

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 49 OF 2023**

*(Appeal from the Decision of the Resident Magistrate Court of Kinondoni at Kinondoni, Dar es salaam,  
(Before Hon Mushi -PRM) dated 30<sup>th</sup> day of March 2023 in Civil Case No. 203 of 2019)*

**THE REGISTERED TRUSTEES OF SEVENTH**

**DAY ADVENTIST CHURCH OF TANZANIA.....1<sup>st</sup> APPELLANT**

**THE PRESIDENT OF EAST CENTRAL**

**TANZANIA CONFERENCE.....2<sup>nd</sup> APPELLANT**

**THE PASTOR OF KINONDONI SEVENTH**

**DAY ADVENTIS CHURCH.....3<sup>rd</sup> APPELLANT**

**VERSUS**

**BARNABAS THOMAS.....1<sup>st</sup> RESPONDENT**

**MWIRA KATI KIRO..... 2<sup>nd</sup> RESPONDENT**

**DAVID MAIBA.....3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

**MKWIZU, J:-**

This appeal stems from a religious matter between the church enthusiasts, church frontrunners and the church itself. According to the trial court's records, the respondents were disciples and choir members and worshippers of the Kinondoni Seventh Day Adventist Church who together with other church choir members, participated in composing and singing 20 songs which were recorded in an audio CD in the year

2017. Their church membership could not however go further They were in 2018 expelled from the church due to misconducts. Subsequently, in 2019 the 1st appellant proceeded to record an audio-visual DVD comprising of 20 songs titled "WANADAMU" by using among others, the respondents voice recordings without their consent. Irritated, the respondents resorted to Copyright Society of Tanzania (COSOTA) for injunction against the appellants but in vain. Still remonstrating the appellants acts, the respondents instituted a civil case before the District Court of Kinondoni at Kinondoni Dar es salaam claiming for judgement and decree as follows:

- i. A declaration that the plaintiffs act of seeking remedies at copyright Society of Tanzania (COSOTA) by filing a claim against the third defendant is not a misconduct under the constitution of Kinondoni Seventh Day Adventist Church Choir as alleged by the 3<sup>rd</sup> defendant nevertheless it is their statutory right under copyright and Neighboring Act of 1999.*
- ii. A declaration that the 3<sup>rd</sup> defendant infringed the plaintiff's neighbouring rights over the twenty (20) gospel and worship songs which are being protected under the Copyright and Neighbouring Act of 1999 under which civil remedies are applicable.*
- iii. A declaration that the audio- visual Fixation (DVD) for the said twenty (20) gospels and worship songs is null and void for lack of plaintiff consent/authorization.*
- iv. An injunction restricting the defendants from publish, distribute and sale the audio -visual fixation for the said 20 songs.*

- v. An order for payment of general damages at sum of Tanzania Shillings One Hundred Fifty Million (Tshs 150,000,000) by the Defendant.*
- vi. Costs of this suit.*
- vii. Interests at 20% commercial rates on Tanzania shillings.*
- viii. Any other further relief(s) that this honourable court may deem fit to grant.*

The defendants WSD was a total denial of all the claims. They asserted that the Respondents were not the owners of the Church Choir, the Choir is under Kinondoni Seventh Day Adventist Church, and the singing at the Choir is essentially for church services.

The case was initially heard at District Court of Kinondoni before Hon. Mlashaini, RM and the Judgment was delivered in the favour of the appellants on 31<sup>st</sup> August 2021. The Respondents appeal to this court by Hon. Masabo, J. was allowed on 7th October 2022 with an order quashing the trial court's judgment and decree, for failure by the trial court to accord the parties the right to be heard on the amended issues with an order returning the case file to the trial court for composing a fresh judgment. The trial court was also given the option to re-hear the parties on the new issues raised by the court *suo-moto*.

The file was remitted back to the trial court, and parties were accordingly entertained this time before a different Magistrate Hon. Mushi- PRM. The parties were invited to address the court on the new issues raised by the court, and this was done by recalling the witnesses who had testified prior to that order. Unlike the first magistrate, the 2<sup>nd</sup> trial magistrate found in favour of the respondents. A declaration was made that the 3<sup>rd</sup> Appellant

has infringed the respondents neighbouring rights over the twenty (20) gospel and worship songs protected under the law. The appellant were severally and jointly ordered to pay the defendants 90,000,000 general damages with a restraining order, restricting the appellant from distributing, publishing and selling the DVD subject to the matter and the respondents were also awarded costs of the suit.

Appellants are aggrieved. They have filed a memorandum of appeal containing 16 grounds of appeal as follows: -

- 1. That the learned trial magistrate erred in law and fact by entertaining the matter before him while the Trial Court was not seized with jurisdiction.*
- 2. That the learned Trial Magistrate erred in law and in facts to accept and rely on testimonies of the witnesses who were not under oath as statutorily required by the law.*
- 3. That the learned trial magistrate erred in law and facts holding that plaintiff/respondents copyright were infringed while there was no evidence tendered to prove the claims*
- 4. The learned trial magistrate erred in law and facts for failure to address and adjudicate properly the issues framed consequently lead to reach into an erroneous decision.*
- 5. The learned trial magistrate erred in law and facts relying on the CD and DVD which were not tendered by the plaintiff/respondent witnesses during trial while addressing the three issues observed by the High Court.*
- 6. That the trial magistrate erred in law and facts relying on the CD and DVD which were not admitted as Exhibits.*

7. *That the learned trial magistrate erred in law and in fact in holding that the respondents' voices were used in Production of DVD, without playing the audio CD and DVD in court in order to identify the said voices.*
8. *That the trial learned magistrate erred in law and in fact by not considering the testimony on admission made by the plaintiff/Respondents witness that they are not the owners of 20 songs in audio CD.*
9. *That the trial learned trial magistrate erred in law and in fact to arrive on its decision relying on 20 songs in audio CD and DVD without being heard loud as required by law.*
10. *That the learned trial magistrate erred in law or in fact in reaching in the award while the plaintiffs did not prove any economic or moral loss suffered.*
11. *That the trial magistrate erred in law and in fact by awarding general damages to all respondents while only two appeared before the court trying to prove their claims in respect of the three issues directed by the High Court of Tanzania.*
12. *That the learned trial magistrate erred in law and in fact for not specifying the extent of liabilities to each of the appellants.*
13. *That the learned trial magistrate erred in law and in fact by awarding general damages at the tune 90,000,000/= without any justification or evidence to support the awards.*
14. *That the learned trial magistrate erred in law and fact for reaching into a wrong decision without considering the doctrine of fair of fair use on religious services.*

15. *That the learned trial magistrate erred in law and in fact for issuing orders that the DVD for 20 gospel songs is null and void while it does not belong to the respondent.*

16. *The trial magistrate erred in law and fact to reach in conclusion of the award without considering seventh day Adventist church procedures and guidelines for an individual to be a church choir member.*

The hearing of the appeal was done through written submissions. I thank both parties for their detailed submissions promptly filed before the court. Mr. Gadi Silas leaned advocate for the appellants preferred to argue 5<sup>th</sup> & 6<sup>th</sup> grounds jointly, 7<sup>th</sup> & 9<sup>th</sup>, and 11<sup>th</sup>, 12<sup>th</sup> & 13. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup>, 15 and 16<sup>th</sup> were argued separately.

The appellants submissions in respect of the 1<sup>st</sup> grounds is two fold, First, that the trial district court is not vested with jurisdiction to entertain Civil Case No. 203 of 2019 and secondly that the Resident Magistrate Court is not the trial court envisaged by this court's order dated 7/10/2022 hence lacked jurisdiction to determine the matter.

Elaborating on the first point, the appellants counsel said, the term Court is well defined under section 4 of the Copyright and Neighbouring rights Act 1999, as amended on 30<sup>th</sup> June 2019 through the **written laws' miscellaneous amendment No 9 of 2019** to mean, "The court of competent jurisdiction" deposing that since the respondents plaint did not contain any substantive claim apart from Tsh 150,000,000 general damages for the alleged infringement to give pecuniary jurisdiction of the court, the case was supposed to be filed in the lowest court in the hierarchy which is the Primary Court as provided under section 13 of the

Civil Procedure Code (CAP 33R.E 2019).Several cases were reversed on this points including **Bestcom Company Limited VS Jacob Mtalitinya t/a IT Farm, HC at Dar es salaam**, Civil case No. 160/2012; **D.W.T Saccos and Two Others Versus Jeremia Charles Kayagambe** .(DC)civil appeal No.02 of 2022;**Hamad Lila Mwinyikondo vs Said Ally Kupo**, Civil Appeal No.188/2022 ( All unreported ) **and Tanzania China Friendship Textile Co Limited Vs. Our Lady of the Usambara Sisters** [2006] TLR 70.

The arguments on the second point was that the order for the composition of a fresh judgement by The High Court (Masabo J )was directed to the trial court which is the *the District court of Kinondoni* but contrary to that, the case file was placed to the Resident Magistrate Court of Kivukoni at Kinondoni, which concluded the hearing and issued a fresh judgment in favor of the Respondents.To him, the Resident Magistrate Court of Kivukoni at Kinondoni had no jurisdiction under the law to takeover and proceed with the case which was instituted in District Court of Kinondoni. He asked the court to dismiss the appeal with costs for the case was tried without jurisdiction.

Respondents reply to the first ground of appeal was premised on the provisions of section 13 of the Civil Procedure Code contending that the primary court is the court of first instance in Tanzania court's hierarchy. And the claimed 150,000,000/= amount was above the jurisdiction of the primary court and therefore could not be filed at the primary court.

Regarding the jurisdiction of the Resident Magistrate Court in dealing with the matter at hand, the respondent was of the view that the Resident Magistrates' court and District court have concurrent jurisdiction in

deciding the proceedings of civil nature in the exercise of its original jurisdiction as per section 13 of the Civil Procedure Code and section 41(1) of the Magistrates' Courts Act(Cap 11R:E 2019) and therefore any order for retrial could be entertained by the Resident Magistrate court under powers vested to it under section 20(c) of the Civil Procedure Code(supra). Seemingly in the alternative, the respondents said, the grounds contravenes section 19 of Civil Procedure Code which bars the court from entertaining objections based on jurisdictional issues which was not raised in the court of first instance at the earliest stage.

Having heard the rival submissions advanced by the parties, closely examined the record of appeal and the grounds of appeal I find it obligatory to first determine the first ground of appeal on whether the district court and resident magistrate court had jurisdiction to determining Civil Case No. 203 of 2019 before I move to the rest of the grounds if need be. This decision is activated by the settled principle that the question of jurisdiction is so basic and it goes to the very substratum of the authority of the court to adjudicate upon a given case: See for instance: **Director of Public Prosecutions v. Farid Hadi Ahmed & 9 Others**, Criminal Appeal No. 96 of 2013 (unreported).

The first point calls for a critical examination of the plaint and the prayers affixed to it to answer the question whether a monetary figure mentioned in a plaint as general damages can be taken as a permissible measure in determining pecuniary jurisdiction of the court. As rightly submitted by the appellants counsel none of the prayers in the plaintiffs (respondents) plaint indicated in this decisions above, is for specific damages. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> prayers are for two declarations and one restraint order. The



4th prayer is for general damages, and the rest are for interest, and costs of the suit. None of the reliefs is for specific damages. It is certain therefore that the suit before the district court was for declarations and general damages.

As hinted above, The plaintiffs complaint was premised on the infringement of their rights protected under the Copyright and Neighbouring rights Act 1999. Part V of the Copyright and Neighboring rights Act 1999 permits any person whose rights under this Act are in imminent danger of being infringed to institute proceedings in court for injunction or / and damages . And section 4 of the said act as amended by the written laws (Miscellaneous Amendments) (No.3) Act, 2019 defines the term Court to mean

*"the court of competent jurisdiction;"*

The appellant counsel assertion is that the dispute was to be filed in the court of the lowest grade possible which is the primary court. Indeed, that is the position as ascribed under section 13 of the CPC and section 18 of the MCA. Section 13 of the CPC Cap 33 RE 2019 Reads:

*"13. 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."*

The relevant phrase in this section is ***the court of the lowest grade competent to try it***. The inference here is that the court of the lowest grade is not always the primary court, but any court of the lowest level

with authority to try the matter . This is so because, the jurisdiction of the court is not by choice, either by the court itself or of the parties. It is a statutory issue. The term "Jurisdiction" is defined in **Halsbury's Laws of England**, Vol. 10, paragraph 314 to mean: -

*"...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for Its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted and may be extended or restrained by simiiar means. A limitation may be either as to the kind and nature of the claim or as to the area which jurisdiction extended, or it may partake of both these characteristics. "[Emphasis added].*

In **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199 at 202 that:

*"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"*

The court of the lowest grade envisaged under section 13 of the CPC refers to the lowest court in the hierarchy vested with the jurisdiction to entertain the dispute at issue. Like any other court, the primary court's jurisdiction is regulated by section 18 of the MCA. The section provides.

*"18 (1) A primary court shall have and exercise jurisdiction*

*(a) in all proceedings of a civil nature*

*(i) where the law applicable is **customary law** or **Islamic law**: Provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act (21);*

*(ii) for the recovery of civil debts, rent or interests due to the Republic, any district, city, municipal or town council or township authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sublease or contract, if the value of the subject matter of the suit does not exceed five million shillings, and in any proceedings by way of counter-claim and set-off therein of the same nature and not exceeding such value;*

*(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed three million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; and*

*(b) in all matrimonial proceedings relating civil and Christian marriages;*

*(c) in all proceedings in respect of which jurisdiction is conferred on a primary court by the First Schedule to this Act; and*

*(d) in all proceedings in respect of which jurisdiction is conferred on a primary court by any other law.*

With respect to Mr. Silas , there is nothing in the above provisions vesting the primary court with powers to determine the dispute advanced in the plaint and nothing was mentioned to the court which may be construed to have been restricted the district court from entertaining the matter. The levelled claim in part one of ground one is without merit.

The next issue raised in the 1<sup>st</sup> ground is whether the Resident Magistrate court had powers to entertain the matter after this courts order directing a rehearing of the parties by the trial District Court. I have reviewed the proceedings. Indeed, initially the matter was tried by the District Court of Kinondoni and it is the same court that was directed to rehear the parties. I wish to reproduce party of this court's order dated 7<sup>th</sup> October 2022 for convenience:

*"... The judgment and decree of the trial court are hereby quashed and set aside. It is subsequently ordered that the case file be remitted back to the trial court for composing of a fresh judgment. Should the trial court find the three sub issues indispensable, it should first afford the parties the right to be heard on these issues before composing the judgment. Costs to follow event."*

The review of the records reveals that after this court's order, the file was taken back to the trial district court. The District Resident Magistrate in charge on 27/12/2022 issued an order in the absence of the parties re assigning the file to Enock Rwehumbiza PRM. The assigned magistrate

was in court on 31/1/2023 with the plaintiffs and 3<sup>rd</sup> defendant and the matter was scheduled for mention on 27/2/2023. Before that date, on 21/2/2023 the records show that the matter was placed before Hon. F.S Kiswaga Principle Resident Magistrate in charge who re-assigned the matter to Rahim Mushi RRM of the resident Magistrate court of Kinondoni for purposes of backlog clearance. The re-assigned magistrate took over and determined the matter to the end hence the impugned judgement and decree made at the RESIDENT MAGISTRATE COURT OF KIVUKONI AT KINONDONI

I agree with the appellants counsel that the Resident Magistrate Court of Kinondoni had no power to determine Civil Case No. 203 of 2019 after this court's order with specific directives to the *trial – district court*. The respondent's contention that the appellants ground relating to the jurisdiction of the court was belatedly brought to the court's attention contrary to section 19 of the CPC is a misconception. The section caters for objection as to the place of suing and not jurisdiction of the court. Section 19 of the CPC provides:

*"Section 19: No objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice"*

The law is settled that issues of jurisdiction can be raised at any stage of the proceedings even at an appellate stage. This is because a question of jurisdiction is quite definitive of the legal basis for exercising the judicial

function absence of which renders any proceedings incompetent. Since the high court order was directed to the district court, whatever proceedings conducted in contravention of this court's order was without authority and therefore a nullity.

Consequently, the proceedings by the Resident Magistrate court of Kinondoni dated 27<sup>th</sup> February 2023 and 14<sup>th</sup> March 2023 are declared a nullity and its decision dated 30<sup>th</sup> March 2023 is hereby quashed and set aside for lack of jurisdiction. This ground alone suffices to dispose of the appeal. **The District court -Kinondoni** is by this decision directed to comply with this court's order dated 7<sup>th</sup> October 2022.

Ordinarily costs follow the event; but Since confusion was brought by the court, each party is ordered to bear owns costs. Order accordingly.

**Dated at Dare es salaam** this 15<sup>th</sup> December 2023



**E. Y Mkwizu**  
**Judge**  
**15/12/2023**