUDGE

28/04/2021