

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE SUB REGISTRY OF KIGOMA)**

**AT KIGOMA**

**(DC) CIVIL APPEAL NO. 2 OF 2023**

(Originating from the District Court of Kasulu in Civil Case No. 08 of 2018)

**WAYSABI INVESTMENT COMPANY.....APPELLANT**

**VERSUS**

**ANGELINA REUBEN SAMSON.....1<sup>ST</sup> RESPONDENT**

**REUBEN SAMSON KAHUZA.....2<sup>ND</sup> RESPONDENT**

Date of last Order: 22/08/2023

Date of Judgement: 22/09/2023

**JUDGEMENT**

**MAGOIGA, J.**

The appellant, **WAYSABI INVESTMENT COMPANY** dissatisfied by the judgement and decree of the District Court of Kasulu dated 15/12/2022 in Civil case No. 08 of 2018, now appeals against the said whole judgment and decree of the trial Court to this Court.

The brief backdrop of this suit is that in the years 2013/2014 and 2014/2015, the appellant and 1<sup>st</sup> respondent acting on behalf of the 2<sup>nd</sup> respondent entered into contract for hiring the 2<sup>nd</sup> respondent's motor vehicle with registration No.T575 AEM for transportation of waste products materials within Kasulu Town council at a consideration of Tshs.100,000/- per each day. It is alleged that under that arrangement, the appellant used 175 trips worth Tshs.17,500,000/= out of which only Tshs.4,000,000/- was paid leaving unpaid balance of

Tshs.13,300,000/= . Efforts by the respondents to be paid the balance were in vain and leading to the institution of Civil Case No. 08 of 2018 claiming the unpaid balance and consequential reliefs, as contained in the plaint.

Upon being served with the plaint, the appellant (the then defendant) filed written statement of defence disputing all claims by the plaintiffs and prayed for dismissal of the suit with costs.

After hearing parties on merits, the trial Court dismissed the suit for 2<sup>nd</sup> respondent and entered judgement in favour of the 1<sup>st</sup> respondent for payment of Tshs.13,300,000/- as special damages, payment of Tshs.7,000,000/-, interest and costs of the suit.

Distressed by the said District Court's decision, the appellant preferred this appeal armed with 10 grounds of appeal faulting the trial District court which can be summarised in the following language namely: -

- 1. That, since the specifically pleaded and allegedly proved amount in the respondents' suit was Tshs 13,000,000/=only, then that the trial court had no **pecuniary jurisdiction** to entertain the suit;*
- 2. The trial court, subsequently erred in law and in fact in answering the 1<sup>st</sup> issue in the affirmative, notwithstanding the 1<sup>st</sup> respondent misrepresentation, fraudulence and incompetence to contract in respect of the vehicle, factors that violated the agreement;*



3. *The trial court erred in law and fact in finding that the suit had been proved to the required standard entitling the 1<sup>st</sup> respondent to the reliefs granted;*
4. *That, the trial court erred in law and fact in lopsidedly and unfairly evaluating the contents of exhibit P3 being logbooks dully written on and signed or merely written on by the 1<sup>st</sup> respondent acknowledging receipt of different payment from the appellant that were cemented by the appellant's exhibit D1 collectively instead of accepting meagre and bare accounts of such payments by the 1<sup>st</sup> respondent;*
5. *That, the trial court erred in law and fact in allowing the respondents 'claims notwithstanding grave contradictions between the pleading and oral evidence adduced by the 1<sup>st</sup> respondent vis a vis exhibits tendered rendering the decision mathematically contradictory;*
6. *That, the trial court erred in law and fact in in subsequently drawing a negative inference against the appellant for drawing in his favour a cheque with NMB bank Exh.P4.*
7. *That, the trial court erred in law and fact in drawing negative inference against the appellant for not bringing a witness one Flora J. Ntikwiza, an accountant to the appellant;*
8. *That, the trial court erred in law and fact in holding that the appellant had breached the agreement entitling the 1<sup>st</sup> respondent to reliefs awarded;*
9. *That, the awarding general damages in the tune of Tshs 7,000,000/- unto the respondent, the trial court applied a wrong*



*principle in law and reason in total disregard of the background of the matter.*

10. *That, in answering the 3<sup>rd</sup> issue, the leaned trial court erred in law and in fact when he mathematically ventured into justifying the award of Tshs 13,300,000/= unto the 1<sup>st</sup> respondent.*

On the above grounds, the appellant prayed this court to allow the appeal with costs by quashing and setting aside the decision of the trial court, costs of the appeal and any other reliefs.

When this appeal was called on for hearing, the appellant was represented by Mr. Ignatus R. Kagashe, learned advocate whereas the respondents enjoyed the legal service of Mr. Method R. G. Kabuguzi Senior learned advocate.

Mr. Kagashe started by praying to argue the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> as one, the 2<sup>nd</sup> and 5<sup>th</sup> grounds as one, and the rest to be argued seriatim.

On the 1<sup>st</sup> ground, on jurisdiction, Mr. Kagashe argued that, the specific claim was Tshs.13,300,000/=. On that note, Mr. Kagashe pointed out that the DC had no jurisdiction to hear a matter with specific claim of Tshs.13,300,000/= which is within the jurisdiction of the Primary Court. To buttress his position, the counsel cited the provision of Section 18(1)(a)(b) of the MCA which was amended in 2016 and raised the pecuniary jurisdiction of the Primary Court from Tshs 5,000,000/= to 50,000,000/= for immovable property and Tshs 30,000,000/= to

movable property. This was done through Misc. (Amendment) Act No. 4 of 2016.

In that same amendment, Mr. Kagashe articulates that section 40 of the MCA was also amended and enhanced the pecuniary jurisdiction of DC from Tshs.50,000,000/= to 300,000,000/= for immovable and from Tshs.20,000,000/= to Tshs.200,000,000/=. So, MCA provides the pecuniary jurisdiction of these two categories of the court and when read together with section 13 of the CPC, then this suit was to be instituted in the primary court. He referred the court to the case of **Denja John Botto and 2 others vs Umoja wa Wafanyabiashara ndogo ndogo Maili moja**, Civil Appeal No. 157 of 2018 HC (unreported) which held that the DC had no jurisdiction to try the case whose value was below and within the Primary Court jurisdiction. On that note, Mr. Kagashe prayed the appeal to be allowed. He also cited the case of **John Agricola vs Rashid Juma** [1990] TLR 1 which insisted that lack of jurisdiction in presiding Magistrate is a fundamental defect that is not curable at all.

In the alternative and without prejudice to what is argued above, the applicant's counsel argued that in the 2<sup>nd</sup> and 5<sup>th</sup> grounds the trial court erred to hold that the respondent proved his claim.





On specific claim Mr. Kagashe argued that it must be specifically claimed and strictly proved. To buttress that stance, he cited the case of **Masilele General Agencies vs African Inland Church of Tanzania** [1994] TLR 192. The respondents pleaded the claim of Tshs.13,300,000/= but their evidence said they have been paid Tshs 3,500,000/= as reflected in page 13 of the typed proceedings and admitted that their driver one Bayana Shomari was paid Tshs.1,000,000/= but in the plaint at paragraph 6 admitted to have been paid Tshs 4,000,000/= only. So, their pleading and evidence are at variance. This contradiction per Mr. Kagashe was not determined at all, hence problematic as to what they pleaded and proved.

On the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> grounds, Mr. Kagashe submit that in this suit there were three issues and one was whether there was lawful contract between parties. After hearing parties, the trial Magistrate decided in favour of the respondents, but looking at the contract subject of this appeal (as **exhibit P1** and **exhibit P2**) the owner of the Motor vehicle was the 2<sup>nd</sup> respondent who signed as witness and not owner.

Mr. Kagashe went on submitting that, much the trial Magistrate agreed that the 2<sup>nd</sup> respondent had no privy to that contract, then, there is no way the 1<sup>st</sup> issue could have been answered in the affirmative.



Also exhibits which were tendered, exhibit D1 and P3 which is a log book, the counsel argued that had the trial Magistrate read them together, the court would have found that the claim was full paid for exhibit P3 is clear of what was paid for and if these too exhibits are examined the whole amount was paid off. So, it was wrong to hold otherwise.

On the 7<sup>th</sup> ground Mr. Kagashe argued that while it is true that Flora Ntikwizu was not necessary because all needed, the Director had tendered them. He proposed that this ground be allowed.

On the 8<sup>th</sup> ground, the counsel prayed to drop it.

On the 9<sup>th</sup> ground, he submitted that, while it is true that general damages are discretion but must be judiciously exercised. At page 14 of the typed judgment, Mr. Kagashe argued that, the award of general damages based on fact that the case has taken long time in court. To his view, it was wrong to award general damages basing on long period while no proof that the appellant is the only cause, so it was wrong and it occasioned failure of justice. He prayed the order of general damages to be set aside.

On the 10<sup>th</sup> ground, the counsel argued that the trial Magistrate erred in law to calculate the amount paid and came into erroneous figures not supported by evidence. He pointed out that, for instance, the trial

magistrate got Tshs.45,000,000/= instead of Tshs.52,000,000/= of which all these gapes were to prove otherwise.

In the final, Mr. Kagashe prayed the appeal to be allowed with costs.

On the other hand, Mr. Kabuguzi strongly opposed the appeal stating that all grounds set forth and argued are baseless and this appeal should be dismissed with costs.

On the 1<sup>st</sup> ground, he replied that according to pleadings, the claims were for specific damages for breach of contract and award of general damages are not within the jurisdiction of the Primary Court. The law of contract is the one which govern the contract and breach of contract is not applicable in primary court. So according to him, the District Court had jurisdiction to entertain this suit and the Primary Court had no jurisdiction to determine breach of contract and general damages. Much as the law of contract do not apply to Primary Court so it was proper for the District Court to determine this case as it did. He prayed for the ground to be dismissed and the cases cited be distinguishable for the circumstances of this appeal.

On grounds numbers 2 and 5, the counsel for the respondents replied that claims were proved to the stand required in law. The oral testimony of PW1 and exhibit P4 cheque bank which was issued by appellant which was for Tshs.13,300,000/=, there was no plausible explanation given



why a cheque was issued. The issue was that, all amount paid. The presence of exhibit P4 is proof that they were not paid. According to Mr. Kabuguzi, there is evidence that the unpaid amount was proved. Flora was the one who prepared payment and issued receipt but was not called to corroborate that all money was paid. The gaps were to be testified by Flora, he pinpointed that the court was right to draw adverse inference to her failure to testify. According to Mr. Kabuguzi, there was enough evidence that the amount was strictly proved.

On the grounds 3 & 6, Mr. Kabuguzi submitted that there was a contract which was genuine and it was admitted without objection from the appellant, hence making these grounds baseless and let them be dismissed.

On ground no. 7, on Flora Ntikwizu, the counsel for the respondents submitted that Flora was material and key witness who was to corroborate if the money was paid or not. According to Mr. Kabuguzi, the court was proper to draw an adverse inference for failure to call her. So, to him, this ground lacks merits and be dismissed in its entirety.

On the 9<sup>th</sup> ground on award of general damages, Mr. Kabuguzi submitted that this ground has no merits because the issue framed was breach of contract and once proved then it was consequential and was discretionary. He added further that, the counsel for the appellant did not

argue that there was none direction or misdirection. So, according to Kabuguzi, he is barred to argue in rejoinder. In Kabuguzi's view, the court was correct to grant the amount granted and prayed to remain intact. So, this ground to has to fall and be dismissed for want of merits. On the 10<sup>th</sup> ground, Mr. Kabuguzi submitted that this ground is without merits because exhibit P4 proved what was pleaded.

On the totality of all what was argued in reply, the learned advocate for the respondent prayed that this appeal is without any useful merits and be dismissed with costs.

In rejoinder, Mr. Kagashe argued on the 1<sup>st</sup> ground that under section 18 (1) (a) (III) the Primary Court has jurisdiction to determine civil debts arising from breach of contract so the argument by Mr. Kabuguzi is misplaced. Much as is a part of law it can be raised any stage, even on appeal.

All payments were done through documents as exhibited in exhibit D1 and when compared all payment were paid. The cheque was written in the name of the 2<sup>nd</sup> respondent and was in fact double payment if it was honored. Finally, on calculations, Kagashe submitted that, there was a miscarriage of justice.

This marked the end of hearing of this appeal and the duty of this court now is to determine the merits or otherwise of this appeal.

Coming now to the merits of this appeal, in particular, of the 1<sup>st</sup> ground of appeal which centres on jurisdiction of the trial court. Having carefully followed the rivaling arguments of the counsel for the appellant and that of the counsel for the respondents, the main issue for determination in this ground is, whether the trial court had pecuniary jurisdiction to entertain and determine this case.

On the part of the counsel for the appellant, it was his strong argument that, the District Court had no jurisdiction to hear a matter with specific claim of Tshs.13,300,000/= which is within the jurisdiction of the Primary Court. He justified his argument with the provisions of Section 18(1)(a)(b) of the MCA which was amended in 2016 and raised the pecuniary jurisdiction of the Primary Court. On the part of the counsel for the respondents, resisted this ground by arguing that, the claims were for specific damages for breach of contract and award of general damages which, according to him, are not within the jurisdiction of the Primary Court. According to Mr. Kabuguzi, the law of contract is the one which govern the contract and breach of contract is not applicable in primary court, so, the DC had jurisdiction to entertain this suit.

Having heard the competing arguments by the legal trained minds for parties, and visited the pleadings, there is no dispute that the claim at the District Court was for the recovery

of Tshs.13,300,000/= as specific damages claimed by the respondents. It is further not in dispute that following the amendment of the Magistrates' Act in 2016 now the pecuniary jurisdiction of a Primary Court for immovable properties is Tshs. 50,000,000/= and Tshs. 30,000,000/= for movable properties. It goes therefore that, the claim of Tshs.13,300,000/= falls under the jurisdiction of the Primary Court. It is also not disputed that a case is required by law to be instituted in the lowest court competent to try it. Essentially, it is a trite law that jurisdiction is a creature of statute as such it cannot be conferred on a court by a party.


Equally important to note is that, when jurisdiction is conferred by statute, nothing, but the law itself can oust such jurisdiction. It is a trite law that a court before embarking on determining any matter, it must ascertain whether it is vested with jurisdiction. Failure by the court or tribunal to ascertain its jurisdiction is fatal. Same was ruled and underscored in the case of Sospeter Kahindi Vs. Mbeshi Mashini, Civil Appeal No. 56 of 2017, CAT at Mwanza, where the Court held:

*"At this point we would hasten to acknowledge the principle that the question of Jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level. Any trial of a proceeding by a court lacking requisite jurisdiction to*

*seize and try the matter will be adjudged a nullity on appeal or revision"*

This interpretation was taken by my learned brother Justice Mugeta in the case of **Denja John Botto and 2 others vs Umoja wa Wafanyabiashara ndogo ndogo Mailimoja(supra)**. I hold the same view that it was wrong for the District Court (trial Court) to entertain the case whose claim was on Tshs.13,300,000/= without jurisdiction.

Advocate Kabuguzi for the respondents in justifying the move submitted that the same was necessitated because the claims were for specific damages for breach of contract and award of general damages are not within the jurisdiction of the Primary Court and that the law of contract is the one which govern the contract and breach of contract is not applicable in primary court. I think the counsel's view is misconceived and misplaced because of the reason I am going to give. It is the position of the law that jurisdiction being a creature of statute cannot be conferred to a court by a party nor be assumed. The pecuniary jurisdiction of primary courts whereby the value of immovable is not to exceed Tshs.50 million and for recovery of a civil debt, the value should not exceed Tshs.30 million. This is as per the amendments done to section 18 of the Magistrate Court Act (MCA) Cap. 11 R.E 2002 by Misc. Amendment Act No. 3 of 2016.





As regard to the issue of general damages, the law is clear under the provision of Fourth Schedule to the MCA (supra), paragraph 3(1) which provides that;

*3.-(1) A primary court, in proceedings of a civil nature may-*

- (a) award any amount claimed;*
- (b) award compensation;*
- (c) order the restitution of any property;*
- (d) order the specific performance, if any;*
- (e) make orders in the nature of an injunction, both mandatory and prohibitive;*
- (f) order the payment of any costs and expenses incurred by a successful party or his witnesses;*
- (g) promote reconciliation and enrage and facilitate the settlement, in an amicable way, of the proceedings on such terms as are just;*
- (h) make any other order which the justice of the case may require.*

It follows, therefore, that the learned Counsel for the respondents did not come across with this provision which, to me, compensation as an award which the Primary can award is nothing else but general damages in the other language. Therefore, the allegation that the Primary Court didn't have power to entertain the suit basing on breach of contract and



award of general damages is misconceived and misleading on the part of Mr. Kabuguzi hence rejected.

Having considered the question of jurisdiction which is fatal, I see no need to go into the remaining part of the grounds as this ground alone suffices to end up the matter. Continuing discussing the same will add nothing than exercising academic but futile exercise.

And considering that the issue of jurisdiction being the creature of the statute, it follows therefore that it cannot be covered by overriding objective principle. The effects thereof is to nullify the proceedings and the resultant judgement and decree. See the case of **Tanzania Conservation Ltd, Ngorongoro District Council Commissioner for Lands and The Attorney General**, Civil Appeal No. 66 of 2017, where Kwariko JA stated that:-

*"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."*

In the event, I hold that the trial court entertained the suit without jurisdiction. Appeal is allowed. I nullify the proceedings and set aside the District Court's judgement and decree.



Considering the nature, circumstances and factors leading to this appeal,  
I give no order as to costs. The respondents are at liberty to file a fresh  
suit in the court of competent jurisdiction subject to the law of  
limitation.

It is so ordered.

Dated at Kigoma this 22<sup>nd</sup> day of September, 2023.



  
**S. M. MAGOIGA**  
**JUDGE**  
**22/09/2023**