

**IN THE HIGH COURT OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**AT DAR ES SALAAM**  
**COMMERCIAL APPEAL NO. 04 OF 2019**

**ARAFA ISSA.....APPELLANT**

**Versus**

**KASSIM MAKAME.....RESPONDENT**

Last Order: 10<sup>th</sup> Dec, 2019

Date of Judgment: 11<sup>th</sup> Feb, 2020

**JUDGMENT**

**FIKIRINI, J.**

The appellant, Arafa Issa sued the respondent, Kassim Makame at District Court of Rufiji, at Utete, claiming Tzs.12,000,000/= for specific damages. A preliminary point of objection was raised by the respondent that the court had no jurisdiction over case which Trial Magistrate sustained and rejected the suit.

Aggrieved the appellant appealed to this Court raising three (3) grounds of appeal. Close scrutiny of the memorandum of appeal, the Court find all three grounds can basically be combined into one ground:

*“That, the learned trial magistrate erred in both law and fact by ruling and ordering that Commercial Case No. 01 of 2019 before the District Court of*

*Rufiji, at Utete be struck out for want of jurisdiction contrary to section 40 (3) (b) of the Magistrate Courts Act, Cap. 11 R.E. 2002 as amended by Written Laws (Miscellaneous Amendment) Act No. 4 of 2004”*

On 10<sup>th</sup> December, 2019 when the matter came for hearing, Mr. David Nyamhanga appeared on behalf of the appellant and was ready to proceed with the hearing of the appeal. The respondent entered appearance but said was not ready to proceed as he could not secure an advocate who could represent him due to their exorbitant prices. For the interest of justice the Court ordered parties to dispose of the appeal by way of written submissions. Parties filed their submissions timely.

I have gone through the submissions, though I will not reproduce them wholly but would agree to the appellant as well as the respondent that the appeal is well founded. A suit instituted before the District Court was a commercial case of which the court had pecuniary jurisdiction, since the value did not exceed Tzs. 70,000,000/=. The trial magistrate was therefore incorrect to reject the suit for lack of jurisdiction.

This would have concluded the appeal in favour of the appellant, had the respondent not raised another issue. that the amount of Tzs. 12, 000,000/= was not value of the subject matter but value of the claim. The point was however,

raised in course of arguing the appeal. Expounding on the point, it was the respondent's argument that the appellant has not disclosed the value of subject matter of the case. The amount stated under paragraph 15 of the plaint was thus relied on to determine the value of the appellant's claim to suggest the pecuniary jurisdiction of the court. This, according to the respondent contravened the dictates of Order 1 Rule 1 (f) of the Civil Procedure Code, Cap. 33 R. E. 2002 prior to the amendment vide Written Laws (Miscellaneous Amendment) (No. 4) Act, Act No. 11 of 2019 (the CPC). The provision requires a party to state facts showing that the court has jurisdiction. The reason behind the requirement was to allow the court to determine if it has jurisdiction or not, submitted the respondent. And that the value for determination is based on the subject matter and not value of the claim.

The plaint was thus fatally defective and rendered it incompetent, consequently robbing court of the jurisdiction, he stressed. Since the issue involves jurisdiction it can thus be raised at any time even at the appeal stage. On the strength of his submission he urged the Court to dismiss the appeal as the suit would have still fail for contravening Order 1 Rule 1 (f) of the CPC.

The appellant contested the assertion as misinterpretation of section 40 (3) (b) of the Magistrate Courts Act, Cap 11 R. E. 2002 (the MCA). Mr. Nyamhanga's submission interpreted the provision relying on a definition given by **Webster**

**New World Law Dictionary, Wiley Publishing Inc. (2006)** found at **page 245**, which defined the term to mean whatever in dispute; the actual cause of the law; the issue about which a right or obligation and **Essential Law Dictionary, First Edition, Sphinx Publishing, Sourcebooks Inc. (2008)** at **page 475** on the term subject matter.

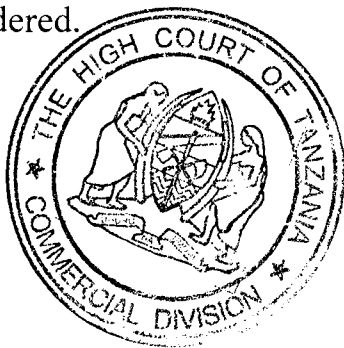
Concluding his submission Mr. Nyamhanga submitted that the plaint disclosed the cause of action and jurisdiction of the trial court. The submission by the respondent is thus total misdirection and should be disregarded and allow the appeal with costs.

While raising a preliminary point of objection is a recognized practice in place, the same has the manner on how it should be presented. Any intended preliminary point of objection ought to be preceded by a “notice of preliminary point of objection”. The notice must point out the contested point of law and the elaborate disclose of the contents has to be made. This is needed so as to let the court and the opposite party not to be caught off guard. In the present situation the respondent raised her should be point of objection in course of the submission, and not by way of notice, arguing that a preliminary point of objection in respect of jurisdiction of the court can be raised at any time even on appeal. The asserted position is correct that issue of jurisdiction can be raised at any time even at the appeal phase, but that doesnot mean “notice of

preliminary point of objection” should be ignored. Letting go of the notice requirement should be discouraged as it will be entertaining the practice of none adherence to the rules and procedures in place. The danger is this could breed chaos, uncertainty as the court and the other party will be ambushed unnecessarily. Also if the practice is allowed to stay there will be no need of having the rules and procedures in place to start with.

The court can raise an issue *suo motu*. Nonetheless, apart from that being court’s privilege, parties are always given room to address the court on the issue raised. That privilege has not been extended to them, which means they have to abide to the procedure in place which require a “notice of preliminary point of objection” to be filed in order for the court and the other party to be put on notice rather than be caught by surprise.

The preliminary point of objection raised is thus struck out and consequently, the appeal is allowed, the order the District court of Rufiji, at Utete is hereby quashed and all orders set aside. The record be placed before a different Magistrate who should hear the suit afresh. The appeal is allowed with costs. It is so ordered.



  
P.S.FIKIRINI

**JUDGE**

**11<sup>th</sup> FEBRUARY, 2020**