IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 102 OF 2005

GEORGE DAVID GORDON.....PLAINTIFF
VERSUS
RELIANCE INSURANCE COMPANY (T) LIMITED.....DEFENDANT

JUDGMENT

1. Date of Last Submission – 12/3/2007

2. Date of Judgment – 27/3/2007

MASSATI, J:

The Plaintiff, who is represented by M/S F.K. LAW CHAMBERS, has filed a suit against the Defendant, **RELIANCE INSURANCE COMPANY (T) LTD** who is represented by M/S OCTAVIAN AND CO, ADVOCATES, for the total sum of shs.35,000,000/= as indemnity for total loss of his motor vehicle which was gutted by fire. He also claims for loss and damages arising out of the Defendant's failure or refusal to settle his claims under the insurance contract. The said sum of 35,000,000/= comprises I think, of shs.17,000,000/= as the value of the motor vehicle and shs.18,000,000/= as damages for expenses for alternative transport during the period of delay. He also seeks for general damages, interests and costs.

In its defence the Defendant has denied liability followed by a reply from the Plaintiff. Thus the pleadings were completed. Mediation having failed the case was set for trial before me. Three issues were framed for trial. Indeed, trial proceeded with the Plaintiff producing 2 witnesses, and 4 documentary exhibits. On the other hand the Defendant produced also 2 witnesses, and also 4 documentary exhibits. The learned Counsel then proceeded to file their written final submissions in pursuance of their cases.

In the course of preparing this judgment, I had to restudy the plaint. As I said above, the principal claim shown was Tsh.35,000,000. This is per paragraph 3 of the plant. How the total sum of Tshs.35,000,000 was reached is shown in paragraph 17. PARTICULARS OF LOSS AND DAMAGE:

> *"(a) The Defendant's refusal, failure, or neglect to pay and indemnify the Plaintiff the full insured value of the vehicle has caused the Plaintiff to suffer loss and damages equivalent to the insured value of the Motor vehicle being Tshs. Seventeen Million (Tshs.17,000,000/=)."*

There is no direct reference to the sum of Tshs.18,000,000/= except by implication from clauses (b),

(c) and (d) of paragraph 17 and then paragraph (b) of the prayers:

"(b) Judgment that the Defendant pay the Plaintiff the sum of Tanzanian shillings Eighteen Million (Tshs.18,000,000/=) being damages for the expenses which the Plaintiff incurred in securing alternative transport for the whole period during which the settlement of his claim was delayed and loss of use suffered by the Defendant during the said period of delay."

It, at once, leaps to the eye, that this prayer is founded on clauses (b) (c) and (d) of paragraph 17 of the plaint, and the particulars of loss and damage. Which to me, and on a close look appears to be that the sum of Tshs.18,000,000/= is still fluid and therefore unascertained.

Then there is paragraph 19 of the plaint. It reads: -

"For the purposes of jurisdiction and the court fees, the cause of action arose in Dar es Salaam within the territorial jurisdiction of this Honourable Court and the amount claimed is Tanzania Shillings Seventy Five Million, hence well within the pecuniary jurisdiction of this

Honourable Court. This Honourable Court is hence vested with jurisdiction to entertain the suit."

The first problem I have with this paragraph is the amount "claimed" of Tanzania Shillings Seventy Five Million. In the first place, I did not know whether it was put there by mistake or deliberately, because it is not consistent with the substance in the body of the plaint. Secondly I will be forced to consider the effect of this inconsistency in the pleading on this court's jurisdiction.

On the date set for the judgment of this court (i.e. 27/3/2007) I invited the learned Counsel to address me on the issue of this court's pecuniary jurisdiction in view of the discrepancies discovered in the plaint.

Mr. Duncan, learned Counsel, for the Plaintiff submitted that the figure of shs.75,000,000/= appearing in paragraph 19 was an error, and that he was praying that this be amended under O. VI (17) of the Civil Procedure Act. He said that the actual claim was 67,850,000/= calculated at the rate of Tshs.30,000/= per day from the date of the accident to the date of filing the suit. Therefore this court had jurisdiction. Elaborating in reply to Mr. Temu's reaction, Mr. Duncan submitted that under O. VI (17) of the Civil Procedure Code,

the term "At any time of the proceedings" meant, what it says at any stage, even at the appellate stage. On the other hand, Mr. Temu, learned Counsel submitted that the 30,000/= per day claim under paragraph 17 (d) of the plaint was for actual expenses incurred. It cannot be left to guess work. He said in view of the conflicting figures, he was leaving it to the court to determine which figure would be used in determining the court's pecuniary jurisdiction. It was his view also, that amendments could not be made at the stage of judgment, as O. VI rule 17 could not be stretched that far.

After carefully considering the submissions of the learned Counsel, I must first begin by stating the position of the law. According to **SARKAR CODE OF CIVIL PROCEDURE** 10th Ed. Vol. 1 p. 975 it is the Plaintiff's valuation that controls and determines the court's jurisdiction. It is also the law that the question whether the court has jurisdiction to entertain a suit and for assessment of court fees is always to be decided on all the allegations in the plaint. It is therefore incumbent upon the Plaintiff to plead facts which make the suit prima facie entertainable by the court.

Guided by the above principles, I will now turn to examine the plaint. First, I accept that the figure of Tshs.75,000,000/= was a typographical error. I would exercise my inherent powers under s. 96 of the Civil Procedure

Code Act and correct that error. But after doing so, I am at a loss as to which figure to replace with. Mr. Duncan has suggested that the figure of 67,500,000/= be replaced being a derivative of the rate of 30,000/= per day for loss of use from the date of the accident to that of filing the suit. The problem is that this computation is not pleaded in the body of the plaint which only supports the floating sum of Tshs.17,000,000/= and Tshs.18,000,000/= which is calculated to last for the period of delay. If that means up to the date of filing the suit, it works to 30,000/= x 365 days x 3 = 32,850,000/= and not 67,850,000/= suggested by Mr. Duncan from the bar. So all these confusing figures only go to show that the exact figure for the claim for loss of use and incidental expenses is still not certain. The only figure that is certain is the insured value of Tshs.17,000,000/=. The issue is whether in the circumstances, the court has the necessary pecuniary jurisdiction to determine the suit?

I don't have to justify why I had to do so because, as has been repeatedly said, jurisdiction is always in issue and may be raised at any stage of the proceedings. (J**OHN VS R.** [1951] 18 EACA 218. So I have to turn to it, regrettably despite the stage that this case has reached.

The immediate issue is whether in the present case the court is entitled to take into account the sum claimed for loss

of use, be it, 67,850,000/= or 18,000,000/= in deciding whether this court has the requisite pecuniary jurisdiction?

In **TANZANIA – CHINA FRIENDSHIP TEXTILE CO LTD VS OUR LADY OF USAMBARA SISTERS** (CAT Civil Appeal No. 84 of 2002 (unreported) the facts were almost similar to those in the present case. There, the Respondents had sued the Appellants in the Commercial Division of the High Court for (i) shs.8,136,720/= being costs incurred for the production of the vitenge fabrics and tax paid, and (ii) shs.15,000,000 being general damages for inconvenience caused in the preparation of their celebrations, interests and costs. The question of the court's pecuniary jurisdiction was not taken up in the trial, court. After the trial the Respondents were awarded shs.8,136,720/= as well as shs.7,500,000/= as general damages. The Appellant appealed.

On appeal, the issue of jurisdiction was taken up for the first time. It was argued on appeal that since under the Magistrates Courts Act, the High Court's pecuniary original jurisdiction did not exceed shs.10,000,000/= it was wrong for the trial court to have tried the suit whose pecuniary value did not exceed shs.10,000,000/= (in that case it was 8,136,720/=). It was on the other hand, argued for the Respondent that, on top of shs.8,136,720/= the court trial was entitled to take into account the claim of Tshs.15,000,000

to add the value of the claim to shs.23,136,270/= so as to bring the case within the pecuniary jurisdiction of the court. Rejecting the Respondent's argument, the Court of Appeal said:-

> *"...since general damages are awarded at the discretion of the court, it is the court which decides which amount to award. In that respect, normally claims of general damages are not quantified. But where they are so erroneously quantified, we think, this does not affect the pecuniary jurisdiction of the court. In our view, it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the court."*

After this observation, the Court of Appeal navigated through various provisions of the Constitution of the United Republic of Tanzania, the Judicature and Application of Laws Act, the Civil Procedure Code Act, including sub rule 2 of Rule 1 Order IV, and the Magistrates Courts Act. The Court of Appeal concluded that the jurisdiction of the High Court generally was subject to other laws. It also concluded that in that case, under the Civil Procedure Code O. IV rule (1) (2) and s. 13, and s. 40 (2) (b) of the Magistrates Courts Act, the Commercial Division of the High Court had no jurisdiction to try a matter whose pecuniary value was below shs.10,000,000/= .

In my recent judgment in Commercial Appeal No. 1 of 2006 (**ZANZIBAR INSURANCE CORPORATION VS RUDOLPH TEMBA** (Unreported) I considered and applied the decision of the Court of Appeal above cited, and concluded that in terms of s. 40 (3) (b) of the Magistrates Courts Act, this court had no jurisdiction to adjudicate on commercial matters whose pecuniary jurisdiction did not exceed thirty million shillings. In that case, the Respondent had lodged a claim of shs.60 million together with claims for USD. 60 per day for loss of use of the stolen vehicle, also as in the present case, the subject of insurance. In that case I held that the lower court had no pecuniary jurisdiction in the said commercial case because its value exceeded shs.30/million.

What I gather from the Plaintiff's averments in the present case is that his principal claim is for shs.17,000,000/= which is the declared/insured value of his vehicle, but the shs.18,000,000/= or whatever figure raised by learned Counsel for the Plaintiff for damages for expenses which the Plaintiff incurred in securing alternative transport for the whole period during which the settlement of his claim was delayed and loss of use suffered by the Defendant during the said delays is still fluid. It cannot be ascertained before judgment. This is so because in the particulars of the loss and damage, the Plaintiff estimates the said loss at the rate of Tshs.30,000/= per day, from the date of the accident to the

date of payment in full. As I remarked in the **ZANZIBAR INSURANCE CORPORATION** case, although this amount was not claimed by way of general damages, the actual amount was still at large, and like, general damages, it was subject to proof and assessment by the court. I would not therefore regard, the claim for Tshs.18,000,000/= as part of the shs.35,000,000/= that the Plaintiff has put forward in his claim. I would, instead relegate the principal sum to be claimed, to shs.17,000,000/=.

The pecuniary jurisdiction of this court, in the light of the provisions of s. 40 (3) (b) s. 2 of the Magistrate Courts Act as amended, as read together with O. IV rule 1 (2) of the Civil Procedure Code as amended; is limited, in the case of movables capable of monetary estimation, to those whose value is in excess of shs.30,000,000/= excluding claims for general damages or any claim that cannot be ascertained at the time of filing the suit. Any subject matter below this value would be within the competency of the subordinate court. And the present one is the case in point.

For the above reasons I am constrained to have to conclude that belated as it might be, upon discovering that this court has no jurisdiction, I would not proceed on to deliberate on the merits of the case. Regrettable, as this might be, perhaps this is a reminder to all the us, servants of the

law, to always be on the look out on the issue of jurisdiction, on deciding to institute a suit, or once a suit is filed, for as I had remarked earlier on, jurisdiction is always in issue and it is the primary duty of every player to satisfy himself that the court in which the matter is filed, is vested with the requisite jurisdiction.

In the result, I would strike out the suit, but the Plaintiff is at liberty to file a fresh suit in a court of competent jurisdiction, subject to the law of limitation. I would also order that, at the option of the parties or in any case after the lapse of the period of appeal, all the exhibits tendered in this case shall be returned to the parties.

As the issue of jurisdiction was taken up by the court suo moto, I shall make no order as to costs.

Order accordingly.

S.A. MASSATI

JUDGE

27/3/2007

2,322 words