

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

COMMERCIAL CASE NO.4 OF 2009

HERITAGE MOTEL PLAINTIFF

VERSUS

COPYRIGHT SOCIETY OF TANZANIA 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

Date of last order: 13.05.2009

Date of final submissions: 18.06.2009

Date of ruling: 03.07.2009

RULING

MAKARAMBA, J.:

On the 22nd January 2009, the Plaintiff, a private limited liability company, running hotel business, lodged a suit in this Court against the 1st Defendant, a body corporate, and the 2nd Defendant, the chief legal advisor of the Government in all legal matters. The Plaintiff sought among other reliefs a declaration that the *Copyright and Neighbouring Rights Act*, (CAP 218 R.E. 2002) and the *Copyright (Licensing of Public Performance and Broadcasting) Regulations*, 2003 are unfair; and a permanent injunction against the defendants. The action attracted preliminary objections from both the 1st and 2nd defendants.

The 1st Defendant raised a preliminary objection to the effect that this Court has no pecuniary jurisdiction to entertain the case. The 2nd Defendant

also raised a two-point preliminary objection. That the Plaintiff does not disclose any cause of action against the 2nd Defendant, and that a notice to sue the Government has not been issued against the 2nd Defendant as required by section 6(2) of the *Government Proceedings Act*, (CAP 5 R.E. 2002). The preliminary objections were disposed of by way of written submissions. This is the ruling.

The learned Counsel for the Plaintiff readily conceded to the preliminary objection raised by the learned Counsel for the 1st Defendant that this Court has no pecuniary jurisdiction to adjudicate on the instant case, given that the value of the subject matter is below Tshs. 30,000,000/-. The learned Counsel for the Plaintiff however, maintained that this Court has jurisdiction since the Attorney General is a party in terms of the provisions of section 6(4) of the *Government Proceedings Act*, (CAP 5 R.E. 2002). The argument in support of this line of reasoning is that since the Attorney General on behalf of the Government is a party, the case cannot be heard in a subordinate court and therefore this Court has jurisdiction to entertain this matter per section 6(4) of the *Government Proceedings Act* (CAP 5 R.E. 2002). I shall revert to this argument later. First let me address the issue of lack of pecuniary jurisdiction of this Court in the matter before it.

The concession by the learned Counsel for the Plaintiff that this Court lacks jurisdiction to entertain the case in itself would have sufficed to dismiss the matter. However, given the pertinence of the arguments fronted by both sides some canvassing by this Court of the arguments advanced by both sides in this matter is quite in order.

As a matter of law, this Court does not have exclusive jurisdiction in commercial matters. A party is therefore at liberty to lodge a commercial case either in this Court or in the lower courts competent to try the case subject only to the pecuniary value of the subject matter of the suit. In terms of Order IV Rule 3 of the Civil Procedure Code, suits of which competence fall within the lower courts are prohibited from being lodged in this Court. As rightly submitted by the learned Counsel for the Plaintiff, it is a well established principle derived from the provisions of section 13 of the Civil Procedure Code [CAP 33 R.E. 2002] that suits must be instituted in the court of the lowest grade competent to try them. In terms of section 40(3) of the Magistrates' Courts Act (CAP 11 R.E. 2002) which was brought by Act No.4 of 2004, the pecuniary jurisdiction of this Court on movable property is above Tshs. 30,000,000/-. Consequently, in an instance, where as in the present case, the pecuniary value is less than the pecuniary jurisdiction of this Court, in itself that would automatically ousts the jurisdiction of this Court. This line of reasoning finds support in the articulation of Lady Justice Kimaro (as she then was) in the case of **KNIGHT SUPPORT LIMITED VS RAMZAN D. WALJI t/a MOOSAS,** **Commercial Case No.24 of 2004** (unreported) cited to this Court by the learned Counsel for the Plaintiff. In that case, Her Ladyship had the opportunity of interpreting section 40(3) of the Magistrates' Courts Act and found that the Plaintiff's claim of Tshs. 18,000,000/- was far less than the pecuniary jurisdiction of this Court and dismissed it. In the instant case, the Plaintiff's claim is of Tshs. 1,500,000/-. This is far below the pecuniary jurisdiction of this Court. This automatically ousts the jurisdiction of this

Court in this matter. Consequently, the preliminary objection that this Court lacks jurisdiction to entertain the suit is upheld.

The learned Counsel for the Plaintiff though conceding that this Court lacks pecuniary jurisdiction in the matter, maintained that the Court has jurisdiction in terms of 6(4) of the Government Proceedings Act, (CAP 5 R.E. 2002), for the simple reason that the Attorney General is a party on behalf of the Government, making subordinate court incompetent to hear this case and therefore conferring this Court with jurisdiction in the matter. The argument that the nature of the claim confers jurisdiction on this Court, is closely related to the preliminary objection raised by the learned Counsel for the 2nd Defendant that the Attorney General has been wrongly joined in this matter. The argument is that the 1st Defendant being a body corporate is, in terms of section 46 of the Copyright and Neighbouring Rights Act (CAP 218 R.E. 2002), capable of suing and being sued in its own name. The learned Counsel for the Plaintiff on his part maintained that the Attorney General given the nature of some of the orders sought, the Attorney General is a necessary party.

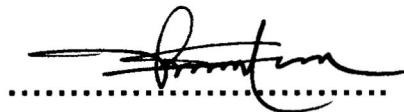
I do not have any qualms at all with the nature of the orders sought in this matter. The only problem is whether this Court would assume jurisdiction merely on the basis of the position of the Attorney General as chief advisor and custodian of all legislation. The learned Counsel for the Plaintiff has cited to this Court a number of authorities including *AMI MPUNGWE V ABAS SYKES* Civil Appeal No. 67 of 2000 (CAT)(unreported); *NATIONAL HOUSING CORPORATION V. TANZANIA SHOE COMPANY AND OTHERS* [1995] TLR 251; *FARIDA MBARAKA &*

FARIDA AHMED MBARAKLA V DOMINA KAGARUKI Civil Appeal No. 136 of 2006 (CAT)(unreported) and AMON V. RAPHAEL TUCK & SONS (1956) 1 All E.R. 273, to show how the Attorney General is a necessary party in this matter. All of these authorities point to the fact that the only reason which makes a person a necessary party to an action is that the question the action cannot be effectively and completely settled unless he is a party so as to make that party to be bound by the result of the action. With due respect to the learned Counsel for the Plaintiff, this still begs the question whether this Court has jurisdiction in this matter. Before coming to the result of the action the need to settled whether the matter is properly before the court is a condition precedent and in this instant case that has not been met consequently this Court will not be a in a position to bind the so-called necessary party ultimately. The issue whether this Court has jurisdiction to entertain the matter has to be settled first before embarking on the excursion to determine whether one or the other party has been properly impleaded. In the circumstances it difficult to rationalize the argument by the learned Counsel for the 1st Defendant that the nature of some of the orders sought in this suit makes the Attorney General a necessary party before settling the issue whether this is the proper forum for the action, which as I have determined it is not.

Let me for the sake of setting the record straight canvass albeit brief on the nature of the orders sought by the Plaintiff in this matter. The Plaintiff is seeking a declaration against the propriety of the Copyright and Neighbouring Rights Act and the Copyright (Licensing of Public Performance and Broadcasting) Regulations 2003, which he deems unfair. This, as rightly submitted by the learned Counsel for the 1st Defendant

brings the matter within the ambit of a constitutional petition and catapults this Court off the course. As further submitted by the learned Counsel for the 1st Defendant and rightly so, constitutional matters are dealt with under a special procedure in terms of the relevant provisions of the Basic Rights and Duties Enforcement Act (CAP 3 R.E. 2002). I need not go any further than this lest I traverse an area not well canvassed by the parties in their submissions. Suffice to say that this Courts lacks jurisdiction in this matter given the pecuniary value of the subject matter and no amount of argument will make this Court assume jurisdiction.

In the upshot and for the foregoing reasons, the suit is hereby dismissed with costs. Order accordingly.

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R.V. MAKARAMBA

JUDGE

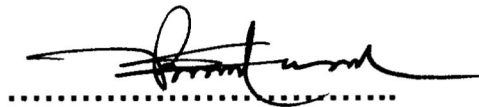
03/07/2009

Ruling delivered in Chambers this 3rd of July 2009 in the presence of:

For the Plaintiff: Absent

For the 1st Defendant: Absent

For the 2nd Defendant: Mr. Malata, State Attorney

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

03/07/2009

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