

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL No. 113 OF 2020**

**TABASAM CLEARING & FORWARDING COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MWAJUMA URASSA MALYA t/a INAKUBALIKA STORE.....RESPONDENT**

*((From the decision of Resident Magistrate Court of Dar es salaam at Kisutu))*

**(Kasonde- Esq, RM.)**

Dated 23<sup>rd</sup> March, 2020

in

Civil Case No. 97 of 2018

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**JUDGEMENT**

20<sup>th</sup> April & 17<sup>th</sup> June 2021

**Rwizile, J**

This appeal traces its origins from Civil Case No. 97 of 2018. Facts leading to this appeal are that; The respondent entered into an agreement with the appellant to transport her consignment from Zanzibar to Dar es Salaam. The consignment was not delivered to her in Dar es Salaam as agreed. The reasons for none delivery was that, the same was destroyed by fire, when in the boat to Dar es salaam.

The dispute arose between them. The appellant could not refund the respondent for the loss of her consignment. The respondent therefore instituted Civil Case No. 97 of 2018, where she successfully sued for the claim of 165,150,900/=, as value of goods lost, 10,821,500/= shipment costs and 30,000,000/= as general damages. This decision aggrieved the appellant who is now appealing before this court on eight grounds that;

- 1. The honourable court or magistrate erred in law and fact in entertaining a commercial case or commercial transaction or commercial business without jurisdiction to try the same.*
- 2. The honourable court or magistrate erred in law and fact in violating the principle of international trade or marine trade or commercial trade or commercial transaction or business.*
- 3. The honourable court or magistrate erred in law and fact in entertaining the respondent's case without calling the appellant to testify and without using the power of attorney granted to Pw1, filed in court and not used to pass power or locus standi to act on behalf of the respondent.*
- 4. The honourable court or magistrate erred in law and fact in entertaining and admitting hearsay evidence contrary to the legal requirements.*
- 5. The honourable court or magistrate erred in law and fact in interpreting evaluating and considering the evidence and pleadings of the case in record in determining the matter in dispute.*
- 6. The honourable court or magistrate erred in law and fact in holding the claim in favour of the respondent while there is no liability or any breach of contract or cause of action against the appellant.*

7. *The honourable court or magistrate erred in law and fact in coming up with new or further issues and legal points without affording the parties an opportunity to be heard or to address them as raised.*
8. *The honourable court or magistrate erred in law and fact in granting unproved reliefs without any lawful justification to do so.*

He therefore prayed for this court to quash and set aside the decision of the trial court with costs and for other orders this court may deem fit and just to grant.

At the hearing, parties were represented, for the appellant was Mr Mtatiro learned advocate, and for the respondent was Mr Msuya learned advocate. The parties agreed to argue this appeal by written submission.

Supporting the appeal, the appellant argued the first ground that, the trial court had no jurisdiction to try a suit which arose from a commercial/business transaction whose value was above 30,000,000/=. He added that, the pecuniary jurisdiction of the resident magistrate court in commercial suits is 30,000,000/=: while in this case the respondent claimed for a total of 202,160,750/=. He stated further that, the trial court had no territorial jurisdiction. Based on the bill of lading, courts with jurisdiction are in Singapore. He grounded his support in the cases of **Paula Inter business Co. Ltd v Osman Gao Hoza**, Civil Appeal No. 253 of 2016, **Zanzibar Insurance Corporation Limited v Rudolf Temba**, Commercial Appeal No. 1 of 2006.

On the second ground of appeal, the appellant was of the view that since their transaction was international, covered by C.I.F, it involves an insurer. It was his argument that, the trial court ought to have involved an insurer. Since that was not done, the plaint ought to have been struck out.

Asserting on the third ground of appeal, it was said, the respondent never testified at the trial. According to him, the same did not appear to prosecute her case. He said, the remedy was to have the suit dismissed. He further said, the power of attorney given to Michael Chami was never used in court in compliance with the law. He referred this court to the case of **Kulwa Daudi v Rebeca Stephen** [1985] TLR 116.

As for ground four, it was argued that, since the respondent never testified at the trial court, the evidence given by Michael Chami based on hearsay. According to him, there was no evidence adduced by the plaintiff, what was testified was hearsay.

The appellant combined and argued together the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> grounds of appeal. It was submitted that the trial court erred in evaluation and interpretation of the law governing international commercial transactions. He said, there was no breach of contract. He added that, the value of the subject matter in dispute is beyond the jurisdiction of the trial court. He alluded, the trial court misdirected itself in condemning him without proof which is contrary to the law. He argued, marine transport governed by C.I.F differs from normal suit.

Lastly, he submitted that, the trial court framed its own issues without affording parties an opportunity to be heard. He was of the view that there was no agency and the matter was of a commercial nature. Therefore, the court had no jurisdiction and so, he has been wrongly condemned.

Disputing the appeal, Mr. Msuya learned advocate argued on ground one that, the trial court has jurisdiction by virtue of section 40(2)(b) of the Magistrates' Court Act, [Cap 11 R.E 2002], as amended by the Written

Law (Miscellaneous Amendment) Act,2016. He said, since the suit was instituted in 2018 after the amendment of the law and the total claim is 166,478,570/= . He then said the court had jurisdiction to try the matter. He said the case of **Paula inter-business Co. Ltd (supra)** is distinguished from this case.

He asserted further that, the bill of lading ceased to apply when the consignment arrived in Zanzibar. He was of the view that, the appellant was to transport the consignment to Dar es salaam but he failed to do so.

As for ground two, he asserted that, the appellant cannot invoke the issue of C.I.F. It was argued that, the appellant was duty bound to transport goods from Zanzibar to Dar es Salaam, which he did not. He further argued that, it was the appellant who was to insure the goods. He stated that, the appellant never accounted for the goods or informed the respondent of the loss.

It was his submission on ground three that, at the trial the respondent requested and was allowed to use the power of attorney. He added that, in measuring weight of evidence, consideration is on the quality of the evidence procured. He referred to the case of **Hemedi Saidi vs Mohamed Mbilu** [1984] TLR 113. He then said, the evidence of Chami proved the respondent's case.

It was submitted on ground four that, the evidence adduced by Chami were not hearsay. Chami testified and tendered documents which were not objected to by the appellant. He added that, no issue of hearsay evidence was ever raised by respondent during the trial. According to the respondent, the issue of hearsay evidence cannot be raised now.

Like the appellant, Mr. Msuya, argued grounds 5, 6 and 8 together that, the appellant was to transport goods from Zanzibar to Dar es Salaam. In his view no document was issued by the appellant to the respondent. Advancing another point, it was stated that the appellant did not show which international law or convention that has been breached. According to him, the appellant's argument on these grounds are mere allegations which have to be disregarded.

Dealing with the seventh ground, the respondent argued that, the trial court determined all the issues framed at the trial. He said, the issue of jurisdiction, agency, loss and non- delivery of goods were all addressed by the trial court. The learned advocate went on submitting that the trial court had jurisdiction to try the matter. He then prayed, the appeal be dismissed with costs.

When re-joining, the appellant reiterated what he submitted in chief on jurisdiction that, the trial court had no jurisdiction to try a dispute from an international transaction/business. He said, it is the High court commercial division which is vested with jurisdiction to try the suit.

He also submitted on the issue of locus stand and hearsay evidence that, the power of attorney was never tendered and admitted in court. He said the respondent never testified in court. Therefore, the case was abandoned by the respondent. For him, whatever was testified by Chami (Pw1) was based on hearsay evidence which is inadmissible in court.

Lastly, he submitted that, the appellant is not liable for the loss of goods under C.I.F. He added that, the respondent failed to joined proper parties which according to him are, TRA, MV. Alkhatib, insurance company and the shipper, PIL.

After a keen consideration of the submissions of the parties and records of the lower court. I propose to deal start with the first ground of appeal.

It has been submitted that the trial court was not seized with jurisdiction to hear the matter because it a commercial case and the amount involved exceeded its pecuniary jurisdiction. Although the appellant did not clearly elaborate, but it was submitted for the respondent that same was within the limits of the trial court. The case of **Zanzibar insurance** (supra) was held distinguishable by Mr. Msuya for the respondent. I have three issues to determine to best deal with this ground of appeal.

**First**, to consider if it is proper to raise the issue of jurisdiction at this stage when it was not raised at the trial court. **Second**, which is akin to the first, if it is proper to consider whether the suit is a commercial matter, when it was not raised at the trial, and **third**, if the same trial court had jurisdiction to determine this matter.

In short, I have no doubt that the question of jurisdiction as crucial as it is can be raised at stage of the suit. Since all three points herein touch the jurisdiction of the court, this court is therefore justified to deal with them at this stage. It was also the position in the case of **Zanzibar insurance** (supra). In the Zanzibar Insurance case, being towed with a litany of authorities, the court was fortified by the case of **M/S TANZANIA - CHINA FRIENDSHIP TEXTILE CO. LIMITED vs OUR LADY OF THE USAMBARA SISTERS** (Civil Appeal No. 84 of 2002 (Unreported) at page. 10, where the Court of Appeal said: -

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

I am of the firm view therefore that it was proper for the point of jurisdiction to be raised at the appellate stage.

On whether this is a commercial matter one has to visit the law. Section 2 of the Magistrates' Court Act, defines what cause amounts to a commercial matter. It states as hereunder;

**“commercial case”** means a civil case involving a matter considered to be of commercial significance including but not limited to-

- (i) *the formation of a business or commercial organization;*
- (ii) *the governance of a business or commercial organization;*
- (iii) *the contractual relationship of business or commercial organization with other bodies or persons outside it;*
- (iv) *the liability of a commercial or business organization or its official arising out of its commercial or business activities;*
- (v) *the liabilities of a commercial or business person arising out of that person's commercial or business activities;*
- (vi) *the restructuring or payment of commercial debts by or to business or commercial organization or person;*
- (vii) *the winding up or bankruptcy of a commercial or business organization or person*
- (viii) *the enforcement of commercial arbitration award;*
- (ix) *the enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement to which the United Republic is a signatory and which forms part of the law of the United Republic;*



- (x) *admiralty proceedings; and*
- (xi) *arbitration proceedings.*

The matter before the trial court is based on shipment of goods from Dubai to Zanzibar and from Zanzibar to DSM. The parties are two companies doing business in Tanzania. The items bought were for sale in shops. From the background of the transactions. I am of the humble view that this was a commercial transaction. The trial court therefore needed to treat it so.

Next, is the crucial issue of whether the court had jurisdiction to try the matter. Mr. Msuya was of the view that since the matter was filed in 2018, it is governed by section 40(2)(b) of the MCA upon an amendment of the same in 2016. I agree with Mr. Msuya that pecuniary jurisdiction of the trial court is the amount not exceeding 200m.

But with due respect, that applies to the normal civil claim before the trial court. I have ruled before that this case was a commercial one. The commercial matter is governed by 40(3) of the MCA. It states clearly as follows;

*(3) Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited-*

*(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed one hundred million shillings; and*

*(b) in the proceedings where the subject matter is capable of being estimated at money value, to proceedings in which the value of the subject matter does not exceed seventy million shillings.*

This amendment into the law, was I think, to align it with Rule 5(2) of the Commercial Court Rules, GN 250 of 2012, which has similar position and is coached in as nearly as possible with the law. From the foregoing, it is crystal clear, that the amount claimed here is over 100m. It follows therefrom that it is over and above 70m stated in the law. In my considered view, the same exceeded the pecuniary jurisdiction of the trial court to deal with. I therefore hold that the first ground of appeal has merit.

For that reason, it is enough to quash the decision of the trial court and set aside the judgement and decree, costs have to follow the event. Since the first ground disposes of the appeal, I have no reason to deal with the remaining grounds.

**AK Rwizile**  
**JUDGE**  
**17.06.2021**



Recoverable Signature

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Signed by: A.K.RWIZILE

