

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 188 OF 2020**

(Arising from the decision of the District Court of Kilosa at Kilosa in Civil Case No. 2 of 2019 before Hon. T.A. Lyon, **RM** dated 10<sup>th</sup> July, 2020)

**HAMADI LILA MWINYIKONDO..... APPELLANT**

**VERSUS**

**SAIDI ALLYKUPO @ KUPO..... RESPONDENT**

**RULING**

27<sup>th</sup> April & 07<sup>th</sup> May, 2021.

**E. E. KAKOLAKI J**

By way of appeal the appellant has registered her dissatisfaction in this Court against the decision of District Court of Kilosa at Kilosa in Civil Case No. 2 of 2019, dated 10<sup>th</sup> July, 2020 that was entered in favour of the respondent. She has staged seven (7) grounds of appeal. Briefly before the trial court in the year 2019 through the above cited case the respondent successfully sued the appellant together with two other parties for breach of contract whereby the appellant had contracted the respondent to cultivate and harvest for the appellant 100 acres of paddy under consideration of Tshs. 14,000,000/-. The other two parties were Lila Kilosa Enterprises Co. Ltd a company owned by the appellant and Ally Tengeneza who was the farm manager by then. Only

Tshs. 4,800,000/= out of the claimed amount were paid to the respondent when the contract came to an end the fact that forced him to institute the suit against the trio in the District Court of Kilosa. His claims against them jointly and severally were for a total sum of Tshs. 9,200,000/= plus interests, special damages at the tune of Tshs.19,000,000/-, general damages and any other reliefs. In their written statement of defence the appellant and 2<sup>nd</sup> defendant raised counter claim against the plaintiff claiming for a total sum of Tshs. 23,350,000/= plus interests, general damages and costs of the suit.

After a full hearing of the suit, the trial court found the respondent's case proved against the appellant only and ordered him to pay the respondent the following.

1. A total sum of Tshs. 9,200,000/-, interest at the rate of 12% from the date of default in 2017 till full payment; court interest at the rate of 7% from the date of filing this matter until judgment; and 6% interest of the principal sum from the date of judgment till full payment.
2. Special damages to the tune of Tshs. 10,000,000/-
3. General damages at the tune of Tshs. 3,000,000/= and
4. Costs to follow the event.

It is from that decision this appeal has been preferred. With leave of the court the appeal was argued by way of written submission and the judgment date set. The appellant was under legal representation of Mr. Bartalomew Tarimo whereas the respondent enjoyed the services of Mr. Jackson Liwewa both learned advocates. As the court was about to start composing the judgment noted a jurisdictional issue and summoned the parties to address it first. Parties appeared before the court on 27/04/2012 and submitted on

the raised issues as to whether the trial court had pecuniary jurisdiction to try the case and if the answer is in negative whether the appeal before this court is competent or not.

It was Mr. Tarimo for the appellant who took the floor first and echoed from the outset that the trial court had no jurisdiction entertain the suit that was before it. He reasoned that the claimed amount of Tshs. 9,200,000/= and Tshs. 10,000,000/- as special damages in total were far below the pecuniary jurisdiction of the District Court. While observing that the our courts are creature of statutes and that the District Court and Primary Courts are established under the Magistrates Courts Act, [Cap. 11 2019] (MCA) he argued under section 18(1)(b)(ii) of MCA it is the Primary Court which had jurisdiction to entertain the suit at dispute as its pecuniary jurisdiction on contract and movable matter is limited to Tshs. 30,000,000/-. He said even by totalling the due contractual amount of Tshs. 9,200,000/= and special damages of Tshs. 19,000,000/= which is equal to Tshs. 28,200,000/= still the amount is within the jurisdiction of the Primary Court and therefore the District Court had no jurisdiction to entertain the said suit, Mr. Tarimo stressed. He supported his stance with the case of **Francis Andrew Vs. Kamyn Industries (T) Ltd** (1986) T.L.R 31 where this court dismissed the suit as the amount claimed was below its jurisdiction. As the suit was to be filed in the court of lowest grade which is the primary court Mr. Tarimo prayed this court to quash the proceedings of the District Court and set aside the judgment, decree and orders thereto for want of jurisdiction.

In rebuttal Mr. Liwewa countered Mr. Tarimo's submissions, contending that the District Court was clothed with jurisdiction to entertain the suit given its

complexity nature for involving matter which was beyond competence of the Primary Court assessors. To fortify his contention he referred the court to the case of **Zacharia Milalo Vs. Onesmo Mbona** (1983) T.L.R 240 at page 244 and went further to argue the Primary Court can be deprived of its jurisdiction in three situations. **One**, where the law applicable is neither customary or Islamic law, **secondly**, where jurisdiction is expressly taken away by statute and **thirdly**, where the dispute is of such legal and technical complexity as to be considered to be beyond the competence of such court. Further to that Mr. Liwewa contended there was an issue of power of attorney which is recognised under Order III Rule 2(a) of the Civil Procedure Act, [Cap. 33 R.E 2019] (CPC) which was competent to be addressed by the trial as the CPC is not applicable in the Primary Court. It was therefore his submission that the District Court had jurisdiction to try the suit given its complexity nature, thus the appeal is competent before the Court and this court be pleased to determine it on merits.

In his rejoinder submission on the cited case of **Zacharia Milalo** (case) he countered despite of stating situation where the Primary Court's jurisdiction can be deprive, parties cannot agree to grant jurisdiction to the court which it does not have. He was of the view that what the respondent ought to have done if at all it was necessary, was to file the suit in the court vested with jurisdiction which is the Primary Court and transfer it to the District Court under section 47 of the MCA. As regards the power of attorney he said such issue did not feature in the trial court. And lastly was on the issue of competence of assessors to comprehend the facts of the case where he submitted that there was no evidence to prove that fact that the facts of the case were such complex to be comprehended by the assessors. To him that

was learned counsel's assumption which were unfounded. Otherwise he reiterated his earlier submissions in the submission in chief and prayer prayers thereto.

Having taken time to digest the submissions by both counsels on the raised question and perused the pleadings and proceedings of the trial court, the issues for determination are whether the trial court had jurisdiction to try the suit in dispute and whether this appeal is competent before the Court. What is deciphered from both counsels submission is that it is uncontroverted fact that the claimed amount which is the basis for determination of the jurisdiction of the court is Tshs. 28,200,000/-. What remains in dispute is whether the District Court can entertain the suit of such amount in which Mr. Liwewa submits it does given the complexity nature of the case as the Primary Court's jurisdiction is limited to matters involving customary law and or Islamic law. Mr. Tarimo is of the contrary view that the jurisdiction of the Primary Court on matters of contract is well provided by section 18(1)(b)(iii) of MCA which statute establishes both Primary Court and District Court. That since the claimed amount is within the jurisdiction of the Primary Court the Respondent if so wished to have his matter entertained by the District Court, he would have instituted it in the Primary Court and transfer the same under section 47 of the MCA.

Starting with the issue jurisdiction of the court, it is trite law that all courts in Tanzania are creatures of statute and their jurisdiction including pecuniary jurisdiction is purely statutory. This proposition of the law was stated by the erstwhile East Africa Court of Appeal in the case of **Shyam Thanki and Others Vs. New Palace Hotel** (1971) 1 EA 199 at page 202 where it said:

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

In view of the above position of the law it is uncontroverted fact that the Primary Court, District Court and Resident Magistrates Court are all creatures of the statute under section 3, 4 and 5 of the MCA respectively. Whereas the three courts are established under MCA their procedural laws governing civil matters are different. The Primary Court civil procedure rules are sourced from the MCA under The Magistrates Courts (Civil Procedure in Primary Courts) Rules whereas the District Court and Resident Magistrate Court rules of procedure are provided under the CPC. The pecuniary jurisdiction of the trio courts in respect of civil suits is specifically provided under the MCA, whereas section 18(1)(a)(ii) and (iii) of the Act sets it for the Primary Court while sections 40(2)(a)(b) and 41(1) of the MCA provide for the District Court and Resident Magistrates Court respectively. The pecuniary jurisdiction of the Primary Court on matters of contract for recovery of civil debt as provided under section 18(1)(iii) of the MCA is for the amount not exceeding thirty (30) million. The said provision reads:

***"18(1)(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; and"*** (emphasis is mine).

As for the District Court the pecuniary jurisdiction for movable property is the amount not exceeding two hundred thousand as provided under section 40(2)(b) of MCA. The section provides thus:

*“(2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited-*

*(a) N/A.*

*(b) in other 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 two hundred million shillings.**” (emphasis supplied).*

Now back to the point at issue, basing on the provisions of section 18(1)(a) of MCA where the Primary Court has jurisdiction to entertain matters for recovery of debts arising out of contract and considering the fact that the claimed amount in total was far below thirty million, I am of the conviction that the competent court to try the said suit was the Primary Court as the District Court had no jurisdiction to entertain the suit in dispute. My finding is premised on the principle in the provisions of section 13 of CPC which was well adumbrated in the case of **Tanzania China Friendship Textile Co. Limited Vs. Our Lady of Usambara Sisters**, (2006) TLR 70 that every suit must be instituted in the court of the lowest grade competent to try it,

which in this case is a primary court. As once this court stated in the case of **Wan Security Company Ltd Vs. Mantra Tanzania Limited**, Civil Appeal No. 225 of 2020 (HC-unreported) to say that Primary Court is the court of lowest grade does not mean that it is so within the meaning of sections 13 and 3 of the CPC but rather the court of first instance in Tanzania courts system hierarchy. And that for that matter it automatically becomes the court of lowest grade to both District and Resident Magistrate Courts. The object and purpose of instituting case in the courts of lowest grade was well articulated in the case of **Peter Keasi Vs. The Editor, Mawio Newspaper and Another**, Civil case No. 145 of 2014 (HC-unreported), where this court observed observation I subscribe to:

*“The object and purpose of the said provision is I think three fold. **First**, it is aimed at preventing overcrowding in the court of higher grade where a suit may be filed in a court of lower grade. **Second**, to avoid multifariousness of litigation and **third**, to ensure that the case involving huge amount must be heard by a more experienced court.”*

Basing on the spirit of the provision and the cases cited above I distance myself from Mr. Liwewa’s submission that the suit was involving complex issues which were far out of competence of the assessors presiding and forming part of the decision in the Primary court for two reasons. **One**, most of the Primary Courts especially in the urban areas like Kilosa are presided over by magistrates who are law graduates, who can handle even complicated contracts leave alone simple contracts which are within their jurisdiction. Thus provide guidance to the gentlemen assessors. **Secondly**,



there is no material evidence tabled before this court to justify the claim that the said suit involved complex facts which could not be comprehended by assessors before the primary court. My perusal of the plaint has revealed that it contains simple contracts which in my opinion were not complicated to challenge competence of assessors. It follows therefore that the case of **Zacharia Milalo** (case) relied on by Mr. Liwewa is inapplicable under the circumstances of this case.

As regard to the assertion by Mr. Liwewa of existence of the issue of power of attorney in the suit whose procedure is regulated under CPC which is not applicable to the Primary Court, the fact which compelled the matter to be entertained in the District Court, I hold the same is unfounded. I so hold after satisfying myself that the contention is not premised on the pleadings and proceedings of the trial court, since that issue had never been pleaded or raised, discussed and determined by the trial court. Even if it was in existence still I could hold it was not the ground for filing the suit in the Primary Court as no person is precluded from suing for and on behalf of another in the Primary Court under power of attorney. I further join hands with Mr. Tarimo's submission that if the appellant wanted to have his matter tried in the District Court for whatever reason it was imperative for him to institute it in the competent court which is the Primary Court and transfer the same to the District Court under section 47(1)(a) and (b) of MCA. The provision provides thus:

*47.-(1) Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for- (a) the primary court, with the consent of the district court or a court of*

*a resident magistrate having jurisdiction, to transfer the proceeding to such district court or court of a resident magistrate or to some other primary court; (b) the district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court;*

As the trial court proceeded with hearing of the suit without jurisdiction the whole proceedings, judgment and orders thereto were nothing but a nullity. I therefore proceed to quash the proceedings and set aside the judgment and orders thereof.

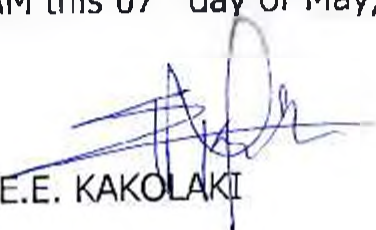
Since the appeal is premised on null proceedings, judgment and orders there is no competent appeal before this court. The appeal is therefore struck out for want of competence. The respondent is at liberty to file a fresh suit in the court of competent jurisdiction.

I order no costs to any party as the question was raised by the Court.

It is so ordered.

DATED at DAR ES SALAAM this 07<sup>th</sup> day of May, 2021.



  
E.E. KAKOLAKI

**JUDGE**

07/05/2021

Delivered at Dar es Salaam in chambers this 07<sup>th</sup> day of May, 2021 in the presence of Mr. Bartholomew Tarimo advocate for the appellant, Mr. Barton Mayage advocate for the respondent, the Respondent in person and Ms. Asha Livanga, court clerk.

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "E. E. Kakolaki".

E. E. Kakolaki

**JUDGE**

**07/05/2021**