

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 4 OF 2021

(Appeal from the Judgment and Decree of District Court of Ilala at Kinyerezi, in Civil Case No. 168 of 2018, before Hon. Laizer, RM, dated 15th December, 2020)

SALUM ALI.....1ST APPELLANT

MOHAMED ALI.....2ND APPELLANT

VERSUS

SALMA SAIF ABDALLAH.....RESPONDENT

JUDGMENT

Date of last Order: 10/03/2022

Date of judgment 25/03/2022

E.E. KAKOLAKI J.

This appeal originates from Civil Case No. 168 of 2018 before the District Court of Ilala, in which respondent sued the appellant for breach of contract.

What is discerned from the record it that, on 10th of June, 2016 parties entered into sale agreement of the house located at Shariff Shamba street with Ilala District, Dar es Salaam Region at the sale price of 350,000,000/=.

After signing the contract, respondent paid advance payment of Tsh.120,000,000 and the remaining balance, that is 230,000,000/= was to

be paid on handing over of the title deed by the appellants. However, the appellants did not furnish the title deed to the respondent despite several reminders. Thus, the respondent decided to pursue his right through Civil Case No. 68 of 2018 before the District Court of Ilala in which he was claiming for the following prayers;

- (i) Declaration that the defendant breached the terms and conditions of the sale agreement contract.
- (ii) An order for specific performance of the terms and conditions of the contract
- (iii) General damages to the tune of Ts. 20,000,000/= for the breach of contract
- (iv) Cost of the suit
- (v) Any other order(s) relief (s) this Honourable court may deem fit and just to grant

Upon hearing of both parties, the trial court decreed in favour of the respondent as follows;

- (i) Specific performance of the terms and conditions of the contract by the defendant, in lieu of refund of Tsh. 120,000,000 to the plaintiff with 7% interest from the date of signing of the contract till the date of payment in full.

- (ii) General damages to the tune of Tsh.10,000,000
- (iii) Costs of the suit.

The said decision triggered the discontented appellants to file this appeal armed with one ground thus; *the trial magistrate erred in law and fact in deciding the matter in favour of the respondent while it had no jurisdiction to entertain the same.* On strength of the said ground, the appellants are requesting the court to allow the appeal by setting aside the decision of Ilala District Court, cost of the appeal and trial court be borne by the respondent, and any other relief this court may deem fit to order for want of jurisdiction of the trial court.

At the hearing of the appeal which was argued orally, Mr. Frank Mtuta learned advocate appeared representing the appellant's while respondent enjoyed the services of Mr. Abdul Aziz learned advocate. Both parties were heard viva voce.

Addressing the Court on the sole ground of appeal, Mr. Mtuta faulted the lower court for deciding the matter in favour of respondent without jurisdiction. While referring the court to section 40 (2) of the Magistrates Courts Act ,[Cap 11 R.E 2019] which provides for pecuniary jurisdiction of the District Court, Mr Mtuta argued that, the nature of the dispute in this

matter is based on the contract of sale of the house whose contractual value is Tsh. 350,000,000/= and unpaid balance is 230,000,000 million. In his view the title deed and the unpaid balance are both movable properties, thus he stood firm that, since the centre of dispute is the contract valued at 350,000,000 the District Court had no jurisdiction to entertain the same. Mr. Mtuta implored the court to follow its decision in the case of **Mkurugenzi Mtei Express Vs ,Peter Shauri**, Civil Revision No 02 of 2019 (HC) at page 3, in which the court clarified the pecuniary jurisdiction of the District Court. Mr. Mtuta rested his submission by submitting that, since the trial court acted without jurisdiction and since jurisdiction of court is the creature of statute then, the decision made out is null and illegal. He thus requests the court to allow the appeal and set aside the judgment of District Court of Ilala with costs.

In response Mr. Abdul Azizi for the Respondent contended that, the trial magistrate had jurisdiction to entertain the matter basing on the claims in the plaint. He said that, the respondent's cause of action is found on paragraph 4 of the plaint and the relief clause as it is predicated on breach of contract and prayer for specific performance. Concerning the centre of dispute, Mr. Abdul Azizi was at one with Mr. Mtuta's assertion that, it was on

unpaid up balance of Tsh. 230,000,000 arising from breach of contract, and thus respondent sued for specific performance so that the appellant would be compelled to surrender the title for him to realize the payment and if specific performance could not be effected then to be refunded the advance payment. He referred this Court to section 40 (2) (a) and (b) of the MCA, where jurisdiction of the District Court is well elaborated to be 300,000,000/- million for immovable and 200,000,000/- million for movable properties. In his view, since the property is immovable and the dispute was on the balance of payment of Tsh. 230,000,000 the same was within the jurisdiction of the trial court to try. He argued that, the submission by Mr. Mtua that, the title and unpaid up amount of Tsh. 230,000,000/- is movable property is misplaced and misconceived as the two could not exist without the house in dispute which is immovable property.

While making reference to page 6, paragraph 2 of the trial court Judgment on the orders of the court, Mr. Azizi went on arguing that, the court issued an order for specific performance of the terms and conditions of the contract by the defendant, in lieu of refund of Tsh.120,000,000/= to the plaintiff. To him specific performance meant handing over of the title deed by the appellant to the respondent so that respondent could pay the balance of Tsh.

230,000,000/= to the appellant. He further argued that, there is nowhere it is indicated that, there was dispute of Tsh. 350,000,000 million, and added that, the case cited by the appellant has no relation with the matter at hand apart from explaining the jurisdiction of the District Court on immovable and movable properties. In concluding, Mr. Azizi invited this court to dismiss the appeal with costs since the same has no merit. In brief rejoinder Mr. Mtuta had nothing new to add apart from maintaining that; the title deed subject of this dispute is valued at Tsh. 350,000,000 as per the contract so the District Court had no jurisdiction to entertain the matter. Otherwise he reiterated what he stated in his earlier submission in chief.

I have keenly examined and considered the fighting submissions by the parties in light of the sole ground of appeal with the weight it deserves. I have also inquisitively perused the lower court records with view of understanding the nature of parties' dispute for the proper determination the question of jurisdiction. It is common knowledge that, the question of jurisdiction of the Court is so fundamental and it has to be established the earliest possible time before commencement any trial before the court of law or tribunal. In my firm view the reason behind is to avoid the risk of the Court to proceed with hearing of any matter before it on assumption of being

clothed with jurisdiction which in fact it does not have. This position was adumbrated by the Court of Appeal in the case of **Fanuel Mantiri Ng'unda**

Vs. Herman M. Ng'unda, [1995] TLR 159 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 the law as also rightly submitted by Mr. Mtuta that, 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." (Emphasis added)*

In this case, both parties do agree on the settled law concerning establishment and jurisdiction of the courts as stated above, but they only lock their horns when it comes to the issue as to whether the District Court of Ilala had jurisdiction to entertain the matter at hand or not. In order to disentangle them, one has to understand the nature of the claim which was before the trial Court. From the evidence on record and submissions of both counsels, it is not disputed that, parties signed a sale agreement of the property (house) in Plot No. 86 located at Shariff Shamba street Ilala Municipality at Dar es Salaam for consideration of Tshs. 350, 000,000/= as the purchase price. It is also uncontroverted fact that, the respondent paid advance payment (first instalment) of 120,000,000/=, and the remaining amount (second instalment) of Tshs. 230,000,000/= was to be paid after handing over of the title deed of the said property to the respondent. It is further uncontested fact that, the said property is immovable one. What seem to bring parties into dispute during the trial was the issue of specific performance of one of the term of contract (sale agreement) by the appellants in respect of the said immovable property for either handing over of the title deed to the respondent so that the 2nd instalment of Tshs. 230,000,000/- could be effected to the appellants or refund of Tsh.

120,000,000 paid as advance payment to the respondent. With that understanding, and given the nature of the claims or reliefs sought by the respondent in the said case, it is evident to me and I have no doubt in holding that, the respondent's cause of action was predicated on breach of sale agreement (contract) of immovable property whose value (consideration) stood at Tshs. 350,000,000/- and therefore the relief sought and granted by the trial court in favour of the respondent for handing over the title deed to him was for recovery of immovable property and not movable property as submitted by both counsels. To that end, I differ with Mr. Mtuta's proposition that, the claim is premised on movable property but rather immovable property (house) which is the subject matter of the alleged breach of contract. In the same vein, I distance myself from Mr. Aziz's assertion that, determination of pecuniary jurisdiction of the matter at hand hinges on the unpaid up contractual amount of Tshs. 230,000,000/- and/or the claimed price amount Tshs. 120,000,000/- paid in advance by the respondent to the appellants, as it is aggregate of the two claimed amounts that constitute the purchase price of the property in the sale agreement, the agreement in which the order for specific performance was granted from.

Now back to the crux of the matter as to whether the District Court of Ilala had jurisdiction or not to entertain that matter, the law under section 40(2) (a) and (b) of the MCA is very clear as to the pecuniary jurisdiction of the District Court and the Resident Magistrates Court which is Tshs. 200,000,000/- for movable property and Tshs. 300,000,000/- for recovery of immovable property. For clarity section 40 (2)(a) and (b) of the MCA is quoted here under.

40 (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) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed three hundred million shillings; and

(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.

Applying the above provision to the present appeal and considering the fact that parties' dispute is premised on breach of sale agreement (contract) of immovable property (house) whose purchase price is Tshs. 350,000,000/- as rightly argued by Mr. Mtuta, and since the said amount exceeded Tshs. 300,000,000/- which is the pecuniary limitation for the District Court, I find the District Court of Ilala was not clothed with pecuniary jurisdiction when entertained the claims in Civil Case No. 168 of 2018. I therefore find merit in the appellants' grounds of appeal. In view of the aforesaid, this appeal is allowed and consequently the judgment of the District Court of Ilala in Civil Case No. 168 of 2018 is hereby set aside.

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

It is so ordered.

DATED at Dar es salaam this 25th day of March, 2022.



E. E. KAKOLAKI

JUDGE

25/03/2022.

The Judgment has been delivered at Dar es Salaam today on 25th day of March, 2022 in the presence of Mr. Abdul Azizi advocate for the

Respondent and Ms. Asha Livanga, Court clerk and in the absence of the appellants.

Right of Appeal explained.

A handwritten signature in blue ink, appearing to be 'E. E. Kakolaki', written in a cursive style.

E. E. KAKOLAKI

JUDGE

25/03/2022