IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 38 OF 2011

HAMISI MWINYIJUMA ..... 1ST PLAINTIFF

AMBWENE YESAYA ..... 2ND PLAINTIFF

VERSUS

TIGO COMPANY LTD ..... DEFENDANT

Date of last Order : 16/9/2011

Date of Ruling : 23/9/2011

RULING

Mwaikugile, J.

The 1st and 2nd plaintiffs instituted a suit in this court seeking the latter to grant:

"(a) Declaration that the defendant's infringement of the rights of the plaintiffs over their registered joint authorship musical work is illegal and it infringes the copyright and or Neighbouring rights to which civil remedies are applicable.

(b) An injunction restraining the defendant, its agents, workmen except upon permission obtained from the plaintiffs.

(c) Payment of special damages at the total of as pleaded on paragraph 6 (a), (b) and (c) and 6 (a) and (b).

(d) Interest at 20% commercial rate on Tanzania shillings.

(e) Costs of the suit.

(f) Any other or further relief this court deems fir and just."

The defendant filed a written statement of defence to the suit in which he vehemently disputed the same and in addition filed a notice of preliminary objection on a point of Law which with approval of the court, the parties were ordered to dispose the same by way of written submissions. The defendant under the service of Ms Kabisa, learned Advocate filed her respective submission on 30/6/2011 as scheduled. Mr. Msumi, learned counsel for the plaintiffs did not file his reply to the written submission within time. He filed it on 15/7/2011 a date beyond the prescribed time limit. Since there was no leave sought and obtained to file the same out of time, this court treated the said written

submission to be no submission in the eyes of the Law and ordered the ruling to be composed on the basis of the written submission filed by the learned counsel for the defendant.

Arguing the preliminary objection raised, the learned counsel submitted that the High Court is not the Court of original jurisdiction in entertaining dispute of this nature. The counsel went on by submitting that under the provisions of Section 36 (1) and Section 4 of the copyright and Neighboring Rights Act [Cap 218 R.E. 2002], action for injunctive relief and payment of any damages in respect of infringement of the intellectual property rights should be instituted in the District Court and not otherwise.

Having carefully followed trough the learned counsel's submissions I reverted to the provisions of Section 36 (1) of the Copyright and Neighboring Rights Act [Cap. 218 R.E. 2002] which states and for ease of reference I reproduce it in full as hereunder:

> " 36 (1) Any person whose rights under this act are in imminent danger of being infringed may institute proceedings in the United Republic of Tanzania for:
>
> (a) An injunction to prevent the infringement or to prohibit the continuation of the infringement.

(b) Payment of any damages suffered in consequence of the infringement, including any profits enjoyed by the infringing person that are attributable to the infringement. If the infringement is found to have been prejudicious to the reputation of the person whose rights were infringed, the court may, at its discretion, award exemplary damages"

In the case at hand, the plaintiffs claim is for infringement of their rights of authorship they possess in respect of the musical work. The claim of that nature is governed by the Copyright and Neighboring Rights Act [Cap 218 R.E. 2002] hereinafter referred to as the Act. Section 37 (1) of the Act directs that the **rights protected by the Act once infringed, the injured party "may bring an action in court."** It is important to point out at this juncture that the word "may" in Section 37 (1) of the Act gives a discretion to a party whose rights under the Act have been infringed either to bring an action in court if he so wishes or not at all. But where the injured party decides to bring an action in court, the word "court" referred to in the preceding section has been clearly defined in Section 4 of the Act to mean the District court established under the Magistrates Courts Act.

With that definition, it is clear to me that a matter of this nature has to commence in the District Court and not otherwise. It is not in dispute that the High Court has unlimited jurisdiction, but for a matter of this nature the law has specifically conferred original jurisdiction to a District Court. Once the injured party decides to bring an action in court, he cannot go straight to the High Court on the ground that it has no jurisdiction. The court competent to entertain a matter of this nature is the District Court. The Court of Appeal of Tanzania in the case of **Tambueni Abdallah & 89 others National Social Security Fund**, Civil Appeal No. 33 of 2000. Considered the use of the word "may" in Section 4 (1) of the Industrial Court Act, 1967 and held that the word "court" in that particular provision does not give discretion as to which court to go but that **an employee has a discretion of whether to litigate or not to litigate".** Similarly in the case at hand the word "may" in Section 37 (1) of the Act creates a similar situation that once the injured party decides to go to court, then that court must be no other than the District Court. There is no freedom of choice. That said and on the basis of the foregoing reasons, I find the preliminary objection raised to have merit and do sustain it.

Consequently I find the suit to be incompetent and is struck out with costs for want of jurisdiction.

N. M. Mwaikugile

JUDGE

23/9/2011

Delivered this 23rd day of September, 2011 in the presence of Ms Kabisa learned counsel for the Defendant and holding brief of Mr. Msumi learned counsel for the plaintiffs.

N. M. Mwaikugile

JUDGE

23/9/2011