

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 41 OF 2022

ABRI GENERAL TRADERS LIMITED PLAINTIFF

VERSUS

ABRO INDUSTRIES INC DEFENDANT

RULING

1st July & 9th August, 2022

KISANYA, J.:

The plaintiff, Abri General Traders Limited filed a suit praying for judgment and decree against Abro Industries Inc. (the defendant) as follows:

- a) A declaration that the Defendant has caused damages to the Plaintiff business to the tune of Tanzania Shillings One Billion only (TZS 1,000,000,000.00) plus interest and other charges thereon;*
- b) interest on the amounts due at the rate of 27 % per annum from 22nd March, 2019 till due date of judgment or sooner payment;*
- c) interest on the decretal sum from the date of judgment till date of full and final satisfaction thereof;*
- d) interest on costs at the rate of 7% from the date of judgment till full and final determination of the suit;*
- e) costs of and incidental to the suit; and*
- f) any other relief the Honourable Court may deem fit and just to grant.*

It is the plaintiff's case that, on 29th March, 2019, her goods were impounded by the Fair Competition Commission (FCC) basing on the defendant's complaint that the said goods were counterfeits of the defendant's goods. On 1st June, 2019, the plaintiff was informed by the FCC that FCC in association with BRELA had arrived a finding that the confiscated goods were in contravention of section 6 of the Service Trademarks Act of 1963. It was on 29th July, 2019, when the FCC handed back to the Plaintiff the seized goods after being satisfied that the plaintiff had not contravened the law.

The plaintiff claims that, subsequent to the recourse taken by the FCC, the defendant has been imposing obstacles on her business by harassing their staff and trying to block their licence renewal. As the said acts are injurious to the plaintiff's business reputation, the plaintiff resolved to file this suit.

The defendant vehemently disputed the plaintiff's claims. Apart from filing the written statement of defence, the defendant lodged a notice of preliminary of objection on the following points of law:-

- 1. That, this Honourable Court has no jurisdiction to entertain this matter:*
- 2. That, the suit is defective and unmaintainable for failure to join the necessary parties.*

The hearing of the preliminary objection was preceded by way of written submissions. Mr. Patrick Sanga, learned advocate filed submission in support of the preliminary objection, while the submission against the preliminary objection was filed by Mr. Sinare Zaharan, learned advocate.

Arguing the first limb of objection, Mr. Sanga submitted that this Court has no jurisdiction to entertain the matter. His submission was premised on the contention that the grievances arising from the action of the FCC are governed by section 2 C (2) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2007 and Regulation 51 of the Merchandize Marks Regulations, 2008. It was his further argument that the defendant filed her complaint in terms of section 3 and 12 of the Merchandize Marks Act, 1963 (as amended) and regulation 12 of the Merchandize Marks Regulations. Therefore, referring to section 23 of the Merchandize Marks Regulation, Mr. Sanga argued that it is the Chief Inspector who was inclined to order the defendant to pay the plaintiff compensation for the loss occasioned through wrongful detention of goods. He argued further that grievances against the actions of the Chief Inspector can be handled through appeal under section 51 of the Merchandize Marks Regulations and thus, the plaintiff has not exhausted the available remedy.

Citing section 2(3) of the JALA and the cases of **Marco Thuway Mallange vs Principal Secretary of Defence and National Service and**

3 Others, Misc. Civil Application No. 52 of 2018, he argued that the Court has no jurisdiction and that the suit contravenes the laws governing competition in Tanzania.

In rebuttal to the first limb of objection, Mr. Zaharan prefaced his submission by citing section 2(1) and (3) of JALA which empowers this Court to exercise jurisdiction in civil matters in conformity with the written laws. He also referred me to Order VII Rule 1(e) and (i) of the Civil Procedure Code, Cap. 33, R.E. 2019 which requires the plaintiff to state facts showing that the court has jurisdiction.

The learned counsel went on to submit that the damages against the defendant is for occasioning the seizure of the plaintiff's goods as well as constant harassment as deposed in paragraphs 3, 10 and 11 of the plaint. It was his further argument that the quantified damages suggest that this Court has pecuniary jurisdiction under section 40(2) of the MCA.

Mr Zaharan further submitted that the defendant's argument with respect to jurisdiction is a total misconception of the plaintiff's claim. Elucidating his contention, he cited the case of **Hotels and Lodges (T) vs Attorney General and Chapwan Hotels Limited** (2013) TLR 250 where it was held that a pure point of law must be elucidated from what has been pleaded or implied from the pleadings.

Submitting further, he learned counsel further argued that the plaintiff's claim before this Court is not a result of the Chief Inspector of the FCC failing to order compensation or any action of the Chief Inspector or decision of BRELA. He contended that the claim is based purely on the interference and disturbance caused by the defendant to the plaintiff. He was therefore of the considered view that it will be improper for the Court's jurisdiction to be ousted.

Commenting on the case of **Marco Tluway Malange and RSA Limited** (supra), Mr. Zaharan conceded that it is the position of law. However, he was of the view that the said position does not vitiate the plaintiff's suit which has been instituted in conformity to other written laws. That said, the learned counsel prayed that the first limb of objection be dispensed with.

In his rejoinder submission, Mr. Sanga reiterated that the powers of the High Court are limited and exercised in conformity with written laws. He then submitted that the Merchandize Marks Act being among the written laws has provided the manner of handling the claims at hand. It was his further argument that if jurisdiction of the Court is expressly excluded, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint. His argument was cemented by the cases of **Commissioner General Tanzania Revenue Authority and Another vs Milambo Limited**, Civil

Appeal No. 62 of 2022 (unreported) and **Attorney General vs Lohay Akonaay and Another** [1995] TLR 80.

Mr. Sanga further submitted that parties are bound by their own pleadings as held in **Peter Ng'homango vs The Attorney General**, Civil Appeal No. 114 of 2011. He contended that the plaintiff has specifically pleaded that the claim against the defendant arise from loss of business that was caused by seizure and confiscation of the goods. It was his considered view that the goods were legally seized by the FCC under the supervision of the Chief Inspector basing on the defendant's complaint and that the defendant did not seize the same.

The learned counsel went on replying that this is not a tortious matter and that even if it was tortious, the claim ought to have been raised under the FCC and not the defendant. He reiterated that the plaintiff has not complied with the procedure set out under the law to challenge the decision of the FCC and that the suit is unmaintainable for failure to join the necessary parties. In the end, the Court was invited to dismiss this suit with costs.

Having examined the pleadings and considered the rival submissions, cited authorities and the law, the issue is whether this Court has no jurisdiction to entertain this matter.

It is worth noting here that, in terms of the settled law, a preliminary objection must be on pure point of law pleaded or arising from clear implication out of pleading and which if argued as preliminary point is likely to dispose the suit. Apart from the case of **Hotels and Lodges (T) vs Attorney General and Chapwan Hotels Limited** which cited by Mr. Zaharan, the above principle was stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696.

As far as limb of objection is concerned, it is settled principle of law that the question of jurisdiction goes to the root of the power of the court to entertain the matter before it. In that regard, the court is enjoined to satisfy itself whether it has mandate to determine the matter lodged before it. See for instance the case of **Fanuel Mantirid Ng'unda vs Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 which was referred to in the case of **Commissioner General Tanzania Revenue Authority and Another vs Milambo Limited** (supra). The law is further settled that jurisdiction of the court is a creature of the statute and that parties cannot be in agreement or confer jurisdiction upon the court. [See the cases of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported), in which the Court of Appeal cited with approval the case of **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199, which

was cited with approval in **Sospeter Kahindi** (supra), in which the then East African Court of Appeal held that:

"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. "

As rightly argued by the learned counsel for both parties section 2 (1) of the JALA empower the High Court to hear civil cases. However, such power is not limited. It is exercised basing on the provisions of other written laws as provided for under Article 108 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977 (as amended) and section 2(3) of JALA. The law is also that where the law establishes special mechanism, procedure or forum of determining the dispute or claim, this Court has no mandate to determine the matter. It is gleaned from the contending submissions that both parties are at one on that position which was also restated in the case **Commissioner General Tanzania Revenue Authority and Another vs Milambo Limited** (supra).

I agree with Mr. Zaharan that, the damages claimed by the plaintiff fall within the jurisdiction of this Court provided for under section 40(2) of the MCA. However, it is apt to note that the contention that the Court lacks jurisdiction to determine this matter is not based on pecuniary jurisdiction. The objection is founded on the contention that the claim arose from the

action of the FCC through the Chief Inspector and thus, determined in accordance with the procedure and before the forum set out under section 2 C (2) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2007 and Regulations 23 and 51 of the Merchandize Marks Regulations.

I have considered the provisions relied upon by that the defendant's counsel. It is not disputed that the defendant lodged her complaint to FCC. In terms of regulation 12 Merchandize Marks Regulations, a person who has reasonable ground to suspect importation of counterfeit is entitled to make an application to the Chief Inspector.

Where a complaint is made frivolously or with improper motive, the Chief Inspector has discretion of ordering the applicant to pay the owner of the goods appropriate compensation for any harm or loss occasioned through wrongful detention of the goods. This is pursuant to regulation 23 of the Regulations which stipulates: -

"Where it is deemed by the Chief Inspector that the application made under regulation 12 has been made frivolously or with an improper motive, the Chief Inspector may order the applicant to pay the owner or consignee or consignor of the goods appropriate compensation for any harm or loss occasioned through the wrongful detention of the goods."

In light of the above provision, it is clear that the compensation for loss occasioned through the wrongful detention of goods is determined by the Chief Inspector after working on the complaint lodged before it. That being the case, failure to make a compensation order is part and parcel of the Chief Inspector exercising the powers conferred upon him. Therefore, I am of considered view that, the Chief Inspector's decision in which compensation order is not granted is appealable to the Fair Competition Tribunal under regulation 51 of the Regulations.

Reverting to this suit, it is not disputed that in the course of working on the defendant's complaint, the FCC through the Chief Inspector seized the plaintiff's goods. Upon investigating the defendant's complaint, the FCC was satisfied that the plaintiff had not contravened the law. However, its order was limited to handing over the seized goods. The compensation for loss occasioned from the detention was not awarded. This fact is reflected in paragraph 8 of the plaint and read together with the Chief Inspector's letter dated 5th August, 2019 (Annex 5 to the plaint).

Now, it is not disputed that the plaintiff's claim is, among others, based on the loss of business that was caused by the seizure of her goods. See for instant paragraph 3 of the plaint in which the plaintiff averred: -

*"That the Plaintiff claims against the Defendants for payment of Tanzanian Shillings One Billion (TZS 1,000,000,000) **being damages for loss of business***

that was caused by the seizure of the Plaintiff's good and constant harassment from the Defendant and resultant disruption of its business."

Therefore, as other paragraph shows that the complaints leading to the case at hand was determined by the Chief Inspector who did not grant the compensation order, I agree with the defendant's counsel that the recourse available in respect of damages for the loss of business that was caused by the seizure of the plaintiff's was to lodge an appeal to the Fair Competition Tribunal (FCT). It cannot be determined by this Court.

With regard to the claim for damages for loss of business caused by constant harassment from the defendant, paragraph 10 of the plaint shows that the said act was committed subsequent to the order made by the FCC. The said paragraph reads as follows:

"That subsequent to the above, the Defendant has been constantly imposing obstacle on the Plaintiff's business by harassing their staff and trying to block their licence renewal. These acts are injurious to the Plaintiff's business and financially."


As it can be glanced from the above paragraphs, it is clear that some of the plaintiff's claims are not based on the matter which was determined by the FCC and the Chief Inspector. However, since the same was merged together with the loss of income arising from the action taken by the FCC

which ought to have been dealt with by the FCT, the present suit is incompetent before this Court.

It is my considered view the first limb on jurisdiction is sufficient to dispose of the matter. As stated afore, the issue of jurisdiction goes to the root of the case. I, therefore, find it not necessary to address the second limb of objection on non-joinder of the necessary parties.

In the event, this suit is hereby struck with costs based on the first limb of objection and to the extent stated herein. The plaintiff is at liberty to file a fresh suit on claims for loss of business in respect of actions which was not dealt with by the FCC.

DATED at DAR ES SALAAM this 9th day of August, 2022.


S.E. Kisanya
JUDGE

COURT: Ruling delivered this 9th day of August, 2022 in the presence of Mr. Benard Nkwabi, learned advocate for the defendant and also holding brief for Ms. Neema Mbagi, learned advocate for the plaintiff. Court Clerk, Ms. Zawadi present.

Right of appeal explained.




S.E. Kisanya
JUDGE
09/08/2022