

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CIVIL APPEAL NO. 25 OF 2021

*(Arising from Civil Case No. 01 of 2020 Resident Magistrates Court of Manyara at
Babati)*

SEBASTIAN MACHAAPPELLANT

VERSUS

OVERMINGI ISOWE1ST RESPONDENT

RICHARD MINJA2ND RESPONDENT

JUDGMENT

15/03/2022 & 05/05/2022

KAMUZORA, J.

The appellant Sebastian Macha being dissatisfied with the judgment and decree of the Resident Magistrate's court (trial Court) brought this appeal to this court against Overmingi Isowe and Richard Minja, the respondents herein. The brief history as gleaned from the records are that, in the year 2012 the parties entered into a contract hiring two lorries tipper T.228 ANE and T.951 ATD owned by the respondents. The agreed amount per day was Tshs. 140,000/= per day for each lorry.

It was alleged that the appellant used the two lorries for 68 days but disappeared without paying the agreed amount. The respondents made a thorough follow-up of the whereabouts of the appellant and managed to arrest him and sent him to the police station. They later agreed to execute another agreement for repayment of the money, Tshs. 16,820,000/= on September 2019. The payment was to be in five instalments and the final instalment was to be paid on 07/01/2020. The appellant handed over the original card for the car with registration number T.610 AAN and land sale agreement as security for the claimed amount. The appellant did not pay the agreed amount and the respondents instituted a suit against the appellant at the trial court claiming for breach of contract and claimed from the appellant payment of Tshs 16,820,000/= with 35% interest per month starting from 07/09/2019 to 07/01/2020 amounting to Tshs 75,412,442.40/=.

The decision of the trial court was entered in favour of the respondents where the court ordered the appellant to pay the defendants (now respondents) the amount of Tshs. 16,820,000/= and interest on the principal sum at commercial rate from 07/01/2020 to the date of judgment. The appellant was also ordered to pay the respondents interest on decretal sum at court rate from the date of

judgment to the date of payment in full and costs of the suit. The court also dismissed the appellant's counter claim with costs.

Being dissatisfied with the trial court's decision the appellant preferred an appeal to this court and six grounds of appeal were advanced as follows: -

- 1) That, the trial court erred in law and fact be entertaining the Civil Case No. 01 of 2020 while it has no jurisdiction to do so.*
- 2) That, the trial court erred in law and in fact by delivering its judgment in favour of the respondent while there was no evidence adduced by the respondent in support of their claims against the appellant.*
- 3) That, the trial court erred in law and fact by entertaining the matter which was time barred.*
- 4) That, the trial court erred in law and fact by failure to consider the defence of duress and counter claim adduced by the appellant in respect of the contract.*
- 5) That, the trial court erred in law and fact by concluding that there was a valid contract between the parties while there was no evidence in support of such matter.*
- 6) That, the trial court erred in law and fact by its failure to weight and evaluate the evidence of the defendants.*

Following those grounds, the appellant prays to this Court for the orders that, the appeal and counter claim be allowed and the decision of the trial court be quashed with costs, an order that the motor vehicle

registration card and the land sale agreement of the appellant be returned to him by the respondents.

As a matter of legal representation, the appellant was ably represented by two learned counsel, Ms. Fatuma who was appearing in court and CPA Harun Idi Msangi who filed the submission in support of appeal. The respondents enjoyed the service of Mr. John J. Lundu senior counsel. Hearing of the appeal was by way of written submissions and both parties complied to the submission schedule.

Submitting for the 1st and 3rd grounds of appeal, the counsel for the appellant addressed the issue of the trial court jurisdiction to try Civil Case No. 01/2020. The counsel submitted that, it is a trite law that it is a substantive claim that determines the pecuniary jurisdiction of the court and that the substantive claim should not be too vague to make it difficult for the court to know whether it had jurisdiction to try it or not. The counsel for the appellant explained that, the amount claimed by the respondents at the trial court included the interest as the substantive claim was Tshs. 16,820,000/= which was below the jurisdiction of the trial court. To cement on this point, the counsel cited the case of **Malembuki Kitesho Mollel V Pop Vriend (Tanganyika) Limited**, Civil Appeal No. 56/2016 (Unreported) where the court nullified the

proceedings, judgment and decree that emanated from a defective plaint as substantive claim was considered vague.

Referring section 18 (1) of the Magistrate Courts Act RE 2019 which set the pecuniary jurisdiction of 30 million shillings to the primary court The counsel for the appellant insisted that, both the proceedings and the judgement of the resident magistrate court be nullified for lack of jurisdiction.

The counsel for the appellant also urged this court to take note and consider the judgement as incurably defective for the judgment is titled Babati District Court while the proceedings and decree is titled the Resident Magistrate Court.

On the 3rd ground the counsel for the appellant also submitted that, the trial court entertained the matter which was time bared. The counsel explained that, the cause of action in Civil Case No. 1/2020 arose in year 2012 and it related to contract executed in the year 2012. Upon giving brief facts related to the contract The counsel for the appellant insisted that, as per item 7 of the Schedule to the law of Limitation Act RE 2019 the time limit founded on contract is six years. That, Civil Case No. 1/2020 was instituted eight years contrary to the Law of Limitation Act. The counsel for the appellant urged this court to regard that the suit

was time barred and the trial court had no jurisdiction to entertain it under the Law of Limitation Act.

Submitting on ground 2 and 5 The counsel for the appellant argued that, the core issue for the determination by this court is whether the respondents proved the existence of contractual relationship between them and the appellant for the judgment to be delivered in their favour. Referring exhibit P1 The counsel for the appellant submitted that, the appellant proved that there was no any contractual relationship between the respondent and the appellant but rather the appellant was just a witness to Exhibit P1 which is a contract entered between the respondent and Daben Construction Limited. The counsel added that, the appellant proved that there was no any contractual relationship between them as he tendered exhibits D1 and D2 which are cheque and a payment note made by Daben Construction Limited to the second respondent showing part payment of hiring the vehicles. The counsel for the appellant was of the view that, the trial Magistrate ought to have invoked Order 1 Rule 10(2) of the Civil Procedure Code Cap 33 RE 2019 and the decision in the case of **Austack Alphonse Mushi Vs Bank of Tanzania Ltd & another**, Civil Appeal No 373/2020 CAT at Mbeya (Unreported) to conclude that there was no agreement for hire of lorries between the appellant and the respondents.

On ground 4 the counsel for the appellant submitted that, the trial court failed to consider the defence of duress and counterclaim raised by the appellant in respect of the contract. the counsel explained that, respondents tendered exhibit P2(RB) with the allegation of obtaining service by false pretence. That, while the respondents' pleadings and evidence before trial court reveal that the appellant signed exhibit P3 which is the agreement for repayment of money, the appellant claimed that the agreement tendered by the respondent as P3 lacked free consent since coercion was used to make the appellant sign the papers and he was not sent to the magistrate at the time of signing the said papers. The appellant's counsel insisted that, fraud was committed by the respondents by changing the original terms to collect the balance of Tshs 2,520,000/= to the amount of Tshs 16,820,000/=. That the trial magistrate did not consider the appellant's evidence, counter claim and the relief sought. The counsel also added that, the Magistrate extracted the decree that reflected the relief sought in the plaint but the decree did not include the relief sought in the counter claim as required under rule 6 (1) of Order XX of the CPC. For this the appellant's counsel cited the decision of the Court of Appeal in the case of **Runway T Limited V. WIA Company Limited and CASCADE Company Limited.**

For the 6th ground the counsel for the appellant submitted that, the honourable magistrate deliberately declined to weigh and evaluate evidence presented during the hearing of the case. That, while the trial court made a conclusion that the appellant was in debt, the appellant insisted that there is nowhere in his testimony, written statement of defence and counter claim the appellant acknowledged that he is indebted to the respondent herein. For this the counsel referred this court to the case of **Omary Abdallah Kilua V Joseph Rashid Mtunguja**, Civil Appeal No 178/2019. The counsel for the appellant insisted that, the trial magistrate did not weigh and evaluate the appellant evidence and judgment of the trial court did not take into consideration the evidence of all witnesses in the main suit and in the counter claim. The counsel pointed out that during hearing the appellant gave notice to the respondents to present the receipts for the purchase of fuel that was used in the vehicles and that evidence was not cross examined upon by the respondents thus urged this court to consider that there was acceptance to the same. The counsel referred the decision in the case of **Browne Vs Dunn [1893] 6R 67 H.L.** Concluding her submission the counsel for the appellant prayed for this court to regard that an erroneous decision was reached against the appellant. The counsel further prayed for the appeal and counter claim

to be allowed and the decision of the trial court to be quashed with costs and also prayed for an order for returning the motor vehicle registration Card and the land sale agreement to the appellant.

In responding to the appellant's written submission, Mr. Lundu submitted for the 1st ground that, the respondents' specific claim was Tshs. 75,412,44/40 at the time of filling a plaint. That, the general damage and costs of the suits were brought separately from the specific claim thus, Mr. Lundu was of the view that, the current case is distinguishable from the **Melembuki Kitesho Mollel** case to which the substantive claim included damages, interest and costs of the suit. Mr. Lundu insisted that the interest of 35% per month was from the date of default up to the date of filing the suit. That the plaint contained specific claim at the tune of Tshs. 75,421,440/40. He insisted that the substantive claim was not vague as opposed to the case cited by the appellant.

With regard to ground 3 Mr. Lundu submitted that, limitation of action depends on when the cause of action arose and not the date of execution of contract. That, exhibit P1 show the existence of a contract and that there is evidence of the hiring charges not paid by the appellant after completion of the construction at Sangaiwe cite. That,

the appellant disappeared until 2019 when he was arrested for the offence of obtaining service by false pretence. For that reason, Mr. Lundu submitted that, the cause of action arose when the appellant agreed to pay a sum of Tshs 16,820,000/= in the year 2019.

As for exhibit P1 Mr. Lundu submitted that, the cause of action arose on 7/01/2020 when the appellant defaulted to pay the amount agreed. He added that, the allegation that the appellant was not present when exhibit P3 was executed is an afterthought as he admitted to have signed exhibit P3 hence the Civil Case No. 1/2020 was not time barred.

Replying to ground 2 and 5 Mr. Lundu submitted that, there is evidence that it was the appellant who approached the respondents and asked to hire their two lorries for his road construction project. That, by the contract of 2012 (Exhibit P1), the appellant did not present himself as the supervisor of any project on behalf of the alleged Daben Construction Limited. That, even exhibit P1 does not show the status of those who witnessed the agreement signed after the appellant had absconded paying the hiring charges. That, the wording of exhibits P5 and D1 show that exhibit P5 was separate from hiring of lorries. That, Exhibit P5 shows that Tshs. 6,900,000 was a debt owed by the appellant to the 2nd respondent which was to be paid with additional amount of

Tshs. 100,000 and exhibit D1 was a cheque for part payment of hiring vehicles. That, Daben Construction Limited was not a part to the contract made in 15/12/2020 as well as to the contract of hiring the vehicles.

The counsel for the respondents also submitted that **Austack Alphonse** case as cited by the appellant is distinguishable to this case as it was the company which entered the loan agreement while in this case the appellant faced the respondent in person not as a company and thus it was the appellant who faulted paying hiring charges. He insisted that, the trial court did not error by delivering its judgment in favour of the respondent as it was correct in law.

Replying to ground 4 Mr. Lundu submitted that, there was no duress as claimed in the counter claim. That, reading page 4 of the trial court judgment the court considered the defence of duress and it was not convinced by the appellant. That, there was evidence that security for payment of the agreed sum in Exhibit P3 was presented by the appellant when exhibit P3 was being executed but it was not handed to the police who later handed the same to the respondents as alleged. That, after court dismissed the counter claim with costs. He therefore prayed for the 4th ground to be dismissed.

Replying on the 6th ground Mr. Lundu submitted that, what the trial magistrate did not do was to reproduce what every witness had said as well as the submissions but that, the trial court evaluated and weighed the evidence of both parties and came to the conclusion. He thus prayed for the appeal to be dismissed with costs for lack of merit.

In rejoinder submission the counsel for the appellant reiterated what was submitted in chief and further added that, the respondent is not objecting that paragraph 8 of their plaint is the one that gave the court jurisdiction. The counsel insisted that the substantive claim was Tshs 16,820,000/ and that the 35% interest only appeared in the plaint and never agreed by the parties thus the suit was not within the pecuniary jurisdiction of the Resident Magistrates Court but rather for the Primary court.

Regarding the 3rd ground it was re-joined that, the court pronounced its judgment relying on Exhibits P1 and P3 breached in 2012 hence if the cause of action arose in 2012 and the suit was instituted in 2020 it was beyond the time limit of six years.

With regard to the 2nd and 5th grounds the counsel added that the trial court did not examine whether the elements of a valid contract existed throughout the evidence adduced by the parties and if the

appellant was a party to exhibit P1. That, the respondents never proved that they had contractual relationship with the appellant and that the appellant was a party to exhibit P1. For the 4th ground the counsel rejoined that, the respondent throughout their evidence and reply submission failed to show that there was free consent on part of the appellant during the execution of P3. That, P3 was executed after they had arrested the appellant and the RB was tendered in court as exhibits P2. That, the respondent failed to prove how the appellant handed over to them the vehicle registration card together with his title deed. That, the trial court did not consider the reliefs sought by the appellant at the counter claims but rather only considered the reliefs contained in the main suit.

Regarding the 6th ground the counsel for the appellant submitted that, the respondents are admitting that the trial court did not ignore the evidence of the appellant but also it produced its own evidence against the appellant. That, the trial court did not give reason as to why it failed to consider the evidence of the appellant or even directing its mind on it. Basing on the above submission the appellant prays that the appeal be allowed and this court quash and set aside the proceedings and judgment of the trial court with costs.

Before I deliberate on the merit of the appeal let me address the issue on the citation of the court that tried the matter. It was alleged and not disputed that, while the judgement of the trial court indicated that the judgment was delivered by the district court of Babati, the proceedings and the decree in the same matter indicated that the matter was heard and determined by the resident magistrate court of Manyara at Babati. It is not in controversy that both appeared and prosecuted or defend their suit at the Resident's magistrate Court of Manyara at Babati before Hon. S. S. Kobero RM. That fact is reflected in the typed trial court proceedings as well as the decree of the court. The variation is on the title of the judgment which shows the district court of Babati to me the error is curable as even the original seal of the court stamped to the judgment is that of the Resident magistrate court of Manyara. I therefore, treat the tittle thereto as a mere sleep of pen and or typing error which is curable by either, the parties making an application for the same to be corrected or by order of the superior court to do so. In that regard I order the title in the judgment to be corrected for the same to read the correct court that heard and determined the matter.

Going back to the merit of the appeal, I will start with the question of the jurisdiction of the court which was argued on the 1st and 3rd

ground on pecuniary jurisdiction and time limitation. Jurisdiction is a question of law and it is a creature of statute such that the court of law cannot adjudicate on any matter which is beyond powers vested to it by the law. Thus, the issue of jurisdiction being the creature of the statute nothing can oust such jurisdiction except by a provision of the law. It is a trite law that a court before embarking on determining any matter it must ascertain whether it is vested with the jurisdiction to do so. Pecuniary jurisdiction of the court and time within which the cause of action arose are important aspects in determining whether the court is vested with jurisdiction to determine a suit or not.

On the issue of pecuniary jurisdiction, it was alleged that the trial court entertained the matter which was below its jurisdiction contrary to section 13 of the Civil Procedure Code Cap 33 R. E 2019. The said section 13 reads: -

"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade: Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court."

It was contended by the appellant that while the above provision requires the suit to be instituted in court of lowest grade, the respondent instituted a suit which its specific claim was within the jurisdiction of the primary court and not the resident magistrate court. The appellant claim that the specific claim by the respondent was Tshs. 16,820,000 as per paragraph 8 of the plaint. However, the respondents insisted that the specific claim was Tshs. 75,412,442.40.

Going through the records before the trial court I discovered that the issue as to pecuniary jurisdiction was not raised before the trial court for determination. However, as said before the question of jurisdiction can be raised at any stage and still be determined by the court. There is plethora of authorities to that effect. In this matter I have perused the records and discovered that among the plaintiff's reliefs sought in the plaint was for payment of Tshs. 75,412,442.40. That amount gets its source from paragraphs 5 and 8 of the plaint which read: -

"5. That, after being arrested the plaintiffs and the defendant agreed that the defendant pay to the plaintiffs Tshs. 16,820,000/= by five equal instalments of Tshs. 3,364,000/= every 7th day of five months starting from 7/9/2019 to 7/1/2020 without fail failure to that, legal actions to be taken against the defendant. photocopy

of the agreement to pay Tshs.16,820,000/= is annexed and marked QR2."

"8. That, since the defendant have failed to honour the agreement, the plaintiffs are claiming Tshs. 16,820,000/= with 35% interest per month starting 7th September 2019 to 7th January 2020 amounting to Tshs. 75,412,442.40."

The wording of the above paragraphs of the plaint suggest that the specific claim was Tshs. 16,820,000 and not Tshs. 75,412,442.40 as suggested by the respondents. The claim emanated from the agreement alleged to be signed by the parties which according to paragraph 5 of the plaint it contained no clause for interest. Thus, the insertion of interest under paragraph 8 was intending to increase the claim which in fact could not be included in the specific claim. In my view Tshs. 75,412,442.40 was not pleaded as substantive claim, it was a claim inclusive of interest. The claim for 35% interest in this matter therefore cannot form part of the specific claim and for that reason I do agree with the counsel for the appellant that specific claim was Tshs 16,820,000/=.

I do not agree with the contention by Mr. Lundu that, the current case is distinguishable from the **Melembuki Kitesho Mollel** case. The decision in that case is similar to the circumstances in the present case. While in that case this court found that the claim of Tshs 52,376,197

was pleaded as substantive claim including damages, interest and costs of the suit was vague to determine the jurisdiction of the court. Similarly in the present matter the claim of Tshs. 75,421,440/40 inclusive of 35% interest was vague in determining the jurisdiction of the trial court.

I am aware of the legal position that, it is the specific claim that is used to determine the courts pecuniary jurisdiction and not the interest accrued thereafter. This position of the law is stated in the Landmark case of **M/s Tanzania-China Friendship Textile Co. Limited Versus Our Lady of the Mount Usambara Sisters (2006) TLR 70** where the Court of Appeal held inter alia that: -

"It is a substantive claim and not damages which determine the pecuniary jurisdiction of the Court"

Since in this case the substantive claim is Tshs. 16,820,000/= the proper court of the lowest grade with jurisdiction to determine the same is the primary court and not the resident magistrate court. I say so because section 18(1)(a)(iii) of the MCA prescribes pecuniary powers of the primary court not exceeding Tanzanian Shillings thirty million while section 40 of the MCA prescribes pecuniary powers of the district court and resident magistrate court not exceeding 200 million for suits of this nature.

It is clear as prior demonstrated above, section 13 of the Civil Procedure Code, [Cap. 33 R.E 2019] requires every suit to be instituted in the court of the lowest grade competent to try it, save for the High Court which has unfettered jurisdiction to hear and determine any suit. It is in my opinion that, the enactment of section 13 of the CPC, was intended to make sure that every court reserves its pecuniary jurisdiction to try and determine cases. And more important, cases to be tried at the lowest grade courts in order to let complicated ones to be tried by the higher courts with great experience. To hold otherwise in my opinion would be going against the spirit of section 13 of the CPC and the settled position of the Court of Appeal in the case of **Ms Tanzania - China Friendship Textile Co. Ltd Versus Our Lady of the Usambara Sisters, [2006] TLR 70**. When dealing with the interpretation of section 13 of the CPC on pecuniary jurisdiction the court held: -

(1) It is the substantive claim and not the general damages which determine the pecuniary jurisdiction of the court. (2) Although there is no specific provision of the law stating expressly that the High Court had no pecuniary jurisdiction to entertain claims not exceeding 10,000,000/= according to the principle contained in section 13 of the Civil Procedure Code that every suit must be instituted in the court of the lowest grade competent to try it.

In **Civil Appeal No. 126/01 Of 2016 Mwananchi Communications Limited and two Others Vs Joshua K. Kajula and two others**, the Court of Appeal of Tanzania pointed out that the plaintiff did not reveal specific amount claimed as only general damage was indicated. The CAT in applying the principle that, it is specific damage which determine the jurisdiction of the court it nullified the High Court judgment on account that the High court assumed jurisdiction which it did not possess. The court held at page 21 as follows: -

*"In the case which is the subject of the current appeal, 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 dear that the High Court erroneously crowned itself with jurisdiction in entertaining and determining the suit that it did not possess."*

In the spirit of the above cited cases and the provision of section 13 of the CPA, as the specific claim by the respondents in this case was Tshs. 16,820,000/= as per the plaintiff filed before the trial court, the proper court to try the same was the primary court subject to the

provision of section 18(1)(a)(iii) of the MCA and not the resident magistrate court. I therefore find merit in the first ground of appeal.

On the issue of time limitation, Order VII Rule 1 (e) of the Civil Procedure Code provides amongst the requirements that, a plaint must contain the facts constituting the cause of action and when it arose. Reading under the respondents' plaint filed at the trial court paragraphs 3, 4 and 5 when read together provides for the facts that contains a cause of action and when it arose. It was contended by the appellant that the cause of action arose in the year 2012 when the parties entered into a contract of hiring the respondents' motor vehicle. However, it is the respondents' view that the cause of action arose after the appellant was arrested and when the parties entered into another contract in the year 2019. That, upon violation of the 2019 contract it is when the respondents instituted a claim against the appellant.

I understand that the Law of Limitation Act Cap 89 under item 7 of Part 1 to the Schedule, suit founded on contract not otherwise specifically provided for the time limit is six years. While the history as to the present dispute is derived from the first contract signed in the year 2012, the action following the breach which triggered the suit before the court arose in the year 2019. To me, the facts constituting the cause of

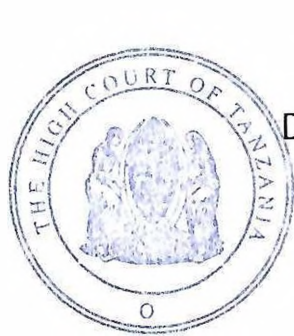
action in the present case is centred on exhibit P3 which was the contract entered between parties in respect of the debt of Tshs. 16,820,000/= and since exhibit P3 was executed on 21/08/2019 and this case was filed before the trial court on 04/02/2020 then, the suit was filed within the time limit. I therefore find no merit in the 3rd ground of appeal.

However, since the first ground had effect to whole proceedings, judgment and decree of the trial court, even if the suit was filed in time, being filed in a court with no competent jurisdiction over the same it makes the same nullity. In other words, the first ground being in affirmative, it defeats the purpose of the remained grounds of appeal. This court cannot discuss the relevance or otherwise of evidence obtained before the court which is considered to assume jurisdiction it did not possess over the matter. I will therefore not deal with the rest of the grounds of appeal.

In the upshot, I find this appeal to have merit and the same is hereby allowed. I therefore declare the trial court's proceedings a nullity, and to meet the justice of the case, I proceed to quash and set aside the entire proceedings, judgment, decree and orders of the resident

magistrate court. Considering the circumstances of this case, each party shall bear his own costs.

DATED at **ARUSHA** this 5th day of May, 2022.




D.C. KAMUZORA

JUDGE

