

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

AT DAR ES SALAAM

CIVIL CASE NO. 120 OF 2019

IVANNA FELIX TERI..... PLAINTIFF

VERSUS

MOHAMMED INTERPRISES LIMITED..... DEFENDANT

RULING

Date of last order: 29/06/2022

Date of Judgment: 19/08/2022

E.E. KAKOLAKI J.

Articles 16(1) and 24 (1) and (2) of the Constitution of the United Republic of Tanzania of 1977 (the Constitution) as amended from time to time provide that:

Article 16(1) of the Constitution provides:

“16(1) Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communication.”

And Article 24 of the same Constitution reads:

"24.(1) Every person is entitled to own property and has a right to the protection of his property held in accordance with the law.

(2) Subject to the provisions of sub-article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purpose without the authority of law which makes provision for fair and adequate compensation."

The above quoted articles reflect the claims in which this court is called upon to determine in the present case. The plaintiff, Ivanna Teri Felix sued the defendant herein, Mohamed Enterprises Limited claiming for payment of sum of Tsh. 800,000,000/= as damages for unauthorized use of her images in marketing and promotion of services without her consent. For the better understanding of the gist of this suit it is imperative that, facts of this case be stated albeit so briefly. Garnered from the plaint, the plaintiff who is photogenic and celebrity had her images used by the defendant in different media platforms to market and promote its services to customers, without any prior consent or legal authorization or any lawful compensation/consideration whatsoever on her part, thus depriving and exploiting her right to property. And further that, the complained of defendant's media platforms used to publish plaintiff's image have wide

coverage all over Tanzania and that, the use of plaintiff's image is not only violation of plaintiff's privacy but also unlawful interference of plaintiff's economic interest over her image. It is therefore plaintiff's lamentations that, the defendant's action amounts to unjust enrichment, deprivation of property without lawful compensation, misappropriation and infringement of personality and image rights, breach of rights to privacy and dignity, misrepresentation, false endorsement and passing off. According to plaintiffs, she learnt of the defendant's deleterious acts described above on June 2019 before the demand notice and the intention to sue her was issued on 4th June, 2019, stating the details of the claim but the defendant turned her ears deaf. Believing that her right of privacy and dignity had been breached and her economic interest over her image has been unlawful interfered with hence exploitation of her property right, the plaintiff preferred this suit praying for the Judgment and Decree on the following reliefs against the defendant:

- (a) Declaration that the defendant is in breach of the plaintiffs right of privacy and dignity and she has unjustly enriched herself by unlawful interfering with the plaintiff's economic interest, personality and image rights, deprived the plaintiff's property over

- her image without lawful compensation, authority and/ or consent for commercial gain
- (b) An order for payment of Tsh. Eight hundred Million (800,000,000) as damages for unauthorized use of plaintiff's image in marketing and promoting the defendants' services and products.
 - (c) Payment of 25% royalties arising out of the benefit gained as a result of publishing and advertisement infringing plaintiffs' rights as of October 2018 when the advertisement was posted to the date of Judgment, with interest of 20% per annum from the date of cause of action to the date of full payment.
 - (d) An order for appointment of receiver to collect and forward to the plaintiff the royalties prayed under paragraph C above
 - (e) An order that the defendant should remunerate the receiver appointed by the court for the purposes of executing the order under paragraph (c) above.
 - (f) Aggravating damages
 - (g) Interest on the decretal amount in (b) and (c) at the court rate of 7% per annum from the date of Judgment to the date of final payment and satisfaction in full.

(h) Costs of the suit

(i) Any other reliefs this honourable court deems fit and just to grant.

On her side the defendant through her Written Statement of Defence admitted using plaintiffs' images in promoting her business. She however disputed the contention that, she is using the same illegally putting it that, the pictures were legally downloaded from www.shutterstock.com website in which, the defendant is a member and paid subscription fees as required in obtaining the licence to use the plaintiffs' images. In short she contested all other plaintiff's claims and called her to strict proof thereof.

At the final pre-trial conference which was held on 18/03/2021 four issues were framed and agreed by the parties for determination of this suit.

1. Whether the plaintiff consented her images to be uploaded into www.shutterstock.com.
2. Whether the defendant has the licence to use whatever item/image uploaded in the said website
3. Whether the plaintiff accepted payment and signed modal release for use of her photos uploaded in the said website.
4. What reliefs are the parties entitled to.

The plaintiff at all material time and throughout the hearing enjoyed the legal services of Ms. Agnes Dominic while the defendant hired the services of Ms. Catherine Solomon both learned advocates. Both parties presented their cases as the plaintiff's case was comprised of one witness, the plaintiff herself (PW1) with four (4) exhibits while the defence was made up of two witnesses and three (3) exhibits. At the end of the trial both parties were accorded with right to file their final submission in support and against the plaintiff's case and the matter was set to come for judgment on 12/08/2022. As the Court was in the preparation of composing the said judgment came across a concern raised by the defendant's counsel in her final submission on the pecuniary jurisdiction of this Court to entertain the suit, the act which moved the Court to pause and summon the parties to address it on that point. Both parties appeared in Court on 10/08/2022 through their respective advocates, in response to the Court's call and upon being introduced to the issue raised by the defendant it was agreed that, they be heard on it by way of written submission in which the filing schedule orders were issued and the ruling date set to that effect to come on 19/08/2022. I am appreciating both parties' useful submissions that made easy the exercise of composing this ruling.

I have had an ample time to thoroughly go through the contesting submission on the matter at discussion as well as perusing the pleadings and entire court record in a search to address the point raised critically. The issue for determination now is whether this Court has pecuniary jurisdiction to entertain the suit before it. It is common knowledge that, all courts in Tanzania are creatures of statutes and their jurisdiction is purely statutory. This position was stated in the case of **Shyam Thanki and Others Vs. New Palace Hotel** (1971) EA 199 where the erstwhile East African Court of Appeal held at page 202 thus:

"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

In view of the above authority then, jurisdiction of any court must be established at the earliest possible time and I would add before the matter is conclusively determined. The purpose of sanctioning the issue of jurisdiction to be raised at any stage of the case in my firm view is to avoid the risk of the Court proceeding with hearing of any matter before it on assumption of being clothed with jurisdiction which in fact it does not possess. This position was adumbrated in the case of **Fanuel Mantiri**

Ng'unda Vs. Herman M. Ng'unda, Civil Appeal No. 8 of 1995 (CAT-unreported) when said:

*"The jurisdiction of any court is basic, it goes to the very 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 assumption that the court has jurisdiction to adjudicate upon case.**"* (emphasis supplied)

It is from the above position and object of the law, I believe the defendant found it convenient to move this Court to determine its jurisdiction before proceeding further with determination of the suit conclusively on merits. It is Ms. Solomon's submission that, the plaint does not disclose whether the plaintiff's claims are general or specific damages nor did that fact feature during the entire proceedings of case, something which leaves a room for interpretation of the claims as general damages. She said, that infracts the provisions of Order VII Rule 1(f) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) mandatorily dictating that, every plaint shall contain facts showing that the Court has jurisdiction. It was her argument that, the plaint

under paragraph 14 states that *"That for the purposes of Court fees, the Plaintiff claims from the Defendant is Tshs. 800,000,000/=*" and the law is very clear that, general damages cannot be used as factor for determination of Court's jurisdiction since they are granted and assessed at the discretion of the Court. She brought to the attention of the Court the decision of this Court in **Ivanna Felix Teri Vs. Barclays Bank Tanzania Limited and MS. A.I.M Group** (T) Limited, Civil Case No. 24 of 2019 (HC-unreported) where similar objection over jurisdiction of this Court was raised and sustained by the Court. She was of the submission therefore that, this suit ought to be dismissed for want of jurisdiction.

In rebuttal submission Ms. Dominic attacked Ms. Solomon's submission in that, she did not submit much on the objection apart from citing to the Court the decision in Civil Case No. 24 of 2019. As to whether the plaintiff had complied with the requirement of Order VII Rule 1(f) of the CPC, Ms. Dominic argued she did as paragraphs 3(b), 13 and 14 of the plaint provide that, the plaintiff's claims against the defendant is Tshs. 800,000,000/- and that the cause of action arose within the jurisdiction of this Court as the defendant has its established business in Dar es salaam. Further to that the learned counsel dwelt on the application of section 13 of the CPC, which she

submitted is the defendant's concern when cited Civil Case No. 24 of 2019 in which the question under discussion was whether this Court has jurisdiction to entertain this matter in the circumstances where the plaintiff has not clearly stated the specific damages. Ms. Dominic argued, while section 13 of the CPC provides that, every suit shall be instituted in the Court of lowest grade to try it, there is a proviso which preserves general jurisdiction of this Court to entertain any suit filed by the party. The Court was referred to Mulla Code of Civil Procedure (Abridged) 14th Ed at page 141 on the commentaries of section 15 of the Indian Code of Civil Procedure which is in parimateria with section 13 of the CPC stating that, *this section is a rule of procedure, not a jurisdiction, whilst it lays down that suit shall be instituted in the Court of lowest grade, it does not oust the jurisdiction of the Courts of higher grades which they possess under the Act constituting them. Therefore, although as a matter of procedure, a suit below a certain value ought to be instituted in the court of the mansif, the subordinate judge still has jurisdiction to try it.*

Ms. Dominic went on to cite the Hansard of the Parliament of 24/06/2016 that brought into play the proviso in section 13 of the CPC that, it was intended not to oust the inherent powers of this Court in entertaining matters

before it. And that, court should not use the said proviso to strike out the cases already filed in Court. She lamented while querying whether it would be proper to strike out this suit which has already proceeded to full hearing simply because the amount of Tshs. 800,000,000/- claimed was not pleaded specifically while the Court enjoys the inherent powers? Her response to that question was indeed a **big no**. She urged the Court to invoke its inherent powers under the provisions of section 95 of the CPC to make orders as may deem necessary for ends of justice, as the court can still entertain the matter at hand. The Court was invited further to be persuaded with its decision in the case of **Ivanna Felix Teri Vs. MIC Tanzania Public Company Limited**, Civil Case No. 5 of 2019, where the Court held that, even when the claimed damages of Tshs. 800 million was to be held as general damages still this Court under section 13 of the CPC would preserve its jurisdiction to entertain the suit. Further to that the case of **The National Bank of Commerce Limited Vs. National Chicks Corporation Limited and 4 Others**, Civil Appeal No. 129 of 2015 (CAT-unreported) was referred to the Court where the Court of Appeal when deliberating on this Court's jurisdiction where the matter not of specialized division is filed in the specialized division and had this to say:

"...In the event a case not of a division's specialization is instituted in any of the division, the parties should not be thrown out as was the case herein under the pretext of lack of jurisdiction. Instead, the parties should either be advised to withdraw and file the same in another Court competent to try it, otherwise such a case should be heard to its conclusion."

While taking note of the decision of this Court in Civil Case No. 24 of 2019 relied on by the defendant Ms. Dominic submitted, the same does not bind this Court under the principle of stare decisis as can be departed from. She therefore invited the Court to dismiss the objection as the case has approached to the judgment.

In rejoinder submission Ms. Solomon argued that, the plaintiff has conceded to the infraction of the provisions of Order VII Rule 1(f) of the CPC. She said, it is not in dispute that the Court has territorial jurisdiction since the defendant conducts its business in Dar es salaam, what is being question is lack of specific amount claimed by the plaintiff in the plaint stating or justifying Court's pecuniary jurisdiction as per the mandatory requirement of Order VII Rule 1(f) of the CPC. Ms. Solomon rejoined further that, since the claim of Tshs. 800 Million was not specifically pleaded nor proved during the trial an inference be drawn that the same is general damages which do not

form the basis of this Court's pecuniary jurisdiction. Hence the proviso under section 13 of the CPC could not be invoked to determine the jurisdiction of this Court without the claim of Tshs. 800 million being pleaded as specific damage. She relied on the case of **Barclays Bank Tanzania Limited and MS. A. I. M Group (T) Ltd** (supra) where this Court when faced with the situation akin to the present one had this to say:

"The Court said clearly that if the suit does not highlight the specific claims and only has general statement claim, then it misses an important ingredient which can enable this court to determine its pecuniary jurisdiction."

It was Ms. Solomon further submission that, looking at the plaint itself, it cannot be ascertained by this Court whether it is seized with jurisdiction to entertain the matter or not as the plaint discloses no any fact explaining how the amount claimed was suffered. With regard to the case of **MIC Tanzania Public Company Limited** (supra) cited by the plaintiff she said, the same is distinguishable from the facts of this case. Basing on the above submission she invited the Court to uphold the preliminary objection and dismiss the suit with costs.

Having summarized and accorded both parties' fighting submission with the deserving weight, I now move on to determine the issue raised above as to whether this Court has pecuniary jurisdiction to entertain the suit before it. Gathered from the submissions above parties are at agreement that, the law under Order VII Rule 1(f) of the CPC is coached in mandatory terms that, facts stating the jurisdiction of the Court must be stated in the plaint. This requirement no doubt goes together with the requirement under sub-rule 1(i) of Order VII of the CPC to the effect that, the plaint shall contain statement of the value of the subject matter of the suit for the purposes of determination of court's jurisdiction and fees. It is settled law that, pecuniary jurisdiction of the court in civil matters is determined by substantive claims as it was held by the Court of Appeal in the cases of **Tanzania - China Friendship Textile Co. Ltd. Vs. Our Lady of the Usambara Sisters** [2006] TLR 70 and **Mwananchi Communications Limited and 2 Others Vs. Joshua K. Kajula and 2 Others**, Civil Appeal No. 126/01 of 2016 (CAT-unreported). In **Tanzania - China Friendship Textile Co. Ltd** (supra) the Court observed thus:

"... it is a substantive claim which determines jurisdiction and not general damages which

determines jurisdiction as general damages are awardable at the court's discretion... (Emphasis added)

In this matter as alluded to above Ms. Solomon asserts that, the plaintiff did not aver substantive claims disclosing pecuniary jurisdiction of the Court to entertain the suit as per the requirement of Order VII Rule 1(f) of the CPC while Ms. Dominic says she did as reflected in paragraphs 3(b), 13 and 14 of the plaint. In order to disentangle parties' disputes over this fact, I find it imperative to reproduce the said paragraphs:

Paragraph 3(b) of the plaint read:

3. That, the Plaintiff's claim against the Defendant is for:
(b) Payment of sum of Tanzania Shillings Eight Hundred Million (800,000,000/=) as damages for the unauthorized use of the plaintiff's image in marketing and promoting the defendant's services and products.

Paragraph 13 of the plaint states:

13. That, the cause of action arose within the jurisdiction of this Honourable Court and the Defendant has its established place of business, thus this Honorable Court has jurisdiction to entertain this matter.

And paragraph 14 of the plaint reads:

14. That, for the purposes of Court fees, the Plaintiff claims from the Defendant is Tanzania Shilling Eight Hundred Million (Tshs. 800,000,000).

Deducing from the above quoted paragraphs, I entertain no doubt that, none of them is specifically stating the substantive claim or in other words specific damages claimed by the plaintiff for the purposes of establishment of this Court's jurisdiction as the territorial jurisdiction stated in paragraph 13 of the plaint which is not subject of contest by parties does not form the base for determination of pecuniary jurisdiction of this court. The plaintiff's claims in paragraph 3(b) of the plaint of Tshs. 800 million as damages for unauthorized use of the Plaintiff's images in marketing and promotion of business, in my firm view refers to nothing than general damages only which is a replica of her prayer in paragraph (b) of the reliefs sought. In view of the above, I subscribe to Ms. Solomon's proposition that, with that mere claim and prayer for Tshs. 800 million by the plaintiff as general damages for unauthorized use of the plaintiff's image in marketing and promoting the defendant's services and products, without particulars of specific damages explaining how the claimed amount was suffered by her, the plaintiff failed to establish to the Court's satisfaction that, this Court has the requisite pecuniary jurisdiction to entertain the suit before it. Such omission no doubt

is in contravention of the provisions of Order VII Rule 1 (f) and (i) of the CPC.

Ms. Dominic when submitting on the relevance of the proviso in section 13 of the CPC which preserved the inherent powers of this Court in entertaining matters that would have been tried by the court of the lowest grade, invited this Court to follow suit of its decision in the case **MIC Tanzania Public Company Limited** (supra) where it was held that, this Court can still entertain the suit even where the disclosed claim is general damages only. With due respect to learned counsel, I am not prepared to accept the invitation. The reasons I am refraining from following the position in that decision is not far from fetching. As alluded to above, it is the settled principle of law set by the apex Court of the land which is binding to this Court that, what is to be considered in determination of the jurisdiction of this Court or any other subordinate courts, is the specific claims and not general damages claimed by the party. See the cases of **Our Lady of the Usambara Sisters** (supra) and **Mwananchi Communication Limited and 2 Others** (supra). Unlike the two above cited cases where specific claims were considered in determination of this Court's pecuniary jurisdiction in **MIC Tanzania Public Company Limited** (supra) it was not the case as jurisdiction of the Court

was determined basing on the provision of section 13 of the CPC only. Thus, the same is distinguishable to the facts under consideration in this matter where the issue in controversy is whether the Court has pecuniary jurisdiction to try the suit in a situation where specific claims is not disclosed in the plaint. In the same beat, the case of **National Bank of Commerce Limited** (supra) is also distinguishable to the facts of this case as the same was dealing with treatments of cases not of specialized divisions which its specific claim for the purposes of determination of pecuniary jurisdiction is disclosed but filed in High Court Divisions, unlike in the circumstances of this case where specific claims for the purposes of establishment of Court's pecuniary jurisdiction is not disclosed.

Now back to the case at hand, and having already found that, the plaintiff's pleadings did not disclose or highlight specific claims for the purposes of establishment of this Court's pecuniary jurisdiction but rather gave general statement of claims, the last question is what is the effect of such omission? It is the position of the law that, where the pleadings do not disclose the specific claims for the purposes of determination of Court's pecuniary jurisdiction, instead states general damages only the High Court ceases to have pecuniary jurisdiction over that matter. And I would add that, this is so

even at the stage when the hearing is concluded but before judgment is delivered like the situation in this matter. The remedy under the circumstances therefore is for the case to be tried at the court of lowest grade as provided under section 13 of the CPC, which under section 40(2)(b) of the MCA are the Resident Magistrates Court or District Court. This settled position of law was expounded by Court of Appeal in the case of **Mwananchi Communication Limited and 2 Others** (supra) when the Court was considering the pecuniary jurisdiction of this Court on the contention that, the amount claimed was generally stated to be in excess of Tshs. 150,000,000/- without particularizing whether it was specific claim or not. In arriving as its decision that, the High court was not seized with jurisdiction to try the matter the Court of Appeal roared that:

*"...the pleadings failed to highlight the specific claims and only had a general statement of claims, which thus means that **there was no specific amount shown to facilitate determination of the pecuniary jurisdiction on the High Court where the suit was filed.** The absence of such specification meant the suit should have been tried in the lower courts, that is, the District or Resident Magistrate's courts under section 40(2)(b) of the MCA. For the foregoing reasons, **it is clear that the High Court erroneously crowned***

itself with jurisdiction in entertaining and determining the suit that it did not possess. (Emphasis supplied).

In this case since the plaintiff omitted totally in her pleadings furnish to this Court with the statement of specific claims or specific damages for the purposes of determination of its pecuniary jurisdiction, and guided with the authority in **Mwananchi Communication Limited and 2 Others** (supra), I am enjoined to hold that, this Court is not crowned with jurisdiction to entertain the suit at hand. Having so found, I would have transferred the matter to the lower court for its trial there but in absence of such statement of specific claims to assist this Court not only to ascertain but also to determine the pecuniary jurisdiction of that lower Court, I am unable to so do.

In the premises and for the foregoing reasons, I uphold the objection raised by the defendant and proceed to strike out the suit as I hereby do. The plaintiff is at liberty to institute a fresh suit in full compliance with the law.

I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 19th August, 2022.



E. E. KAKOLAKI

JUDGE

19/08/2022.

The Judgment has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of Ms. Agnes Dominic, advocate for the Plaintiff who is also holding brief for Ms. Catherine Solomon, advocate for the Defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

19/08/2022.