IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 387 OF 2021

ADAMAS CONGLOMERATE LIMITED ..... APPELLANT
VERSUS
CIHAT DEMIR ..... RESPONDENT
[Appeal from the judgment and decree the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 125 of 2020]

JUDGMENT

20th May & 21st June, 2022

KISANYA, J.:

The appellant, Adamas Conglomerate Limited was aggrieved by the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 125 of 2020. In the said case, the appellant sued the respondent, Cihat Demir claiming for the following reliefs; a declaration that the respondent had breached the terms and conditions of the Work Permit Class A and Residence Permit Class A; a declaration that the respondent had breached the Companies Act, a declaration that the defendant had suffered special and general damages; an order for payment of Tshs. 120,355,500 being special damages for the loss suffered and costs incurred; general damages; and costs of the suit.

It was the appellant's case that, in 2018, the respondent was allotted 115 shares (5%) and appointed him as director responsible for professional

task like interior design. The appellant further claimed that she was inclined to incur significant costs and expenses to ensure that the respondent, a Turkish citizen, stay in Tanzania is lawful. According to the appellant, she incurred USD 1000 for Work Permit Class A, USD 3,955 for residence permit class A, USD 100 for Tanzania Investment Centre's expenses, USD 340 for follow up costs related costs, USD 600 for visa, USD 485 for flight costs, USD 12,360 for house rent and USD 32,500 as advance monthly payment.

The appellant went on deposing that in August, 2019, the respondent absented from the company. It turned out that the respondent had registered a competitor company namely, Roundtable Design and Works Limited and that he was using the Work Permit and Residence Permit issued to him at the instance of the appellant. In view of the foresaid facts, the appellant filed a suit which gave rise to this appeal claiming for the reliefs stated afore.

In his written statement of defence, the respondent resisted the claims. His defence was premised on the contention that he was terminated from his employment. In light of the parties' pleadings, the issues framed for the trial court's determination were as follows: -

1. *Whether the plaintiff had employment contract with the defendant.*
2. *Whether there was breach of terms of contract in respect of working permit and resident permit.*
3. *To what reliefs parties are entitled to.*

In order to substantiate her claim against the respondent, the appellant called one witness. This is her managing director, Ugur Gurses who testified as PW1. His evidence was to effect that respondent agreed orally to work with the appellant. PW1 testified that the appellant incurred costs of advance payment (USD 22,000), work permit (USD 4000), special pass (USD 600). He further adduced that the respondent worked with the appellant for one year before leaving without notice. That upon discovering that the respondent was working with others, the appellant notified the Immigration Department which took up the matter by arresting him (the respondent) and cancelling his permit. He therefore, prayed the trial court to grant the relief sought in the plaint on the account that the respondent breached the terms which he had with the appellant.

For his part, the respondent who testified as DW1 admitted that he worked with the appellant. He also stated that the appellant had offered him a car, house rent, computer, mobile phone and 5% shares in the company. However, he alleged that the appellant did not keep her promise. DW1 testified further that it is the defendant who terminated him from employment. He claimed that the matter was to be dealt with by the Tanzania Legal machinery and not the appellant.

At the end of the defence case, the trial court ordered the parties to file their respective final closing submissions. Apart from the final closing submission, the respondent filed submission in support of a preliminary

objection on the point of law that the trial court had no jurisdiction to entertain the matter. The objection was based on the contention that the matter before the trial court was purely a labour matter. The appellant replied that the matter was not related to labour matter but breach of the terms and conditions stated in the work permit and residence permit under the Immigration Act, Cap. 54, R.E. 2016. It was also the appellant's contention that the Immigration Act (supra) does not bar the civil proceedings arising from its operation.

The trial court found merit in the preliminary objection. It reasoned that violation of the terms and conditions of work permit and residence permit is respectively dealt with by the Immigration Department and the Commissioner for Labour. At the end of the day, the appellant's plaint was struck out.

Aggrieved by that decision, the appellant has approached this Court on appeal upon the following grounds: -

1. *That the Honourable Trial Court erred in law and fact in deciding that the Trial Court lacked jurisdiction while the claim in the plaint together the (sic) written statement of defence indicated that the court was clothed with jurisdiction.*
2. *That the Honourable Trial Court erred in law and fact in treating the claim made thereof as labour dispute and immigration issue while the matter originated from breach of contract of which this Court is clothed with jurisdiction.*

3. *That the Honourable Trial Court erred in law and fact in failing to appreciate the fact that the interpretation, and breach of terms and conditions of permits issued by the Immigration is within jurisdiction of the Trial Court and not Immigration Department as reasoned by the Trial Court thereto.*

With leave of this Court, the appeal was disposed of by way of written submissions filed by Messrs Augustine Kusalika and Abdulaziz Baisi, learned advocate for the appellant and respondent, respectively.

Submitting in support of the appeal, Mr. Kusalika addressed the 1st and 2nd grounds altogether. He contended that the trial court was clothed with jurisdiction to entertain the appellant's claim. The learned counsel submitted that there was no labour or immigration issue on the claim made by the appellant. He elaborated that the appellant's claim was for breach of terms and conditions of works permits and costs incurred by the appellant as averred in paragraphs 5 to 17 of the plaint. It was his further contention that the appellant and respondent were not in dispute with the Immigration Department or with Commissioner for Labour. He argued further that the issue before the trial court was not related to termination of employment because the respondent was one of the shareholders of the appellant company. Therefore, making reference to section 41 (1) of the Magistrates Courts Act (Cap. 11, R.E. 2019) (the MCA), the learned counsel was of the considered view that the trial court erred in holding that it lacked jurisdiction.

Mr. Kusalika further cited *Mulla's Code of Civil Procedure* (13th Edition at page 125), in which the term "jurisdiction" is defined to mean "the extent of the authority of a court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary of its jurisdiction." He, then, submitted that the matter being of commercial nature, the trial court had pecuniary jurisdiction to entertain the same because it was admitted as a civil case. The learned counsel invited this Court to consider the case of **Augustine Mtenga vs University of Dar es Slaam** [1971] HCD No. 247 in which it was held that:-

> *"It is trite to observe that the Court is, and has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted."*

Therefore, the learned counsel prayed that the appeal be allowed and the matter to be heard *denovo* before another magistrate.

With regard to the third ground, Mr. Kusalika faulted the trial court for failing to appreciate that breach of the terms and condition of permits issued by immigration department is within its jurisdiction and not the Immigration Department. Citing section 3 of the Immigration Act which defines the word "court" to mean "a court of competent jurisdiction," the learned counsel argued that the trial had jurisdiction to determine whether the respondent breached the terms and condition specified in the work permit and residence

permit. From the foregoing, he called this Court to allow the appeal with costs.

In response, Mr. Baisi prefaced by urging this Court to note that the appeal was not against the gist of the trial court's decision. He contended that although the impugned decision emanated from the preliminary objection, the decision and reasoning of the learned trial magistrate were based on the procedure to initiate the suit and thus, the case was struck out for want of *locus standi* to sue.

Mr. Baisi went on to submit that the appellant's suit was inter alia, for declaratory order that the respondent had violated the terms and conditions set out in the work permit and residence permit. Referring to section 45(1)(k) and (2) of the Immigration Act (supra), read together with section 20(d) of the Non-Citizens (Employment Regulation) Act, No. 1 of 2015 (the NCERA), the learned counsel was of the view that the matter before the trial court originated from allegations that were criminal in nature. That being the case, he submitted that the appellant had no *locus standi* to sue or prosecute the matter.

It was Mr. Baisi's further argument that the appellant's contention that the matter before the trial court was commercial in nature implies that the trial court had no trial pecuniary jurisdiction. His argument was based on the ground that the appellant's claim was over and above the pecuniary limit of

seventy million shillings set out under section 40(3)(b) of the MCA. That said, Mr. Baisi moved this Court to dismiss the appeal with costs for want of merit.

I have carefully considered the submission made by the learned counsel for both sides. It is my considered view that, the issue for this Court's determination is whether the trial court had jurisdiction to try the matter filed before it.

My starting point is the time bound position that the issue of jurisdiction goes to the root of the case. Therefore, the trial court is enjoined to satisfy itself on whether it is clothed with jurisdiction to entertain and or decide the matter before it. See the case of **Fanuel Mantiri Ngúnda vs Herman Mantiri Ngúnda and 20 Others,** Civil Appeal No. 8 of 1995, CAT (unreported) cited with approval in **Aloisi Hamsini Mchuwau and Another vs Ahamadi Hassani Liyamata,** Criminal Appeal No. 583 of 2019, CAT at Mtwara (unreported) in which the Court of Appeal held that: -

> *"The question of jurisdiction for 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 with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

In another case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported), it was held that the question of jurisdiction can be raised at any stage of the trial or even at appellate stage. The Court of Appeal observed that: -

> *"At this point we would hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level. Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision."*

Being guided by the above position, this Court finds that the trial court rightly considering the question of jurisdiction even if the parties had closed their respective cases.

In addressing the foresaid issue, first for consideration is whether the trial court made a decision that it had no jurisdiction. This issue stems from Mr. Baisi's contention that the trial court's decision and reasoning were based on the procedure to initiate the suit and that the suit was struck out because the appellant had no *locus standi* to sue. I respectfully disagree with the learned counsel due to two reasons. *First*, it is on record that the trial court sustained the objection that it had no jurisdiction. Two, before arriving at that decision, the trial court considered that the respondent's acts of breaching the terms and contract in the work permit and residence permit ought to have

been dealt with by the immigration or labour office. *Three*, the decision of the trial court was based on the respondent's submission in support of the objection, that the proper forum or institution with mandate to deal with issue of breach of terms and condition of work permit and residence permit is the Labour Commissioner and the Commissioner General of Immigration. *Four*, the trial court reasoned that even if there are reliefs capable of being dealt with by way of civil litigation, the same ought to have been brought in a different way. *Five,* the trial court did not hold at all the appellant had no *locus standi*. From the foresaid reasons, the argument that the appeal is not against the decision given by the trial court lacks merit

Now, the next for consideration is whether the trial court erred by sustaining the objection that or holding that it had no jurisdiction to determine the matter.

It is not disputed that the appellant's claims were based on the ground that the respondent had breached the terms and conditions of Work Permit Class A and Residence Permit Class A. While the work permit tendered in evidence shows that the respondent was authorized to engage in occupation as Director of the appellant, the residence permits is to the effect that respondent was to enter and remain in Tanzania for specific employment with the appellant. It was also undisputed fact that apart from being the Director

of Adamas Conglomerate Limited (the appellant), the respondent was shareholder of the said company.

In terms of the plaint and evidence adduced by PW1, the appellant did not claim that the appellant had breached the terms of employment. Therefore, the issue whether the matter was to be dealt with under the forum provided for under the labour laws could not arise. This is also when it is considered that the respondent did admitt that he was one of the shareholders of the appellant's company.

The trial court noticed the undisputed fact that the respondent was no longer working for the appellant and thus, he violated terms and conditions of the Work Permit and Residence Permit. It went on to hold as follows:

> *"The act is definitely a violation of the laws and first it must be dealt with by immigration department or labour office. Under the Immigration Act the act is an offence which needs attention there. Therefore, even if there are reliefs capable of being dealt with by way of a civil litigation should be brought in a way different from this one. Those reliefs capable of being dealt with by this court were kept in a way that they should be awarded after the court has declared the breach on those permits whereby such breach must be dealt with by other organs as I aforesaid.*

I was then inclined to go through the provisions governing the work permit and residence permit. Starting with the work permit, section 3(1) of the NCERA obliges the employer who wishes to employ a non-citizen is duty

bound to apply to the Labour Commissioner for a work permit. In the event the holder of work permit ceases to engage in the employment in respect of which the work permit was issued, section 18(1) of the NCERA requires the employer to report him to the Commissioner General. On the other hand, the residence permit is issued by the Commissioner General of Immigration after taking into consideration the condition of work permit issued by the Labour Commissioner. This is pursuant to section 33 (1) of the Immigration Act. The permit ceases to be valid and the presence of the holder of Class A residence permit becomes unlawful if he or she engages on terms, or occupation other than the trade, business or profession specified in the permit.

I am mindful to the provisions of the above cited law that criminal proceedings may be instituted against a person who contravene the provisions of the respective laws and that said permits be my cancelled. However, it is my considered view that the issue whether the provisions of the NCERA and MIA were complied with is to be considered in determining the case on merit. It cannot be raised as a preliminary objection. For instance, PW1 adduced to have reported the respondent to the Immigration Department. Therefore, the trial court ought to have considered whether the appellant had proved her claim in accordance with the relevant law.

From the foregoing, I am of the considered view that the trial court erred in law in holding that it had no jurisdiction to try the matter before it on

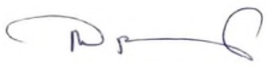
the ground that the reliefs were required to be determined first by the labour commissioner and immigration department.

On the issue whether the trial court had pecuniary jurisdiction to determine the matter, I have observed that the said issue does not feature in the decision subject to this appeal. Considering that the main case was not determined on merit, I will not discuss the issue of pecuniary jurisdiction. This being an appellate court, its mandate is to determine issues arising from the decision of the lower court.

In the upshot, I find merit in this appeal and allow it. Accordingly, the judgment of the trial court is hereby quashed while the drawn order thereon is set side. On the way forward, I also respectfully disagree with Mr. Kusalika who urged me to make an order for retrial. Given that the parties had already been heard by the trial court and filed their respective final closing submissions, I remit the case file to the trial court for it to render a decision on the framed issues or other issues it may deem fit to determine in accordance with the law. Costs shall follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of June, 2022.



S.E. Kisanya
JUDGE

COURT: Judgment delivered this 21st day of June, 2022 in the presence Mr. Augustine Kusalika, learned advocate for the appellant and Mr. Abdulaziz Baisi, learned advocate for the respondent.

S.E. Kisanya
JUDGE
21/06/2022