IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA SUB-REGISTRY
AT IRINGA

CIVIL APPEAL NO. 20 OF 2023

(Arising from Ex-parte judgement and decree of theDistrict Court of Mufindi in Civil Case No. 19 of 2019)

BETWEEN

MAKETE DISTRICT COUNCIL ..... APPELLANT

VERSUS

ANDREA N. MBILING'I .....RESPONDENT

JUDGMENT

19th & 28th March 2024

LALTAIKA, J.

The Appellant herein **MAKETE DISTRICT COUNCIL** is dissatisfied with theEx-parte judgement and decree of the District Court of Mufindi in Civil Case No. 19 of 2019. She has appealed to this Court by way of a Memorandum of Appeal containing 5 grounds. I take the liberty to reproduce them hereunder:

1. *That the learned trial Magistrate erred in law and fact by entertaining the matter without jurisdiction.*
2. *That the learned trial Magistrate erred in law and fact to decide*

the matter in favour of the respondent without proper cause of action.

3. *That the learned trial Magistrate erred in law and fact to decide the matter in favour of the respondent without proof.*
4. *That the learned trial Magistrate erred in law and fact by failing to determine a preliminary objection that was raised by the appellant.*
5. *That the learned trial Magistrate erred in law and fact to entertain and decide a matter that was already struck out by the same Court.*

When the appeal was called for hearing on the **19th of March 2023** the Appellant appeared through Mr. Apolo Laizer, learned Municipal Solicitor. The respondent, on the other hand was represented by Mr. Frank Mpiluka. It was then that Mr. Mpiluka informed the court that his learned colleague **Dr. Ashery Utamwa** who was the one holding this matter as per internal arrangements of their law firm, was in another chamber and requested the hearing to proceed by way of written submissions. The prayer was granted. I take this opportunity to convey my appreciation to the learned Advocates for complying with the court order as required. The next part of this judgement is on a summary of submissions by both parti es.

Submitting in support of the first ground, learned Solicitor for the appellant contended that the trial court lacked territorial jurisdiction to entertain the matter. He emphasized that the action of the learned trial Magistrate of entertaining the matter without jurisdiction was contrary to section 13 and 18 (c) of **The Civil Procedure Code [Cap 33 R.E 2019**]. The learned Solicitor also cited page 11 of a book by a former Judge of this Court B.D Chipeta titled ***Civil Procedure in Tanzania - A student Manual*** to expound on some theoretical aspects of the concept of jurisdiction.

Moving on to **the second ground**, the appellant argued that the respondent failed to provide enough evidence connecting the appellant with the case. Specifically, the learned Solicitor averred, the respondent did not provide proof of authorization by the appellant to enter the purported contract. As a result, Mr. Laizer reasoned, the respondent lacked proper cause of action against the appellant. He cited Order VII Rule 1 of **The Civil Procedure Code [Cap 33] R.E 2019** and several cases including **John M. Byombalirwa Vs Agency Maritime International (Tanzania) Ltd.**[1983] TLR 1 to substantiate his argument.

Mr. Laizer went on to argued whether Fred Twaponile had been authorized by the appellant to enter into the purported contract. He emphasized that the respondent had failed to provide evidence to support this assertion. Mr. Laizer stressed that if Fred Twaponile had been acting on behalf of the appellant, there must be proof of his authorization to do so.

He referenced **"Muongozo wa Manunuzi Ngazi ya Jamii"** (Community level procurement guide), 2012 edition, which mandates that all TASAF projects be implemented by Community Management Committees (CMC) "Kamati ya Mradi wa Jamii." He pointed out specific procedures outlined in the guide, particularly para 4.2.1 (vii) - (ix), which require the appointed bidder to be issued with a written contract. Mr. Laizer highlighted the necessity for a written contract as per the guidelines.

He concluded by asserting that the respondent's claims were without merit and contended that no contract had been formed between the appellant and the respondent. Consequently, he argued that the respondent lacked a valid cause of action against the appellant.

On the third ground, the learned Solicitor for the appellant asserted that the decision of the Mufindi District Court was reached without proof to the required standard. He emphasized that the respondent failed to prove the existence of the claimed contract as required by law.

Mr. Laizer argued that according to established legal principles, the burden of proof lies on the party alleging certain facts necessary for the court to rule in their favour regarding a particular right or liability. Mr. Laizer emphasized that in this case, the respondent had asserted the existence and breach of a contract between him and the appellant but had failed to provide proof of the contract's existence before the trial court.

He referred to the case of **Berelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT-unreported), where the Court of Appeal highlighted the principle that the party making the allegation must provide evidence to prove it. Mr. Laizer also cited section **110 of the Evidence Act, [Cap. 6 R.E 2019**], which places the burden of proof on the party asserting the existence of certain facts.

The learned Solicitor criticized the trial magistrate for incorrectly stating that there was a contract between the respondent and appellant, citing the

mandatory requirement under **section 35(6) of The Public Procurement Act** for acceptance of a contract to be in writing.Furthermore, he highlighted a statement from the Mufindi District Court judgment which he deemed vague, as it did not specify the type of contract between the parties and was not supported by evidence presented by the plaintiff.

On **the fourth ground,**the learned Solicitor contended that the trial magistrate failed to consider the preliminary objection raised by the appellant. He emphasized that the judgment delivered on 7th August 2020 is silent on this issue, indicating an error on the part of the trial court.

Mr. Laizer argued invited this Court to take judicial notice of the records from the trial court on February 14, 2020. He explained that on that date, the appellant's solicitor (who was the defendant at the time) had appeared in court and had been instructed by the plaintiff's Advocate to hold brief and proceed after consultation with Advocate Dr. Utamwa, who could not appear in court on time. Additionally, on the same date, the solicitor had filed a written statement of defense, which was properly received by the Mafinga District Court, as evidenced by a court stamp acknowledging receipt. This written statement of defense, Mr. Laizer averred, contained a

notice of preliminary objection, asserting that there was no cause of action against the defendant and that the court lacked jurisdiction to entertain the matter. Mr. Laizer emphasized that the trial magistrate had not considered this objection, and the judgment delivered on August 7, 2020, remained silent on the issue of jurisdiction, failing to determine the preliminary objection.

Mr. Laizer indicated his awareness that preliminary objections can be raised at any stage before verdicts, yet the trial court had not ruled on the objection raised. He highlighted this procedural failure as a crucial aspect of the appeal.

On the fifth ground, Mr. Laizer argued that on March 22, 2019, the respondent filed a complaint against the appellant in the District Court of Mufindi, registered as Civil Case No. 4 of 2019 between Andrea N. Mbiling'i and Makete District Council. During the hearing, the appellant, then a defendant, raised a preliminary objection regarding the court's lack of territorial jurisdiction to hear the matter and requested dismissal with costs. The plaintiff conceded to the jurisdictional issue. Despite this, the trial court, without justification, **decided to strike out the case for want of jurisdiction under Order XXIII r (1) and (2) of the Civil**

Procedure Code. Subsequently, the respondent filed a new case involving the same parties and based on the same facts (Civil Case No. 19/2019, subject to this appeal).

Mr. Laizer raised the question of why the same court accepted and entertained **Civil Case No. 19/2019 after Civil Case No. 4/2019 had been objected to on jurisdictional grounds**. He argued that parties cannot confer jurisdiction on a court by consent, citing the East Africa Court of Appeal case of **Shyam Thanki and Others v. New Palace Hotel, (1972) H.C.D no.92**. He reiterated that the Mufindi District Court lacked jurisdiction to entertain Civil Case No. 19/2019, a fact accepted by the same court in its ruling dated September 23, 2019, under Civil Case No. 4/2019.

Mr. Laizer contended that the act of the same court entertaining Civil Case No. 19/2019, which had previously been objected to, contravened **Section 4(1) of the Magistrate's Court Act [Cap 11 R.E 2019]** and violated Sections 7(1) and 13 of The Civil Procedure Code [Cap 33 R.E 2019]. The learned Solicitor urged this court, which has statutory powers to supervise, direct, and correct errors or illegal decisions made by lower

courts, to allow the appeal in order to rectify the errors committed by the Mufindi District Court.

The **Counsel for theRespondent,** Dr. Utamwa, countered the first ground of appeal submitted by Mr. Laizer. He averred that on January 25, 2018,TASAF officials from Makete visited the respondentto inquire about acquiring grass. Dr. Utamwa noted that they inspected the respondent's farm and agreed on the type of grass needed, as well as the price per ton. The respondent subsequently transferred 50 tons of grass over five trips, totalling Tsh. 1,500,000 for both the grass and transportation.

Dr. Utamwa argued that this testimony demonstrated that the trial court was correct in adjudicating Civil Case No. 19 of 2019, as per **Section 18 of the Civil Procedure Code CAP 33 [R.E 2019]**, which allows for filing suits where the cause of action fully or partly arises. He emphasized that the appellant had followed the respondent to Mafinga, where the subject matter (grass) was located within the jurisdiction of the Mufindi District Court.

Dr. Utamwa dismissed the appellant's claim that the respondent's location in Makete District, Njombe Region, rendered the trial court's

jurisdiction invalid, asserting that the respondent chose to file the case where the cause of action arose, as permitted by law.He cited the case of **MANTRAC (T) LIMITED VS SUMMER COMMUNICATIONS COMPANY LIMITED**, Civil Appeal No. 279 of 2018 IIC DSM, **and MASHA VS ATTORNEY GENERAL** (Case 136 of 2001) [2005] TZHC 46 to support his argument.

Referring to the decision in **JAMES FUNKE GWAGILO VS THE ATTORNEY GENERAL**, Civil Revision, No. 50/1998, Dr. Utamwa highlighted that Section 18 of the Civil Procedure Code, R.E 2019, determines the appropriate court based on where the cause of action arises.He emphasized that since the cause of action arose in Mufindi District, where the respondent filed Civil Case No. 19 of 2019, the appellant's argument lacked merit and should be disregarded.

Dr. Utamwa**moved on to the second ground of appeal**highlighting that the original suit was based on breach of contract. He explained that a breach of contract occurs when a party fails to fulfill their obligations as agreed upon in the contract. Dr. Utamwa emphasized the key elements in the scenario: the existence of a contract, the respondent's performance

despite obstacles faced, the appellant's failure to perform, and the resulting damages to the plaintiff.

He pointed out that Mr. Laizer questioned the authorization of Fred Twaponile by the appellant, but overlooked the fact that the payment was made by the appellant's boss, **and the bank statements in the court records supported this.** Dr. Utamwa also mentioned that on January 25, 2018, within Mafinga Township, the defendant, represented by her Agricultural officer from Tanzania Social Action Fund program (TASAT), Fred Twaponile, entered a contract with the plaintiff for the supply of 50 tons of grass at an agreed price per ton.

He argued that since there was no other case in court against Fred Twaponile for entering into agreements without authorization, discussing this issue negatively at this stage was procedural. He concluded that the respondent had a cause of action against the appellant, and therefore, this ground lacked merit.

On the third ground of appeal, Dr. Utamwaemphasized that only the issues discussed by the trial court should conclude the dispute. He

addressed the appellant's argument that the respondent had failed to prove the existence of the contract. Dr. Utamwa pointed out that the trial court had indeed determined the issue of the contract's existence, weighing the evidence presented by PW-I, who testified that the appellant had followed the respondent to Mufindi District for an agreement regarding the transfer of grass, which was well established before the trial court. He further highlighted that the trial court had also addressed the issue of whether the appellant breached the contract.

Dr. Utamwa argued that the evidence presented proved the appellant's liability for the breach, as the respondent had fulfilled his obligations by transferring and delivering the items as per the appellant's instructions but had not been fully compensated. He mentioned the respondent's efforts to reach TASAF headquarters and the partial payment received from the appellant, supported by the respondent's bank statement as evidence of the transaction. Dr. Utamwa asserted that the partial payment by the appellant acknowledged the existence of the contract.

Moreover, he referred to **Section 10 of the Law of Contract Act Cap 345 (R.E 2019)**, which states that all agreements are contracts if made by the free consent of competent parties, for lawful consideration, and with

lawful objectives. Dr. Utamwa also cited the case of **BOX BOARD TANZANIA LIMITED VS MOUNT MERU FLOWERS LIMITED**, Civil Case No.08 2016, to support his argument that the partial payment by the appellant indicated the existence of a contract.

Dr. Utamwa, the learned counsel for the respondentaddressed the **fourth ground of** appeal by referring to the proceedings of the trial court, particularly on page 4. He stated that the court had ruled on the alleged ground raised by the appellant. Dr. Utamwa explained that the written statement of defense (WSD) filed by the appellant was considered time-barred because it was filed beyond the stipulated 21 days. As a result, expar-te proof proceeded, and judgment was decreed in favour of the appellant.

He argued against the appellant's attempt to convince the court regarding the issue by stating that the court had been silent on the raised objections. Dr. Utamwa clarified that the preliminary objection was included in the WSD, which was struck out automatically due to being time-barred. He asserted that the raised objection followed the event, and thus, the appellant's argument lacked merit.

Moving on to the fifth ground, Dr. Utamwa, explained that the initial objection raised in the trial court resulted in the matter being struck out. However, he clarified that **the respondent subsequently filed another suit, believing that the court had jurisdiction as per Section 18 of the Civil Procedure Code.** The respondent argued that the case was filed where the cause of action arose, contending that the appellant had followed him to Mafinga, and the subject matter (grass) was within the jurisdiction of the Mufindi District court. Dr. Utamwa also noted that the initial matter was struck out, not dismissed, implying that the respondent filed the same suit again, knowing that the court had legal jurisdiction.He concluded by praying for the dismissal of the appeal with costs, asserting that it lacked merit.

In rejoinder,the learned Solicitor reiterated that there were no meetings relating to the subject matter of this appeal conducted at Mufindi District, hence there is no cause of action that arose therefrom. Mr. Laizer cited relevant sections of the Magistrate Court Act and the Civil Procedure Code to argue that the trial court lacked territorial jurisdiction to entertain the matter. He reiterated his submission in chief on the rest of the grounds.

I have dispassionately considered the rival submissions and carefully examined the court's records. I think this matter should not detain me too long. As a recap, the appeal arises from a dispute regarding jurisdiction, the existence of a contract, and the handling of a preliminary objection by the trial court. The Appellant contests the trial court's jurisdiction, denies the existence of a contract, disputes the adequacy of evidence presented by the Respondent, and challenges the handling of a preliminary objection. I will spend some considerable time on the handling of preliminary objection. I believe the same can dispose of the entire appeal.

However, before I move on to that ground of appeal, I am inclined to clarify a few issues. One, in Tanzania the District Executive Officer (DED) is the accounting officer of the District Council. Only he/she or another person dully authorized by him/her has power to enter a contract binding the council. With respect, the learned Counsel for the Respondent should have conducted due diligence before accepting instructions. As for the receipt purporting to be for part payment of the debt, I wouldn't be so presumptuous when it comes to authenticity of payslips. Be it as it may, two mistakes do not make a right.

Pursuant to procedural practice in our law that whenever a preliminary objection on a point of law is raised the same must be disposed of first (See the following unreported cases of the Court of Appeal of Tanzania CAT tothat effect; **Meet Sigh Bachu vs Singh Bachu,** Civil Appeal No 144/02 of 2018, **Godfrey Nzowa Vs. Selemani Kova and Tanzania BuildingAgency**, Civil Appeal No. 3 of 2014 and **Yazidi Kassim t/a Yazidi Auto Electric Repairs Vs. The Attorney General**, Civil Application No. 552/04 **of** 2018).

I agree with Mr. Utamwa and the trial court that failure to file written submissions sanctioned by court is tantamount to nonappearance. A valuable lesson can be learned from the case of **P 3525 LT Idahya Maganga Gregory Vs. The Judge Advocate General**, Court Martial Criminal Appeal No.2 of 2002 (unreported) where it was stated:

> *"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file written*

submissions are similar to those of failure to appear and prosecute or defend, as the case maybe..."

Coming back to the matter at hand, it is indeed true that preliminary objections can be raised at any stage before judgment. It is undisputable that one of the POs raised in this matter was on jurisdiction. There is no doubt that jurisdiction is a point of law. This is because, handling a matter that is beyond jurisdiction of a given court is tantamount to not having handled it at all.

I must admit that it has disturbed me somehow to learn that the issue of jurisdiction was brough to the attention of the trial Magistrate twice. On the first time the plaintiff conceded, and the learned Magistrate proceeded to strike out the matter. This led to the appellant (then plaintiff) to refile it. This time, the took refuge to alleged delay in filing a WSD by the appellant to proceed with the matter in the form of the impugned expar-te judgement. I am immensely flabbergasted if not utterly bewildered.

Jurisdiction is probably the most important legal issue for consideration by any court of law. If the court had been made aware that it

lacked jurisdiction by way of a conceded PO, the learned trial Magistrate should have dismissed the suit forthwith and not to strike it out as if somehow parties could come back with documents conferring jurisdiction to the court. What made the learned trial Magistrate to go back to the matter he had disposed of remains baffling. In the case **of Commissioner General of the Tanzania Revenue Authority v. JSC Atomredmetzloto (ARMZ)** Consolidated Civil Appeals No. 78 and 79 of 2018 (Unreported) the Court Appeal of Tanzania stated:

> *Jurisdiction is a creature of statute and as such, it cannot be assumed or exercised on the basis of likes and dislikes of the parties. That is why the Court has in a number of occasions insisted that the question of jurisdiction is fundamental in court proceedings and can be raised at any stage even at the appellate stage. The court suo moto can raise it, in adjudication the initial question to be determined is whether or not the court or tribunal is vested with requisite jurisdiction.*

Upholding a preliminary objection on jurisdiction, except where the PO was on pecuniary jurisdiction and a higher court finds it just that the matter be remitted to a lower court for final determination on merit, results in dismissal of the suit. See this courts decision in **MICHAEL TUMAINI JOACHIM NGALO V JITESH JAYANTILAL LADWA** Civil Case No 18 of

2021 HCT, Dar (Unreported) In the matter at hand, the learned trial Magistrate did not revert the matter to the Primary Court but proceeded to confer himself jurisdiction he did not have.

Premised on the above, I allow the appeal. I hereby nullify proceedings of the trial court, quash the decision, and set aside all orders emanating from the same. Each party to bear their own costs.

It is so ordered.

E.I. LALTAIKA
JUDGE
28.03.2024

Court:

Judgement delivered under my hand and the seal of this Court this 28th day of March 2024 in the presence of Ms. Neema Sarakikya, learned State Attorney for the Appellant and Mr. Frank Mpiluka, learned Advocate for the Respondent

E.I. LALTAIKA
JUDGE
28.03.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
28.03.2024