

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 166 OF 2022

(Arising from the Dar es Salaam Resident Magistrates' Court in Civil Case No. 90 of 2021)

COMMXP (T) LTD APPELLANT

VERSUS

KWEYAMBAH QUAKER.....RESPONDENT

JUDGMENT

21/03/2023 & 08/06/2023

BWEGOGGE, J.

The respondent herein, one Kweyambah Quaker, successfully commenced civil proceedings against the appellant herein under tortious liability, alleging that the defendant interfered with his contractual subscription with Vodacom (T) PLC by her involvement in running and operating the lottery game, commonly known as "*Tusua Mapene*." The respondent claimed for special damages to the tune of TZS

3,500,000/=, an equitable relief to the tune of TZS 100,000,000/= being disgorgement of utility gains (unjustified enrichment) accrued out of wrongful use of plaintiff money; injunction orders and punitive damages, among others. Upon hearing both parties and considered the evidence tendered, the trial court entered judgement for the respondent and granted reliefs, among others, equitable relief of TZS 100,000,000/= being disgorgement of utility gains (unjustified enrichment) accrued out of wrongful use of plaintiff money; special damages of TZS 3,500,000/=, punitive and exemplary damages of TZS 40,000,000/=; general damages of TZS 40,000,000; and interests on commercial and court rate on the decretal sum.

The appellant was aggrieved by the judgment and decree entered by the trial court and preferred the appeal herein under eight grounds of appeal, as hereunder reproduced verbatim:

- 1. The learned trial magistrate erred in law in entertaining a matter in which the court had no subject matter jurisdiction contrary to the provision of Regulation 112 (1) of the Gaming Regulation of 2003.*
- 2. The learned trial magistrate erred in law in entertaining a matter with commercial significance involving the liability of a commercial person arising out of its commercial or business activities in which the court had no pecuniary jurisdiction contrary to the provision of section 40(3) (b) of the Magistrates Courts Act (Cap. 11 R.E. 2019).*

3. *The learned trial magistrate erred in law in entertaining the matter which had been finally and conclusively determined between the applicant and the respondent by the Tanzania Communication Regulatory Authority.*
4. *The learned trial magistrate erred in law and fact in holding that the appellant had the intention to induce or procure a third party to breach the contract without any evidence to that effect.*
5. *The learned trial magistrate erred in law and fact in holding the appellant trading is illegal for lack of valid licence without any evidence to that effect.*
6. *The learned trial magistrate erred in law and fact by unjustifiably awarding the respondent TZS 40,000,000/ as punitive damages.*
7. *The learned trial magistrate erred in law and fact by unjustifiably awarding the respondent TZS 40,000,000/= as general damages.*
8. *The learned trial magistrate erred in law and fact by awarding the respondent TZS 100, 000, 000/= as special damages in the absence of specific proof of the same.*

The appellant was represented by Mr. Iddris Juma, learned advocate, whereas the respondent fended for himself. The oral submissions of both parties herein are revisited hereunder, albeit briefly.

In substantiating the 1st ground of appeal, Mr. Juma opened up his submission by stating that, this being the 1st appellate court, is legally enjoined with power to evaluate the evidence and arrive at its own

conclusion. And in a bid to substantiate the 1st ground of appeal, the counsel argued that the trial magistrate erred in law in entertaining the matter which the trial court had no jurisdiction to entertain, contrary to Regulation 112(2) of the Gaming Board Regulation of 2003 (G.N. No.385). That jurisdiction is imposed by law. Therefore, where the law provides a specific forum for settlement of the dispute, the resort to it is imperative before one seeks recourse to court lest the decision is rendered a nullity. The cases of **Salim O. Kabora vs TANESCO & 2 Others** (Civil Appeal No. 55 of 2014) [2020] TZCA 1812 and **Tanga Cement Public Company Ltd vs Fair Competition Commission** (Civil Application No. 10 of 2018) [2021] TZCA 98 were cited to validate the assertion.

Further, the counsel argued that paragraphs 3,5,17 & 20 and the relief section of the plaint and judgment of the court, specifically the issues and proceedings, clearly manifest that the suit was based on the "*Tusua Mapene*" game of chance and interference with the plaintiff's contractual right to take part in lottery games of which fall under the ambit of the above cited law. Hence, opined the counsel, the trial court had no subject matter jurisdiction to preside over the case. The case of **Ally**

Hamis Habibu vs Premier Betting Entertainment Africa Ltd, Civil Case No. 201 of 2017 HC (unreported) was cited to make a point.

In substantiating the 2nd ground of appeal, the counsel reiterated that the trial magistrate erred in law to entertain the matter with commercial significance involving the liability of a commercial person arising out of its commercial or business activities in which the court had no pecuniary jurisdiction, contrary to section 40(3) (b) of the Magistrates' Courts Act [Cap. 11 R.E. 2019]. That the term commercial case is defined under section 2(4) of the Act to mean a civil case involving a matter considered to be of commercial significance. The counsel charged that the trial court failed to observe, specifically in the relief section, that it was a commercial case whereas the claim was based on the liability of the appellant in the operation of the lottery game based on the alleged interference in contractual right. The Commercial Appeal Case No. 01 of 2020 between **Zanzibar Insurance Corporation Ltd and Rudolf Temba**, TZHCComD 38 was cited to bring the point home. The counsel asserted that, the trial court having acted without jurisdiction, the decision arising thereof is null and void.

In respect of the 3rd ground of appeal, the counsel argued that the trial magistrate erred in law to entertain the matter which was conclusively

determined by the Tanzania Communication Regulatory Authority. That exhibit P4 tendered at the trial Court relating to the adjudication proceedings at the TCRA ascertains that the parties thereof were the actual parties in the suit instituted in the trial court. That the principle of *res judicata* under section 9 of the Civil Procedure Code [Cap. 33 R.E. 2019] restricts the court to try a suit in matters which were directly and substantially in issue in the former suit which were determined by a competent court between the same parties. The cases of **Gerald Chuchuba vs Rector, Itaga Seminary** [2002] TLR 212, and **East African Development Bank vs Blueline Enterprises Ltd** (Civil Appeal No. 110 of 2009) [2011] TZCA 52 were cited to bolster the point.

In arguing the 4th ground of appeal, the counsel submitted that without evidence to that effect, the trial magistrate erred in law and fact in holding that the appellant had the intention to induce or procure a 3rd party to breach the contract.

With regard to the 5th ground of appeal, the counsel argued that the trial magistrate erred in law and fact in holding that the appellant trade is illegal for lack of valid licence. That exhibit P5 showing that the appellant is not licenced could not be the ground to hold that the appellant's dealings were illegal as exhibit P6 shows that the appellant

and Vodacom (T) PLC are partners though the appellant was not a party to the case.

In validating the 6th, 7th and 8th grounds of appeal, the counsel charged that the trial magistrate erred in law and fact by unjustifiably awarding the respondent TZS 40,000,000/= as punitive damages as the trial magistrate didn't assign reasons for awarding the impugned general damages. That this court can interfere with the awards if it is seen that the trial magistrate employed the wrong principle to assess the damages. The counsel fortified his argument by citing the case of **Reliance Insurance Co. Ltd vs Festo Mgomapayo** (Civil Appeal No. 23 of 2019) [2019] TZCA 323.

Further, the counsel argued that the court has discretionary power to award general damages, which should be exercised judicially. That the award of general damages to the tune of TZS 40,000,000/= is unjustified as the general damages should only be direct, natural and probable consequences of the act complained against.

In the same vein, the counsel argued that specific damages should be specifically proved. That specific damages to the tune of TZS 100,000,000/= and 3,500,000/= were wrongly awarded as no tangible

proof was tendered to support the claim. The case of **Anthony Ngoo and Another vs Kitunda Kimaro** (Civil Appeal No. 25 of 2014) [2021] TZCA 8 to buttress the argument.

Based on the foregoing arguments, the counsel for the appellant prayed that the appeal herein be allowed with costs.

On the other hand, Mr. Quaker, the respondent herein submitted in reply in respect of the 1st ground of appeal that the argument made by the counsel for the appellant is misconceived. He argued that the appellant is a mere interferer without a licence permitting her to conduct gaming activity; hence, the same is not covered by the Gaming Board Regulations. He rested his argument in that the submission by counsel for the appellant is misguided, and authorities tendered are inapplicable in the circumstances of this case.

With regard to the 2nd ground of appeal, the respondent contended that the provision of section 40 (3) (b) of the MCA has no room in this appeal. That there was no commercial liability involved as discerned in paragraph 3 of the plaint whereas the cause of action is clearly stated. That his action at the trial court was based on tortious liability based on inference by the appellant in gaming activities and disgorgement.

In responding to the argument in support of the 3rd ground of appeal, the respondent submitted that the principle of *res-judicata* was wrongly invoked and patently misleading. That the matter adjudicated at TCRA didn't involve the appellant but Vodacom (T) PLC. Hence, the principle of *res judicata* cannot apply in this matter.

Submitting in reply in respect of the 4th ground of appeal, the respondent charged that the appellant herein, the interferer, intended to induce the third party to subscribe to the deceptive game of chance. This wrong, the respondent asserted, he proved.

In countering the submission made in respect of the 5th ground of appeal, the respondent contended that evidence was availed by the Gaming Board and tendered in evidence in that the appellant had no licence to conduct gaming business.

And in reply to the arguments made in respect of the 6th, 7th, 8th and 9th grounds of appeal, the respondent countered that the averment in the pleading filed herein justifies the damages awarded. That the award of punitive damages doesn't need proof. Further, the respondent contended that he was not obliged to prove general damages as the general damages are in the discretion of the court to grant.

In respect of the award of TZS 3,500,000/= as special damages, the respondent asserted that the expenses incurred and pain endured to locate the appellant for service of court documents were proved and considered by the trial court. Hence, the amount was justifiable. The respondent summed up his counter-arguments in that the appeal herein has no merit and should be dismissed with costs.

In rejoinder, the appellant's counsel reiterated his previous stance which I find needless to replicate herein.

The issue for determination is whether the appeal herein is merited.

The grounds of appeal preferred by the appellant shall be canvassed sequentially, commencing with the 2nd ground of appeal. It was argued by the appellant's counsel that the trial magistrate erred in law in entertaining the matter with commercial significance involving the liability of a commercial person arising out of its commercial or business activities in which the trial court had no pecuniary jurisdiction.

From the outset, I find the 2nd ground of appeal patently misconceived. Apparently, the pleading and the decision of the trial court depict that the respondent commenced civil proceedings against the appellant herein under tortious liability, alleging that the defendant interfered with

his contractual subscription with Vodacom (T) PLC by her involvement in running and operating the "*Tusua Mapene*" lottery game. The respondent alleged the appellant for interference in his contractual relationship with Vodacom (T) PLC in respect of the lottery game to which he subscribed. The respondent, among others, claimed an equitable relief to the tune of TZS 100,000,000/= being disgorgement of utility gains (unjustified enrichment) accrued out of wrongful use of plaintiff money. The respondent has likewise ascertained that his action against the appellant in the trial court was based on tortious liability (inference) in gaming activities and disgorgement. I agree with the respondent in this respect, notwithstanding the validity of the action he commenced in the trial court. And, it is needless to state the fact that the trial court decision was premised on tortious liability. The 2nd ground of appeal collapses.

Now, I revert to discuss the 1st ground of appeal. It is the argument by the appellant's counsel that the trial magistrate erred in law in entertaining the matter in which the trial court had no jurisdiction to entertain. The appellant's counsel vehemently argued that the averment, relief section of the plaint and court decision depicts that the suit was based on the "*Tusua Mapene*" game of chance and interference

with plaintiff's contractual right to take part in lottery games which fall under the Regulation 112(2) of the Gaming Board Regulation of 2003 (G.N. NO. 385).

Unarguably, it is the cardinal principle that the jurisdiction of the court to act upon the matter brought before it must be expressly given, not implied or assumed. See the cases of **Fanuel Mantiri Ng'unda vs Herman Matiri Ng'unda** [1995] TLR 155 and **Tanga Cement Public Company LTD vs Fair Competition Commission** (Civil Application No. 10 of 2018) [2021] TZCA 98. Likewise, jurisdiction is considered to be "*the bedrock on which the court's authority and competence to entertain and decide matters rest.*" See the case of **Salim O. Kabora vs Tanesco & 2 others** (supra). In the same vein, the superior Court in the case of **Commissioner General Tanzania Revenue Authority & Another vs Milambo Limited** (Civil Appeal 62 of 2022) [2022] TZCA 348 had this to say:

".....the question of jurisdiction is a threshold question which must be addressed at the earliest opportunity in order to save time and costs and dire consequences of the proceedings being nullified at the later stage in the case objection is raised and sustained. Therefore, jurisdiction is a creature of statute and not the dislikes or likes of the parties"

Normally, the jurisdiction of the court is determined by the cause of action and reliefs sought by the plaintiff [**Hamidu Ndalahwa Magesha Mandagani vs Reynold Msangi and Reda Farm and Livestock Partners**, Commercial Case No. 52 of 2007 HC (unreported)]. Therefore, before assessing the veracity of the parties' arguments above, I find it fit to revisit the pleading filed by the respondent in the trial court.

It is the respondent's complaint that vide his mobile phone number 0756387270, he subscribed to Vodacom telecommunication services upon pre-paid terms and conditions through maintaining credit on his airtime account. Likewise, on or about 14/09/2017, the respondent subscribed to the service provider's value-added services commercially namely, "*Tusua Mapene*", a lottery game operated on subscription charges of TZS 300/= per day which was billed to his airtime account. It was an express term of such subscription contract that upon opting to unsubscribe, the respondent would be so attended to promptly and unconditionally. Allegedly, on 03/07/2018 and 10/08/2018, having failed to unsubscribe, the respondent served upon the said service provider written demands urging immediate unsubscription. That as the incessant calls and demands for such unsubscription for long went unheeded, a

protracted civil litigation to such effect ensued ultimately landing parties in TCRA Complaints Committee in a dispute then registered as COMPLAINT NO. TCRA/COMP/26/2021.

Allegedly, the service provider refused to accede to the respondent's calls, whereas unwarranted and wrongful subscriptions had consistently escalated causing the respondent to incur expenses to the tune of TZS 27,501/=. Upon the respondent filing the complaint with TCRA, on 21/01/2021, when the matter was called on for hearing, the appellant herein turned up, and admitted that she was the one, not Vodacom, who operate the lottery; though there was no direct relationship between her and the respondent. Allegedly, the appellant conceded that she obtained the respondent's information from Vodacom (T) PLC and finally effected such unsubscription belatedly on 13/12/2020.

Therefore, based on such admission, the respondent claimed that the appellant had induced Vodacom (T) PLC to allow her an illegal easement to his airtime account and prolonged the respondent's subscriptions until 2018, thereby inflicting financial injury upon him. The respondent maintained that to date, the service provider has never effectively unsubscribed him. The respondent alleged that until May, 2018 he suffered the pecuniary loss of TZS 27,501/= whereas all along the

appellant vainly promised him financial returns of TZS 100,000,000/= which, to his opinion, amounted illegal business. Based on the foregoing, the respondent prayed for reliefs earlier mentioned.

It is my considered opinion that based on the averment in the pleadings above mentioned, the respondent's contentions are premised on his induced subscription to the "Tusua Mapene" game of chance available to Vodacom (T) PLC subscribers. Regulation 112 (1) of the Gaming Regulations of 2003 (G.N. 385 of 2003) clothes the Gaming Board of Tanzania with power to deal with all disputes between the licensee and the prayer of any gaming activity. Regulation 112 (1) of GN 385 of 2003 provides:

"All disputes between the licensee and player of any gaming activity arising from the implantation of the Act and this regulation shall be submitted to the Board within fourteen days after the event has occurred. "

It is apparent on the face of the above quoted provision that the classical court is excluded to preside over the disputes arising from the gaming business between the licensee and player. Such disputes are within the exclusive jurisdiction of the Gaming Board. In this respect, I find myself constrained to borrow a leaf from the case of **Salim O. Kabora vs Tanesco & 2 Others** (supra) as thus:

".....the ordinary court's jurisdiction may be limited by express provisions of the law. This implies that the court's jurisdiction should be invariably be determined on the basis of the law establishing it and other laws which specify that a certain dispute or matter be determined by a certain specified court, tribunal or authority."

As aforesaid, the respondent contended that the appellant is not entitled to benefit from the Gaming Board Regulations for the reason that the appellant is simply an interferer without licence permitting her to conduct gaming activity. I find it pertinent to address the fact that the respondent had no direct contractual relationship with the appellant, but Vodacom (T) PLC. Undisputedly, Vodacom (T) PLC has the licence to conduct the lottery game to which the respondent subscribed. The appellant is merely a partner with Vodacom (T) PLC in conducting the impugned "Tusua Mapene" game of chance. The contract between the same provides that Vodacom (T) PLC, the service operator, organises premium SMS promotion campaigns whereas the appellant, the service provider, offers marketing of premium promotional campaign services, among others. The respondent (provider) had a contractual obligation with Vodacom (T) PLC (operator) to provide the technical implementation, know-how advice and coordination of the campaign whereas the respondent was allowed to send informative SMS to the

subscribers relating to the impugned game of chance. Therefore, the respondent had no direct legal recourse against the appellant herein. He had legal recourse against Vodacom (T) PLC and, or jointly with the appellant in the Gaming Board.

The acts allegedly committed by the appellants, which in my opinion are mainly presuppositions, could not have entitled the respondent to commence civil proceedings against the same in the trial court under tortious liability (interference). Therefore, commencing the tortious claim in the trial court in this respect was misconceived. I, therefore, join hands with the counsel for the appellant in that the suit was filed in the wrong forum. The 1st ground of appeal succeeds.

At this juncture, I proceed to canvass the 3rd ground of appeal in that the trial magistrate erred in law to entertain the matter which was conclusively determined by Tanzania Communication Regulatory Authority (henceforth TCRA). It was the argument by the appellant's counsel that exhibit P4 tendered at the trial Court relating to the adjudication proceedings at the TCRA ascertains that the parties thereof were the actual parties in the suit instituted at the lower court. That the principle of *res judicata* under section 9 of CPC restricts the court to try the suit in matters which were directly and substantially in issue in the

former suit which were determined by a competent court between the same parties. I find it pertinent, for the sake of clarity, to reproduce the provision of section 9 of the CPC as hereunder:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. Emphasis mine.

The apposite restatement of the provision reproduced *verbatim* above was made by the apex Court in **Pravin Girdhar Chavda vs Yasmini Nurdin Yusufali**, Civil Appeal No. 165 of 2010 whereas the Court had this to say:

"Speaking of the above provision, it is, perhaps, pertinent to observe that, the law in this country, like the laws of other jurisdictions, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong. Therefore, the object of section 9 of the CPC is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."

I have gone through the decision of the TCRA Committee. I would not tarry to opine that the factual issues thereof were a *replica* of the respondent's case in the trial court. In substance, the respondent alleged that in September, 2017 Vodacom (T) PLC wrongfully subscribed him to the gaming services branded as "*Tusua Mapene*" and then deducted his air time of TZS 300 per day. The respondent had requested to be removed from such service but the same kept deducting his air time whenever he recharged his phone. On the bases of the above, the respondent claimed TZS 50,000,000/= as compensation for the wrongdoer's failure to unsubscribe him instantly. The action succeeded. However, for failure to justify the claimed amount of compensation, the respondent was awarded TZS 500,000/=.

As afore clarified, the appellant had no contractual relationship with the respondent. The respondent subscribed to the impugned game of chance by Vodacom (T) PLC. The appellant's role in the loathed lottery game was merely marketing premium services. The respondent properly instituted a complaint in TCRA Committee against Vodacom (T) PLC, the licenced entity. The record of the TCRA Committee entails that the appellant's representative was part of the defence team before the TCRA Committee.

Therefore, it is my considered opinion that the mainstay of the respondent's suit in the trial court, which I recapitulated at length in canvassing the 1st ground of appeal, was dealt with by the TCRA Committee. That being the case, presuming that the trial court had jurisdiction to preside the case, the matter herein would have been *res judicata*. I, likewise, find the 3rd ground of appeal with substance.

The discussion in respect of the 1st and 3rd grounds of appeal deposes the 4th and 5th grounds of appeal as well. And, I find it needless to further delve into the remaining grounds of appeal pertaining to the justiciability of the awarded damages by the trial court.

Subject to the foregoing discussion, I find the appeal herein meritorious. The appeal is hereby allowed. The decision and orders entered by the lower court are hereby quashed and set aside. The appellant shall have her costs.

DATED at DAR ES SALAAM this 08th June, 2023.

So ordered.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", with a long horizontal stroke extending to the right.

O. F. BWEGOGÉ

JUDGE