

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE NO. 31 OF 2022

ESHQUE RASHID.....1ST PLAINTIFF

ARSHNOOR MUKTHI.....2ND PLAINTIFF

VERSUS

ABDULKARIM MOHAMED ISHAQ.....1ST DEFENDANT

SALMAN ISMAIL ADAMALI.....2ND DEFENDANT

KILOSA KWETU TRADING LIMITED.....3RD DEFENDANT

Date of Last Order: 02/06/2022

Date of Ruling: 01/07/2022

RULING

E.E KAKOLAKI, J.

This ruling seeks to determine the preliminary objection on the point of law raised by the defendants herein against the plaintiffs' suit to the effect that:

- (a) This honourable court has no pecuniary jurisdiction to entertain the dispute involved in this case.
- (b) The suit is incompetent for plaintiffs' failure to join M/s Al Rawais Jewelry LL.C as a necessary party to this case

- (c) The plaint contravenes the provisions of Order 7 Rule 1 (e), (i) of the Civil procedure Code [Cap 33 R.E 2019]

Briely the plaintiffs above named filed the present suit against the defendants. As per paragraph 7 of the plaint their claims against the defendants is for a declaratory order that, since the memorandum of understating (MoU) between 1st plaintiff and 1st and 2nd defendant did not take off, then there is no contract signed between the parties, and that since the 2nd plaintiff did not sign the memorandum of understating (annexure EA1 to the Plaint) dated 24th February 2021, then she is not part to the contract, and further that the 3rd defendant has nothing to do with the contract between the 2nd plaintiff and Al-Rawais. Other reliefs sought are an order for payment of Tshs.100,000,000/= as general damages and costs of the suit. It is gleaned from the pleadings that, in the referred MoU the 1st plaintiff had agreed with 1st and 2nd defendants to be funded with USD 600,000 for the purchase and supply to both defendants raw gold material, before the later connected the 2nd plaintiff to Al-Rawais Jewellery L.L.C of Dubai for business engagement. Upon being connected it appears oral agreement was entered between 2nd plaintiff and Al-Rawais for the supply of gold material as the latter deposited with the 2nd plaintiff USD 600,000 for gold purchase purpose

in which the consignment was supplied to her (Al-Rawais) in excess of the consignment worth USD 80,404 the due amount which was never paid to the 2nd plaintiff instead was paid direct to the 3rd defendant who happened to be Al-Rawais accounting manager. It is claimed further that the said Al-Rawais stopped funding the 2nd plaintiff business with her as decided to engage the 3rd defendant instead, hence frustrated his business and suffered him (2nd Plaintiff) big loss. It is from that frustrated business the plaintiff claims the defendants are destroying their reputation to the gold trading and marketing community hence the present suit.

When served with the plaint the defendants flatly denied the claims by the plaintiff in and as alluded to above in furtherance to their denial file a Notice of preliminary points of objection in which parties opted to pursue by way of written submission. The plaintiffs proceeded under representation of Ms. Jacqueline Rweyongeza, learned advocate while the defendants hired the services of Mr. Jovin M. Ndungi, learned Advocate.

Submitting in support of the raised points of objection, Mr. Ndungi sought leave of the Court to abandon the second and third point of preliminary objections and proceeded to argue the first limb of objection only. In his brief and comprehensive submission, Mr. Ndungi contended that, this Court

has no pecuniary jurisdiction to entertain the dispute involved in this case. He said the plaintiffs' claim in this suit is for declaratory order that the Memorandum of understanding between the parties did not take off and should not be enforced and for payment of general damages of Tshs.100,000,000/=. He asserted that going by the contents of paragraph 17,18 and 19 of the plaint, it is noted that the plaintiffs' are contesting the demand by the defendants for payment of USD 67,627.14 which is lesser than Tshs.Tshs.200,000,000/= if converted into Tanzanian shillings. He argued the disputed amount under section 40(2)(b) of the Magistrate Courts Act [Cap 11 R.E 2019) falls within the pecuniary jurisdiction of the District Court or Resident magistrate Court and not this court. According to him it is the position of the law that, every suit must be instituted in the court of the lowest grade competent to try it as the determinant factor for pecuniary jurisdiction of the Court is the substantive claim and not general damages. To support his stance he cited the case of **Tanzania-China Friendship Textile Co. Ltd Vs. Our Lady of the Usambara Sisters** [2006] T.L.R 70 and section 13 of the Civil Procedure Code [Cap 33 R.E 2019]. Basing on the cited position of the law and the material facts of the case, it is clear that

this suit is incompetent for want of pecuniary jurisdiction, Mr. Ndungi stressed. Hence, a prayer for striking out of the suit with costs.

In reply Ms. Rweyongeza resisted the submission by Mr. Ndungi that, it is the facts as deposed in paragraphs 17,18 and 19 of the plaint which constitute the cause of action stating that, plaintiff's cause of action cannot be deduced from those three paragraphs only, but rather from paragraphs 7-21 of the plaint. She said, the relief sought by the plaintiffs against the defendants is declaratory order only and not monetary value, hence this Court is seized with jurisdiction to entertain the suit. According to her since the sought relief is declaratory order, the alleged three paragraphs disclosing the claim of USD 67,627 cannot form the basis for determination of pecuniary jurisdiction of this Court. Reliance was placed to the case of **Peter Kilibika and Another versus Patric Aloyce Mlingi**, Civil Appeal No.37 of 2009 (CAT-unreported) where the subject matter was defamation and unlawful confinement and general damages of Tshs. 800,000,000 claimed, the Court of Appeal said there was no claim made which could lead to the conclusion that the pecuniary value of the claim is not within the jurisdiction of the High Court.

Ms. Rweyongeza further submitted that, even by looking closely from the MoU for funding of USD 600,000 which is the source of the sought declaratory order for not being executed, its value fits within the jurisdiction of this Court. On the strength of the above arguments she submitted, the suit does not fall with the precincts of section 40(2)(b) of the Magistrates Court's Act, [Cap. 11 R.E 2019] as interpreted in the case of **EGT Inputs Vs. Dominic Logistics (T) Ltd**, Civil Case No. 184 of 2020 (HC-unreported). It was her prayer therefore that, this Court be pleased to dismiss the preliminary objection with costs. In alternative she prayed if the court finds itself to lack pecuniary jurisdiction, then oxygen principle as echoed under section 3B of the Civil Procedure Code (Cap 33 R.E 2019) as amended, be invoke and the order to transfer the suit to the Resident Magistrate of Dar es salaam at Kisutu to proceed there under section 21(1)(a) and (2) of the Civil Procedure Code [Cap 33 R.E 2019] be issued as it was held in the case of **ETG Inputs** (supra). As regard to the rejoinder submission the defendants opted not to pursue their right nor prayed for extension of time to so do before the judgment date is set. I will therefore proceed to determine the matter basing on the filed submissions.

Having intensively analysed the submissions made by the learned counsels and perused the pleadings as well as the case laws referred to this Court, the issue for determination by this court is, whether this court has jurisdiction to entertain the suit before it. In responding to the issue, I wish to preface it with the legal position on what is entailed in the jurisdiction of the court and at what time should it be established. It is trite law that all courts in Tanzania are creatures of statutes and their jurisdiction is purely statutory. This position was stated in the case of **Shyam Thanki and Others Vs. New Palace Hotel** (1971) EA 199 where the erstwhile East African Court of Appeal held at page 202 thus:

"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

In light of the above position of the law, the question of jurisdiction of the court therefore must be raised at the earliest possible time as the main purpose in my humble view is to avoid the risk of the Court to proceed with hearing of any matter before it on assumption of being clothed with jurisdiction which in fact it does not have. See also the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995,

Michael Leseni Kweka Vs. John Eliafe, Civil Appeal No. 51 of 1997; **Tanzania Revenue Authority Vs. New Musoma Textiles Ltd**, Civil Appeal No. 93 of 2009; and **Tanzania Revenue Authority Vs. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (all CAT-unreported). As to why should jurisdiction of the Court should be established at the earliest possible time the Court of Appeal in the case of **Tanzania Revenue Authority** (supra) had this to say:

"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests"

With regard to the risky of proceeding without establishment of the jurisdiction the Court of Appeal in the case of **Fanuel Mantiri Ng'unda** (supra) had the following observation:

"...It is risky and unsafe for the court to proceed on assumption that the court has jurisdiction to adjudicate upon case."

It is also settled that jurisdiction of the court is established from the facts pleaded in the plaint or petition. Now back to the issue at discussion, I wish to point out from the outset that by reading from the plaint, it is no doubt that the plaintiff's claim is for declaratory order that, the memorandum of understanding between the parties did not take off, therefore should not be

enforced as the same was not signed by the 2nd Plaintiff and that the 2nd plaintiff is not part to the memorandum of understanding. For easy understanding, I find it imperative to reproduce paragraphs 7 of the plaint as hereunder.

7. That, the plaintiffs' claim against the defendants is the declaration order that the memorandum of understanding signed on the 25th day of February, 2021 between the 1st plaintiff and 1st and 2nd defendants did not take off as the 1st and 2nd defendants did not provide monies to the 1st plaintiff, that having not signed by the 2nd plaintiff, the 2nd plaintiff is not part to the memorandum of understanding, temporally injunction order restraining the defendants from taking action or any other steps prejudicial to the plaintiffs'.

Before going further to investigate the plaint and establish whether the Court is clothed with pecuniary jurisdiction or not, I find it important to note that, it is the substantive claim which determines pecuniary jurisdiction of the court and not general damages or other forms of claims which are not quantified, and in the event they are mistakenly quantified then they cannot affect the pecuniary jurisdiction of the court. See the case of **Tanzania - China Friendship Textile Co. Ltd** (supra) as cited by the counsel for the defendants.

In this case Ms. Rweyongeza is insistent that since the claim by the plaintiff is based on declaratory order and not derived from paragraphs 17,18 and 19 of the plaint as put by Mr. Ndungi, then this court should find itself is seized with jurisdiction to try the suit. Now, the sub-issue here is, whether the claim for declaratory order itself is sufficient to establish the pecuniary jurisdiction as insisted by Ms. Rweyongeza. As it can be deciphered from paragraph 7 of the plaint the claim quoted above is vague for mixing up the prayer for declaration that the alleged MoU did not take off and that it did not cover the 2nd plaintiff and the prayer for temporary injunction against the defendants the prayer which ought to have been pursued through independent application. In my view the plaintiffs has totally failed to highlight their specific claim(s) leave alone disclosure of specific amount to facilitate determination of the pecuniary jurisdiction of the court, as claimed by them in paragraph 23 of their plaint. In paragraph 23 of the plaint the plaintiffs averred that:

*23. THAT, this cause of Action arose in Dar es salaam within the jurisdiction of the Court. **The subject matter within the pecuniary limits of this Court.** (Emphasis added)*

As the plaintiffs had deposed that the matter fits within the pecuniary limits of this Court were duty bound to indicate it, which duty they failed to discharge. Thus are precluded from relying on the claim of declaratory order which I have already held to be vague to claim jurisdiction of this court. I have read the judgment in **Peter Kilibika and Another (supra)** relied on by Ms. **Rweyongeza** to establish jurisdiction of this Court, and noted that its facts are not similar to the ones in the instant case as the subject matter therein was defamation and unlawful confinement and not claim for declaratory order and temporary injunction which are subject of this matter. Since the subject matters are different then the said case is distinguishable to the fact of this case hence inapplicable. I also had time to read the case of **ETG Inputs** (supra) as cited by Ms. Rweyongeza, the case which its facts I find to be distinguishable to the ones in this case, as the same was dealing with the issue as to whether the case was of Commercial nature or normal civil suit hence a finding that the plaintiff therein ought to have adhered to the requirement of section 13 of the CPC by filing suits in the lowest court competent to try it. Unlike that case the issue herein is whether the declaratory order and temporary injunction establishes the jurisdiction of this Court. I therefore find the same inapplicable too in the circumstances of

this case. It follows therefore that, the alleged claim of declaratory order by the plaintiffs cannot form the basis for determination of the pecuniary jurisdiction. In absence of stated amount to facilitate determination of this Court's jurisdiction means nothing than the conclusion that this court lacks jurisdiction to entertain this suit as per section 13 of the CPC, the suit has to be instituted at the lowest grade court competent to try it so as to prevent overcrowding of cases in the higher court like High Court which normally deals with complicated cases. See the case of **Peter Keasi Vs. The Editor; Mawio Newspaper and Another**, Civil Case No. 145 of 2014 (HC-unreported). I also discount the submission by Ms. Rweyongeza that since the funding of USD 600,000 to the 2nd plaintiff referred in the MoU, which is the subject of the sought declaration orders did not take off, then this Court should consider the same as the determinant factor to be convinced that it had the requisite jurisdiction to try the matter. I so do as the said amount does not form part of the claim or relief sought in this matter. The raised issue therefore answered in negative that, this court has no jurisdiction to entertain the matter.

Next for determination is Ms. Rweyongeza's prayer to this court to invoke the oxygen principle as echoed in section 3B of the CPC and proceed to order

for transfer of this suit to the Resident Magistrates Court of Dar es salaam Region at Kisutu under section 21(1)(a) and (2) of the CPC as this Court did in **ETG Inputs** case (supra). Indeed I am aware of the application of the cited provision and the circumstances under which it is applicable. However in this matter I am not prepared to consider Ms. Rweyongeza prayer as this matter does not qualify to be served under that provision. It is already held above that, the plaintiffs' claim is vague, therefore to transfer the suit which its plaint is defective is like directing the bald headed man carry a sack of nails on the head while knowing that the sack contains injurious materials, the direction which I not prepared to make.

That said and done I uphold the preliminary objection raised and proceed the strike out the plaint as I hereby do for being incurably defective.

I do so without an order as to costs.

It is so ordered

DATED at Dar es Salaam this 01st day of July, 2022.



E. E. KAKOLAKI

JUDGE

01/07/2022.

The Ruling has been delivered at Dar es Salaam today on 01st day of July, 2022 in the presence of Ms. Jacqueline Rweyongeza advocate for the Plaintiffs, Mr. Esihak Yusuph advocate for the Defendants and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

01/07/2022.