IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 160 OF 2012

BESTCOM COMPANY LTD. ..... PLAINTIFF

Versus

JACOB MTALITINYA t/a IT FARM ..... DEFENDANT

Date of submissions: 03/07/2014
Date of Ruling: 31/07/2014

RULING

F. Twaib, J:

It is trite that the court must always be satisfied that it has jurisdiction to determine the matter before it. Jurisdiction is a fundamental issue that the Court may raise *suo motu* whenever appropriate. **Halsbury's Laws of England**, 4th Edition, Reissue Vol. 10, para. 314, defines jurisdiction as follows:

> "By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means".

As I was preparing to commence an *ex parte* trial in this case, it came to my notice that the plaintiff's claim is for a sum of US Dollars 35,000 (less than Tshs. 60 Million) which, I surmised, was below the normal pecuniary jurisdiction of this court in civil cases. My understanding was that the pecuniary jurisdiction of District Courts and Resident Magistrate's Courts in all civil cases involving claims in respect of movable properties is limited to Tshs. 100 Million.

Mindful of the decision of the Court of Appeal in **Tanzania China Friendship Textile Mill v Our Lady of the Usambara Sisters** [2006] TLR 70, I called upon the plaintiff's counsel to address me on the issue. As the matter was proceeding *ex parte*, I posed the question as to whether I had jurisdiction to try the case to Mr. Mbamba, learned counsel for the plaintiff, and called upon him to address me thereon. In **Usambara Sisters**, the Court of Appeal held that the High Court did not have jurisdiction to determine civil suits in which the quantum for damages sought fell within the pecuniary jurisdiction of District Courts and Courts of Resident Magistrates.

Mr. Mbamba expressed an earnest belief that this court has jurisdiction to determine this case. He relied on the amendments to section 40 of the Magistrates Courts Act, 1984 (Cap 11, R.E. 2002) ("the MCA"), through the Written Laws (Miscellaneous Amendments) (No. 2), Act No. 4 of 2004. The amending Act added subsection (3) to section 40, which states:

> *"(3) Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited—*
>
> *(a) In proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed fifty million shillings and*

(b) In the proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed thirty million shillings."

These words can have only one plain meaning: That the jurisdiction of District Courts is limited, where the claim is of a commercial nature, to Tshs. 30 Million. In plain language, therefore, Mr. Mbamba is right in saying that on the strength of the provisions of subsection (3) of section 40 of the MCA, as amended, subordinate courts (meaning District Courts and Resident Magistrates' Courts) cannot exercise jurisdiction in commercial cases where the subject matter is a movable property and its value is more than Tshs. 30 Million. It is to be noted, *obiter*, that subordinate courts no longer have jurisdiction to entertain matters relating to immovable (landed) properties. All land cases now fall under the exclusive jurisdiction of the Land and Housing Tribunals and the Land Division of this Court, established under the Land Disputes Courts Act, Cap 216 (R.E. 2002).

That this is a commercial case is obvious: the plaintiff's claim stems from an alleged agreement for the supply of computer items and failure on the part of the defendant to pay the full agreed price. It falls under the definition of a commercial case as defined by section 2 (iii), (iv) and (v) of the MCA, which was also introduced by the same amendments to the MCA through Act No. 4 of 2004.

Hence, taken literally, the 2004 amendments reduced the jurisdiction of subordinate Courts in commercial cases from Tshs. 100 Million to Tshs. 30 Million—which means that for anybody whose claim is above Tshs. 30 Million, the proper forum would have to be the High Court. The plain or literal meaning of this provision also leads to the conclusion that since the jurisdiction of the Commercial Division of the High Court is not exclusive, a

prospective plaintiff has the option of filing his/her case either in the Commercial Division or the ordinary civil registry of the High Court.

This position is further given strength by section 6 of the Judicature and Application of Laws Act, Cap 9 (R.E. 2002) ("the JALA"). It states:

> "Subject to the provisions of any written law and to the limits of its jurisdiction, a magistrates' court shall exercise its jurisdiction in accordance with the laws with which the High Court is required by this Act to exercise its jurisdiction and with such other laws as shall be in force in Tanzania from time to time, and applicable to the proceedings before it, **but no magistrates' court shall exercise any jurisdiction or powers that are by any such law conferred exclusively on the High Court as such or on a court of record.**" [emphasis mine]

Further support of the position, if any was needed, is in sections 6 and 7 (1) of the Civil Procedure Code, Cap 33 (R.E. 2002). The two sections provide as follows:

> "6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.
>
> "7. (1) Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Hence, the literal or plain meaning approach to the interpretation of the relevant law as cited above supports Mr. Mbamba's contention that this court has powers to entertain his client's suit. However, given the circumstances, the issue cannot be answered that simply. It is therefore

necessary to look beyond the plain meaning rule in order to understand the true rationale for the 2004 amendments.

Applying the literal interpretation of the amendments, if a claimant does not wish to file his/her case in the Commercial Court, he/she would have to file it in the ordinary civil registry of this Court, so long as the value of the subject matter is above Tshs. 30 Million. In my view—a view that is supported by legislative intent—such approach would defeat the clear intention of the 2002 amendments to the Magistrates Courts Act [see the Written Laws (Miscellaneous Amendments) Act, No. 25 of 2002, which increased the pecuniary jurisdiction of District Courts and Resident Magistrates Courts to Tshs. 100 Million].

What really was the intention of the legislature in making the 2004 amendments? To answer this question, one is minded to look at other rules (also known as *canons* or *approaches*) of statutory interpretation. Writing on such rules in common law jurisdictions, Elmer Driedger, in his ***Construction of Statutes*** (Toronto: Butterworths, 1983, p. 1), observes:

> "The notion has long prevailed that three different rules or approaches may be employed in ascertaining the meaning of a statute. First, there is said to be the 'purpose' approach or 'mischief rule'....Then there is said to be the 'literal' approach or 'plain meaning' rule....Finally there is what is called the 'golden rule'."

As we have already seen, a literal interpretation appears to provide a meaning that is too wide to correctly reflect the limited scope that the amendments apparently intended to cover, namely, civil cases of a commercial nature that could, pursuant to the amendments, be filed in the Commercial Division of this Court. Instead, a literal approach would take away the jurisdiction of District Courts in *every commercial case* of a value above Tshs. 30 Million.

So much for the literal or plain meaning rule. The golden rule has been codified in our laws: section 2 (2) of the Interpretation of Laws and General Clauses Act, Cap 1 (R.E. 2002) states as follows:

> "(2) The provisions of this Act shall apply to, and in relation to, every written law, and every public document...unless in relation to a particular written law or document–
>
> (a) ....[not relevant]
>
> (b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application;

This provision directs us towards the second rule of interpretation, namely, the golden rule. It allows us, while interpreting statutes and public documents, to examine the intent and object of the statute and see whether a literal reading of its provisions is not entirely inconsistent with the objectives with which the statute was enacted. This gives us room for a more sensible interpretation of a statute, where a literal interpretation (which is to be the first approach one should consider in every situation) may lead to either an obnoxious result, or defeat the purpose for which the law was enacted.

The example I have of the use of the golden rule in which the Court avoided an absurd result is a relatively recent English case of **Adler v George** (1964) 2 QB 7. Under section 3 of the English Official Secrets Act 1920, it was an offence to obstruct His Majesty's Forces *in the vicinity* of a prohibited place. Mr. Frank Adler had in fact been arrested whilst obstructing His Majesty's forces *within* such a prohibited place, the Markham Royal Air Force Station in Norfolk.

Mr. Adler's defence was that he was not *in the vicinity* of a prohibited place, but rather, he was actually *in* a prohibited place. The court applied the golden rule to extend the literal wording of the statute to cover the action committed by the accused. If the court restricted itself to the literal rule, it would have produced an absurdity, as someone protesting near the base would be committing an offence whilst someone protesting in it would not.

The principle, however, is that the plain meaning rule is to be the rule of first resort, and the court would only be entitled to employ the golden rule where the plain meaning rule would lead to absurd results. The golden rule is in effect a modification of the literal rule. It is applicable where the court sees the need to look for another meaning to the words used in a statute to avoid an absurd result. The golden rule was suitably defined by Lord Wensleydale in **Grey v Pearson** (1857) HL Cas 61, who said:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther."

In the case at hand, I am not convinced that the golden rule can be adequately applied. Simply holding that a literal interpretation of the 2004 amendments removed the jurisdiction of subordinate courts to entertain all cases of a commercial nature where the value of the subject matter is more than Tshs. 30 Million would not necessarily lead to an absurd result. Likewise, I do not see anything in the subject or content of the Act that is inconsistent with the application of the provisions of those amendments.

We are thus left with the third rule of interpretation, the mischief rule. This will require us to make an enquiry as to the true intention of the legislature in making the 2004 amendments.

The mischief rule was first laid down in the famous **Heydon's Case** [1584]76 ER 637 3 CO REP 7a, where Lord Coke held that there are four points to be taken into consideration when interpreting a statute:

> "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:
>
> 1) What was the common law before the making of the Act?
>
> 2) What was the mischief and defect for which the common law did not provide.
>
> 3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And,
>
> 4) The true reason of the remedy."

Under the principle in **Heydon's Case**, the office of the judge is always:

> "...to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*"

What was the mischief that the Legislature intended to remedy by the 2004 amendments? That question would entail a look at the objects of those amendments. I thus visited the record of Parliamentary proceedings

when the Bill that led to the amendments was presented to Parliament. The Minister for Constitutional Affairs and Justice is recorded by the Hansard of 12th February 2004 as telling the Parliament of the United Republic of Tanzania, the following:

> *"Mheshimiwa Naibu Spika, itakumbukwa kwamba mwaka 1999 Mahakama ya Biashara ilianzishwa chini ya Kanuni za Mahakama Kuu yaani* The High Court Registries Amendments Rules 1999 *ili kushughulikia kesi zote za Biashara. Marekebisho yaliyofanyika mwaka 2002 kwenye Sheria ya Mahakama za Mahakimu imeziwezesha Mahakama za Mahakimu Wakazi kushughulikia kesi nyingi za biashara jambo ambalo iinaanza kuonekana linaipunguzia sana kazi Mahakama ya Biashara na hivyo kuiathiri Mahakama hiyo kimapato kinyume kabisa na madhumuni ya Serikali ya kuanzishwa Mahakama ya Biashara."*

My free translation is:

> "Honourable Deputy Speaker, it will be recalled that in 1999, the Commercial Court was established under the High Court Registries Amendments Rules 1999 so that it could deal with all commercial cases. The amendments made in 2002 to the Magistrates' Courts Act enabled Courts of Resident Magistrates to entertain many commercial cases, something that begins to appear to reduce the workload of the Commercial Court and thereby affect the court's revenue collection, contrary to the objectives of the Government in establishing the Commercial Court."

It is important to note that the Hansard, being a record of proceedings in Parliament, constitutes facts of which the Court is entitled to take judicial notice under section 59 (1) (c) of the Evidence Act, Cap 6 (R.E. 2002), read together with section 58 of that Act.

It is clear from the Minister's speech (which was in fact what the "Objects and Reasons" of the Bill said) that the mischief the amendments were intended to remedy was that the earlier amendments, done hardly two years back, significantly reduced the number of cases filed in the Commercial Court, because Tshs. 100 Million was rather high. This reduced the Court's revenue, as it is entitled to retain part of the court fees it collects under a retention scheme. From the Minister's speech, it is obvious that the intention was to ensure that the Commercial Division of the High Court is not rendered redundant, as was beginning to be the case. That threat was not there as regards the ordinary civil registry of the High Court and, in any case, the latter operates no retention scheme, and the fees it charges are relatively much lower.

Hence, if one were to look for what the Legislature had in mind when passing the amendments to the MCA, the Hansard as quoted above provides a clear-cut answer: the amendments were meant to allow more claimants to file their cases in the Commercial Court, and not necessarily to restrict the pecuniary jurisdiction of District Courts in commercial cases (when the Minister spoke of Courts of Resident Magistrates, he/she must have meant District Courts, given the context of the law sought to be amended). Perhaps the misconception is betrayed by the misdirection in the Minister's speech, who seems to have assumed that the Commercial Court has exclusive jurisdiction in commercial cases when he said "...the Commercial Court was established ... so that it could deal with *all commercial cases*." [emphasis mine].

With due respect, it is not correct to say that the Commercial Court deals with *all commercial cases* at the High Court level, the High Court Registry Rules do not provide for such exclusive jurisdiction. The civil registry of this court, as a court of record, still retains its general jurisdiction to hear and determine commercial cases, as part of its *full* original jurisdiction in

civil matters, as provided for by section 2 (1) of the JALA (*supra*). In any case, a subordinate legislation such as the Registry Rules cannot take away the constitutional and statutory jurisdiction of this Court. The minimum pecuniary limit of that jurisdiction is the issue I am called upon to determine in this ruling.

It is clear to me, from the Hansard just cited, that when the Government presented the relevant Bill to Parliament, it did not intend to bring all commercial cases of the value above Tshs. 30 Million to the High Court. That would have defeated the whole purpose for which the earlier amendments to the MCA (of 2002, to which the Minister referred) were made.

In my view, therefore, the cure to the mischief that the amendments intended to bring about was not intended to completely remove the power of District Courts to entertain commercial cases whose value was beyond Tshs. 30 Million. It was to rescue the Commercial Division of this Court from the threat of redundancy and severely reduced revenue that was encroaching upon it, and give it a new lease of life. Put simply, the amendments would allow claimants to access the Commercial Court if they so wished. For those who did not want to do so, they could still file their cases in District Courts and Courts of Resident Magistrates, subject to the pecuniary limit of Tshs. 100 Million for claims on movable properties.

In fine, I am disposed to employ the mischief rule in the interpretation of section 40 (3) as added by amendments made through Act No. 4 of 2004. I hold that the original jurisdiction to entertain this matter lies within the pecuniary jurisdiction of subordinate courts and the Commercial Division of this Court. It is not within the jurisdiction of the ordinary civil registry of this Court.

With this finding, what is the appropriate order to make? The decision in **Our Lady of the Usambara Sisters** requires this court to strike out the suit. However, I am also aware of some earlier decisions of this Court which express views contrary to those in **Usambara Sisters**. One of those cases was **Renada Minerals Corporation v. Consolidated Holding Corporation & Anor,** High Court of Tanzania at Arusha Civil Case No. 52 of 1999 (unreported). In that case, Rutakangwa J. (as he then was), held that section 13 of the CPC is a rule of procedure and not of jurisdiction and, as such, cannot be construed to take away the jurisdiction of this court to entertain matters simply because it requires suits to be instituted in the lowest court competent to try it. His Lordship stated as follows (after citing with approval Mulla on ***The Code of Civil Procedure***, 16th edition):

> "It is my holding therefore, that s. 13 of the CPC 1966 does not oust the jurisdiction of this court in respect of suits of this nature which by their monetary value ought to be commenced in the district or even in the primary courts. If by sheer inadvertence or for the sake of convenience a plaintiff institutes a suit of this nature which by virtue of s.13 of the CPC 1966 as a matter of procedure and policy ought to have been instituted in one of the two subordinate courts, **this court, has the option of either returning the plaint to the plaintiff under Order VII rule 10 of the CPC 1966 or trying and determining the same.**" [emphasis mine].

See also "*The Pecuniary Jurisdiction of the High Court of Tanzania in Civil Cases*", a case note by Advocate Fatma Karume, published in ***Journal of the Tanganyika Law Society*** [2012] vol. 2 No. 2 p. 102). However, since **Usambara Sisters** is a decision of the Court of Appeal, I am bound by it. The effect of that decision is to exclude the option of applying Order VII rule 10 of the CPC, which would have allowed this court to either try the case itself, or return the plaint to the plaintiff for filing in a registry of a

competent subordinate court. The only remaining option, following **Usambara Sisters**, is to strike out the suit.

In the final analysis, therefore, I am constrained to strike out this suit on grounds of want of jurisdiction. Given that these proceedings were conducted in the absence of the defendant, and the issue determined herein was raised by the Court on its own motion, there shall be no order as to costs.

DATED and DELIVERED at Dar es Salaam this 31st day of July, 2014.

Fauz Twaib
Judge