

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 250 OF 2021**

(Originating from a Judgment and Decree of Civil Case No.104 of 2019 issued by the resident Magistrate's Court of Dar es salaam at Kisutu by Hon. A.W.Mbando SRM dated on 28<sup>th</sup> April, 2021)

**DORA SADICK META.....1<sup>ST</sup> APPELLANT**

**JOHN MARCIANO PETER MCHAU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROSEMARY ALPHONCE ASSENGA..... RESPONDENT**

**JUDGMENT**

*Date of last order: 13/07/2022*

*Date of Judgment: 16/09/2022*

**E.E. KAKOLAKI, J.**

Before the Resident Magistrate's Court of Dar es salaam at Kisutu, the respondent herein sued the appellants for payment of the sum of Tshs.84,000,000/= as special damages for breach of contract, general damages, costs of the suit and any other relief as the Court may deem fit to grant.

The facts giving rise to this appeal as gleaned from the record can simply be narrated as follows. The 1<sup>st</sup> appellant herein entered into an oral contract with the respondent for the later to contribute Tshs. 50,000,000/= to her

business which would be returned with profit, thus a total amount of Tshs. 98,200,000 payable to the respondent within one year for investing in the business. The respondent acted on their contract and advanced the said amount to the appellants in instalments through cheques. It appears only Tshs.14,200,000/= out of Tshs. 98,000,000/= was paid to the respondent despite of several demands which ended in vain, the result of which landed her into the Resident Magistrates Court of Dar es salaam at Kisumu in Civil Case No. 104 of 2019, claiming for the remained amount of Tshs. 84,000,000/-. The trial Court having heard both parties' evidence, decided in favour of the respondent and the appellants were ordered to pay the respondent Tshs.47,800,000/= being the outstanding balance and Tshs.10,000,000/= as general damages while directing for each party to bear its own costs. the appellants are dissatisfied with the trial court decision and in so proving, have expressed their discontentment in four grounds of appeal going thus:

1. The trial magistrate erred in law and fact by awarding damages of Tshs.10,000,000/= without proof of any suffering /injury on the part of the respondent.

2. The trial Magistrate erred in law and fact by entertaining suit without pecuniary jurisdiction to entertain the same.
3. That the trial Magistrate erred in law and fact by condemning appellant to pay profit to the respondent at the tune of Tzs.12,000,000/= even without a proof of any profit realized by the appellants.
4. That the trial Magistrate erred in law and fact by entertaining agreement which was against the Banking and Financial laws of the country.

During hearing of the appeal both appellants and respondent appeared represented by Mr. Frank Kilian and Said Abdallah Azizi, learned advocates respectively, who with leave of the Court agreed to disposed of the appeal by way of written submission. Both parties filed their respective submission save for the appellants who up to the time of setting the matter for judgment had not filed their rejoinder submission, thus I will proceed to determine the appeal on the filed submissions. In this judgment, I am prepared to discuss and determine each and every ground of appeal as canvassed by the parties.

In his submission in support of the appeal, Mr.Kilian opted to start with the second ground of appeal, whereby the jurisdiction of the trial court is put into question for entertaining a commercial case which was above its

pecuniary value. He voiced that, parties cannot agree to cloth the court with jurisdiction it does not have, as in this matter the trial court's jurisdiction to entertain a commercial case is limited to Tshs. 70,000,000/- only, while the pleaded amount for the purpose of jurisdiction as per paragraph 8 of the plaint is Tshs. 84,000,000/-. Relying on section 40(3)(b) of the Magistrates Court's Act, [Cap. 11 R.E 2019] (the MCA) submitted that, the pecuniary jurisdiction for the District Court in Commercial cases is limited to Tshs. 70,000,000/- only. He said as the parties relationship was created by contractual agreement at the consideration of profit to be realised when the investment pays out, then the dispute is a commercial one under the interpretation of commercial cases as provided in section 2 of MCA. Inviting this Court to be persuaded with and follow its decision in the case of **Tabasam Clearing & Forwarding Company Limited Vs. Mwajuma Urassa Mallya t/a Inakubalika Store, Civil Appeal No. 113 of 2020**, where the amount claimed exceeded 70 million this Court held the same had exceeded the pecuniary jurisdiction of the trial court. He thus prayed the Court to find the ground is meritorious and allow the appeal.

In rebuttal Mr. Azizi for the respondent submitted that, the complaint on the jurisdiction of the trial court lacks merit as the Resident Magistrates Court

has concurrent jurisdiction with District Court. He said the suit under discussion was instituted on the 14<sup>th</sup> of August 2019 under section 40(2) of the MCA before coming into operation of the amended of the said section on 20<sup>th</sup> September, 2019, under Act No.11 of 2019 which conferred jurisdiction to district/resident court to entertain commercial cases of Tshs. 70 million and below. Thus to him the trial court had jurisdiction to entertain the case under section 40(2)(b) of the MCA hence prayed the Court to dismiss the ground.

I have carefully considered both parties' submission for and against this ground of appeal as well as perused the entire record of the trial court. What is gathered from is that parties are not at dispute on whether the transaction between parties was of commercial nature. I say so as the oral agreement entered with parties was for investment of Tshs. 50,000,000/- in the appellants' business in return of Tshs. 98,000,000/- out of which only Tshs. 14,200,000/- was paid hence the remaining claimed outstanding amount of Tshs. 84,000,000/-. The transaction is in consonant with the definition of the term commercial case as defined in section 2 of the MCA where the term "Commercial case" is defined among others to mean:

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

*(i) N/A.*

*(ii) N/A*

***(iii) the contractual relationship of business or commercial organization with other bodies or persons outside it;***

*(iv) N/A (Emphasis supplied)*

What brings the parties into cross ways is the issue as to whether the trial court had jurisdiction to entertain the matter at dispute which its amount for the purpose of jurisdiction as averred by the respondent in paragraph 8 of the plaint is Tshs. 84,000,000/-. It is the law and I agree with Mr. Kilian's submission that, all courts in Tanzania are creatures of statutes and their jurisdiction is purely statutory, thus parties cannot agree to cloth the Court with the jurisdiction it does not have. 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 this matter the jurisdiction of the District Court to entertain commercial court is provided under section 40(3)(a) and (b) of the MCA, is the property which its value does not exceed Tshs. 100 million for immovable properties and Tshs. 70 million for movable properties. In this matter the applicable provision is subsection 3(b) of section 40 of the MCA. The said section 40(3)(a) and (b) of the MCA, reads:

*(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.** (Emphasis supplied).*

It is the law under section 41(1) of MCA that, the Resident Magistrates Court had concurrent jurisdiction with the District Court, hence vested with jurisdiction to entertain commercial cases too. Now back to the issue at hand, while Mr. Azizi does not dispute the subject matter at hand to be of commercial significance, it is his submission that, the contention by Mr. Kilian that, the respondent's suit exceeded the pecuniary jurisdiction of the trial court to entertain commercial case whose amount exceeds Tshs. 70 million

is unfounded. He argued the same does not cover the respondent as the case was filed under section 40(2)(b) of the MCA on 14/08/2019, long before the District Court was conferred with jurisdiction to entertain commercial cases of value of 70 million and below vide Written Laws (Miscellaneous Amendment) Act, No. 11 of 2019 that came into operation on 20/9/2019.

It is true and I, agree with Mr. Kilian that, the respondent's suit was filed before the coming into operation of Act No. 11 of 2019, which stated that the pecuniary jurisdiction of the district Court to entertain commercial cases is 70 million or below, as the case was instituted on 14/06/2019 and not 14/08/2019 as submitted by Mr. Kilian, while the changes on the pecuniary jurisdiction of the District Court became operational on 20/09/2019, hence could not affect the respondent. I however, disassociate myself with his submission that, before the amendment of section 40 of MCA by Act No. 11 of 2019 the District Court was not conferred with jurisdiction to entertain the commercial case. I so do as the District Court was clothed with jurisdiction to entertain commercial cases way back in 2004, vide Written Laws (Miscellaneous Amendment) Act No. 4 of 2004 which amended the provisions of section 40 of the MCA by adding immediately after subsection (2) of section 40 of MCA. The said amendment reads and I quote:



*(b) in section 40 by adding immediately after subsection (2) the following new subsection:*

*“(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 fifty 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 thirty million shillings.**” (Emphasis supplied).*

From the above cited provision of the law I entertain no doubt that, the pecuniary jurisdiction of the District Court to entertain commercial cases before the amendment of section 40(3) of MCA by Act No. 11 of 2019, was 30 million, which no doubt covered the respondent basing on the submission by Mr. Kilian that the matter was filed before 20/09/2019. I have also taken into consideration Mr. Kilian’s submission that, the suit was preferred under section 40(2) of MCA and hold the view that, the same does not bail out the respondent as that provision does not cover commercial cases rather normal civil cases. The provisions of section 40(2)(b) of MCA provides thus:

*(2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), **have and exercise original jurisdiction in proceedings of a civil nature**, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited-*

*(a) N/A.*

*(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed two hundred million shillings. (Emphasis supplied)*

Since the suit at discussion is not covered by the provisions of section 40(2)(b) of the MCA for not being a normal suit and since the claimed amount of Tshs. 84,000,000/- as deposed in paragraph 8 of the plaint for the purposes of determination of the jurisdiction of the court exceeds 30 million which was the pecuniary jurisdiction of the trial court at the time of its institution, I am satisfied that, the trial court was not crowned with the jurisdiction to entertain it. Hence this ground of appeal has merit and I uphold it. The ground no doubt disposes of the appeal and I see no reason to labour much on rest of the grounds for that will be academic exercise which does not serve any purpose.

All said and done, in invoke the revisionary powers bestowed to this Court under section 44(1)(b) of MCA and proceed to quash the proceeding of the Resident Magistrates Court of Dar es salaam in Civil Case No. 104 of 2019 and set aside its judgment and orders thereto. The respondent is at liberty to institute a fresh suit in accordance with the law and subject to the law of limitation of actions. The appeal is allowed to that extent.

Given the nature of the case, I order each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 16<sup>th</sup> September, 2022.



E. E. KAKOLAKI

**JUDGE**

16/09/2022.

The Judgment has been delivered at Dar es Salaam today 16<sup>th</sup> day of September, 2022 in the presence of Mr. Roman Selasin Lamwai, advocate holding brief for advocate Glory Mushi, for the appellants, the respondent in person and Mr. Rashid Umande, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**  
16/09/2022.

