

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 29 OF 2023

**(C/F Civil Case No. 6 of 2021 in the Resident Magistrate Court of Arusha at
Arusha)**

JANETH GINAI HENRY ALBERTH FOSBROOK.....APPELLANT

VERSUS

BARAKAELI ANDREA MMARI.....RESPONDENT

JUDGMENT

24/08/2023 & 10/10/2023

GWAE, J

Aggrieved by the decision of the trial court delivered on the 13th day of December 2021, the appellant, Janeth Ginai Alberth Fosbrook has filed this appeal with two grounds of appeal to wit;-

1. That, the trial court erred in law and facts to find that the Resident Magistrates' Court of Arusha at Arusha have no jurisdiction to determine the Civil Case No. 6 of 2021.
2. That, the trial court erred in law and facts to dismiss the Civil Case No. 6 of 2021.

Before the Resident Magistrate Court of Arusha at Arusha (“the trial Court”), the appellant filed a suit against the respondent. The appellant sought among others; a declaratory order against the respondent that, there is a serious breach of contract and that the purported sale was null and void. He also sought a declaratory order that, the defendant now respondent to receive a sum of Tshs. 126, 000, 000/= from the plaintiff together with an order for payment of punitive damages, general damages and costs of the suit.

According to the plaint filed in the trial court, it was the assertion of the appellant that on 18th November 2020 he entered into the sale agreement with the respondent of a parcel of land with Title No. 1075 Block “X” situated at Makao Mapya in Arusha for consideration of Tshs. 150,000,000/=. In that agreement, the appellant stood as vendor and the respondent as the purchaser. It was further agreed that the purchasing amount was to be paid in full on the date of the execution of the sale agreement. Nevertheless, the agreed amount was not paid in full as stipulated in the sale agreement, instead the respondent made payment of Tshs. 126,000,000/= to the appellant and promised to pay the remaining amount of Tshs. 24,000,000/= on the very same date. It is also the appellant’s version that, the said variation in payment of the sale price

was signed by both parties in a counter book and that, to date the respondent has not paid the remaining balance of Tshs. 24,000,000/=. Therefore, it was her allegation that the respondent herein is in a breach of the said contract.

On the other hand, the respondent seriously denied the appellant's allegations via his written statement of defense, which was accompanied with a notice of the preliminary objection that, the trial court lacked jurisdiction to entertain the matter.

As a matter of judicial practice, the preliminary objection had to be determined first since the same may dispose of the matter. Expounding to his PO, the respondent submitted that the trial court lacked pecuniary jurisdiction to entertain the matter on the reason that according to paragraph 6 of the plaint what brought the appellant to court was the remaining part of the payment which was Tshs. 24,000,000/=. Therefore, according to his opinion, the trial court had no pecuniary jurisdiction to entertain the matter, as the same ought to have been filed at the Primary Court.

In its finding, the trial court stated that the defendant did not breach the fundamental terms of the contract and therefore the appellant's claim is on the remaining part of the payment since they both consented to the

part payment of the total consideration. Therefore, the trial court was of the view that the appellant's claim was of Tshs. 24,000,000/= and not Tshs. 150,000,000/=. Hence, it lacked jurisdiction. Consequently, the suit was dismissed.

When the matter was called on for hearing, Mr. Stephano P. James and Mr. Arnold Tarimo, both the learned advocates represented the appellant and respondent respectively. The hearing was ordered to be disposed by way of written submissions.

Arguing in support of the appeal, Mr. Stephano submitted that the trial court was wrong to dismiss the appellant's case on the reason that, it had no jurisdiction. Mr. Stephano went on to state that the appellant's claim based on the breach of contract as reflected under paragraph 5,6,7 and 12 of the plaint and that it is the respondent herein who failed to honor the terms of the contract whose consideration was Tshs. 150, 000, 000/=. The appellant's learned counsel also argued that the respondent also refused to finalize the payment of Tshs. 24,000,000/=. Thus, making the parties' contract voidable on the part of the appellant. He thus insisted that the trial court had jurisdiction to entertain the matter.

Submitting on the second ground of appeal, it is the contention of the appellant's counsel that even if it were assumed that, the trial court's

finding was genuine, but the consequential order was to strike out the matter and not to dismiss it. He therefore argued this court to allow the appeal.

Responding to the appellant's submission, the respondent through his counsel insisted that the trial court had no jurisdiction to entertain the matter on reason that, according to the plaint at paragraph 6 the sale agreement was varied by a separate agreement for unpaid amount of Tshs. 24,000,000/=only. He went on to state that it is a settled principle of law that once an agreement is varied then it is the unpaid amount which may be claimed and not the entire agreement. He supported his argument with the case of **Edwin Simon Mamuya vs. Adam Jonas Mbala** (1983) TLR 410. Therefore, the respondent maintained that the suit was to be entertained by the Primary Court.

As to the 2nd ground of appeal, the respondent's counsel conceded that, the trial court was wrong to dismiss the matter, as the proper remedy was to strike it out. He thus urged this court to exercise its revisionary power and step into the shoes of the trial court and strike out the entire proceedings of the trial court.

Having considered the contending submissions of the parties' advocates, the grounds of appeal to be determined by this court are;-

One, whether, the trial court lacked pecuniary jurisdiction and **two**, if the 1st ground is answered in affirmative, whether the trial court was justified to make an dismissing the suit.

The court's determination in the first ground of the appeal. It has been the position of law that, jurisdiction is the creature of statute and this is the primary aspect to begin with for a judge or magistrate or any body exercising adjudicative function before embarking on adjudication of a case (See **Republic vs. Ahmad Ally Ruambo** (Criminal Appeal No. 3 of 2017) [2020] TZCA 57 (6th March 2020).

In the matter at hand, the appellant filed her suit in the trial court whose pecuniary jurisdiction as per section 40 (2) (a) & (b) of the Magistrates' Courts Act Cap 11, R.E, 2019 for immovable properties whose value does not exceed Tshs. 300,000,000/= and Tshs. 200,000,000/= for movable properties.

The trial court ruled out, that it lacked the requisite jurisdiction on the reason that, the appellant herein by signing another agreement where she agreed to receive the part payment of Tshs. 126, 000,000/= indicative that she was willingly to vary the terms of the original contract. Therefore, the amount claimed by the appellant is the remaining part of the payment Tshs. 24,000,000/=.

From the records of this appeal, the appellant herein does not dispute the fact that, she received part payment of Tshs. 126,000,000/= and that the remaining part of the payment of Tshs. 24,000,000/= which remains unpaid to the time of filing of the suit. Further, my careful perusal of the plaint entails that, the appellant's claim is for the breach of the contract pursuant to the remaining part of the payment but also reading from the reliefs sought, the appellant also alleges that since the contract is breached he intends to return the already paid amount of Tshs. 126,000,000/= .

From the pleadings, it is the view of this court that the trial court was obliged to observe two issues. These are; **one**, whether there was breach of contract as pleaded by the appellant and if the 1st issue is affirmatively answered, the **2nd issue** would be, whether the respondent could receive Tshs. 126,000,000/= from the appellant following the breach of the agreement.

Thus, there being two issues for determination by this court is of the firm view that the trial court had pecuniary jurisdiction to determine the matter. Had it been the appellant's claim is only on the remaining part of the payment i.e Tshs. 24,000,000/= then the trial court could have no jurisdiction over the matter. However, since there is also a claim that the

respondent herein should take back his money, which he had already paid to the appellant due to the alleged breach of contract. Therefore, in my considered view, it will be absurd to take the matter to the Primary Court, which may also lack the requisite jurisdiction. I am of that view as section 18 (1) (a) (iii) of the Magistrates Courts Act (supra) provides that, the pecuniary jurisdiction of the Primary Court is Tshs. 30,000,000/= for immovable while the refund as depicted in the appellant's claim is Tshs. 126,000,000/=. The refund of money to the respondent was also subject to the determination of the trial court. It should also be noted that, the respondent is also entitled to the refund (to have his counter claim of sum of Tshs. 126,000,000/=determined) in the event the breach of the parties' agreement is confirmed.

Therefore, the primary court would not clothed with the requisite jurisdiction to entertain the asserted refund of Tshs. 126, 000,000/= or counterclaim of the same amount by way of counter claim by the respondent. Tshs. 126,000,000/=amount of money ousting the pecuniary jurisdiction of primary courts. Had the learned trial magistrate properly directed her mind, she could not find to have lacked jurisdiction. Therefore, the first ground is found meritorious, the same is allowed.

*As to the second ground of appeal, the appellant challenged the dismissal order of the trial court stating that even if it lacked jurisdiction, yet, the remedy was to strike out the matter and not to dismiss it. As supported by the respondent, indeed this court is of the firm view that the trial Magistrate having found that it lacked jurisdiction to determine the matter, the proper order was to strike out the suit and not to dismiss the same. Reason being that, the latter order (dismissal) implies that, the matter was disposed of on merit while the former (striking) suggests that the suit was improperly filed. Though sometimes it is advisable to look at the nature of the order itself. I subscribe to the case of **Ngoni Matengo Cooperative Marketing Union Ltd vs. Alimahomed Osman [1959]** EA 577, the defunct Court of Appeal for Eastern Africa stated that:*

"This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

Furthermore, this court sitting at Mwanza in **S & C Ginning Company Ltd vs. William M. Sang'una and 10 others**, Consolidated

Land Appeals Nos. 108, 109, 110, 111 and 112 of 2016 (unreported) had an occasion of dealing with similar situation, discussing the order of DLHT for Mara at Musoma dismissing the dispute for lack of jurisdiction instead of rejecting the same, it was held that and I quote:

*"The dismissal order not be misconstrued or misused by a contention that the matter was finally determined or the order was conclusive. What one is supposed to consider is **the substance of the matter** rather than the words used in the order. See a decision in **Essaji and others vs. Solanki** [1968] IEA 218 approving the decision made in **Ngoni Matengo Co-operative Marketing Union Ltd V. Ali Mohamed Osman** [1959] EA 577. In our case, the District Land and Housing Tribunal order should not therefore be relied upon as *res-judicata* to a subsequent suit."*

In basis of the above courts' decisions, it is advisable to consider the nature and substance of the dismissal order before invoking a thought that reinstatement of the matter is barred by such order merely because the case was dismissed. A dismissal order is usually made by our courts in various scenarios for instance;-

- a. When a matter is heard on merit and finally determined and a court of law finds that the matter before it lacks merit. A consequential order is dismissal and remedy available is to appeal to a higher court

- b. When a matter is filed out of time where law applicable is the Law of Limitation, Cap 89, Revised Edition, 2019 is applicable (See section 3 (1) of the Act. The remedy is to appeal
- c. When a party especially plaintiff or applicant or petitioner or appellant does not enter his appearance on a date (s) fixed for hearing, the matter may be dismissed and remedy available for an aggrieved party is to make an application for restoration (See MCA &CPC)

As a matter of propriety or appropriateness of orders of the courts, when matters are improperly or incompetently filed, the proper order is to strike out or reject the same. A party whose matter has been struck out may have a remedy of reinstating the same before the same court or if the matter was degenerated for want of jurisdiction then the same matter to be re-filed to the court or quasi-judicial body with a competent jurisdiction.

vAs the court's observation, the order of the trial court, such order, to my considered view, was not intended to have a bar to a subsequent institution of the same suit. The learned Resident Magistrate in her holding stated that the tribunal had no pecuniary jurisdiction to entertain suit. That order to my understanding was not meant to bar re-instituting an

appeal to the competent appellate tribunal. What matters in the ruling of the trial court is the substance of the order.

That being said and done, this appeal succeeds. The order made by the trial court dated 13th December 2021 is quashed and set aside. The case file shall be remitted back to the trial court as soon as practicable for expeditious hearing and determination of the appellant's suit. Given the circumstances of the case and nature of the impugned dismissal order, I refrain from giving orders as to costs.

It is so ordered.

DATED DELIVERED at **ARUSHA** this 10th October 2023




MOHAMED R. GWAE
JUDGE