

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL CASE NO 24 OF 2019

IVANNA FELIX TERIPLAINTIFF

VRS

BARCLAYS BANKK TANZANIA LIMITED.....DEFENDANT

MS. A. I. M GROUP (T) LIMITEDTHIRD PARTY

RULING

Date of last order: 15-12-2021

Date of ruling : 15-2-2022

B. K. PHILLIP, J

The plaintiff claims for payment of a sum of Tshs 800,000,000/= being damages for the unauthorized use of her images in marketing and promoting the defendant's services and products, aggravated damages, interests and costs of the suit. It is alleged in the plaint that the plaintiff is photogenic and has celebrity personality. The defendant has been using the plaintiff's images in different media platforms to market and promote its service and / or products without her consent or legal authorization. By using the plaintiff's image the 1st defendant has unjustifiably enriched itself.

Upon being served with the plaint, both the defendant and the third party filed their written statements of defence in which they disputed the plaintiff's claims. In addition, the advocate for the third party raised a point of preliminary objection, to wit;

- i) That this Honourable court has no Jurisdiction to entertain the matter as the claimed general damages in the sum of Tshs 800,000,000/= does not determine the pecuniary Jurisdiction of the Court.*

I ordered the point of preliminary objection to be disposed of by way of written submissions. Ms. Winjaneth Lema, learned Counsel filed the submission for the third party. Her submission was to the effect that it is a settled law that what determines the pecuniary jurisdiction of the Court is the substantive claim not the general damages. To cement her argument, she referred this court to the case of **Tanzania – China Friendship Textile Co. Ltd Vs Our Lady of Usambara Sisters (2006) TLR 70**, in which the Court of Appeal held as follows;

"..... In our view, it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the Court"

Other cases cited by Ms. Lema in cementing her argument are; **Tanzania Breweries Limited Vs Athony Nyingi , Civil Appeal No 199 of 2014, Iddy J. Kirume vs Sanlam General Insurance Tanzania Limited , Civil case No 105 of 2018,**(both unreported) and **Mwananchi Communications Limited and two others Vs Joshua K. Kajula and two others, Civil Appeal No 126 /01 of 2016** (unreported), in which the Court of Appeal held as follows;

".....if 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 of the High court where the suit was filed. The absence of such specification meant that the suit should have been tried in the lower the Courts that is the District Court or the Resident Magistrate's Court under section 40 (2) (b) of the MCA."

Ms. Lema argued that in the instant case the plaintiff has assumed the jurisdiction of this Court on the basis of the amount of general damages imposed by the plaintiff since it is neither specifically pleaded nor justified in any manner whatsoever in the pleadings. She maintained that this case was supposed to be file at the lower Court in compliance with the provisions of section 13 of the Civil Procedure Code, Cap 33 (the "CPC")

In rebuttal, Mr. Richard V. Massawe learned counsel for the plaintiff, submitted as follows; That the provisions of section 13 the CPC establishes a rule of procedure not jurisdiction and it is not intended to oust the jurisdiction of the Courts of higher grades which they possess under the Act constituting them. To cement his arguments, he referred this Court to Mulla Code of Civil Procedure, (Abridged) 14th Ed. Page 141. Moreover, he referred this court to Hansard of the parliament of the United Republic of Tanzania of 24th June 2016 available at <https://www.parliament.go.tz>. He contended that the provisions of section 13 of the CPC was amended by section 9 of Act No. 4 of 2016 by adding a proviso so as to cure a mischief that was there, to wit; to protect the inherent powers of the High Court.

Furthermore, Mr. Massawe referred this Court to the case of **Ivanna Felix Teri vs MIC Tanzania Public Company Limited Civil case No. 5 of 2019**, (unreported) whose claims are similar to the case in hand in which this Court while deliberating on a point of preliminary objection similar to the one in hand rule out that after the amendment of section 13 of the CPC, the proviso thereof gives this Court powers to entertain any case if wishes to do so and went on dismissing the preliminary objection that was raised by the defendant's advocate . Relying on the case of **Serengeti Breweries**

Limited Vs Hector Sequeriaa, Civil Application No 373/18/2018, (unreported), Mr. Massawe invited this Court not to depart from the legal position held by this Court in the case of **MIC Tanzania Public Company Limited** (supra).

With regard to the authorities cited by Ms.Lema , Mr. Massawe contended that all of them are distinguishable from the instant case. Starting with the case of **Our lady of Usambara Sisters** (supra) and **Tanzania Breweries** (supra), Mr. Massawe contended those cases were decided before the amendment of section 13 of CPC .The case of **Iddy J. Karume** (supra) involved a claim for a sum of Tshs 200,000,000/= which by itself was below the pecuniary threshold of the High Court, but also was decided *per incuriam*, argued Mr. Massawe. As regards the case of **Mwananchi Communications** supra) he submitted that the Court of Appeal did not make any determination on the application / interpretation of the provision in section 13 of the CPC and had the Court been moved to interpret the proviso in section 13 of CPC it would have arrived at the different decision. In addition, he argued that the claimed amount in that case was Tshs 150,000,000/=which was below the High Court's pecuniary jurisdiction whereas the claim in the case in hand is far higher than Tshs 150,000,000/=.

In concluding his submission, Mr. Massawe , insisted that there are number of ways/rules used in interpretation of statutes such as literal rule, golden rule mischief rule and purposive approach, but the most appropriate way of interpretation is the one involving exploring the intention of the legislature. To cement his arguments, he cited the case of **Pan African Energy Tanzania Ltd Vs Commissioner General Tanzania Revenue Authority, Civil Appeal No 172 of 2020** and **James Burchard Rugemalira Vs Republic and one another, Criminal Application No. 59 /19 of 2017** (both unreported). He contended that the proviso in section 13 of the CPC was added to safeguard the general jurisdiction of the High Court. He urged this Court to dismiss the point of Preliminary objection.

In rejoinder, Ms. Lema reiterated her submission in chief. She maintained that the plaintiff claims for payment of general damages, not special damages which can be used to determine the Court's jurisdiction. She insisted that the case of **Our Lady of Usambara Sisters**(supra) and **Mwananchi Communications** (supra) are relevant in this case as they state clearly that what determines the pecuniary jurisdiction of the Court is the substantive claim not the general damages. She contended that she cited the provisions of section 13 of the CPC just to show that the plaintiff's case

was supposed to be filed at the Court of the lowest grade competent to try it and did not mean that provisions of section 13 of CPC provides for the jurisdiction of this Court, as contended by Mr. Massawe in his submission.

Having analyzed the submissions made by the learned counsel and perused the pleadings as well as the case laws referred to this Court by the learned counsel, let me embark on the determination of the merit of the point of preliminary objection. First of all, I wish to point out that by reading the plaint, there is no doubt that the plaintiff claims for general damages to a tune of Tshs 800,000,000/= though it is not stated in the plaint that the claim is for general damages. However, it is a common knowledge that special damages are normally specifically pleaded by stating how the amount claimed have been arrived at and need to be proved (**see the case of Zuberi Augustino Vs Anicet Mugabe (1992) TLR 137**). In this case the plaintiff just stated that she claims for damages and has not given any specific explanation how the sum claimed was arrived at. That is why I have reached at a conclusion that the plaintiff's claim is for general damages. For easy of understanding let me reproduce paragraphs 3, 4, and 5 of the plaint hereunder.

3. That the plaintiff's claim against the defendant is for;

(a) Declaratory orders

(b) payment of sum of Tanzania Shillings Eight Hundred Million (Tshs 800,000,000/=) as damages for the unauthorized use of the plaintiff's images in marketing and promoting the defendant's services and products.

(c) payment of royalties arising out of the benefits gained as a result of publishing the image referred under paragraph 5 below.

(d) aggravated damages

(e) interests

(f) Costs of this Suit

4. That the plaintiff's is photogenic and has a celebrity personality. Plaintiff's photos are annexed here to and marked as "annexure 1F-1 collectively "and leave of this Court is sought that the same form part of this plaint.

5. That the defendant, using different media platforms including its automatic Teller Machines (ATMs) and without the plaintiff's consent, has been using plaintiff's image to market and promote its services and /or products. Copies of the defendant's advertisements are annexed hereto and marked as "annexure 1F 2 collectively "and leave of this Court is sought that the same form part of this plaint.

Before going further , I think , it is also important to point out at this juncture that the position of the law is that, except special damages which have to be specifically pleaded as alluded earlier in this ruling other forms of claims for damages are normally assessed and granted by the court depending on the circumstances of each case. [**see the case of Copper Motor Corporation Limited Vs Moshi / Arusha Occupational Health services (1990) TLR 96**]. In the case of **Tanzania friendship Textile** (supra) the court said that general damages are awarded at the discretion of the Court. The court decides the amount to be awarded, that is why they are not quantified and in event they are quantified erroneously the same cannot affect the pecuniary jurisdiction of the Court.

Mr. Massawe submitted extensively on the interpretation of the section 13 of the CPC in particular the proviso thereto. With due respect to him, in my understanding the point of preliminary objection raised by Ms. Lema is concern with the criteria used by the Court in determining its pecuniary jurisdiction.

It is a common knowledge that before entertaining any case the Court has to ascertain whether or not it has jurisdiction to entertain the matter. Now,

how does the Court determine its pecuniary jurisdiction is the central issue in the point of preliminary objection in hand.

I have read the judgment of this Court in the case of **MIC Tanzania Public Company Limited (supra)** whose facts are similar to the facts in the instant case and am alive of the doctrine of the *stare decisis*, which requires a judge not to lightly dissent from the considered opinion of his brethren. I have also read the judgment of the Court of Appeal in the case of **Mwananchi Communication** (supra). In my considered opinion, the decision of the court of Appeal in the case of **Mwananchi Communication** (supra) is relevant in this matter and gives the correct position of the law as far as the determination of the pecuniary jurisdiction of the Court is concern. I am not bound by decision of this Court in the case of **MIC Tanzania Public Company Limited** (supra), but I am bound by the decisions of the Court of Appeal. With due respect to Mr. Massawe, the points he raised in distinguishing the case of **Mwananchi Communication** (supra) have no merits because that case was decided by the Court of Appeal after the judgment of the High Court of Tanzania in the case of **MIC Tanzania Public Company Limited** (supra) and the Court of Appeal deliberated specifically on the criteria used in determination of the Jurisdiction of this

Court. The Court said clearly that if the suit does not highlight the specific claims and only has a general statement of claim, then it misses an important ingredient which can enable this Court to determine its pecuniary jurisdiction. Such a suit has to be filed in the lower Courts. The Court of Appeal, quoted with approval its findings in the case of our **Lady of Usambara Sisters** (supra). The facts of the case of **Mwananchi Communication** (supra) are similar to the facts of the case in hand since the plaintiff claimed for general damages in excess of Tshs 150,000,000/= a figure which indicated that the plaintiff's claim was above the pecuniary jurisdiction of the lower Courts, but there was no any claim for special damages as it is in the case in hand. As I have point out herein above, the plaintiff's claims in the case of **Mwananchi Communication** (supra) was more than Tshs 150,000,000/= not Tshs 150,000,000/= as contended by Mr. Massawe. Also, it has to be noted that the amount indicated in the plaint as general damages to tune of Tshs 800,000,000/= cannot be a basis for determination of the jurisdiction of this Court since general damages are assessed by the Court. In short the position held by this Court in the case of **MIC Tanzania Public Company Limited** (supra) has been overturned by the Court of Appeal in the case of **Mwananchi Communication**(supra).

Moreover, Mr. Massawe's contention that the since the Court of Appeal in the case of **Mwananchi Communication** (Supra) did not discuss the proviso in section 13 of the CPC, then that case is distinguishable from the case in hand is misconceived because the main issue that was considered by the Court was whether or not general damages can be a basis in making determination of the pecuniary jurisdiction of the Court. The point of preliminary objection raised in this case is exactly on the same issue. With due respect, to Mr. Massawe, in my opinion he has missed the gist of the point of preliminary objection in hand.

In addition, to my understanding, in the case of **Mwananchi Communication** (supra), when the Court of Appeal held that if there is no specific claim for an amount which is within the pecuniary jurisdiction of the High Court, then the case has to be tried in the lower Courts , in essence the Court was impliedly referring to the provision of section 13 of CPC which requires cases to be filed in Court of the lowest grade competent to try it . Therefore , according to the judgment of the Court of Appeal in the case of **Mwananchi Communication**(supra), jurisdiction of this Court is affected by the pecuniary value of the subject matter and parties to a case are obliged to state the value of the subject matter as

provided in Order VII rule 1 (i) of the CPC so as to enable the Court to determine whether or not it has pecuniary jurisdiction to entertain the case before it .

In the upshot, I hereby uphold the point of preliminary objection and strike out this suit with costs.

Dated this 15th day of February 2022



A handwritten signature in blue ink, appearing to read "B. K. PHILLIP", is written over a circular stamp.

B. K. PHILLIP

JUDGE