

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**DC. CIVIL APPEAL NO. 9 OF 2019**

*(From the decision of the District court of Mtwara in Civil Case No. 48 of 2017)*

**MUNICIPAL DIRECTOR MTWARA**

**MUNICIPAL COUNCIL ..... APPELLANT**

***VERSUS***

**SHAIBU HASSAN KIOZE.....RESPONDENT**

*Hearing date on: 07/7/2020*

*Judgment date on: 06/10/2020*

**JUDGMENT**

**NGWEMBE, J:**

The appellant Municipal Director of Mtwara Municipal Council being aggrieved with the judgement and decree passed by the trial court, appealed to this court armed with five grounds namely:-




1. The trial court erred in law and in fact by presiding over and determining Civil case No. 48 of 2017 without the requisite pecuniary jurisdiction;
2. The trial court erred in law and in fact by irregularly setting aside an order dismissing Civil Case No. 48 of 2017 while Application to that effect was filed out of the time prescribed by law;
3. The trial court erred in law and in fact in entertaining the suit against a non- existing person that is Municipal director, Mtwara Municipal Council;
4. The trial court erred in law by taking into consideration extraneous matters which materially affected the trial court's decision, thereby occasioning miscarriage of justice;
5. The trial court gravely erred in law and in fact in hold that the appellant breached the contract.

Briefly this appeal traces back to the contract alleged to have entered between the disputants, on 11<sup>th</sup> October, 2015 , copy of same was tendered in court during trial as exhibit SHK1. The contract involved supply of 16 tables and 294 stools valued a total of TZS 77,574,000/=. However, the appellant failed to comply with the terms and conditions of the contract thus, the respondent found his way to the court of law to seek redress.

Upon hearing both parties and on consideration of parties' case, the trial court entered judgement and decree in favour of the respondent. The appellant was aggrieved with such judgement and decree, hence this appeal.

On the hearing date of this appeal, both parties were represented by learned counsels. While the appellant was advocated by Mr. Grayson Okado – Solicitor, the respondent was represented by Mr. Ruta Bilakwata. The learned counsel for the appellant argued briefly in all grounds of appeal as summarized herein. On ground one, he argued that the jurisdiction of the District court of Mtwara is regulated by section 40 of the Magistrate Court Act. Its pecuniary jurisdiction is set into two categories, first normal civil suit, and two is commercial cases as per section 40 (3) whose pecuniary jurisdiction is TZS 30 million for movable properties and TZS 40 million for immovable properties.

The trial court admitted a suit, which comprised a claim of TZS 97, 574,000/=. That the issue of pecuniary jurisdiction was raised during trial, but the court decided otherwise. He posed a question of whether the District Court had jurisdiction to try a case involving such huge amount of money. Since the dispute is a commercial case, whose pecuniary jurisdiction of District Court is TZS 30 million only then the plaintiff ought to file same to the High Court. To justify his argument, he referred this court to the judgement in **Commercial Case No. 01 of 2006 between Zanzibar Insurance Corporation Vs. Rudolf Temba** where it was



held, the District Court had no jurisdiction to determine cases involving above TZS 30 million. Also referred this court to **Commercial Case No. 2 of 2019 between Commercial Bank of Africa (T) Ltd Vs. Patroba Adeli Ademba**, where the court discussed in details on the pecuniary jurisdiction of the District court. Argued that the suit ought to have been filed in the High Court.


In ground two he briefly argued that the suit was filed in court on 2017, later on 25<sup>th</sup> June, 2018 the said suit was dismissed for want of prosecution. However, the respondent after passing 50 days, applied to set aside the dismissal order and restore the suit, which application was made on 15<sup>th</sup> August, 2018. Mathematically, from 25<sup>th</sup> June, 2018 to 15<sup>th</sup> August, 2018 was equal to 50 days. Thus referred this court to section 3 (4) of the Law of Limitation Act, which provide only thirty (30) days from the date of dismissal. Therefore, the application faulted the Law of Limitation Act, consequently the whole proceedings should be nulled. To support his argument, he referred this court to the case of **National Bank of Commerce (NBC) Vs. Sadrudin Megh [1998] T.L.R. 503**, where the application was dismissed for being filed out of time.

On ground three, he argued, at trial the respondent/plaintiff sued a none existing defendant. According to Local Government (Urban Authorities) Act Cap 288 R.E. 2002, once a Local Government is established, must possess a certificate, as provided for under section 5 and 9 of the Act. Mtwara-Mikindani Municipal Council is established by GN. No 219 of 2005.

Whereby, the defendant at trial was Municipal Director Mtwara Mikindani Municipal Council, which is not existing. To bolster this argument, he cited the case of **Usangu Sugar Processing Estate Vs. Mbarali District Executive Director [2005] TLR 71**, where the Court of Appeal held that Director is a mere Chief Executive officer of a Local Government Authority, thus cannot be sued on behalf of the Local Government Authority. Therefore, concluded on this point by submitting that the suit was brought against a non-existing person.

The last ground was in respect to breach of contract. He argued that, such breach did not exist for there was no contract. Even a copy of same was wrongly tendered in court for same was tendered by an advocate instead of a witness. He stretched his muscle on this ground by referring to the case of **Ismail Rashid Vs. Marian Msati, Civil appeal No. 75 of 2015**, and in the case of **Godbless Lema Vs. Hamis Mkanga & 2 others**.

In reply, the learned advocate Ruta Bilakwata, argued ground one by referring to **Order IV Rule 4 of Civil Procedure Code**, which provide that it is not mandatory for a commercial case be instituted at the High Court Commercial Division. Therefore, the District Court had jurisdiction to entertain the suit. He referred this court to the case of **Sinoma Internation Engineering Co. Ltd Vs. DP Shapria Ltd, Civil case No. 5 of 2014**.



On restoration of the dismissed suit, he argued that it was filed timeous, thus, this ground is misconceived.

In respect to ground three, he submitted that it is intended to abuse the court process and is an afterthought. Order I rule 13 of CPC cured any defect and same was not raised during trial.

Arguing jointly, on grounds four and five, the learned advocate submitted that, the total claimed amount of the respondent to the appellant is TZS 254,648 000/= the respondent was only paid two instalments, the remaining balance was never paid to date. Thus, breached the contract for failure to settle such balance of the agreed amount of money.

This appeal has raised serious allegations against the trial court's decision. The most pertinent issue worth determining first, is the second ground on time limitation to file restoration of a dismissed suit for want of prosecution. Perusing the proceedings of the trial court, it is on record that, on 15<sup>th</sup> August, 2018 the respondent filed an application seeking restoration of the dismissed Civil Case No. 48 of 2017. The dismissal was effected on 25<sup>th</sup> June, 2018. The chamber summons was supported by an affidavit affirmed by the respondent. Such application was blessed by a counter affidavit and notice of preliminary objection related to defectiveness of the affidavit in support to the chamber summons. However, on 19<sup>th</sup> September, 2018, when both parties appeared for hearing of the application, the respondent/appellant was represented by M. Kulanga, did not oppose the application for restoration of the dismissed suit. Thus, the application was granted and the main suit No. 48 of 2017 was restored.

However, the issue of time limitation is statutory like jurisdiction of the court. Even if parties agree on a certain legal point, be it, on jurisdiction of the court or time limitation, I think, the law is settled on this legal point that the presiding judge or magistrate, must look on the provisions of law and satisfy if the prayer is within time and or the court has jurisdiction to entertain it. In other words, parties cannot confer jurisdiction of the court or agree to extend time limitation. Those are statutory matters which must be adjudicated according to the dictates of the law.

Now in this appeal, the learned counsel for the appellant Mr. Okado has argued quite strongly, on the application for restoration of the dismissed suit that it was made out of time and without leave of the court.

Section 3 of the Law of Limitation Act serves many purposes including, to set time limitation within which, to institute proceedings in a court of law; second is to prescribe the consequences when the proceedings are caught in the Web of time limitation and without leave of the court. Part III item 4 of the schedule to the Law of Limitation Act provide:-

*"application for an order under the civil procedure Code or the Magistrates Courts Act, to set aside a dismissal of a suit is thirty (30) days"*

Always time limitation is material in every action in a court of law. The relevance of the Law of Limitation Act is when parties comply with time



limitation as provided for, otherwise, the Act loses its relevance and meaning.

The Court of Appeal, likewise gave similar weight on the time limitation in the case of **Night Support (T) LTD Vs. Benedict Komba, Revision No. 254 of 2008** held:-

*"Limitation is material point in the speedily administration of justice. Limitation is there to ensure that a party does not come to court as when he chooses".*

The Court of Appeal in the case of **National bank of Commerce Vs. Sdrudin Meghji (supra)** was confronted by many grounds of objections, however, the court took the ground related to the Law of Limitation Act and ruled that the application ought to be filed within the prescribed time frame. Failure of which was enough to conclusively decide the application. Likewise, in this appeal time limitation is fundamental.

In responding to this point, the learned advocate Ruta Bilakwata argued that the application was filed within time. His response may mean, it was filed within thirty (30) days from the date of dismissal of the suit for want of prosecution. However, the record speaks louder, that the suit was dismissed on 25<sup>th</sup> June, 2018, while the application to set aside such dismissal was filed on 15<sup>th</sup> August, 2018. Simple additional mathematics provide an answer of fifty (50) days. Thus, making the application to set aside the dismissal order being filed out of time contrary to the cited provisions of the Law of Limitation Act.



The second leg of consideration on this appeal is on the authenticity of parties. The appellant in ground three strongly disputed the existence of the defendant/appellant called "*Municipal Director Mtwara Mikindani Municipal Council*" that does not exist, thus the respondent sued a non-existing party. In turn the learned counsel for the respondent argued quite strongly, that in fact ground three is intended to abuse the court process and it is an afterthought. In alternative he argued that even if, it may be mistakenly done, yet such mistakes is curable under Order I Rule 13 of CPC. Since the issue was never raised on trial, same cannot be raised at this stage of appeal. In essence, this issue should not tie me up, because it is a question of law and may easily be answered by referring to the applicable law.

Legally, all urban authorities are established by the Local Government (Urban Authorities) Act Cap 288 R.E. 2002, as may be amended several times. Section 5 of the Act states that:-

*"Subject to section 7 and 8 of and to other provisions of this part, the Minister may, by Order published in the Gazette, establish in any area of Mainland Tanzania an appropriate urban authority or authorities"*

Moreover, sections 7 and 9 of the Act provide on the procedure for establishment of an authority and issuance of establishing certificate, while section 10 of the Act provide the contents of the establishing certificate which includes the proper name of the established urban authority.

According to these sections of the law, every urban authority must possess a certificate establishing it. In fact, such certificate is an identity on the existence of an urban authority in a certain place with specific boundaries and name.

The effect of the established urban authority is provided for in section 14 which is to acquire legal personality capable in its corporate name, suing or being sued. In other words, a properly established urban authority acquires a legal personality like any other legal entities.

In respect to this appeal, Government Notice No. 219 of 2005, the Minister responsible for Local Government established Mtwara – Mikindani Urban Authority. In this point let me buy a leaf from my brother judge S.M. Rumanyika in the case of **Deonatus Nkumbo & Robert K. Lwamuzigu Vs. The District Executive Bariadi District Council, Civil Case No. 14 of 2009**, where at page 4 ruled that the Executive Director, is an employee and the employer is the District Council. Thus, whatever title may be, yet an employee cannot be sued on behalf of the employer. In fact, powers to sue and be sued is a question of legal personality. The one with legal personality may sue and be sued. In respect to this appeal, the one with legal personality is Mtwara – Mikindani Municipal Council, which employed the Executive Director.

The learned defence counsel raised equally an important legal point that such upshot may be cured by Order I Rule 13 of CPC which, for clarity I hereby quote verbatim:-

*"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all case where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen; and any such objection not so taken shall be deemed to have been waived"*

In essence, rule 13 is material, that every objection should be raised at the earliest possible time of the suit. Notwithstanding, objection on legal point may be raised at any time before final verdict of the final court of record. Objection may even be raised on appeal without affecting the contents of rule 13. For instance, a point of objection based on time limitation or jurisdiction of the court and other similar legal points, may be raised at any time of the court proceedings.

In respect to this appeal, the appellant has raised a valid point of law, that the respondent/plaintiff sued a non-existing party. The question is, if left as it is, it means the court decree won't be executed, for obvious reasons that the court decree cannot be executed against a stranger to the suit. Therefore, this ground of appeal is valid and is raised timeously.

I would therefore rest this judgment by stating tht, it is a question of legal prudence and wisdom, that when a party is in a wrong road to the destination of justice, the best option is to retreat and go back to where he went wrong, with a view to find the right road to the ends of justice. Pursuit of justice through a wrong road won't help, rather prolongs attainment of the most wanted justice, and at the end justice delayed becomes equal to justice denied.



In the premises, and for the reasons so stated, I find these two grounds of appeal are capable of disposing off the whole appeal. Even if I may continue to consider other grounds of appeal yet the final verdict may not change. Therefore, I find merit to this appeal, that the respondent wrongly sued a person who has no capacity to be sued, that is, Municipal Director, Mtwara – Municipal Council. Above all the application to set aside the dismissal order was made out of statutory hgtime limitation of thirty (30) days. Accordingly, I quash the judgement, decree and proceedings of the trial court and I grant this appeal with no order as to costs.

**I accordingly Order.**

**DATED** at Mtwara in chambers this 6<sup>th</sup> day of October, 2020



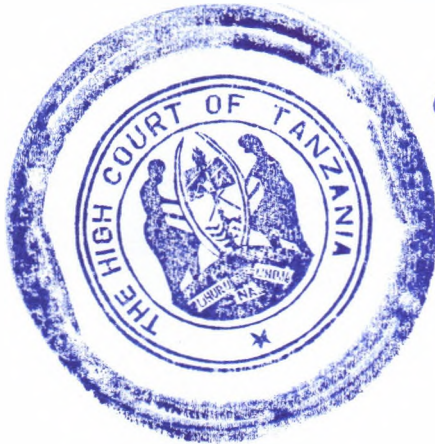
**P.J. NGWEMBE**

**JUDGE**

**06/10/2020**

**Court:** Judgement delivered at Mtwara in Chambers on this 6<sup>th</sup> day of October, 2020 in the presence of Hassan Linyama, Solicitor for the Appellant and in the presence of the Respondent in person.

**Right to appeal to the Court of Appeal explained.**



A handwritten signature in blue ink, consisting of a large loop followed by a series of strokes.

**P.J. NGWEMBE**

**JUDGE**

**06/10/2020**