before him, which was brought by originating summons. The appellant appealed to this Court.

Held: (i) The issue of jurisdiction is fundamental and it can be raised at any time in the proceedings;

(ii) Matters preferred by way of Originating Summons are heard by a Judge and so the Regional Magistrate had no jurisdiction to hear such matter: Order X Rules 6 and 13 of the Civil Procedure Decree Chapter 8.

Appeal allowed in part

Statutory provision referred to:

(1) Civil Procedure Decree Chapter 8, Order X, rules 6, 9 and 13

Mr Patel, for the Appellant

Mr Mbwezeleni Mr Mnkonje, for the Respondents

JUDGMENT

(Dated 24 October 2001)

Ramadhani, J.A.: Zawadi binti Said sued Abbas Fadhil Abbas and the Registrar of Documents in the Regional Court, Civil Case Number 52 of 1997. She claimed that she was the owner of House number 4/33 at Gulioni. She claimed further that Abbas, whom she had brought up as her own grandchild, played a trick on her, went to the Registrar of Documents and caused the house to be registered in his name as having been given to him as a gift from her. The Regional Court decided in favour of Zawadi. Abbas appealed.

Before the learned judge, there was a Memorandum of Appeal containing six grounds which, at the hearing, were consolidated into two. The first ground of appeal was that the learned Regional Magistrate had no jurisdiction to deal with the matter before him according to Order X, rules 6 and 9 of the Civil Procedure Decree (Chapter 8). The second ground was on the burden of proof.

The learned judge disposed the appeal on the first ground and held that the learned Regional Court Magistrate had no jurisdiction according to Order X, rule 6 and declared the proceedings null and void.

Mr *Patel,* learned advocate for the appellant, the late Zawadi substituted by the Wakf and Trust Commissioner, had two grounds: one, the learned first appellate judge erred in finding that the learned regional magistrate had no jurisdiction. Two, the learned judge erred in not considering the issue before him of whether or not the deed of gift produced by the respondent was obtained by fraud.

Resisting the appeal were Mr Mbwezeleni and Mr Mnkonje, learned counsel for the respondent.

We think that we have to deal with the issue of jurisdiction first and it is simply this: could the matter that was before the Regional Magistrate have been dealt with by way of originating summons?

We do not agree with Mr Patel that since jurisdiction was never an issue before the Regional Magistrate, the learned judge should not have entertained it when raised for the first time at the appellate stage. The issue of jurisdiction is fundamental and it can be raised at any time in proceedings.

However, we are at one with Mr Patel that matters by way of Originating Summons are heard by a Judge in chambers and so, cannot be heard by a Regional Magistrate who was not even exercising Extended Jurisdiction.

We are also in agreement with Mr Patel that the dispute before the Regional Magistrate was not one to be disposed of by way of originating summons. We say so because Order X, Rule 13 clearly shows that only matters in which the relief sought could be "disposed of in a summary manner" are dealt with by way of originating summons. The matter before the learned Regional Magistrate was not such as could have been disposed of summarily.

Therefore, we find that the learned regional magistrate had jurisdiction and, therefore, we quash the decision of the learned Judge and restore that of the Regional Court. As the learned Judge did not consider the other grounds of appeal dealing with merits we do not see how we could accept the invitation of Mr Patel and step into the shoes of the High Court. Therefore, we order that the matter be remitted to the High Court for the appeal to proceed on merit.

This appeal is allowed with costs.

GK ISHENGOMA t/a TANZANIA INSURANCE AGENCY v. NATIONAL INSURANCE CORPORATION LTD

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Kisanga, Ramadhani and Lubuva, JJ.A.)

CIVIL APPEAL No. 73 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Mapigano, J. dated 16 February 1999 in Civil Appeal No. 26 of 1998)

Agency – Suspension of agent – Agent transacts business during suspension – Whether agent entitled to commission.

Agency – Agent suspended – Agent transacts business partly using facilities of the principal – Whether agent entitled to same amount of commission.

Agency – Agent's right to remuneration – General rule and exceptions to the general Rule – Calculation of agent's commission.

The appellant, trading as Tanzania Insurance Agency was an agent of the respondent, up to 30 January 1991, when he was suspended. He complained about the suspension and, as the matter was being investigated the agency was terminated on 3 September

1992. However, during the suspension, the appellant conducted business for the respondent worth TZS. 52 994 161-25. The appellant, without success, claimed a commission of TZS. 9 079 628-45. He filed a suit in the Resident Magistrates' Court of Dar es Salaam at Kisutu and won. The respondent, aggrieved, successfully appealed to the High Court. Aggrieved by the decision of the High Court the appellant fled this second appeal.

Held: (i) There is a general Rule that remuneration is not payable for work done during a period of termination of agency but that is not absolute;

(ii) It is trite law that a principal is liable to third parties who, in good faith, deal with an agent on the assumption that he still has authority; the exception is where the authority has been terminated by the death of the principal;

(iii) The measure of the plaintiff's payment was to be calculated not by the work done by him, but by the fruits of that work to the respondent corporation, which they do not deny;

(iv) Where there is no express contractual provision, then a contract to pay reasonable remuneration is implied by the Court; Courts, in making such decision are guided by previous negotiations between the parties, as well as trade custom.

Appeal allowed

Cases referred to:

(1) *Bilbee v. Hasse and Company* [1889] 5 Times LR 677

(2) *Bower v. Jones* [1831] 8 Bing 65

(3) *Bryant v. Flight* [1839] S.M and W 114

(4) *Christie, Owen and Davies t/a Christie and Co. v. Jones* (1966) 198 Estate Gazette 1093

(5) *Crocker Horlock Limited v. Lang and Company Limited* [1949] 1 All ER 526

(6) *Debebham v. Mellon* [1880] 6 Appeal Case 24

(7) *Drew v. Nunn* (1879) 4 661

(8) *Levy v. Goldhill* [1917] 2 Ch 300