

THE DILEMMA IN THE ORIGINAL PECUNIARY JURISDICTION OF THE HIGH COURT

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1. General Introduction

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature .. (T)he question of jurisdiction is so fundamental that courts *must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial...* It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case"¹ (Emphasis supplied)

The writing of this article has been prompted by the uncertainties in the original pecuniary jurisdiction of the High Court of Tanzania particularly the three divisions: labour, commercial and land. The establishment of each division went hand in hand with setting its own pecuniary jurisdiction which is a departure from the pecuniary jurisdiction of the High Court general. In some divisions when there were delays to amend the law and set a departure, judges were quick and instrumental enough to amend the law constructively by coming up with implied interpretations on pecuniary jurisdiction or at some point certain provisions of the law were declared unconstitutional in instances where no constitutional issues were involved or were too remote to be invoked.² It is thought that patience was required in order for the need to

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¹ *Fanuel Mantriri Ng'unda vs. Herman Mantiri Ng'unda and two Others* (1995) TLR 155; *Richard Julius Rukambura vs. Issack Ntwa Mwakajila and Another*, Civil Application No 3 of 2004 Court of Appeal of Tanzania at Mwanza (unreported); *Tanzania Revenue Authority vs. Kotra Company Limited*, Civil Appeal No. 12 of 2009, Court of Appeal of Tanzania at Dar es Salaam (Unreported); and *Tanzania Revenue Authority vs. New Musoma Textile Limited*, Civil Appeal No. 93 of 2009, Court of Appeal of Tanzania at Dar es Salaam.

² *Wajenzi Enterprises vs. NMB and Joseph Musiba*, Commercial Case No. 27 of 2003; Commercial Court Manual Reports (2003) Vol. 1 page 148; *Hima Investment Limited V. F. K. Motors Limited* Commercial case No. 33 of 2003; and Commercial court manual Reports (2003) Vol. 1 p. 158.

drive the amendments of the laws on jurisdiction. At this stage it is key to define the term pecuniary and its rationale in order to lay down a foundation of this paper.

Pecuniary jurisdiction is the power of the court to entertain a claim basing on its monetary claim. *Black's Law Dictionary*³ traces the origin of the term pecuniary from a Latin word "*pecunia*" which means money or real or personal property and the term pecuniary is defined as relating to monetary. So pecuniary simply mean the value in monetary terms. Order VII Rule 1 (i) of the Civil Procedure Code Act Cap 33 R. E. 2002 requires that in every plaint there should be the statement of the value of the subject matter of the suit for purposes of jurisdiction and court fees. The pecuniary or monetary value of the claim has been and indeed it is one of the foremost determinants of the jurisdiction of the trial court. Among the first questions a litigant must ask himself before filing a suit is, what is the monetary value of the claim in order to ascertain the pecuniary jurisdiction and be able to identify the trial court.

The higher the monetary claims involved the higher the court involved in adjudication. This means that where the claim is higher it calls for a more senior official to decide since more serious interests are involved. That has been the rationale of setting different pecuniary level ascending from the lower court to the higher court. Makaramba J. once held that the rationale behind the rule imposing a pecuniary limitation on the jurisdiction of the lower courts in commercial matters is to protect the High Court from being inundated with small claims which could competently be handled by the lower courts.⁴

Apart from the monetary value, the jurisdiction of the court can be determined by the subject-matters such as the labour matter, commercial matter, tax matter and the list is endless. In other instances the jurisdiction of the court is determined by the parties

³ Bryan A. Garner (eds) et al, *Black's Law Dictionary*, Thomson West, 8th Edition 2004, pg 1167

⁴ *Hertz International Limited and another vs. Leisure Tours & Holiday Limited and Others*, Commercial Case No. 74 of 2008 at Dar-es-Salaam (Unreported) at p. 19.

involved such as where the Central Government is a party, it is only the High Court that is vested with jurisdiction regardless of the pecuniary value, unless it is a labour matter of which the Government may be a party in the cases before the Commission for Mediation and Arbitration, though that position is still very controversial as it does not have roots expressly in the law.⁵ Therefore there are several determinants of jurisdiction of court, but for purposes of this article, the pecuniary one is the focal point.

2. Synopsis of the Dilemma

One of the peak dilemmas in jurisdiction generally of the divisions of the High Court featured in instances where the landed property was auctioned exercising powers under mortgage after default to repay the loan. This was so before the enactment of the Mortgage Financing (Special Provisions) Act No. 13 of 2008.⁶ Before the said amendment there was no clear cut provision stating articulately on whether land auctioned to default to repay the loan was just a contract matter because it is just the loan contract that is defaulted or is a land matter because the loan contract is secured by the landed property. The land division maintained that those were just contractual matters and not land matters hence the land court was either moving suo motu or upon the raising of the preliminary objection by one of the parties and suits were struck out.⁷ It can be argued that public auction of landed property is disposition of land. How comes that disposition of land, regardless of the form of disposition, is not a land matter. The same cases faced a similar problem at the commercial court where judges ruled that land sold in public auction were still land matters because that was just disposition of land through public auction, hence they should be filled before the land court which has exclusive jurisdiction on land matters.

⁵ *The Attorneys General vs. Marai Mselemu*, Labour Revision No. 270 of 2008 (unreported).

⁶ Subsections (2), (3) & (4) to Section 140 of the Land Act No. 4 of 1999 were added.

⁷ *Shabani Saidi Shabani vs. CRDB bank Limited*, Land Case No. 210 of 2004 (unreported)

The establishments of the labour division, commercial division and the land division of the High Court have brought several challenges on the pecuniary jurisdiction of the High Court.

In *George Lugembe Case*⁸ The labour court has interpreted the provisions⁹ to the effect that the pecuniary jurisdiction of the Commission for Mediation and Arbitration on among others unfair termination is now unlimited upward and down wards, meaning that the Commission for Mediation and Arbitration may entertain a dispute whose value starts from one cent to trillions and trillions. Very, clearly this is an encroachment into the untouchable, inherent and the long enjoyed unlimited upward pecuniary jurisdiction of the High Court. In other words the Commission for Mediation and Arbitration permanently enjoys extended pecuniary powers of the High Court of Tanzania. This is serious because the mediator or arbitrator are lower in hierarchy than the resident magistrate's court or the district court whose pecuniary powers are limited upwards, for non commercial matter at one hundred and fifty million for and one hundred million for immovables and movables properties respectively while for commercial matters at fifty million and thirty million for immovables and movables respectively. So, a mediator or an arbitrator by all sorts of reasoning and imaginations have to be lower in pecuniary jurisdiction than the resident magistrate's court and district court that are among the yardsticks. Mediators and arbitrators for some reasons are not vested with executory powers but can exercise unlimited pecuniary jurisdiction. It is hard to get cogent reasons for what is happening at the labour court. The labour court has pioneered the vesting of the said unlimited pecuniary jurisdiction to the

⁸ *George Lugembe Malyeta vs. National Bank of Commerce Limited*, labour Dispute No. 29 of 2010 (unreported). The high of Tanzania labour Division at Dar-es-Salaam, at page 3 held that "...The Respondent's submission regarding pecuniary jurisdiction has no basis in law because under section 88 of the Act as amended by section 2 of the Written Laws Miscellaneous Amendment No. 3 of 2010. Jurisdiction and powers of different labour including the high court and the labour court, is based on subject matter not pecuniary value of the matter and or dispute". The court went further to order the file of George Lugembe to be transferred to the Commission for Mediation and Arbitration because the matter was based on unfair termination of employment.

⁹ section 88 of the Employment and Labour Relations Act No. 6 of 2004 as amended by section 2 of the Written Laws Miscellaneous Amendment No. 3 of 2010

Commission for Mediation and Arbitration, by making solid and consistent interpretations to that effect and by striking off all complaints lodged at the labour court based on unfair termination. Possibly, the labour court is not jealous of its powers being exercised by the Commission for Mediation for Arbitration, due to the facts that there are no high filing fees retainable by the labour court for the direct benefit of the labour court as the case is with the Commercial court.

Unlike the labour court, the commercial court on the other hand is doing quite the opposite and has been very jealous to see any subordinate court immediately under it enjoying even the pecuniary jurisdiction clearly set at one hundred and fifty million and one hundred million to the extent that the Commercial Court has pioneered and advocated for marginalizing the pecuniary jurisdiction to fifty and thirty million for immovables and movables for the resident court and district magistrate. The vivid jealous of the commercial court over subordinate court on commercial matters, results from nothing else but the filing fees chargeable and 50% retainable at the commercial court for improvement of the services of the commercial court and be much more efficient¹⁰. Mkumbukwa tried to draw jealous elements of the Commercial Court over arbitration which in a way has been taking a serious share of commercial cases¹¹. Similarly, the Mortgage Financing (Special Provisions)¹² is jealously complained to have been the last nail on the coffin as far as the jurisdiction of the Commercial Court on commercial mortgage is concerned.¹³ The commercial court is recommended for the elements of Jealous in various areas because it is a positive move, though it must be

¹⁰ Dr. Hawa Sinare, " The Commercial Court of Tanzania: Performance Ten Years after its Establishment", Vol. 3 Number 2, *Tanzania Lawyer Journal*, (2009) page 41

¹¹ Nuhu Mkumbukwa, "Is the Commercial Court Jealous of Arbitration?" Vol. 3 Number 2, *Tanzania Lawyer Journal*, (2009) 3 pg 138

¹² Act No. 17 of 2008

¹³ R. V. Makaramba, "Commercial Disputes Resolution in Tanzania: Challenges and Prospects", Vol. 3 Number 2, *The Tanzania Lawyer Journal* (2009) 2 pg 35. Judge Makaramba is bitterly lamenting, using figurative language of the last nail on the coffin, on the jurisdiction that has been taken away from the Commercial court and vested in the then Land Court

backed by expedient disposal of cases. Though the commercial division of the High Court is by law optional court but now indirectly through the backdoor it has been made a compulsory court and that is covered in the following sections of this paper. It is not clear whether the legislature did not comprehend what it was doing or it was intended.

The land division on the other hand, God is thanked !!, it has been disestablished by Act No. 2 of 2010, and prior to disestablishment it was enjoying a much lower pecuniary jurisdiction departing from the normal High Court jurisdiction.¹⁴ It is thought that, that was among the reasons why the land matters were not making progress. Between the District Land and Housing tribunal and the High Court general there is launa of land matters valuing between fifty million and one hundred and fifty million and also between thirty million and one hundred million which cannot be entertained by the District Land and Housing Tribunal because they are above its pecuniary jurisdiction but they cannot be filed before the High Court general because they are below its pecuniary jurisdiction as well.

3. Pecuniary Jurisdiction of the High Court

The High Court of Tanzania draws its powers from article 108 of the Constitution of Tanzania. However the article does not particularise the specificity of jurisdiction, instead it sets a framework, which of course is the work of the constitution. The High Court is vested with jurisdiction on matters where no specificied court have been set for those matters, whether by the constitution or any other law. So, whenever one is faced with a matter, the question to ask is whether the constitution or any other law has

¹⁴ The Pecuniary Jurisdiction of the District land and Housing Tribunal has been set at Fifty million for immovables and forty million for movables hence the amount immediately above fifty million or forty million has been the Pecuniary Jurisdiction of the Labour Court. Section 33 (2) (a) & (b) of the Courts Disputes Settlement Act No. 2 of 2002.

specified any other court other than the High Court. Where there is any court specified whether by the constitution or any other law, then the High Court has no jurisdiction.

The said Article 108 of the Constitution of the United Republic of Tanzania of 1977 provides:-

-(1) There shall be a High Court of the United Republic (to be referred to in short as “the High Court”) the jurisdiction of which shall be as specified in this Constitution or in any other law; (2) Where 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 provided that; the provisions of this subarticle 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. (Emphasis supplied)

Judge Mruma was once faced with an issues of pecuniary jurisdiction of the High Court of Tanzania Commercial Division, he reasoned in light of the Constitution and other laws that:-

“thus in light of Article 108 (2) of the constitution and the provision of section 2(1) of the Judicature and Application of laws Act, the high court has original jurisdiction over all matters that are outside the jurisdiction of the courts subordinate to it. The Commercial Division of the High Court handles all commercial disputes which the high court has jurisdiction to handle”¹⁵

The Judge was absolutely right because that is the crystal clear meaning of the wording of Article 108(2) of the Constitution of the United Republic of Tanzania. It goes that the pecuniary jurisdiction of the High Court is on those matters outside the pecuniary jurisdiction of the subordinate courts to the High Court.

The said article 108(2) subjects the jurisdiction of the High Court to other parts of the constitution or any other law. Sub article two articulates that the jurisdiction of the High

¹⁵ *Packaging and Stationers Manufacturers Limited vs. Dr. Steven Mworira and Another*, Commercial Case No. 52 of 2010 (Unreported) at pg 4.

Court comes into play where there is no court specified for that purpose, in which case where the Magistrates' Court Act specifies the maximum limits for the District Court and the Resident Magistrate's Courts then there is a court specified hence the High Court does not have jurisdiction to the extent and amount specified. Since there is no any part of the constitution that specifies the jurisdiction of the High Court, resort has to be made to other laws of the land. What follows now is a survey on what other laws provide in order to establish the pecuniary jurisdiction of the High Court.

Sections 2 and 3 of the Judicature and Application of Laws Act Chapter 358 R. E. 2002: provide:-

2.-(1) Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters; (2) For the avoidance of doubt it is hereby declared that the jurisdiction of the High Court shall extend to the territorial waters. (3) Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or.....

The provision vests the High Court with full civil and criminal jurisdiction and it goes ahead to subject the jurisdiction to written laws in force, hence no assistance to ascertain the pecuniary limit value of with precision.

Section 6 of the Civil Procedure Code Act¹⁶ puts plainly that the civil procedure code as a whole is not granting jurisdiction to any court and its role is not jurisdictional but the procedural unless expressly provided. This provision does not save any purpose as far as ascertaining pecuniary jurisdiction of the High Court is concerned, because there is no way pecuniary jurisdiction can be assumed. At most it is an alerting provision to

¹⁶ Section 6 of the Civil Procedure Code Act Cap 33 R. E. 2002 provides 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".

practitioners. In *Tanzania harbor Authority case*,¹⁷ it was stated that section 6 emphasizes the need to observe the pecuniary jurisdiction in the filing of a suit on the matter.

Section 7(1) of the Civil Procedure Code Act¹⁸ puts emphasis on the mode in which jurisdiction can either be expressly barred or impliedly. The implied part is confusing because jurisdiction cannot be assumed and have to be express and clear. This provision, as well, does not assist to ascertain the pecuniary jurisdiction of the High Court.

Section 13 of the Civil Procedure Code Act Cap 33 R. E. 2002 provides that:-

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

This provision has been couched in a way to resolve conflict of jurisdiction where there is concurrent jurisdiction on a particular matter because there cannot be questions on which court to go unless there is concurrence, otherwise a specified court will be there. In determining the pecuniary jurisdiction, consideration section 13 of the Civil Procedure Code does not arise since to which court to go in case of concurrent jurisdiction is not a question of pecuniary jurisdiction but procedure. In the famous case of *Tanzania-China case*¹⁹ the Court of Appeal in establishing the pecuniary jurisdiction of the High Court went ahead to use among other provision section 13 of the Civil Procedure Code, which reasoning has been attacked by Fatuma Karume.²⁰ Section 13 of the Civil Procedure Code was not at issue at all since it comes into play where there is concurrent jurisdiction, which was not the case. The Court of Appeal was supposed to

¹⁷ *Tanzania Harbour Authority vs. African Liner Agencies Co. Ltd* (2004) TLR 127

¹⁸ Section 7(1) of the Civil Procedure Code Act Cap 33 R. E. 2002 provides that: "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 impliedly barred."

¹⁹ *Tanzania-China Friendship Textile Co. Limited vs. Our lady of Usambara Sisters* (2006) TLR 70

²⁰ *Supra*, Fatuma karume

stick to Article 108(2) of the Constitution of Tanzania, which expressly states that the High Court has jurisdiction where there is no court specified for that matter as rightly reasoned by judge Mruma.²¹

Order VII Rules 1(i) of the Civil Procedure Code Act provides that: -

The Plaintiff shall contain the following particulars- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

This rule poses a requirement to state the value of the subject matter in order to determine which court has jurisdiction to try the matter. This rule recognizes that the pecuniary jurisdiction of the High Court is determinable by looking at the value of the subject matter. This rule recognises the minimum pecuniary jurisdiction of the High Court, otherwise there could be no point determining the jurisdiction of the High Court if it is unlimited down ward and upwards.

Section 40(1) of the Magistrate's Courts Act²² provides the pecuniary jurisdiction of the Resident Magistrate's Court as well as the District Court which used to be pegged at twelve and ten million for immovables and movables respectively capable of estimation. These limits were amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 and were increased to One hundred and Fifty million for immovables and one hundred million for movables. The immediate amount after the maximum pecuniary limits of the resident magistrates' and district courts has always been taken as the minimum pecuniary limit of the High Court. This is in line with the interpretation of Article 108(2) which vests the High Court with jurisdiction where there is no any other court that has been vested with such jurisdiction on that particular matter either by the constitution or by other laws.

²¹ *Packaging and Stationers manufacturers Limited vs. Dr. Steven Mworio and Another*, Commercial Case No. 52 of 2010 (Unreported) at pg 4

²² Cap 11 R. E. 2002

Sub-section 3 to section 40 of the Magistrate's Courts Act introduced by the Written Laws (Miscellaneous Amendment) Act²³ has introduced another pecuniary limits of the Resident and District Courts, which was set at fifty and thirty million for immovables and movables respectfully for commercial matters. This means the commercial court is not vested with jurisdiction in those matters reserved for the lower division for commercial matter. In determining pecuniary jurisdiction of relevancy is the specific damages and not general damages however quantified.²⁴

4. The Experience of Pecuniary Jurisdiction In Labour Matters

Initially Section 88(1) (b) (ii) of the Employment and Labour Relations Act²⁵ notes the pecuniary jurisdiction to the Commission for Mediation and Arbitration to arbitrate matters whose pecuniary jurisdiction is below the pecuniary jurisdiction of the High Court. This provision was well couched because there is one High Court of Tanzania and several registries as well as divisions which have been established as per the need of the time. In fact section 88(1)(b)(ii) of the Employment and Labour Relations Act²⁶ does not grant pecuniary jurisdiction to the Commission for Mediation and Arbitration, it only recognizes what already exist in order to avoid ambiguities in the law, some of which are manmade ambiguities. Though Written Laws (Miscellaneous Amendments) Act²⁷, section 88(1) (b) (ii) was amended in part by deleting the words "*in which the amount claimed is below the pecuniary jurisdiction of the high court*", the impact of the amendment should not have been to remove the pecuniary jurisdiction requirement in the Commission for Mediation and Arbitration.

²³ No. 4 of 2004

²⁴ *Tanzania China Friendship Textile Co. Ltd vs. Our Lady of the Usambara Sisters* (2006) TLR 70; and *Dr. Noordin Jella vs. Mzumbe University* Complaint No. 47 of 2008 (unreported).

²⁵ No. 6 of 2004

²⁶ No. 6 of 2004

²⁷ Written Laws (Miscellaneous Amendments) Act No. 3 of 2010.

What is of interest is whether the deletion of the wordings which were mentioning the pecuniary jurisdiction under section 88(1)(b)(ii) of the Employment and Labour Relations Act has any impact to the jurisdiction of the Labour Court. Though section 88(1)(b)(ii) was not granting any jurisdiction, its removal has been interpreted and assumed that it has granted unlimited pecuniary jurisdiction to the Commission for Mediation and Arbitration upward and down ward. The pecuniary jurisdiction of the High Court of Tanzania, including all its divisions, is established by Articles 107 and 108 of the Constitution of Tanzania; sections 2 and 3 of the Judicature and Application of Laws Act.²⁸ as well as Section 40 of the Magistrates' Court Act ²⁹ as discussed under heading two in this article. The Labour Division of the High Court of Tanzania, is by itself the High Court, hence the pecuniary jurisdiction of the High Court is intact whether said so or not and I wish to differ with my brother Beatus Malima³⁰ who argues that the phrase “ below the pecuniary jurisdiction of the High Court” as envisaged under Section 88(1)(b)(ii) of the Employment and Labour Relations Act, has the effect of vesting the jurisdiction in other bodies below the High Court, the most it does is it recognizes what already exists.

When any Division of the High Court is established, the pecuniary jurisdiction will remain that of the High Court general up and until, a specific pecuniary jurisdiction is set for that division of the High Court which will mean that it is a departure from the High Court general. That has been the case with the land court³¹ and the commercial court. As long as the labour legislations have not set a different pecuniary jurisdiction

²⁸ Cap 358 R. E. 2002

²⁹ Cap 11 R. E. 2002

³⁰ Beatus Malima, “Rethinking the Original and Exclusive Jurisdiction of the High Court Labour Division”Vol. 1, The Tanzania Lawyer Journal, (2010), pg 90.

³¹ The Pecuniary Jurisdiction of the District land and Housing Tribunal has been set at Fifty million for immovables and forty million for movables hence the amount immediately after fifty million or forty million has been the Pecuniary Jurisdiction of the Labour Court. Section 33 (2) (a) & (b) of the Courts Disputes Settlement Act No. 2 of 2002.

of the labour court, it means there no departure from the pecuniary jurisdiction of the High Court general.

Section 94 (1) (d) of the Employment and Labour Relations Act empowers the Labour Court to adjudicate complaints other than those to be decided through arbitration. These provisions expressly indicate that there is a demarcation between complaints to be determined through arbitration and those through the labour court. That demarcation is the pecuniary jurisdiction of the High Court which is pegged at One hundred fifty million Shillings and One hundred million shillings for immovable and movable property capable of estimation respectively.³² This position is also clearly stipulated under rule 20(3)(b)(ii) of the Mediation and Arbitration Guidelines Rules, 2007,³³ that empowers the arbitrator to adjudicate disputes which are within the pecuniary jurisdiction of the Resident magistrate.

Rule 23(1) of the Labour Court Rules provides very categorically that a statement of complaint shall be presented straight to the Labour Court for matters within the pecuniary jurisdiction of the High Court. Of reference is the general pecuniary jurisdiction of the High Court which is pegged at above One hundred fifty million and One hundred million as stated herein above. It is true that the said rule 23 does not grant jurisdiction, it only restates the pecuniary jurisdiction in force.

Mediation is based on reconciling the parties and the parties can agree or refuse to be reconciled. The resultant decision from mediation is owned by the parties since it is their voluntary decision to end their dispute. Section 87(3) (b) of the Employment and Labour Relations Act mandates the mediator to decide a complaint where the respondent does not attend mediation hearing and it goes further to mandate the High Court labour division to enforce the said decision as if it were a decree of a competent

³² Section 40 of the Magistrate's Courts Act Cap 11 R. E. 2002 s amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002.

³³ GN No. 67 of 2007

court.³⁴ The mediator is not bound by the pecuniary jurisdiction; reason can be good enough because in mediation it is the parties themselves who decide and not the mediator. A chain of decisions of the Labour court have suggested that the jurisdiction of the commission is only an issue when it comes to Arbitration, because it is only during arbitration where the amount claimed has to be below the pecuniary jurisdiction of the High Court in order to be adjudicated.³⁵

The pecuniary jurisdiction of the High Court is used to determine which court to file a labour dispute.³⁶ I am of the view that this is not proper because the Commission is one organ and there are no two organs, only that there are stages within the same organ just like in the Resident Magistrate's Court in which mediation cannot have its pecuniary jurisdiction distinct from trial. Also rule 15³⁷ requires the mediator to address any jurisdictional issue arising before conducting mediation. The requirement for the mediator to clear arising jurisdictional issues prior to mediation leaves no doubt that the jurisdiction of CMA as one organ binds both the mediator and the arbitrator.

Under Rule 5(2) of the Third schedule to the Employment and Labour Relations Act, 2004 the labour court is vested with power to adjudicate on all disputes arising from voluntary agreement entered under the repealed laws.³⁸ Section 95 of the same Act ousters the jurisdiction of the CMA in the event the voluntary agreement provides for another adjudicatory machinery.³⁹ Under this clearly the jurisdiction is not based on pecuniarity.

³⁴ *Berkely Electric Limited vs. Christopher Musa and Another* Labour Revision No.236 of 2008 (unreported).

³⁵ *Namera Group Industries(T) Limited V. Juma Zimbabwe & 58 Others*, Revision No. 5 of 2008; and *Fabian makoye V. Knight Support (T) Limited*, Revision No. 200 of 2010.

³⁶ Rule 23(1) Labour Court Rules, 2007.

³⁷ Labour Institution (Mediation and Arbitration) Rules GN 64 of 2007.

³⁸ *Kariakoo Market Corporation vs. Otieno and Others* Revision No. 101 of 2010 (unreported).

³⁹ *Stephano Elias vs. Mwanza Fishing Industries Limited* Revision No. 118 of 2009 (unreported)

Recently, Judge Rweyemamu⁴⁰ had ruled that the jurisdiction and powers of different labour institution including the CMA and labour court is based on subject matter not pecuniary value of the matter and or dispute. She went further to rule that as the matter under her consideration was based on unfair termination, she directed the dispute to be transferred to CMA to be resolved through arbitration, which means that matters of unlawful termination are reserved for CMA. It is thought that, the decision by Rweyemamu is erroneous, in the first place, it was expected a decision on jurisdiction to be as scant as it is. The judge has just made a blanket and sweeping statement without details. Among the contents of a judgment or any ruling is the reasoning of the judge leading to the decision which is made. The ruling has stated as a fact that section 88 of the Employment and Labour Relations Act has been amended by Written Laws Misc. Amendments No. 3 of 2010 hence amending the jurisdiction of the labour court. This is not because the said amendment has not to any extent touched the pecuniary jurisdiction of the labour court because its presence had no impact on the pecuniary jurisdiction of the labour court. The sad thing is that there will be great suffering and confusion until it will be resolved. Judges of the Labour court⁴¹ have consistently ruled that the jurisdiction and powers of different labour institution including the CMA and labour court is based on subject matter not pecuniary value of the matter and or dispute in view of the amendment of section 88 by Act No. 2 of 2010. Judge Rweyemamu in *Legembe's case* went further to rule that as the matter was based on unfair termination she directed the transfer to CMA to be resolved through arbitration.

5. The Experience of Pecuniary Jurisdiction In Commercial Matters

⁴⁰ *George Lugembe Malyeta vs. NBC Ltd* Labour Dispute No. 29 of 2009 (unreported) pg 3.

⁴¹ *George Lugembe Malyeta vs. NBC Ltd*, Labour Dispute No. 29 of 2009 (unreported) pg 3; *Abubakar Haji yakubu vs. Air Tanzania Co. Ltd* Revision No. 162 of 2011 (unreported); and *Kunduchi Beach Hotel & Resort vs. Lewis Rueben Ngahuga* Revision No. 3 of 2012 (unreported).

The Commercial Division of the High Court of Tanzania is an optional court without any form of exclusivity.⁴² Filing and pursuing a claim at the commercial court is a matter of choice not compulsory⁴³ unlike in labour matters where filing the dispute before labour courts is compulsory and a party faced with a labour dispute has no choice but to lodge it at the appropriate labour court. When the Commercial Division of the High Court was established its pecuniary jurisdiction remained that of the High Court of Tanzania generally, of course it being a High Court as well, which was pegged at twelve million and ten million for immovables and movables respectively and later on amended and set at One hundred fifty million and One hundred million for immovable and movables capable of estimation respectively.⁴⁴ With that limit available there were times where the commercial court became jealous of magistrate courts handling commercial matters below the then pecuniary limit of the High Court and judge of the commercial court were divided some stuck to the minimum pecuniary limit of one hundred million but other judges went ahead to entertain disputes whose claims involved were far less than one hundred million. The amendment by Act No. 25 of 2002 had a serious impact on the amounts collected by the Commercial court which dropped from 1. 2 Billion in 2002 to 0.6 billion in 2003.⁴⁵

In *Wajenzi case* when the preliminary objection was raised that the commercial court had no pecuniary jurisdiction to entertain claims whose value was below One hundred million, Judge Bwana⁴⁶ as he then was, invoked Articles 107A and 108 of the

⁴² *Charles Akwilini Makoi vs. Gapcoil Tanzania Limited*, Arusha Registry , Commercial Case No. 1 of 2006 (unreported) at pg 3. Also see S. J. Bwana, "Evaluation and Development of the Commercial Division of the High Court of Tanzania" Vol. 3 Number 2, *Tanzania Lawyer Journal*, (2009), pg 10; Also see. R. V Makaramba, "Commercial Disputes Resolution in Tanzania: Challenges and Prospects", Vol. 3 Number 2, *Tanzania Lawyer Journal*, (2009), pg 23.

⁴³ Rule 1 (4) of Order IV of the Civil procedure Code Act Cap 33 R. E. 2002

⁴⁴ Section 40 of the Magistrate's Courts Act of 1984 s amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002.

⁴⁵ Dr. Hawa Sinare, " The Commercial Court of Tanzania: Performance Ten Years after its Establishment", Vol.3 Number 2 , *The Tanzania lawyer Journal*, (2009) pg 19.

⁴⁶ *Wajenzi Enterprises vs. NMB and Joseph Musiba* Commercial Case No. 27 of 2003,, Commercial Court Manual Reports (2003) Vol. 1 page 148. ; Commercial case No. 33 of 2003; *Hima Investment Limited vs. F. K. Motors Limited* Commercial court manual Reports (2003) Vol. 1 page 158.

Constitutional of Tanzania as well as public policy to justify that the commercial court is not bound by the pecuniary jurisdictional limits of the High Court general registry set in section 40 (2) of the Magistrates' Court Act.⁴⁷ The judge reasoned as follows, First that the amendment had the effect of ousting the jurisdiction of the High Court for matters whose values starts from ten million to one hundred million hence unconstitutional thereby contravening articles 107 A and 108 of the constitution. It is thought that the Hon. Judge was erroneous because if the amendment was unconstitutional then even the earlier laws on pecuniary limits which was ten million should have been unconstitutional as well since the judge had held that the High Court has unlimited jurisdiction down ward and upward meaning that it can even entertain disputes reserved for the primary court as well. Why ten million and not one shilling for that matter, just to challenge the elasticity of the reasoning of judge Bwana. Secondly, the judge reasoned that the amendment was only dealing with the pecuniary ceiling of the subordinate courts but not ousting jurisdiction of the High Court. The judge again was erroneous since the subordinate courts and the High Court should be looked at together and not in isolation and the pecuniary jurisdiction of the High Court arise where the is no court specified for that amount as require by article 108(2) of the Constitution hence the pecuniary jurisdiction of the High Court starts immediately above the pecuniary jurisdiction of the resident magistrate's court. The jurisdiction of the High Court comes in where there is no other court specified for those matters, so it cannot be expected to find a law setting the pecuniary jurisdiction of the High Court. Thirdly the reasoning that the amendment was contravening article 108 of the Constitution was erroneous as well because the same very article quoted by the judge states articulately that the jurisdiction of the High Court comes in where there is no other court vested with jurisdiction either by the constitution itself or by any other law and for that matter. Fourthly the honourable judge explored the public policy towards establishing the commercial court that it aimed at just, effective, efficient and speed in the disposal of

⁴⁷ Cap 11 R. E. 2002

commercial cases. The public policy cited by the judge was out of context completely as it does not in any even touch and or establish the jurisdiction of the court. The public policy may mean a statement made by the minister in a political rally; hence the meaning of public policy is very fragile. Well, all in all, and though totally erroneous, the reasoning in this case by Judge Bwana revealed the jealous and envy of the commercial court to subordinate court on commercial matters and that called for the amendment in 2004.

In the *Courtyard case*⁴⁸ judge Kalegeya as he then was, went ahead to strick out the suit with costs for want of pecuniary jurisdiction as the value of the subject matter was TZS 22,151,164/=, which was below one hundred million. That is the correct position of the law at the time, arrived at with the required sobbrity.

Sub-section 3 to section 40 of the Magistrates' Court Act⁴⁹ as amended by of the Written Laws (Miscellaneous Amendment)⁵⁰ has been introduced to set a new pecuniary jurisdiction of the commercial division and of the Magistrates' courts, which is fifty million and thirty million for immovables and movables respectively. The commercial division then became very strict in which suit which did not state the values of the subject matter were rejected or struck out.⁵¹ This amendment brought in several issues; one it impliedly established the commercial division of the magistrates' court though no specified magistrates have been designated for the purpose,⁵² and that's why since

⁴⁸ *The Courtyard Dar-es-Salaam vs. the Managaing Director Tanzania Postal Bank* Commercial Case No. 35 of 2003, (Unreported)

⁴⁹ No. 11 R. E. 2002

⁵⁰ Act No. 4 of 2004

⁵¹ *Hertz International Limited and another vs. Leisure Tours & Holiday Limited and Others*, Commercial Case No. 74 of 2008at Dar-es-Salaam (Unreported) at pg 19; *Mikoani Traders Limited vs. Engineering & Distributors Limited* Commercial case No. 49 of 2006, (unreported) Where Massati J without hesiatation held that TZS 11,200,000/= was below the pecuniary jurisdiction of the commercial court which must be above TZS 30,000,000/= and stroke out the suit.

⁵² S. J. Bwana, "Evaluation and Development of the Commercial Division of the High Court of Tanzania" Vol. 3 Number 2, Tanzania Lawyer Journal, (2009) , pg 10.

November 2005 the Commercial Division of the High Court was vested with appellate jurisdiction on commercial matters.⁵³ The amendment created a dilemma for commercial matters falling between the fifty or thirty million and the one hundred million and fifty and one hundred respectively. Commercial matters whose monetary value exceeded fifty or thirty million but which were less than one hundred million could not be filed before magistrates' court because that exceeded their pecuniary jurisdiction in commercial matters. Also those matters could not be filed before the general registry of the High Court because the minimum pecuniary limit of one hundred million or one hundred and fifty million applied. At this stage the commercial division of the High Court became not longer the optional court but the compulsory court with exclusivity that has come by default. It is not clear, that the amendment brought in by the Written Laws (Miscellaneous Amendment)⁵⁴ was meant to introduce exclusive and mandatory jurisdiction to the commercial division for commercial matters falling between the fifty or thirty million and the one hundred million or one hundred and fifty million. Only that the draftsman did not think wide and across the board, the thinking towards amendment was, in piece meals. The magistrates' court were then tasked to always look at matters and determine whether they are commercial or not in the first place. This trend has brought dilemma and confusion in the legal practice. The amendment by Act No. 4 of 2004 was to go hand in hand with reviewing the list of commercial matters because currently where one part is commercial and the other is not commercial the matter is categorized as commercial and the purely non commercial institutions are compelled to institute commercial cases before the commercial court.

⁵³ GN.427/2005. Rule 5A of the High Court Registries, rules was amended by re-designating former rule 5A as rule 5A(i) and introducing sub-rule (2) which reads as that:-“(2) The Commercial Division of the High Court shall have both original and appellate jurisdiction over cases of a Commercial Significance.

⁵⁴ Act No. 4 of 2004

In *Zanzibar Insurance Corporation Limited vs. Rudolf Temba at Dar-es-salaam*⁵⁵ Massati J, though the appeal was based on amendment by Act No. 25 of 2002, the judge went ahead to apply Act No. 4 of 2004 of the Written Laws (Miscellaneous Amendment)⁵⁶ which had already introduced sub-section 3 to section 40 of the Magistrates' Court Act Chapter 11 R. E. 2002 there by introducing the new pecuniary limits for magistrates court as fifty and thirty million for immovables and movables respectfully, and went further on to nullify the judgment of the district court over a matter whose value was Sixty million. The judge went ahead to rule that the Respondent was at liberty to bring a fresh suit in the appropriate division. The judge seem to have meant that the fresh matter be filed at the Commercial Division of the High Court. Truly, the claim whose value is sixty million must be filed at the commercial division of the High Court, since it cannot be lodged at the High Court as it is does not exceed on hundred million. This is one of classical cases where the commercial court is no longer an optional court but a mandatory court with exclusive jurisdiction.

In the *Nico Insurance* case⁵⁷ the Advocate for the Appellant framed the first ground of appeal in the following words

“that the honourable trial court erred in fact and in law for entertaining the suit while it had no prerequisite jurisdiction, in that, the quantum involved in such a disputes is triable by the commercial division of the high court”.

The value of the claim involved was TZS 46,506,900/= which was higher than thirty million set as maximum limit for movables. The advocate for the Appellant after having perused the law, framed the first ground of appeal which was not only seeking to set aside of the judgment of the lower court but a declaration as well that the value of TZS 46,506,900/= was reserved for the Commercial Court. This shows how the amendment

⁵⁵ *Zanzibar Insurance Corporation Limited vs. Rudolf Temba at Dar-es-salaam*, Commercial Appeal No. 1 of 2006 , (unreported).

⁵⁶ See also *Mikoani Traders Limited vs. Engineering & Distributors Limited*, Commercial Case No. 49 of 2006, at Dar-es-salaam, (unreported)

⁵⁷ *Niko Insurance (T) Limited vs. L-Line Corporation*, Commercial Appeal No. 1 of 2008 (unreported)

has been understood by the practitioners as well, thereby making the commercial court a compulsory one, contrary to its establishment.

The establishment of the commercial division of the High Court was right from the beginning intended to be the optional court that is why the filing and other fees are relatively very high hence one should opt to subject himself to such fees but not being forced to. The definition of commercial matters is wide enough to net several transactions even those not intended for commercial purpose. Parties who are purely not commercial are very unwillingly dragged to the commercial court by the interpretation of commercial matters.

The Commercial Court Rules of 2012⁵⁸ have introduced another pecuniary limit to the commercial court, which is one hundred million for immovables seventy million for movables. This has not only brought dilemma and confusion, but also chaos. Several problems have been created. First is that the pecuniary limit of the magistrates' court on commercial matters has remained the same fifty million and thirty million hence commercial matters falling between fifty or thirty million and one hundred million or seventy million respectively have nowhere to go, they cannot be filed before the resident magistrates' court because they exceed its pecuniary jurisdiction in commercial matters, they cannot be filed before the general High Court because they are below its pecuniary limit and they cannot be filed before the commercial court because they fall below its pecuniary limits. Second is that the change of pecuniary jurisdiction of the commercial court was to be handle inclusively by considering the pecuniary jurisdiction of subordinate courts as a whole. Third there is no link or connection between the magistrates' courts and the commercial division of the High Court. There is no way the new pecuniary limits of the commercial court can be set without addressing first the pecuniary jurisdiction of the district and the resident magistrate's court.

⁵⁸ Rules 5 of the High Court (Commercial Division) Procedure Rules, GN N0. 250 of 2012

Since Article 108(2) of the Constitution of Tanzania sets unlimited jurisdiction of the High Court, commercial division inclusive, on all matters to which no specified courts have been set, there is no point setting the jurisdiction of the High Court. The law has to specify matters to be handled by other courts such as subordinate court so that all those not mentioned automatically go to the High Court, hence you do not need to state the figures as the jurisdiction of the commercial court. In fact, the Commercial court rules GN. No. 250 of 2012 setting the pecuniary jurisdiction of the High Court is unconstitutional because the constitution requires something different. Between the Commercial Court Rules and the Magistrates Court Act there is a lacuna. This is another instance of legislating in piece meals, meaning that legislation is done in isolation leading to problems and confusions.

One may ask what has gone wrong since very clear dilemma and confusions are created and surprisingly even if are seen no step is taken to rectify them. This has much to do with good governance where the government structure does not respond to the needs of the society timely and the Government has no well streamlined sufficient feedback system which will immediately notice any injustice or inconsistency or irregularity and call for redress.

6. The Experience of Pecuniary Jurisdiction In Land Matters

With the disestablishment of the Land Division of the High Court⁵⁹ and resorting back to the High Court general, the intriguing issue is where the link between the District Land and Housing Tribunal and the High Court. The Pecuniary Jurisdiction of the District land and Housing Tribunal is set at Fifty million for immovables and forty

⁵⁹ Section 17 of Act No. 2 of 2010 Written Laws (Miscellaneous Amendments) amended section 167 (1) (b) thereby disestablished the land division of the high court and land matters became just part of civil matters before establishment of the Land Division. Also Act No. 2 of 2010 amended the Land Disputes Courts Act in which everywhere in the Act where it read the land division was amended to read the high court. The Commercial Court ruled that the land division has been disestablished in *Samwel George Mhina vs. Justine Ernest Massawe and Another* Commercial Case No. 118 o 2011 (unreported).

million for movables hence the amount immediately after fifty million or forty million⁶⁰ has been the Pecuniary Jurisdiction of the land court which no longer exist.

The High Court general exercises pecuniary jurisdiction above one hundred million for movables and one hundred and fifty million for immovables. The High Court general is not bound by the pecuniary jurisdiction of the land division which was less. The disestablishment of the land division of the High Court means that there is no court bound to exercise the pecuniary jurisdiction just after the pecuniary jurisdiction of the District land and Housing Tribunal. Land matters whose value range between fifty or forty million and One hundred and fifty million or One hundred million respectively has nowhere to go, since they cannot be filed before the District land and Housing Tribunal because they are above the pecuniary jurisdiction but also cannot be filled before the High Court because they are below the pecuniary jurisdiction of the High Court. This is a dilemma in the laws.

The disestablishment of the land division of the High Court had to go hand in hand with enlarging the pecuniary jurisdiction of the District Land and housing tribunal to the level of the resident magistrate so that a link is created between the District Land and Housing Tribunal with the High Court, in the absence of that, injustice is created.

7. Remedy to the Dilemma

The remedy to the dilemma in pecuniary jurisdiction in divisions of the High Court is the proper application of Article 108 of the Constitution of the United Republic of Tanzania that vests the High Court with jurisdiction whenever it is not provided for in the constitution and whenever there is no any other law that provides jurisdiction to any other court, hence: -

⁶⁰ Section 33 (2) (a) & (b) of the Courts Disputes Settlement Act No. 2 of 2002; also see *Petromark Africa Limited vs. Tanzania Ports Authority* Land Case No. 138 of 2008; (unreported).

- a. All the commercial cases whose value ranges between fifty or thirty million and one hundred or seventy are within the jurisdiction of the High Court which includes the commercial court itself.
- b. All the labour cases which are currently entertained by the Commission for Mediation and Arbitration above One hundred million which seem to be a lacuna in the law as they are entertained without the prerequisite jurisdiction are within the jurisdiction of the High Court which for the purpose is the labour court.
- c. The land cases whose pecuniary value ranges between fifty or thirty million and one hundred or one hundred and fifty which seem to be a lacuna in the law are within the jurisdiction of the High Court which for this purpose is the High Court general.

However, the road through to cover these lacuna is not smooth because on filing matters whose pecuniary jurisdiction is somewhat in the lacunae range, they face a lot of challenges. In the first place the plaint is rejected at the registry, you meet the registry in-charge you talk and differ and he/she informs you that admission of your plaint has been refused hence it will not be registered. To a layman, the matter would end there, but for some advocates who knows that rejection to put the plaint in registration process in the registry by the registry is not the end of the matter would go to the second stage. Second step is to ask for an appointment to meet the Registrar. So, you will meet the registrar explain your issue and request for the Plaint to be admitted. The registrar is very reasonable hence he would admit the plaint and the matter is filed.

To resolve the dilemma, legislative actions are required in order to put the position articulately.

8. Way Forward and Conclusion

There are no advantages good enough to override disadvantages in setting separate pecuniary jurisdictions of the divisions of the High Court than using the standard

pecuniary jurisdiction of the High Court general. The High Court is one and all the divisions been established should abide to the pecuniary jurisdiction of the High Court general. So, far only three divisions of the High Court have been established, though the land division has been disestablished hence reduced to two, but there is lots of dilemma in pecuniary jurisdiction of each division resulting from an attempt to depart from the pecuniary jurisdiction of the High Court general. It is imagined the extent of confusion by the time we have ten divisions of the High Court each with its arbitrarily set pecuniary jurisdiction, which does not in any way correspond to pecuniary jurisdiction of other courts.

So many cases have been struck out and in most cases with costs due to the dilemma in pecuniary jurisdiction, thereby causing injustices to people. The dilemmas are so apparent that's why even judges are seriously divided. This state of affairs calls for both administrative and legislative intervention.

Any amendment of any law needs serious inputs from different stakeholders which includes the legal practitioners in order to give it practical value. The input cannot be sufficiently obtained if the proposed amendment is circulated by the TLS after having being received a day or two before the closure. The input from the legal practitioner can sufficiently be obtained by incorporating practitioners in the teams proposing amendments.

The pecuniary jurisdiction of the High Court and its division be widely explored in order to reduce controversies. Amendment of any law including those dealing with pecuniary jurisdiction requires thinking across the legal regime and not thinking in piece meals. It is always a cardinal rule that any proposed amendment of any law has to be examined on its compatibility with other laws.

The dilemma in the pecuniary jurisdiction of the divisions of the High Court and more pertinently to note is the adverse effect to the clients of the court, in terms of frustration of justice system and obstructing access to justice, to me is a policy issue and it has to be

addressed at all levels. The test of the suitability of any law is whether it opens access to justice and whether after accessing, justice is attained.

The last thing but not the least, the public trust in the judiciary is built much more by the consistence and certainty, of which when the two are combined keeps the public aware of what they should expect from the judiciary, in terms of how to seek justice, from which forum, when and that there are clear rules of the game.