

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

COMMERCIAL CASE NO. 49 OF 2006

**MIKOANI TRADERS LIMITED.....PLAINTIFF
VERSUS
ENGINEERING & DISTRIBUTORS LTD.....DEFENDANT**

R U L I N G

MASSATI, J

In this case the Plaintiff was allowed to amend the plaint, following an objection on the verification clause. According to the amended plaint the Plaintiff is now claiming for: -

- (a) Payment of Tshs.8,500,000/= being refund of purchase price.
- (b) Payment of Tshs.28,828,800/= being loss of profit.
- (c) Payment of shs.2,700,000/= being refund of medical expenses.
- (d) General damages to be assessed by the Court.

- (e) Interest on (i) (ii), and (iii) above at 31% from the filing date to the date of full satisfaction and on (iv) at the same rate from the date of judgment to full satisfaction of the decretal sum.

The case was set for final pretrial conference before me today. Mrs. Rwebangira, learned Counsel for the Defendant, took up a point of law, that the Court had no pecuniary jurisdiction to try the matter. She submitted that the substantive claims in the present suit are those which can be ascertained. They are prayer (i) and (iii) of the plaint. Prayer (ii) (loss of profits) is in the nature of general damages, which cannot be ascertained before trial. Therefore it cannot be used to elevate the pecuniary claim. She referred to me my own unreported decision in **KUSAGA G MAUMA & ANOTHER VS RAJABU MABIRA & ANOTHER** in Commercial Case No. 13/2006, and **TANZANIA CHINA FRIENDSHIP TEXTILE LTD VS OUR LADY THE USAMBARA SISTERS** (CAT Civil Appeal No. 84 of 2004) (Unreported). On the basis of those authorities, she prayed for the striking out of the suit.

Ms. Adelarde, learned Counsel for the Plaintiff, who, though taken by surprise by the preliminary objection, nevertheless put up a valiant fight. He submitted that the cases cited by Mrs. Rwebangira were distinguishable from the present one, in that in those cases, the

amounts claimed were inflated by claims of general damages which were erroneously pleaded.

Whereas, in the present case, apart from the special damages for refund for purchase price and medical expenses, the item of shs.28/- million as loss of profit has been pleaded and particularized in paragraph 12 of the amended plaint. He was therefore of the view that there was no substance in the preliminary objection, and prayed that the same be dismissed.

In her brief rebuttal submission, Mrs. Rwebangira said that the loss of profits of shs.28/= million cannot be accumulated to inflate the total substantive claim. If this figure is left out, the balance of the claim cannot sustain itself in this Court. She thus reiterated her prayer for the suit to be struck out.

I have carefully followed the arguments of the learned Counsel. Although the point was not taken in the Written Statement of Defence, in terms of O. VIII rule 2, this is a question of jurisdiction, and it is now settled law that it may be taken at any stage of the proceedings even at an appellate stage; as was the case in the **TANZANIA – CHINA FRIENDSHIP TEXTILE’S** case.

TANZANIA – CHINA FRIENDSHIP case is also authority for the proposition that general damages if erroneously pleaded cannot be

used to inflate the substantive claims. Following the reasoning of the Court of Appeal in that case carefully, the decision boils down to this: the trial Court cannot use any claims put up by the Plaintiff, however described, which cannot be ascertained at the pleading stage, or which have to be proved and assessed by the Court after a trial. In the present case the Plaintiff, has claimed shs.28,828,800/= as "*loss of profits*." Although the schedule of daily production capacity and profit margin, is attached; that does not, in my view, bring it any nearer to special damages, such as the purchase price, and medical expenses supported by receipts on actual expenses. Loss of profits on the other hand, is still at large. It needs to be ascertained. That is why it cannot be regarded on equal footing with "*special damages*". It is a specie of general damages. It is just as fluid.

In my considered view, there is considerable merit in Ms. Rwebangira's submission. If the shs.28/= million loss of profit claim is left out, the substantive claim remains shs.11,200,000/= which is far below the pecuniary jurisdiction of this Court, which is, shs.30,000,000/= and above, as set out in s. 40 (3) of the Magistrates' Courts Act as amended by Act 4 of 2004.

In the result, I shall uphold the preliminary objection and find that this Court lacks pecuniary jurisdiction to entertain the present suit. The suit is accordingly struck out. In the circumstances of the case, there shall be no order as to costs.

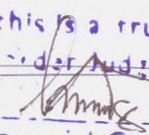
Order accordingly.

S.A. MASSATI

JUDGE

26/11/2007

808 words

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign 
Registrar Commercial Court Dsm.
Date 28 Nov 07