

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CIVIL APPEAL NO. 15 OF 2019

BAHATI MATIMBA NGOWIAPPELLANT

VERSUS

1. THOMAS MBWATE

2. ESTHER WILSON MPWAPWA

(T/A UPENDO TRAVELLERS COACH) }

..... RESPONDENTS

(Being an appeal from the judgment of the District Court of Iringa
at Iringa)

(Hon. H.M. Marando - RM)

dated the 28th day of July, 2020

in

Civil Case No. 10 of 2019

JUDGMENT

Date of Last Order: 12/07/2022 &

Date of Judgment: 05/08/2022

S. M. Kalunde, J.:

In this appeal, the appellant, BAHATI MATIMBA NGOWI, is appealing against the decision of the District Court of Iringa at Iringa (hereinafter "the trial court") dated the 28th day of July, 2020 in Civil Case No. 10 of 2019, whereby the appellant case was dismissed with costs.

The facts leading to the present are not hard to understand. Before the learned trial court, the appellant contended that on the 04th day of April, 2018, the appellant, travelled from Dar es Salaam to Iringa on board **Upendo Travelers Coach** bus with registration **No. T. 756 DDB**. The bus was allegedly the property of the second

respondent. It was the appellant case that whilst at Mbezi Mwisho in Dar es Salaam she handed her bag containing various valuables to the 1st respondent who was by then operating as a conductor to the said bus. However, on arrival to Iringa the appellant could not locate her bag and the valuables. He reported the matter to the 1st respondent who intimated that the bag could have been taken by an unknown passenger from Kilolo. Despite several follow-ups the appellant was not assisted to locate his bag and the valuables contained therein. He then resorted to file **Civil Case No. 58 of 2018** at the Bomani Primary Court in Iringa. Through their advocates, Icon Law Corporate, the respondents requested the matter be transferred to the District Court to afford them a legal representation. Through a letter dated 04th July, 2018 with reference **No. JY/DM/IR/321/VOL.III/92** the matter was transferred to the District Court, the appellant was instructed to draft a new plaint and logged the same with the trial court. The question of pecuniary jurisdiction of the trial court does not therefore arise.

In the suit before the trial court the appellant prayed for judgment and decree against the respondents inter alia in the following terms: payment of Tshs. 6,030,000.00 being specific damages for the lost bag containing various valuable items; Tshs.6,000,000.00 being general damages; and costs of the suit. The respondents resisted the claims and instructed Icon Law Corporate to lodge a Written Statement of Defence. After full trial judgment was entered in favour of the respondents. The appellant was aggrieved; hence this appeal.

By consent of the parties, the appeal was argued by way of written submissions. In compliance with Court orders, submissions were duly filed. However, before composition of the decision the Court noted existence of a point of law touching on the jurisdiction of trial court over a regulated activity. Consequently, parties were ordered to make additional submissions addressing the question whether the trial court was clothed with the requisite jurisdiction to entertain the matter. All parties filed their submissions hence the present verdict.

In her submissions the learned counsel for the respondents, Ms. Theresia Charles was of the firm view that the matter at the trial court concerned a regulated activity. In her view the Land Transport Regulatory Authority (LATRA) had exclusive jurisdiction to resolve complaints relating to consumers of road transport and suppliers of the said services. In bolstering her position, she cited the provisions of section 5(1)(h), and 33 of **the Land Transport Regulatory Authority Act, 2019, No. 3 of 2019** ("the LATRA Act"). The counsel invited the court to set aside the judgment and decree of the trial court.

On his part Mr. Cosmas Kishamawe learned counsel for the appellant contended that the gist of the suit at the trial court was contractual based on a Bailor and Bailee relationship in terms of the provisions of section 100(1) and (2) of **the Law of Contract Act, Cap. 345 R.E. 2019**. The counsel reasoned that the trial court had jurisdiction to entertain the suit depending on the prayers sought. On another limb the counsel argued that the fact that LATRA had

jurisdiction did not preclude the appellant from lodging a suit before the court. In surprising move, the counsel claimed that all regulatory authorities were based in Dar es Salaam therefore presenting a geographical challenge for complainants from rural areas to follow up their complaints. Relying on the above submissions the counsel prayed the matter proceed on merits and the issue raised *suo mottu* be overruled.

In her brief rejoinder, Ms. Theresia reiterated her submission in chief and added that in terms of section 47(3) the provisions of **the SUMMATRA (Complaints and Review Procedures) Rules, 2008 GN No. 15 of 2008**. She was of the view that the appellant ought to have lodged a complaint with LATRA instead of resorting to the trial court. She concluded with a prayer that this court proceed to set aside the judgment and decree of the trial court.

The gist of the issue raised by the Court *suo mottu* is based on the now established position of law that 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. In the case of **Commissioner General Tanzania Revenue Authority & Another vs Milambo Limited** (Civil Appeal 62 of 2022) [2022] TZCA 348 (14 June 2022 TANZLII) the Court of Appeal having borrowed a leaf from Halsbury's Laws of England, Vol. 10 and quoted the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (unreported) the Court (**Mugasha, J.A**) stated:

"From the above quoted excerpts, principally, in adjudication, the question of jurisdiction is a threshold question which must be addressed at the earliest opportunity in order to save time and costs and dire consequences of the proceedings being nullified at the later stage in case the objection is raised and sustained. Therefore, jurisdiction is a creature of statute and not the dislikes or likes of the parties or mere compelling situations as intimated by the learned High Court Judge despite a strong presumption that civil courts have jurisdiction to decide all questions of civil nature, the exclusion of jurisdiction of civil courts is not to be readily interfered and such exclusion must either be explicitly expressed or clearly implied."

The above excerpts denotes that the court's jurisdiction should, invariably, be determined on the basis of the law establishing it and other laws which specify that a certain dispute or matter be determined by a certain specified court, tribunal or a particular authority. Therefore, in terms of the above position, where a particular piece of legislation provides for a special or specific forum for settlement of disputes or complaints that forum ought to be pursued first instead of approaching a court. This seems to be a view of the Court of Appeal in **Tanzania Revenue Authority vs. Kotra Company Ltd.**, Civil Appeal No. 12 of 2009 which was quoted with approval in **Tanzania Revenue Authority vs. Tango Transport Company Limited**, Civil Appeal No. 84 of 2009 (all unreported)

In the present I must state at the outset that having exhaustively gone through the pleadings, particularly paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the plaint, I gather that the substance of the appellant's complaint forming cause of action at the trial court rested primarily on the 2nd respondent acts or omission in taking care

of her luggage when she was on board the 2nd respondent's bus travelling from Dar es Salaam to Iringa. As a result of the said omission the appellant lost her bag containing some valuable items. In view of the above circumstances, I am satisfied that the nucleus of the suit at the trial court was substantially related to road transportation services which, in terms of the provisions of the LATRA Act, is a regulated sector.

Having provided the above background and exposition of the applicable law, I think I am now in a position to resolve the issue whether the trial court was clothed with the requisite jurisdiction to entertain the present matter.

To resolve that question, I find it pertinent to expound the relevant provisions of the LATRA Act. I propose to start with sections 5(1)(h) and 6(c) imposes a duty to LATRA **"to facilitate resolution of complaints and disputes"** and **"protecting the interests of consumers in relation to costs, quality and standards of transport services"**. To implement the above mandates section 33 of the Act provides for complaints handling mechanism. The section reads:

*"33.- (1) Where a complaint is referred to, or otherwise comes to the attention of **the Authority**, and it appears to the Authority that-*

*(a) the complainant has an interest in the matter to which the complaint relates;
and*

*(b) the complaint is not frivolous or vexatious, the Authority **shall** investigate the matter.*

- (2) *Where it appears to the Authority at any time during or after its investigation that **the supplier** has not considered the complaint or has not considered it adequately, the Authority **may refer** the complaint to **the supplier** with a directive that **the supplier** should consider or reconsider the complaint.*
- (3) *Where it comes to the knowledge of **the Authority** at any time during or after its investigation that **the supplier** has considered the matter but the complainant is not satisfied with the decision, **the Authority shall** handle the complaint in accordance with this section.*
- (4) *The **Authority shall investigate** the complaint and attempt to resolve it amicably, and in the event it cannot be resolved, the Authority shall present its findings and recommendations to **the Board**.*
- (5) *The Board shall make a decision on the complaint within the prescribed time.*
- (6) *Any party aggrieved by the decision of the Board may, within prescribed time, appeal to the Fair Competition Tribunal." [Emphasis mine]*

Section 3 of the LATRA Act describes the terms "**Authority**", "**regulated supplier**" and "**Board**" to mean:

*"**Authority**" means the Land Transport Regulatory Authority or in its acronym "LATRA" established under section 4;*

*"**Board**" means the Land Transport Regulatory Authority Board established under section 7;*

*"**regulated supplier**" means any person engaged in activities in or in connection with a **regulated sector** and includes any person whom the Authority declares under this Act to be such supplier;*

*"**regulated sector**" means rail transport, commercial road transport, commercial underground and cable transport;*

From the above position of the law it seems to me that, the procedure for complaints and dispute settlement is well stipulated under section 33 of the LATRA Act. The procedure is well stipulated from the institution of a complaint to the mechanisms for resolution and the appellate process for the aggrieved.

By way of illustration a complaint in relation to any regulated sector may referred to the Authority. The Authority then considers whether the complaint merited or otherwise, it then proceeds with investigation under subsection (1). In terms of subsection (2) where after its investigation the Authority is satisfied that the supplier has not considered the complaint or has not considered it adequately, the Authority may refer the complaint to the supplier with a directive that the supplier should consider or reconsider the complaint. If it appears to the Authority that at any time during or after its investigation the supplier has considered the matter or complaint nevertheless the complainant is not satisfied with the decision, the Authority, under subsection (3), shall take over the handling of the complaint. Under the provisions of subsection (4) the Authority is compelled to investigate the complaint and attempt to resolve it amicably, and in the event the matter cannot be resolved, under subsection (5), the Authority is obliged to refer its findings and recommendations to the Board.

The Board shall then consider the matter and proceed to make its decision on the complaint. The powers of the Board to make the necessary orders are provided for under section 34 of the LATRA Act. The sections provide as follows:

"34.- (1) *Subject to section 33, the Board may make an order-*

- (a) requiring a party to pay a certain amount of money;*
- (b) requiring a party to supply goods or services for specified periods;*
- (c) requiring a party to supply goods or services on specified terms and conditions;*
- (d) requiring a party to pay the costs of another party or of a person appearing at the hearing or producing documents;*
- (e) dismissing a complaint;*
- (f) imposing fines and or refunds;*
- (g) requiring specific performance;*
- (h) setting up an escrow fund;*
- (i) appointing a trustee; and*
- (j) such other relief as may be deemed reasonable and necessary.*

(2) The orders of the Board under this section shall be enforceable as orders of the High Court." [Emphasis is mine]

If a party is still dissatisfied with the decision of the Board, section 33(6) of the LATRA Act, provides for an appellate mechanism. In terms the respective section, any party aggrieved by the decision of the Board may appeal to the Fair Competition Tribunal. However, prior to an appellate process, the LATRA Act provides for review mechanism under section 27 which reads:

27-(1) Any person aggrieved by any decision made by the Authority may, within fourteen days after receipt of the decision, apply to the Authority for it to review the decision.

(2) The Board may make rules prescribing procedures governing review under this Act.

[Emphasis is mine]

For a person who is still aggrieved by the decision of the Board the appellate procedure to the Fair Competition Tribunal is stipulated under section 28 which provides as follows:

"28.- (1) Any person aggrieved by the decision of the Board may appeal to the Fair Competition Tribunal in accordance with the Fair Competition Act.

(2) Notwithstanding subsection (1), the grounds of appeal shall be the following:

(a) the decision made was not based on evidence produced;

(b) there was an error in law;

(c) the procedures and other statutory requirements applicable to the Authority were not complied with and the non-compliance materially affected the determination; and

(d) the Authority did not have power to make the determination."

[Emphasis is mine]

My closer examination of the above provisions leads me to a conclusion that the LATRA Act leads me to a conclusion that plainly and manifestly create a forum with a hierarchy for appeal purposes and they provide for adequate remedies to a person who has complaints in respect of the handling of complaints and disputes in relation to the regulated sectors. Whilst I agree with Mr. Kishamawe that there is no express provision, in the LATRA Act, ousting the trial court's jurisdiction to entertain the dispute but, in view of the fact that

there is a specific forum which is created by statute and which is mandated to provide adequate remedy to the parties, I have no hesitation to hold that, in the present case, the trial court jurisdiction is impliedly barred by the LATRA Act. See **Salim O. Kabora vs Tanesco Ltd & Others** (Civil Appeal 55 of 2014) [2020] TZCA 1812 (07 October 2020 TANZLII). In the circumstances the appellant ought to have referred the matter to LATRA in terms of section 33 of the LATRA Act.

Before I conclude on this matter, I find myself constrained to comment on the clever drafting of the plaint by the appellant to include the 1st respondent in his capacity as an employee of the 2nd respondent. I say clever because from what I see the appellant intended to divert the suit out of the established forum under the LATRA Act to ordinary courts. However, I am not ready to walk into that trap. Apparently, I am not venturing into unknown territory. Confronted with an almost similar situation, the Court of Appeal in the case of **Tanzania Revenue Authority vs New Musoma Textiles Limited**, Civil Appeal No. 93 of 2009 (unreported) stated that:

*"The second answer provided by Mr. Magongo to the issue, is that there was no reference to any tax dispute in the body of the plaint or prayers. The answer to that is provided by this Court in KOTRA's case, where the decision of the Indian case of RAM SINGH vs. GRANPANCHAYAT (1986) 4 SCC 364 AIR, 1986) SC. 2197 was approved. **In the latter case it was held that where the civil Court's jurisdiction is excluded, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint"***

[Emphasis supplied]

Also see **Salim O. Kabora vs Tanesco Ltd & Others** (supra); and the decision of this Court in **Janet Joseph and Another vs. Beatrice Lyinga** (Land Revision 26 of 2019) [2020] TZHCLandD 3967 (16 November 2020 TANZLII); and **Airtel Tanzania Ltd. vs. Domician Njau & Another** (Civil Appeal 16 of 2017) [2018] TZHC 2245 (23 October 2018 TANZLII).

As observed earlier, what can be gathered from the record is that before the trial court the appellant's complaints and major cause of action primarily rested against the 2nd respondent omission in taking care of his luggage resulting into the loss of the bag containing her valuable items. The loss of the passenger luggage was a failure of the 2nd respondents' obligations and duties under the LATRA Act. The complaint should have been referred complaint to LATRA.

I am convinced that the appellant cleverly drafted the plaint to implead a claim against the 1st respondent in a deliberate attempt to bring the suit within the jurisdiction of the trial court. This Court cannot condone the that blatant attempted abuse of process. On another limb Mr. Kishamawe had argued that the location of LATRA headquarters in Dar es Salaam presented, in his words, a "**critical performance setback**" in the appellants ability to prosecute his complaint. However, the learned counsel did not explain how or what ways was the geographical location of the headquarters a "critical performance setback". Further to that there is evidence that the appellant was to travel, un incumbered, back and forth to several places including foreign jurisdictions. In the circumstances I do not find any merits to this argument.

Guided by the above authorities, I am prepared to conclude that, in the present case, the trial court embarked on a nullity having wrongly assumed jurisdiction which was expressly ousted by the prescribed specific forum established under the LATRA Act. In the process the trial court erroneously clothed itself with jurisdiction that it did not possess in entertaining and determining the appellant's suit. Having proceeded without the requisite jurisdiction, the proceedings and the resultant judgment and decree were a nullity, and they cannot be allowed to stand.

In the circumstances, I invoke the revisional powers conferred to this Court under section 44 of **the Magistrates' Court Act, Cap. 11 R.E. 2019** to nullify the entire proceedings, and judgment and the resultant orders in **Civil Case No. 10 of 2020**. Since this disposes the entire appeal, I shall therefore not embark on the determination of the merits of the appeal. Thus, the appeal is dismissed. Having raised the issue suo mottu, each party shall bear their costs.

It is so ordered.

DATED at IRINGA this 05th day of AUGUST, 2022.



A handwritten signature in blue ink, appearing to read "S.M. Kalunde", is written over the printed name.

S.M. KALUNDE

JUDGE