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Review

Civil jurisdiction of the high court of the United Republic of Tanzania: A critical comment on the amendment made by Act no. 25 of 2002 and its impact on the pecuniary jurisdiction of the High Court

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There have been debates on the bench and bar on the civil jurisdiction of the High Court of the United Republic of Tanzania, particularly the pecuniary jurisdiction. On the bench, the debates have been developed by the Honorable Judges of the Court itself. The basis of the debates is the amendments brought by Act No. 25 of 2002, the written laws (miscellaneous amendments) Act, which, *inter alia*, amended the Magistrates Courts' Act of 1984 by raising the pecuniary jurisdiction of subordinate courts (district and resident magistrates' courts). Both the court and members of the bar have interpreted the provisions of the amending law in two different ways. There are those who argue that the High Court is ousted of its jurisdiction to hear cases whose pecuniary value is below shillings 100,000,000/= while others argue that the court has unlimited jurisdiction and therefore its pecuniary jurisdiction is not affected by the amendments brought by Act No. 25 of 2002. This paper considers whether the relevant provisions of law are properly interpreted in determining the pecuniary jurisdiction of the High Court. By way of research methodology, the author made use of secondary sources of information which involves a review of law dictionaries, text books, statutes, commentaries of prominent law scholars, cases, both reported and unreported, and other related materials in the course of writing this review article. After making a thorough analysis of the materials employed, the author submits that the amendments brought by Act No. 25 of 2002 did not intend to oust the jurisdiction of the High Court rather they were meant to set a ceiling on subordinate courts' pecuniary jurisdiction. Since the said amendments do not expressly take away the jurisdiction of the High Court, then they should not be interpreted as so doing.

Key words: Civil, pecuniary, jurisdiction, High Court, Tanzania, amendment, Act, impact.

INTRODUCTION

In 2002 the Parliament of Tanzania passed a law known as the written laws (miscellaneous amendments) Act, 2002.[1] This law amends, *inter alia*, the Magistrates' Courts Act, 1984[2] whereby section 40(2) thereof was amended by raising the pecuniary jurisdictions of the District Court and Resident Magistrates Court from twelve million shillings (12,000,000/=) and ten million shillings (10,000,000/=) for immovable and movable properties to one hundred and fifty million shillings (150,000,000/=) and one hundred million shillings (100,000,000/=), respectively. It has been said and even decided by courts of law that this amendment ousts the High Court of its jurisdiction to hear cases whose pecuniary value is below 100,000,000/=. This has prompted me to review the law on civil jurisdiction of the High Court and give some critical comments on some of the cases decided by the High Court itself and the Court of Appeal of Tanzania on the pecuniary jurisdiction of the High Court. This paper, therefore, considers whether the relevant provisions of law are properly interpreted in determining the civil jurisdiction of the High Court.

[1] Act No.25 of 2002.
[2] Act No.2 of 1984 (Cap.11 R.E.2002).

DEFINITION OF JURISDICTION

The word jurisdiction is defined in black's law dictionary as the power of the court to decide a case or issue a decree."[3] Shivji et al. (2004) argue that the court's power to determine matters that are brought before it are restricted in three ways: territorial jurisdiction – the court's power to hear matters arising in the specified geographical area; pecuniary jurisdiction – the court's power to hear matters whose subject matter is worth up to certain value only; and the subject matter itself which means that the court has power to hear certain matters only.[4] It should be noted that jurisdiction is a creature of statutes. Therefore, relevant provisions of law have to be fully examined before one comes to a conclusion of the jurisdiction of a certain court or judicial body.

Establishment and jurisdiction of the high court of the United Republic

The High Court is established under the constitution of the United Republic of Tanzania of 1977.[5] Article 108(1) of the Constitution provides that:

"There shall be a High Court of the United Republic the jurisdiction of which shall be as specified in this Constitution or in any other law."

The High Court is a superior court of record and at the apex of the judicial system in the country. It derives its jurisdiction from the Constitution itself and the provisions of section 2 of the judicature and application of laws Act.[6] Article 108(2) of the constitution, which is the supreme law of the land, grants the High Court unlimited jurisdiction. The Article provides:

"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 a High Court; save that, the provisions of this sub article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other law."

From the above cited provisions of the constitution, it can be said that the High Court of the United Republic of Tanzania enjoys not only unlimited pecuniary jurisdiction but also territorial jurisdiction in determining disputes arising from Mainland Tanzania. The Debate on section 40(2) of the Magistrates' Courts Act, 1984 as amended by the written laws (miscellaneous amendments) Act, 2002.

There are two schools of thought with regard to the pecuniary jurisdiction of the High Court since the passage of Act No. 25 of 2002. These schools of thought have been developed by the High Court itself (especially commercial division) while adjudicating cases filed before it. The Court has interpreted the provisions of the amending law in two different ways. There are those who argue that the High Court is ousted of its jurisdiction to hear cases whose pecuniary value is below 100,000,000/=. Another group argue that the High Court has unlimited jurisdiction and therefore its pecuniary jurisdiction is not affected by the amendment brought by Act No. 25 of 2002. These two schools of thought are elaborated broadly in this work.

The first school of thought

This school argues that the High Court is ousted its jurisdiction to hear cases whose pecuniary value is below 100,000,000/=. Supporters of this school rely on the provisions of sections 7(1) and 13 of the Civil Procedure Code, 1966.[7] The two provisions are fully quoted herein below for ease reference.

7(1)."Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or implied barred."

"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade."

The argument raised by this school is that the constitution vests the High Court with unlimited jurisdiction where there is no other law expressly conferring the same jurisdiction to other courts. This school argues further that section 13 of the civil procedure code bars the suit whose pecuniary value is below 100,000,000/= from being entertained by the High Court. Supporters of this school thus conclude that those suits ought to be filed in the subordinate courts.

The High Court (Commercial Division) has in number of cases held that the Court has no jurisdiction in the matter whose pecuniary value is below 100,000,000/=. In the case of The Courtyard Dar es Salaam v the Managing

[3] See Black's Law Dictionary (1999). 7th edition, p. 855.
[4] Shivji, I.G. et.al. (2004). Constitutional and Legal System of Tanzania: A Civics Sourcebook. Dar es Salaam: Mkuki na Nyota Publishers Ltd., p. 222.
[5] Cap.2 R.E. 2002.
[6] Cap. 358 R.E. 2002.
[7] Act No.49 of 1966 (Cap.33 R.E.2002).

Director Tanzania Postal Bank,[8] Kalegeya J had this to say:

"Now, although the Counsel for the Plaintiff avoids direct statement on this, the obvious is that what he concedes to, tantamounts to saying that this court has no jurisdiction, which view I also hold…"[9]

The learned Judge relied on the amendments vide Act No. 25 of 2002 and the provision of section 13 of the Civil Procedure Code on arriving to this decision. Kalegeya J went on to cite the provisions of GN. No. 140 of 1999 which amended order iv rule 1 of the civil procedure code by adding sub-rule 3 which states:

"No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or tribunal of competent jurisdiction or which falls within the competency of a lower court."

Prior to determination of the above case, Kalegeya J had already held in another matter the Jubilee Insurance Company of Tanzania Ltd. v DHL Tanzania Limited.[10] (in a ruling dated 11th April, 2003) in which the principal sum claimed was shillings 50,067,680/=, that the High Court has jurisdiction in claims whose value is above 100 million.

Kalegeya's position is also supported by Kimaro J in the case of Akiba commercial bank limited v the network of technical publications in Africa and others.[11] In that case the plaintiff was suing the defendants for the recovery of shillings 14,429,842.24/= being a loan and overdraft facilities extended to the first defendant. The second to fifth defendants were directors of the first defendant and they guaranteed the loan. It was only the third defendant who filed a Written Statement of Defense. He raised three points of preliminary objection (but only one point is relevant with regard to this paper) that: the suit had been filed in a wrong court that is in violation of Act No. 25 of 2002. He prayed that the suit be rejected with costs. The learned advocates who appeared in this case; that is Mr. Swai for the plaintiff and Mr. Mjindo for the third defendant, advanced written arguments. The argument by Mr. Mjindo (on the preliminary objection) is in respect of the jurisdiction of the Commercial Court after enactment of Act No. 25 of 2002. Mr. Mjindo's argument on this matter was that, since the pecuniary value of the subject matter of that suit was below 100 million, the suit ought to have been filed in the District Court. Section 13 of the Civil Procedure Code, 1966 was cited to argument his submission. The reply by Mr. Swai was that the amendments made by Act No. 25 of 2002 do not affect the jurisdiction of the Commercial Court because the High Court has unlimited jurisdiction in civil and criminal matters and that the amendments are only concerned with magistrates and do not affect the High Court. In presiding this case, Kimaro J quoted the case of Haji Ukwaju t/a Wajenzi Enterprises v National Microfincance Bank and Joseph Musiba[12] The learned Judge had this to say:

"…*my Brother Judge, Dr. Bwana pointed out the negative effects experienced from Act No. 25 of 2002. I respect his view and will add that Act No. 25 of 2002 defeats the purpose of the establishment of the Commercial Division of the High Court in as far as expediency in finalization of cases is concerned."*[13]

Unfortunately, Kimaro J was of the view that the court has no jurisdiction and she uphold the preliminary objection raised by the third defendant. The Judge criticized the arguments raised by Mr. Swai that the amendments were meant to affect only the subordinate courts (magistrate courts). It was the learned Judge's view that if the law is let to operate that way there will be a total confusion. The Judge went on to hold that option of where to start can not be left on the parties and there must be a control. Furthermore, the learned Judge was of the view that the negative effects found in Act No. 25 of 2002 have to be corrected by the relevant authority which is responsible for that duty. Having stated the reasons herein above, Kimaro J ended the debate by concurring with the position of Kalegeya in the courtyard Dar es Salaam v the managing director Tanzania postal bank (supra).[14]

What should be noted from the above rulings of Kalegeya J and Kimaro J is that the learned Judges (as they were then – because now they have been appointed as Justices of the court of appeal) were of the view that the commercial division of the high court cannot inquire into facts, apply the law and give judgments in matters whose pecuniary value is below 100,000,000/=. In their views, this is so notwithstanding Article 107A of the Constitution of the United Republic of Tanzania which enjoins courts, in civil matters, to give decisions on the basis of justice and without undue regard to technicalities. All in all, it can be summarized that this school of thought is of the view that the High Court has no jurisdiction to entertain cases whose pecuniary value is below 100,000,000/=. The school concludes that the jurisdiction of the Court to entertain such cases was

[8] High Court of Tanzania, Commercial Division at Dar es Salaam, Commercial Case No. 35 of 2003 (Unreported).
[9] *Id.* See pages 4 and 5 of the type script.
[10] High Court of Tanzania, Commercial Division at Dar es Salaam, Commercial Case No. 16 of 2003 (Unreported).
[11] High Court of Tanzania, Commercial Division at Dar es Salaam, Commercial Case No. 18 of 2003. (Unreported).
[12] High Court of Tanzania, Commercial Division at Dar es Salaam, Commercial Case No. 27 of 2003 (Unreported). This case, which is discussed in detail herein below, is in conflict with the decisions made by Kalegeya J in cases discussed above.
[13] See page 4 of the typescript.
[14] See page 5 of the typescript.

ousted by the amendments brought by Act No. 25 of 2002. This study will now shift its focus to the second school of thought.

The second school of thought

This school argues that the High Court has unlimited jurisdiction and thus its pecuniary jurisdiction is not affected by the amendments brought by Act No. 25 of 2002. Those who support this school argue that by virtue of Article 108 of the Constitution of the United Republic of Tanzania 1977 and section 2 of the Judicature and Application of Laws Act, the High Court of Tanzania has unlimited jurisdiction to entertain any matter as the highest court of record, and that this jurisdiction is unfettered even against the statutory provisions. 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*. According to this school, the Civil Procedure Code, as the name denotes, regulates procedures of a civil nature before courts[15] of law but does not take away the jurisdiction of the High Court in determining matters whose pecuniary values are below 100,000,000/=.

The leading case of supporters of this school is that of Haji Ukwaju t/a Wajenzi Enterprises v the National Microfinance Bank and Joseph Musiba[16] that was presided by Dr. Bwana J (the then Judge in charge of the commercial division of the high court – he is at present the Justice of the Court of Appeal of Tanzania). His Lordship Dr. Bwana Ji/c was of the following view with regard to sections 7(1) and 13 of the Civil Procedure Code, 1966:

"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. 100 m/= 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 107A[17] *and 108."*

In this case the plaintiff was claiming from the defendants payment of shillings 27,402,081/= for loss suffered. The plaintiff was represented by Mr. Maira the learned advocate while the defendants were represented by Mr. Kabakama the learned advocate. It was Mr. Kabakama's views that the commercial division of the High Court has no jurisdiction to such cases whose pecuniary value is below 100 million - following the amendments brought by Act No. 25 of 2002 to the Magistrates' Courts Act, 1984. He based his arguments on the provisions of the Act itself and sections 7 and 13 of the civil procedure code. On his part, Mr. Maira submitted that the said recent amendments to the 1984 Act do not change the pecuniary jurisdiction of the high court. He relied on the provisions of Articles 107A and 108 of the constitution of the United Republic of Tanzania of 1977. He also submitted that the provisions of section 6 of the civil procedure code grants the commercial division jurisdiction to continue with trials of cases of a commercial nature whose value is below those stipulated by the said amendments to the law. Thereafter, when the two learned counsels argued their respective views, the bottom line of all that was said is to ask the Court to make a ruling as to whether the provisions of Act No. 25 of 2002 have made the High Court lose its jurisdiction in cases of a commercial nature whose pecuniary value is bellow 100,000,000/=. Further the Court was asked to examine the Constitutionality of the said amendments.

In discussing the amendments made by Act No. 3 of 2000, His Lordship Dr. Bwana Ji/c had this to say:

"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 acknowledge the fate suffered by many litigants for years – that of delays."[18]

The learned Judge went on to quote the provisions of Article 107A(2) (a), (b) and (e) of the Constitution (in Kiswahili – but this paper preferred to use the english version directly) which provides that:

107(2): "In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say- impartiality to all without due regard to ones social or economic status; not to delay dispensation of justice without reasonable ground; to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice."

After examining the above provisions of the constitution, Dr. Bwana Ji/c was of the following view:

"The above quoted provisions of the constitution and in deed 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,

[15] According to section 2 of the Civil Procedure Code, the Code applies in Mainland Tanzania in determining proceedings in the High Court, Resident Magistrate Court and the District Court which is presided by a civil magistrate.

[16] High Court of Tanzania, Commercial Division at Dar es Salaam, Commercial Case No. 27 of 2003 (Unreported).

[17] See the Constitution of the United Republic of Tanzania as amended by Act No. 3 of 2000.

[18] See page 3 of the typescript.

contravenes the spirit of the Constitution as enshrined in Article 107A(2)(a), (b) and (e)."

The learned Judge went a step further to examine the provisions of Article 108(2) of the constitution by making it clear on what is the legal traditions obtaining in Tanzania that have to be dealt with by the High Court. He also commented on the amendment that was done by the Parliament by enacting a law that is discriminatory. Under these issues Dr. Bwana remarked:

"It is my further considered view that the said amendments, read together with Article 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. 10 m/- 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 Article 107A(2)(a) of the Constitution."[19]

Finally, the learned Judge considered whether the provisions of sections 7 and 13 of the civil procedure code and the amendments to the 1984 Act oust the jurisdiction of the High Court. He ruled that the said provisions do not oust the jurisdiction of the commercial court to hear cases whose pecuniary value per se, is below specified limitations and that the said amendments do not expressly prohibit the filing of such cases in the High Court. His Lordship concluded 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 and that the jurisdiction of the High Court has therefore not been affected. It can still accept cases whose monetary value is below 100,000,000/=.

Dr. Bwana's position is strongly supported by the decision made by Rutakangwa J in the case of Renada Minerals Corporation v Consolidated Holding Corporation and National Bank of Commerce[20] while examining the provision of section 13 of the civil procedure code. In a ruling dated 12th July 2004, Rutakangwa J (as he then was – now a Justice of the Court of Appeal) relied on Mulla's commentary[21] on the civil procedure code and ruled that:

"s.13 of the CPC (Civil Procedure Code) *1966 does not oust the jurisdiction of this Court* (High Court) *in respect of suits of this nature which by their monetary value ought to be commenced in the district or even in the primary courts. If by sheer inadvertence or for the sake of convenience a plaintiff institutes a suit of this nature which by virtue of s.13 of the CPC 1966 as a matter of procedure and policy ought to have been instituted in one of the two subordinate courts, this Court, has the option of either returning the plaint to the plaintiff under Order VII Rule 10 of the CPC 1966 or trying and determining the same."*

Another case that supports this school is that of Dr. Ally Shabhay v Tanga Bohora Jamaat[22] in which Mwaikasu J (as he then was) held that even if the amount claimed were to fall within the pecuniary jurisdiction of the lower court, that in his view, would not bar the High Court from entertaining the suit.

The case of Bikubwa Issa Ali v Sultan Mohammed Zahran[23] is also of paramount important in support of this second school of thought. Kannonyele J (as he then was) in deciding that case he held that 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 not to say that the other was thereby deprived of jurisdiction in the matter.[24]

High Court of Uganda has also had time to discuss the issue of its pecuniary jurisdiction. In the case of Munyagwa v Kamujanduzi,[25] the plaintiff sued in the High Court for possession of his house and did not include in the plaint a statement of the value of the house. The defendant contended that the High Court had no jurisdiction to hear the case which was within the jurisdiction of the Chief Magistrate's Court and that the omission of the value of the house was fatal to the claim. It was held (Saied J) that

"the jurisdiction of the High Court in civil matters is unlimited; institution of the suit in the High Court when it was within the jurisdiction of the lower court only affected costs."

The lesson we learn from Uganda in the above decision is that the High Court is not deprived of its jurisdiction simply because subordinate courts can exercise jurisdiction on matters which can also be tried by the High Court.

From the above discussion, a short summary can be made that the second school of thought conclude the debate by stating that 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,

[19] Page 5 of the typescript.
[20] High Court of Tanzania at Arusha, Civil Case No. 52 of 1999 (Unreported).
[21] Mulla's position is discussed in detail in a later part of this work.
[22] High Court of Tanzania at Tanga, Civil Case No. 3 of 1996 (Unreported).
[23] [1997] TLR 295.
[24] At page 296.
[25] [1972] E.A. 332 (UG).

then those provisions of Act 25/2002 would be null and void as they would infringe the provisions of Articles 107A and 108 of the Constitution.

THE POSITION OF THE COURT OF APPEAL OF TANZANIA ON THE PECUNIARY JURISDICTION OF THE HIGH COURT

The Court of Appeal, which is the Court of last resort as far as the court hierarchy in Tanzania is concerned, has made the "so called confusing decision" on what exactly is the pecuniary jurisdiction of the High Court. In a judgment dated 19th October, 2005 in M/S Tanzania – China Friendship Textile Company Limited v Our Lady of the Usambara Sisters,[26] the Court held, *inter alia*, that the pecuniary jurisdiction of the High Court is limited by the pecuniary jurisdiction of the subordinate courts and effectively, the High Court has no jurisdiction to entertain matters which are within the pecuniary jurisdiction of the subordinate courts. The background of this appeal is not difficult to trace. The Respondent instituted a suit in the Commercial Division of the High Court at Dar es Salaam seeking special damages to the tune of shillings 8,136,720/=, general damages to the tune of 15,000,000/= and interest to the tune of 8,136,720/=. On appeal to the Court of Appeal, the Appellant argued that the Commercial Court had no jurisdiction to entertain the said suit simply because at that particular time as it was provided for under section 40(2)(b) of the Magistrates' Courts Act, 1984[27] and section 6 of the Civil Procedure Code, 1966 the High Court in its original jurisdiction had no power to adjudicate upon claims whose amounts did not exceed shillings 10,000,000/=. The contention of the advocate for the appellant was based on the premise that the amount claimed was shillings 8,136,720/= and that the amount for general damages was irrelevant because, in his view, the amount for general damages (which is normally granted on the discretion of the court) is not required to be quantified in the plaint and that, where erroneously quantified, it does not alter or affect the jurisdiction of the Court. The learned counsel submitted that since the substantive amount was below 10,000,000/= the trial court had no pecuniary jurisdiction to adjudicate upon the matter as it did.

The judgment of the Court of Appeal on this matter was very simple that:

"the whole proceedings and the decision thereat (of the commercial division of the high court) *are null and void"* for want of jurisdiction. In its reasoning the Court held that *"it is the substantive claim and not the general damages which determine the pecuniary jurisdiction of the court."*

After commencing with this determination, the Court then proceeded to answer the question it posed itself, namely 'what is the pecuniary jurisdiction of the High Court?' To answer this question, the court made analysis of section 6 of the Civil Procedure Code (1966), section 40(2)(b) of the Magistrates' Courts Act 1984, section 2(1) of the Judicature and Application of Laws Ordinance,[28] Article 108 of the constitution of the United Republic of Tanzania of 1977 and section 13 of the Civil Procedure Code 1966. Section 6 of the Civil Procedure Code 1966 states that:

"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."*

With regard to this section, the court was of the view that it is a common knowledge that the high court has unlimited pecuniary jurisdiction upwards and therefore no amount can be said to exceed the pecuniary jurisdiction of the high court. This is confusing because, in my view, the constitution does not provide that the jurisdiction of the High Court is unlimited upwards!

Proceeding to examine the provision of section 40(2)(b) of the Magistrates' Courts Act 1984,[29] the court was of the view that, by implication, a proper forum for a claim exceeding 10,000,000/= was a court higher than a district or resident magistrates court, meaning, the high court. Continuing with its reasoning, the position of the court on article 108 of the constitution was that under the said article the jurisdiction of the high court is subject to some other laws. However, it should be noted that, what the Court did not say is whether such other laws can take away or oust the jurisdiction of the high court granted by the constitution. Finally, the court examined the provision of section 13 of the civil procedure code (supra) and concluded that:

"although we could not come across a specific provision of law stating expressly that the high court had no pecuniary jurisdiction to entertain claims not exceeding shillings 10,000,000/=, yet under the principle of this provision of law (section 13 of the civil procedure code 1966), the high court had no pecuniary jurisdiction to entertain claims not exceeding shillings 10,000,000/=.

The underlining is mine because section 13 is discussed fully in the part that follows.

[26] Court of Appeal of Tanzania, Civil Appeal No. 84 of 2002 (Unreported).

[27] It must be noted that at the time of filing this appeal the provision of section 40(2)(b) of the Magistrates' Courts Act, 1984 that deals with the pecuniary jurisdiction of the District Court and the Resident Magistrates Court was not yet amended by Act No.25 of 2002. However, that notwithstanding this case is very important to this discussion.

[28] By then Cap. 453 of the Laws of Tanzania. Now it is commonly called the Judicature and Application of Laws Act, Cap. 358 R.E. 2002.

[29] At that material time this section placed the pecuniary jurisdiction of the District Court and Resident Magistrates Court to a sum not exceeding shillings 10,000,000/= on movable properties.

Statutory interpretation and the intention of the legislature

The essence of the above debate of the two schools of thought in the high court and the so called confusing decision of the court of appeal of Tanzania goes back to statutory interpretation. The confusion is brought about by the way judges differ in arriving at conflicting decisions. It is advisable that judges of the same court or even of the court higher, while interpreting the provisions of the statute, must set to work on the constructive task of finding the intention of the legislature. The judge must also take into consideration the social conditions prevailing in the society.

It is on this basis that this study was conducted with the commentary of Mulla on the code of civil procedure.[30] Mulla discusses section 15 of the Indian code of civil procedure, 1908 which is in *pari materia* to section 13 of our civil procedure code (supra) and makes it very clearly that

"the object of the section in requiring a suit to be instituted in the court of lowest grade competent to try it is that courts of higher grades shall not be overcrowded with suits. This section is a rule of procedure, 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 the courts of higher grades which they possess under the Acts constituting them." [31]

Unlike the high court and the court of Appeal of Tanzania, since 1885[32] the courts in India have been interpreting this provision as a rule of procedure and not a rule of jurisdiction. It is on this basis that this study is in total agreement with Mulla's position. This means, therefore, that a suit below the sum provided by Act No.25 of 2002, that is, 100,000,000/=, can be tried by the high court (the court still has jurisdiction) although, as a matter of procedure, that suit ought to be instituted in either the district court or the resident magistrates court.

A close examination of the language used in section 13 indicates that the section is addressing the plaintiff. This study believes in the faith which is supported by Sarkar[33] and Mulla (supra), that the language is clearly placing an obligation on the suitor (plaintiff) to ensure that he files his suit in the court of the lowest grade competent to try it. Thus, the word 'shall' used in the section is imperative on the plaintiff and not to oust the jurisdiction of a higher court.

It is also very important to note that section 13 can not be read in isolation but should be read in conjunction with the provisions of Order VII Rule 10 of the civil procedure code which provides that:

"(1) the plaint shall, at any stage of the suit, be returned to be presented to the court in which the suit should have been instituted. (2) On returning a plaint the judge or magistrate, shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it."

This is a procedure that has to be followed in the event that a suit is filed contrary to the provision of section 13. From the above discussion one question remains unanswered: What happens if the high court fails to return a plaint (to the subordinate court) that has contravened the provisions of section 13 and proceeds to hear the case and passes a decree? Mulla's answer to this question, basing on Or.7 r.10 of the Indian code of civil procedure 1908 which is in *pari materia* with Order VII Rule 10 of our Code, is that the decree is not a nullity.[34] He argues that in itself is a case of irregularity which does not affect the jurisdiction of the court within the meaning of section 99[35] of the Indian Code (in *pari materia* with section 73 of the Tanzanian Code) which provides that:

"No decree shall be reversed or substantially varied, nor shall any case be remanded, on appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court."

Accordingly, given the fact that a failure to comply with the provisions of section 13 does not go to the jurisdiction of the high court but rather goes to non adherence to procedural requirements, even on appeal the decree issued by the high court in a suit that ought to have been instituted in a court of the lowest grade cannot be reversed or substantially amended. This is the lesson that the Court of Appeal should get from this paper.

In addition, this study does not believe that the intention of the legislature in enacting the said amendment was to oust the jurisdiction of the high court to hear cases whose pecuniary value is below 100,000,000/=. My views are in conformity with the second school of thought (founded by the High Court itself) that the intention of the legislature in enacting Act No.25 of 2002 was to raise the ceiling of the pecuniary jurisdiction of the subordinate courts but not to oust the jurisdiction of the High Court. If the intention of the legislature in the said amendment was to oust the jurisdiction of the High Court to hear cases whose pecuniary value is below 100,000,000/=, then it will lead to a denial of access to justice on matters that require a

[30] Mulla. The Code of Civil Procedure. 16th Edition. Volume 1.
[31] Ibid., at p. 368.
[32] See Nidhi Lal v Mazhar (1885) ILR 7 All 230.
[33] Sarkar. Code of Civil Procedure. 11th Edition. Reprint Vol.1, p.197.
[34] Mulla, op. cit., p.371.
[35] Mulla emphasizes that a case of irregularity does not affect the jurisdiction of the court within the meaning of section 99 and that the language of Or.7 r. 10, though imperative, is addressed to the plaintiff and not to the court, which has a discretion either to return the plaint to be presented to the court of the lowest jurisdiction or to try it itself. See ibid.

quick attention of the High Court. 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 this country.

CONCLUSION

Since the mid 1980s the Government of Tanzania has been undergoing various economic programmes. One of those programmes is the creation of enabling environment for a liberal market oriented economy. The government has been emphasizing that in order for these programmes to be successful there must be a well functioning legal sector. It was on this spirit that the commercial division of the high court, aiming at a just, efficient and speedy disposal of commercial cases, was established in 1999. According to Dr. Bwana J/ic,[36] about 80% of the cases which have been filed in the commercial court have monetary value of between shillings 10 and 100 m/-. The average disposal period has been reported to be five months from the date of filing to the date of final determination. Commendably, the functioning of the commercial division of the high court has been in conformity with the expectations of the government and public at large. Therefore, if the said amendments to the 1984 Act 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 retrospective. It is my considered view that the amendments brought by Act No.25 of 2002 did not intend to oust the jurisdiction of the high court rather they were meant to set a ceiling on subordinate courts' pecuniary jurisdiction. Since the said amendments do not expressly take away the jurisdiction of the high court, then they should not be interpreted as so doing. It is on this basis that this study totally concurs with the wisdom of Lord Denning that in interpreting the provisions of the statute judges should take into account social conditions of the community. Technicalities should be avoided as far as possible so as not to defeat the ends of justice. This study unassumingly quoted the words of His Lordship in Seaford Court Estates limited. v Asher[37] in which he held that:

"Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to preset 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 clarify. 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 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." (emphasis added).

It should be noted that we are judged with our own history. Until 1966 when the parliament of Tanzania enacted our own civil procedure code, civil proceedings in this country were being governed by the Indian code of civil procedure of 1908. It is also known that our code, with the exceptions of the amendments made to the Indian code beginning from 1976, is a replica of this latter Code. The point that is to be emphasized here, not only to the Court of Appeal but also to courts subordinate to it and all stakeholders of civil procedure, is that in interpreting the numerous provisions of our civil procedure code the courts (of all grades) in Tanzania, have always sought guidance and reliance on the interpretation given by the Indian and English superior courts and commentaries made by the eminent lawyers and jurists on identical provisions in the Indian code. Two such prominent commentators or authors are Mulla and Sarkar. Their treatises on the Indian code of civil procedure of 1908 have been cited as authorities on various issues almost daily in our courts in civil litigations. In this study, speculations were made on why the Court of Appeal in M/S Tanzania–China Friendship Textile Company Limited v Our Lady of the Usambara Sisters (supra) paid no attention at all to these commentaries to clear the conflicting decisions that have been made by the judges of the High Court! Are the commentaries of no importance to this country any more or what? This question needs an answer which, in my view, can only be answered by the Court of Appeal, so far, so that it can act as a guideline to judges of the High Court on how to use their discretion in determining matters which on their quick look ought to be filed in subordinate courts. It is the duty of the Court of Appeal to assist the High Court to guard its jurisdiction.

Finally, it is believed that the parliament was and is still aware that the high court is a court of unlimited jurisdiction. If we say that the said amendments are taken to mean ousting the High Court of its jurisdiction over cases whose pecuniary value is 10,000,000/= and above but below 100,000,000/=, then such amendments offend and are in contravention of Articles 107A and 108 of the Constitution, hence they ought to be declared unconstitutional.

[36] See the case of Haji Ukwaju (supra).
[37] [1949] 2KB 481.

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