

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

COMMERCIAL CASE NO. 27 OF 2003
HAJI A. UKWAJU t/a
WAJENZI ENTERPRISES.....PLAINTIFF
VERSUS

1.THE NATIONAL MICRO FINANCE BANK }
2.JOSEPH MUSIBA } DEFENDANTS

Counsel: Mr. Maira for Plaintiff
Mr. Kabakama for Defendant

R U L I N G

(On Preliminary Objection about
the validity of Act 25 of 2002)

BWANA, J.

The preliminary objection raised by the defendants contains interesting points of law which in turn attract considered views on the validity and applicability of recent amendments to the Magistrates Courts Act 1984. The said amendments to section 40 thereof are said to have changed the pecuniary jurisdiction of both the High Court of Tanzania and subordinate courts, particularly District and Courts of Resident Magistrates. Those amendments have also attracted the attention of all stakeholders – be they members of the Bench, the Bar, public policy makers and members of the diplomatic corp especially those whose countries have close business and commercial ties with Tanzania. Therefore when the two learned counsel above argued their respective views, the bottom line of all that was said is to ask this court to make a Ruling as to whether the provisions of Act 25 of 2002 have made this court lose its jurisdiction in cases of a commercial nature whose pecuniary value is below shs.100m/- and shs.150m/- respectively. Further the court is being asked to examine the constitutionality of the said amendments.

It is Mr. Kabakama's views that this court has no jurisdiction to such cases. He bases his arguments on the provisions of the Act itself and sections 7 and 13 of the Civil Procedure Code (the CPC). On his part, Mr. Maira submits that the said recent amendments to the 1984 Act do not change the pecuniary jurisdiction of this court. He relies on the provisions of Articles 107 A and 108 of the Constitution of the United Republic of Tanzania (the Constitution). He also submits that the provisions of section 6

of the CPC grant this court jurisdiction to continue with trials of cases of a commercial nature whose value is below those stipulated by recent amendments to the law.

Facts of the Case:

The plaintiff filed this case on 6 February 2003 setting in motion issues and matters that are a subject of this Ruling. He is claiming from the defendants the following reliefs:-

1. Payment of shs.27,402,081 for loss suffered.
2. General damages for the loss of business good will.
3. Interests on the above (1) and (2).
4. Interests on the decretal sum.
5. Costs of this suit.
6. Any other relief (s).

In addition to those claims, the plaintiff further raises the issue of fraudulent transaction that led the plaintiff to suffer some loss, including penalty due to a late start of construction work awarded to him. He also claims that the defendants were negligent in handling the whole affair hence causing further loss to him.

In its Written Statement of Defence (the WSD) the first defendant seems not to admit nor dispute many of the issues raised by the plaintiff in the plaint. The interpretation of this stand taken by the first defendant shall be made at an appropriate stage of these proceedings. It is suffice to note here that my main concern at this stage is to determine the legal issue raised in the Preliminary objection.

The Preliminary Objection.

In its Written Statement of Defence the first defendant has raised the following plea in limine litis:-

"At the first hearing of this case the first defendant will raise a preliminary objection on a point of law that the Honourable court has no jurisdiction to entertain this case, therefore pray that it be dismissed with costs."

In its subsequent submission, the defendant states further in support of the preliminary objection:

"The suit at hand was filed under the CPC. In conferring jurisdiction the Civil Procedure Code provides under s.7(1)...."

He goes on to quote both sections 7(1) and 13 of the CPC, provisions which in essence spell out which type of court should try which kind of civil cases. The provisions of Act 25 of 2002 which changed the pecuniary jurisdiction are also quoted with emphatic arguments that since the commercial court is a Division of the High Court of Tanzania, then it has no jurisdiction to try cases whose pecuniary value is below shs.100m/-. This is so, it is argued, because it is not mandatory to institute cases of a commercial nature in the Commercial Court.

In his submission, Mr. Maira counters the above arguments advanced by Mr. Kabakama. He bases his views on Articles 107 A and 108 of the Constitution and the views of the respected author, Mulla, on the question of ousting jurisdiction. I will revert to all the above at later stages of this Ruling.

The Act and the Constitution.

It is a settled principle that the Constitution of a country is the Supreme (or Basic) Law of the Land. All other laws must be in conformity with the said Basic Law or else they are null and void ab initio. The Civil Procedure as the name connotes, regulates procedures of a Civil nature before a court of law. Section 7 (1) thereof states:

"The courts shall...have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred..."(emphasis mine).

Section 13 further states:

"Every suit shall be instituted in the court of the lowest grade competent to try it..." (emphasis mine).

The two provisions of the law considered together, seem to show that the recent amendments to the 1984 Act bars cases whose pecuniary value is below shs.100m/- from being tried in a High Court, the commercial court inclusive since it is – as stated above, a division of the said High Court of Tanzania. Those provisions however, do not contravene the relevant, Articles of the constitution, namely Articles 107 A and 108.

Act 3 of 2000 brought into our Constitution what I consider to be very important changes. They are important because for the first time in the history of this country, our Constitution acknowledges the fate suffered by many litigants for years – that of delays. Art. 107 A (2) states (in Kiswahili):

"katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani:

- a) kutenda haki kwa wote bila kujali hali ya mtu kijamii au kiuchumi.*
- b) Kutochelewesha haki bila ya sababu ya msingi.*
- c).....*
- d).....*
- e) Kutenda haki bila ya kufungwa kupita kiasi na masharti ya kiufundi yanavyoweza kukwamisha haki kutendeka. (emphasis mine).*

Art.108 (2) states further:

" If this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by High Court...(emphasis mine).

The above quoted provisions of the Constitution and indeed all laws must be interpreted in light of the existing times in the country. In this regard, it needs no further emphasis to point out that the recent amendments to the 1984 Act will bring more injustice to litigants than anticipated. We are aware – no doubt – that our Subordinate Courts are poorly equipped to handle such an influx of cases that will now be filed there. That amendment therefore, it is my considered view, contravenes the spirit of the Constitution as enshrined in Art.107 A (2) (a) (b) and (e).

It is my further considered view that the said amendments, read together with Art. 108 (supra) do not oust the jurisdiction of this court to hear cases of a commercial nature whose pecuniary value falls below shs.100m/. The legal tradition currently obtaining in Tanzania is that such cases whose pecuniary value is shs.10m/- and above may be filed at the Commercial Court. In fixing that pecuniary limit, the same legislature was aware of the kind of cases that are likely to be filed and what kind of litigants are likely to make

use of this court. By suddenly raising the pecuniary limit, it is my view, the law has become discriminatory as only fewer people will be able to obtain the services of the Commercial Court – hence contravening Art 107 A (2) (a) of the Constitution.

The foregoing notwithstanding, it is my further considered view that the provisions of sections 7 and 13 of the CPC and the recent amendments to the 1984 Act all in all do not oust the jurisdiction of this court to hear cases whose pecuniary value per se, is below specified limitations. The recent amendments do not expressly (Art.108 (e) of the Constitution) prohibit the filing of such cases in this court. It is my view – as is shown later herein – that what those provisions have done is to set new ceilings for cases that are to be tried before District and Courts of Resident Magistrates. The jurisdiction of this court has therefore not been affected. It can still accept cases whose monetary value is below shs.100m/-. This argument is further fortified by Mulla in his Code of Civil Procedure (15th Ed Vol. 1 pp.221) wherein he states (commenting on section 15 of the Indian Civil Procedure Code which is pari materia with our section 13):

"the object of the section in requiring.....a suit in a court of lowest grade competent to try it is that the courts of higher grades shall not be overcrowded with suits. This section is a rule of procedure and not of jurisdiction and whilst it lays down that a suit shall be instituted in the court of the lowest grade it does not oust the jurisdiction of lower courts of higher grades which they possess under the courts constituting them" emphasis mine)

The above views were supported by Mwaikasu, J (as he then was) in the case of Dr. Ally Shabhay vs Tanga Bohora Jamaat (CC No.3/96 Tanga Registry unreported) when he stated:-

"...In fact even if the amount claimed were to fall within the pecuniary jurisdiction of the lower court, that in my view, would not bar this court from entertaining the suit. For if we go by.... the provision of section 6 of the CPC only when the subject is in excess to the court's pecuniary jurisdiction that the court concerned would be barred to entertain a suit of that kind on account of lack of pecuniary jurisdiction..."(emphasis mine).

That Section 6 of the CPC states:

" 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" (emphasis mine).

In furtherance of that argument, it was stated in *Bikubwa Issa Ali vs Sultan Mohamed Zahran* (1997) TLR 295 thus:

"...where jurisdiction was conferred concurrently on courts...proceedings should normally and preferably be commenced in the one placed lower in the hierarchy but that was no to say that the other was thereby deprived of jurisdiction in the matter..."

All what the above entails is that the amendments to the 1984 Act are aimed at putting a ceiling to what the said Subordinate courts may entertain in so far as pecuniary jurisdiction is concerned. No where in the said amendments is expressly stated that the High Court of Tanzania is deprived of its hitherto jurisdiction in cases of a given pecuniary value. If it were meant so, then those provisions of Act 25/2002 would be null and void as they would infringe the provisions of Articles 107 and 108 of the Constitution (*supra*).

What are the cumulative effects of the foregoing discourse? There are basically two. **First**, if the said amendments are taken to mean ousting the High Court of its jurisdiction over cases whose pecuniary value is shs.10m/- and above but below shs.100m/- then such amendments offend and are in contravention of Articles 107 and 108, hence they are unconstitutional. **Second**, since the said amendments do not expressly take away the jurisdiction of this court, then they should not be interpreted as so doing. Instead, the said amendments are meant to setting a ceiling on the said subordinate courts' pecuniary jurisdiction but not ousting the High Court of its jurisdiction. The High Court is a court of unlimited jurisdiction. I believe this was the intention of the Legislature when enacting that law. I have always found comfort in the words of Lord Denning (in *Seaford Court Estates Ltd vs Asher* – 1949 2KB 481) thus:

" Whenever a statute comes up for consideration,

it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and even if it were, it is not possible to provide them in terms free from all ambiguity.....it would certainly save the judge's trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it when a defect appears a judge cannot simply fold his hands.....he must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from consideration of social conditions which gave rise to it and of the mischief which it was passed to remedy.....A judge must not alter the material of which it is woven but he can and should iron out the creases".

I cannot improve upon the language and views of Lord Denning above. I will not attempt to do so. They are, in my opinion, very positive views and should be followed.

The Act and Public Policy

Since the 1980s the government of Tanzania has been engaged in far reaching inter alia, economic reform programmes. A central feature of these programmes is the creation of an enabling environment for a liberal, market oriented economy. To that end, it was emphasized that a well functioning legal sector is an essential prerequisite for the success of the said reforms. Various steps –legal inclusive – have therefore been taken since then. They include the establishment of the Commercial Court aiming at a just, effective, efficient and speedy disposal of commercial cases. This success story has been just operative since 1999. About 80% of the cases filed at this court have a monetary value of between shs.10m/- and 100m/-. The average disposal period is about five months from date of filing to final determination.

The functioning of the Commercial Division of the High Court has been in conformity and expectations of the said public policy of this country. Therefore if the said amendments to the 1984 are meant to take away 80% of its workload and transfer it to ill equipped subordinate courts, such a move can only be seen as retrogressive. I believe that was not the intention of the Legislature in enacting the said amendments.

For, I do not believe that the said Legislature did not see the rationale that by restricting this court from exercising its jurisdiction that will lead to a denial of access on many issues of a commercial nature with significant magnitude. Should that be allowed to continue, it will fetter the main objective for the establishment of the Commercial court in particular and at large, the economic reforms currently being implemented in the country. There arises need therefore for the Legislature to revisit those amendments for reasons stated herein. The issue to be emphasised here is one of desirability rather than legality for, the said provisions as enacted by Parliament may be legal but the question is; are they desirable? My reply to that is , definitely not.

Conclusion:

It is my considered and strong view that what was intended by the amendments to the 1984 was to raise the ceiling of the pecuniary jurisdiction of the Subordinate courts but not to oust the jurisdiction of this court. The views by the Legislature had, however, the unintended effect of creating this confusion. They were intended to supplement not supplant the jurisdiction of this Court. I am aware that there are already Rulings by judges of this court who have different views – their views are in line with Mr. Kabakama's arguments. It has been argued in some cases – some even by this court (see Misc. application No.17/1994 T.C.A.; com. C. 24/2000) that it is advisable that judges from the same court should share a common stand on certain legal issues so as to remove uncertainty to all interested parties. Indeed it is a good advise. I have, however considered the importance of this matter to the public and the country at large, legal technicalities notwithstanding (Art.107 a (e) of the Constitution). I am also aware that views of my fellow judges of same jurisdiction are persuasive but not binding.

All in all, I do concur with Mr. Maira and for reasons stated herein the preliminary objection as raised is dismissed. No order as to costs.

Sgd: Dr. S. J. Bwana

JUDGE

13/5/2003

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