

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL REVISION NO. 11 OF 2020

(Arising from the Judgment and decree of the District Court of Resident Magistrates' Court of Mwanza at Mwanza (Lema, RM) in DC Civil Case No. 54 of 2016, dated 17th September, 2020.)

AFRICAN WHEELS AND TYRES LIMITED..... APPELLANT

VERSUS

TRANSEC LIMITED RESPONDENT

RULING

9th June & 28th July, 2021

ISMAIL, J.

This an application for revision, preferred against a summary judgement, pronounced by the Resident Magistrates' Court of Mwanza at Mwanza. The summary judgment, delivered on 17th September, 2020, condemned the applicant to payment of the sum of TZS. 106,631,639/-. The decretal sum allegedly constituted the purchase price of tyres sold to the applicant on credit, vide a tax invoices No. TZ IN 0195, issued on 15th June,

2019; and TZ IN 0548 issued in January, 2020, respectively. It was alleged that, whereas the purchase price was to be paid within 30 days from the date of the sale, in this case, the said sum remained due and owing for in excess of the 30-day time frame agreed by the parties. It is this delay in the execution of the payment framework that bred the summary proceedings which were commenced by the respondent. Noting that these are summary proceedings, the applicant's participation therein required prior leave of the court. This, then necessitated the filing of an application for leave to appear and defend, and the trial court granted it. The view taken by the trial court is that subsequent to granting such leave, the applicant sat back and dawdled without fielding any defence against the respondent's claims. The applicant's alleged inaction triggered the trial court's decision to enter a summary judgment.

The applicant is bemused by this decision, taking the view that the same is tainted with illegality and procedural flaws the particulars of which are stated in the supporting affidavit. It is in view thereof, that the Court is moved to call for and examine the records and proceedings of the trial court and satisfy itself as to their correctness and legality; and revise the judgment and decree of the trial court. With respect to illegality, the applicant's contention is that the summary judgment sought to be revised was entered

on 17th September, 2020, while the 21-day statutory period that ran from 25th August, 2020 was yet to expire, meaning that the applicant was yet to forfeit its right to file a written statement of defence.

This view is strongly disputed by the respondent. In a counter-affidavit sworn by Heri Emmanuel, its counsel, the averment is that, reckoning from 25th August, 2020, the date on which the court was to check if the applicant had furnished security for costs, to 17th September, 2020, the statutory period of 21 days had elapsed. It is the respondent's contention that the trial court was justified in its decision.

The application was argued by way of written submissions the filing of which followed the schedule that was drawn by the Court on 9th June, 2021. It is observed, however, that, whereas the applicant's submission was filed timeously, the respondent did not file any written representation in reply to the applicant's contentions. This is a swapping of roles from what it was when the parties were called upon to address the Court on the preliminary objections, whose disposal was done on 9th June, 2021. In that case, the applicant was the culpable party.

Guided by the decisions in ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported); and ***P3525 LT Idahya Maganga Gregory v. Judge***

Advocate General, Court Martial Criminal Appeal No. 2 of 2002 (unreported), I order that disposal of the application be done in the absence of the respondent. I do that by considering that the applicant's submission in support of the application is uncontested.

Turning on to the substance of the matter, the applicant's complaint is based on two issues. One is the trial court's jurisdiction to deal with the matter whose value is in excess of the cap set by law. The second is with respect to the regularity of the suit, it being filed as a summary suit.

With respect to the first ground, the contention by Mr. Kassim Gilla, the applicant's counsel, is that, since the respondent's claim is for payment of the sum of TZS. 106,631,639/-, entertainment of the suit filed by the respondent constituted a fundamental jurisdictional error as the trial court's powers are capped at TZS. 70,000,000/-. Mr. Gilla contended that the capping has been prescribed by the provisions of section 40 (3) (b) of the Magistrates' Courts Act, Cap. 11 R.E. 2019, which provides as hereunder:

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

(a) N/A

(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.”

Mr. Gilla invited the Court to be inspired by the Court of Appeal’s decision in ***Republic v. Farid Hadi Ahmed & 22 Others***, CAT-Criminal Appeal No. 59 of 2015 (unreported), and hold that the trial court acted without jurisdiction.

Submitting on the second ground, the applicant’s counsel took the view that the suit preferred by the respondent did not qualify to fall under, and be treated as a summary suit. This is in view of the fact that sale of tyres, from which the cause of action emanated does not entitle the respondent to a summary suit. In the applicant’s contention, such claim does not fall in any of the conditions set in rule 1 (a – g) of Order XXXVI of the Civil Procedure Code, Cap. 33 R.E. 2019.

Mr. Gilla asserted, further again, that the reliefs (b) and (c) in the decree, and reliefs (ii) and (ii) (sic) granted in the decree and judgment, respectively, need proof through trial and adducing concrete evidence. It was his contention that the act of granting the said reliefs without proof was another form of illegality, and it calls for revision of the judgment and decree passed by the trial court.

From this one sided account of facts and the law, the singular question is whether the trial court indulged in any procedural missteps that justify a call for exercise of the Court's revisional powers.

With respect to jurisdiction, the applicant's contention is that the court was not vested with pecuniary jurisdiction to entertain a commercial case the subject matter of which had a value exceeding TZS. 70,000,000/-. Before I get to the heart of the contention by the applicant, it serves all of us well to state, albeit in brief terms, that the duty is cast upon courts and tribunals, to ensure that, before a dispute is instituted, their mandate as expressly conferred upon them by a statute is established. This trite position has been underscored in a multitude of decisions, both in this Court and in the Court of Appeal. These include the holding in ***Shyam Thanki and Others v. New Palace Hotel*** [1972] HCD No 97; and ***Laurian Mlemi v. Serikali ya Kijiji Kasisa***, HC-Land Appeal Case No. 88 of 2018 (unreported).

See also: ***Consolidated Holding Corporation Ltd. V. Rajani Industries Ltd & Bank of Tanzania***, CAT-Civil Appeal No. 2 of 2003 (unreported).

In ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda***, Civil Appeal No. 8 of 1995 (unreported), the Court of Appeal underlined the importance of jurisdiction in the following words:

*"The jurisdiction of 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 the trial. **It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.**"*[Emphasis added]

To be able to properly determine the question of jurisdiction, need arises for finding out if the suit that was before the trial court was a commercial dispute whose pecuniary jurisdiction is covered by section 40 (3) (b) of Cap. 11. The High Court (Commercial Division) Procedure Rules (as amended by GN. No. 107 of 2019, define the term "**commercial case**" to mean:

"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 a business or commercial organization with other bodies or persons outside it;*

- (iv) *The liability of a commercial or business organization or 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 retracting or payment of commercial debts by or to business or commercial organization or person;*
- (vii) *The enforcement of commercial arbitration award;*
- (viii) *The enforcement of awards of a regional court or tribunal of competent jurisdiction made in;*
- (ix) *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."*

[Emphasis added].

See: ***Access Bank Tanzania Limited v. Michael Daud Msufu***, HC-Civil Appeal No. 2 of 2019 (TBR-unreported).

From the quoted definition, there can hardly be a dispute that the transaction between the parties herein was a business transaction and the liability that emanated therefrom is a commercial liability, perfectly fitting in the mould of a commercial case. It follows, therefore, that what was preferred in the trial court was, true to its designation in the pleading, a commercial case for which section 40 (3) (b) of Cap. 11 is applicable. Its institution ought to have conformed to the pecuniary limit set by law. In this case, this limit was flouted, and the trial court was lured into 'punching above its weight', by entertaining a case in respect of which it did not have any powers to adjudicate. As the applicant submitted, this was a serious and intolerable infraction of the law, sufficient to nullify the trial proceedings. While this ground is sufficient to dispose of the application, I feel obliged to say a word or two on the next ground of the applicant's complaint.

Turning on to the second ground, the contention by the applicant is that treatment of the matter as a summary suit was outrightly erroneous in procedure. As I subscribe to the view held by the applicant, it bodes well to begin by stating the object of the summary suit. This is as stated in the case of ***CRDB Bank Limited v. John Kagimbo Lwambagaza*** [2002] TLR 117, quoted with approval in ***Diamond Trust Bank v. Mtenda Distributors***

Company Limited, HC-Comm. Case No. 79 of 2016 (unreported). The Court held that:

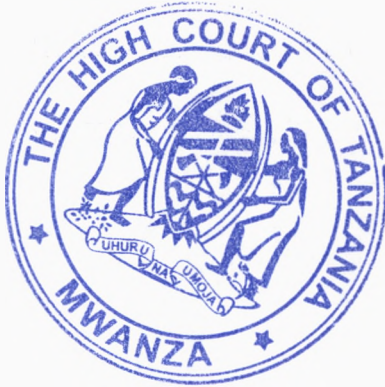
"the object of a summary suit is to enable a plaintiff to obtain judgment expeditiously where the defendant has in effect no substantial defence to the suit and to prevent such defendant from employing delaying tactics and in the process, postpone the day of reckoning."


Worth of a note, in this respect, is the fact that the expeditiousness that is brought by the summary procedure set in Order XXXV of the CPC is confined to matters in respect of which such procedure applies. These are as stated in rule 1 (a to g). Recovery of the contract sum such as the respondent's claim falls in none of the claims which are eligible for summary procedure, as listed in the said rule 1. This means, therefore, that preference, by the respondent, of the procedure that is exclusive for certain claims was utterly irregular, and the trial magistrate indulged in a dreadful procedural error when it entertained the matter as though it was eligible for a summary procedure, while in fact it was not. This is a fatal procedural flaw that threw the proceedings into a serious confusion. Its resultant consequence is to render the proceedings profoundly defective, liable to vitiation.

In consequence of the foregoing, the application is meritorious and is granted. The proceedings of the trial court and the ensuing judgment and decree are hereby revised, quashed and set aside with costs.

Order accordingly.

DATED at **MWANZA** this 28th day of July, 2021.




M.K. ISMAIL
JUDGE

Date: 28/07/2021

Coram: Hon. C. M. Tengwa, DR

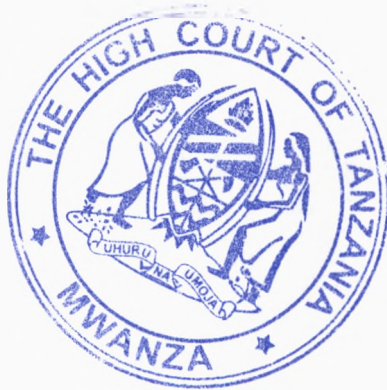
Appellant: Mr. Gilla, Advocate

Respondent: Mr. Gilla holding brief of Mr. Henry Emmanuel, Advocate

B/C: J. Mhina

Court:

Ruling delivered on this day of 28.07.2021 in the presence of both sides.



C. M. Tengwa
DR
28.07.2021