

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**(CORAM: WAMBALI, J.A., KEREFU, J.A. And GALEBA, J.A.)**

**CIVIL APPEAL NO. 104 OF 2021**

**BI. MTUMWA MADARI MAKAME ..... APPELLANT**

**VERSUS**

**ABDALLA OMAR SAID** (Legal Representative  
of the Late **OMAR SAID ABEID**) ..... **RESPONDENT**

**(Appeal from Judgment and Decree of the High Court of Zanzibar at Vuga)**

**(Mwampashi, J.)**

**Dated the 13<sup>th</sup> day of September, 2019**

**in**

**Civil Case No. 4 of 2017**

-----

**JUDGMENT OF THE COURT**

*30<sup>th</sup> May, & 13<sup>th</sup> June, 2023*

**WAMBALI, J.A.:**

This appeal emanates from the decision of the High Court of Zanzibar sitting at Vuga in Civil Case No. 4 of 2017. It is noteworthy that, Omar Said Abeid, the deceased, who was the plaintiff in that case and later the respondent, passed away on 13<sup>th</sup> February, 2022 and this appeal was lodged in Court on 20<sup>th</sup> March, 2020. In the circumstances, pursuant to the order of the Court dated 30<sup>th</sup> May, 2023 issued in respect of Civil Application No.

172/15 of 2023, Abdalla Omar Said was joined as a legal representative of the deceased respondent, Omar Said Abeid, in terms of rule 105 (1) of the Tanzania Court of Appeal Rules, 2009.

According to the record of appeal, in that case the deceased respondent sued the appellant, Bi. Mtumwa Madari Makame for recovery of the house (disputed house) situated at Kisiwandui within the Municipality of Zanzibar worth TZS. 200,000,000.00. In this regard, he prayed to be paid compensation of TZS. 150,000,000.00 being the loss incurred for the appellant's refusal to vacate the disputed house. He also prayed to be paid; TZS. 50,000,000.00 as general damages, 30% interest of the decretal sum from the date of judgment until payment in full, a declaration that the appellant's act of staying in the disputed house is null and void, costs and any other relief that the trial court would have deemed fit to grant.

Basically, the deceased averred in his plaint, particularly paragraphs 5 and 6 that, he bought the house in dispute on 11<sup>th</sup> June, 1986 from one Machano Makame for a consideration of TZS. 100,000.00. He contended further that on 20<sup>th</sup> May, 1989 he created a perpetual Wakf of the disputed house for the benefit of himself, his wife Wahida Abed Awadh and his children namely, Said Omar Said, Salama Omar Said, Salahadin Omar Said,

Abed Omar Said, Abdalla Omar Said, Kassim Omar Said and any other children that may have been born between him and his said wife Wahida Abeid Awadhi.

In the amended written statement of defence, the appellant contested the deceased's claim and maintained that the disputed house was obtained through their joint efforts while they were married as husband and wife. She also claimed that during the said marriage they managed to acquire other properties including a residential house (eight storeys) on plot No. 5 Block No. 67 at Lumumba Kariakoo Dar es Salaam valued at TZS. 3,000,000,000.00 and one flat on Block No. 12 at Kilimani Shehia of Kilimani Zanzibar. She thus attached a marriage certificate to substantiate her claims. The appellant therefore, prayed for the dismissal of the suit and payment of TZS. 200,000,000.00 and TZS. 100,000,000.00 for disturbance, harassment while lawfully occupying the disputed house and general damages respectively.

More importantly, pursuant to order VIII Rule 6 (1) and (4) of the Civil Procedure Decree Cap 8 of the Laws of Zanzibar (the CPD), the appellant lodged a counter claim in which she prayed that the trial court be pleased to order for a distribution of the marital properties jointly acquired by the

parties during the subsistence of the marriage, payment of TZS. 720,000,000.00 as her portion of the accrued money from the disputed house and TZS. 100,000,000.00 as general damages and any other relief to be granted by the trial court.

In rejoinder to the amended written statement of defence, the deceased reiterated his averment in paragraphs 5 and 6 of the plaint. He also denied the allegation of the appellant that they jointly acquired the other house and properties alleged by the appellant. Indeed, though he admitted to the existence of what he termed as 'purported marriage', he maintained that the same did not invalidate and or remove his right of ownership over eight storeys building on plot No. 5 Block 67 at Lumumba Kariakoo Dar es Salaam which he had entered into a contract with Said Mbaraka Said of Dar es Salaam to construct it on the agreement that each had to get four floors after completion of the construction.

Moreover, the deceased disputed the appellant's counter claim. He asserted that prior to the pronouncement of divorce on 22<sup>nd</sup> November, 2015 between the parties, they were no longer cohabiting.

It is noteworthy that following the point of objection raised by the deceased respondent with respect to involvement of the house in plot No. 5 Block 67 at Lumumba Kariakoo Dar es Salaam in the said suit, on 4<sup>th</sup> December, 2017 the trial court ruled that it had no jurisdiction to determine that dispute as the said house did not fall within its territorial jurisdiction. Consequently, it struck out some of the issues, particularly Nos. 5, 6 and 7 which it had framed in respect of that house.

Nevertheless, the five agreed issues framed by the trial court, included mostly those involving the division of matrimonial house allegedly jointly acquired by the parties. For clarity, we reproduce them hereunder:

- "1. Whether House No. 17/15B situated at Kisiwandui Unguja bought in 1986 by the plaintiff was by then just a hut and not a one storey building as it stands now.*
- 2. If the 1<sup>st</sup> issue is in the affirmative whether House No. 17/15B situated at Kisiwandui Unguja was built or renovated to the present status by the defendant on her own initiatives and efforts after getting married to the plaintiff in 1986.*
- 3. If the 2<sup>nd</sup> issue is in the affirmative whether the perpetual Wakf created by the plaintiff in respect*

*of the House No. 17/15B situated at Kisiwandui Unguja in 1989 is a forgery and a deceit then it was not disclosed to the defendant with the aim of denying the defendant her rights and interests over the house.*

*4. If the 1<sup>st</sup> and 2<sup>nd</sup> issues are in the negative, whether plaintiff is entitled to Tshs. 150,000,000/= from the defendant being the loss he has suffered from non-use of the house in dispute.*

*Nos. 5, 6 and 7 deleted*

*8. Whether the flat on block 12 at Kilimani Unguja was jointly acquired by the parties.*

*9. What are the reliefs the parties are entitled to."*

The trial court heard evidence from seven witnesses of the plaintiff (deceased) and four witnesses from the defendant's (appellant) side. Notably, although the plaintiff was alive at the time, he did not testify at the trial.

In the end, judgment was entered in favour of the deceased plaintiff. Consequently, the following orders were made; **one**, the appellant was ordered to vacate the ground floor of the disputed house and handover the

vacant possession of the same to the deceased. **Two**, the deceased respondent to pay the appellant TZS. 20,000,000.00 as her contribution towards the construction and refurbishing of the first floor of the disputed house. **Three**, the appellant to pay the deceased respondent TZS. 9,000,000.00 as damages suffered for not using and occupying the ground floor for the period of 45 months, that is, from 23<sup>rd</sup> November, 2015 to the date of judgment. **Four**, if the appellant delayed to vacate the ground floor of the disputed house, the deceased had to be paid TZS. 200,000.00 for each month that the appellant continued to occupy it. **Fifth**, parties had to bear own costs.

It is the judgment of the trial court which prompted the appellant to lodge the instant appeal. The memorandum of appeal contains eleven grounds of appeal, five substantive and six preferred as alternatives. For the reason to be apparent shortly, we do not intend to reproduce the respective grounds herein.

The appeal was called on for hearing in the presence of Mr. Rajab Abdalla Rajab and Mr. Gido Thomas Simfukwe, both learned advocates for the appellant and respondent respectively.

Considering the nature of the pleadings and proceedings before the trial court contained in the record of appeal, we requested counsel for the parties to address the Court on whether it was appropriate for the trial court to try the suit and grant the respective reliefs prayed by the parties amid the contention of the appellant that the disputed house had to be distributed among them as it was acquired jointly during the subsistence of the marriage. We so requested considering the settled position that jurisdiction is the bedrock on which the court's authority and competence to entertain the case rests and that it can be raised even at the appellate stage. For this stance, see for instance the decision of the Court in **Tanzania Revenue Authority v. Tango Transport Company Limited**, Civil Appeal No. 84 of 2009 (unreported).

Both Mr. Rajab and Mr. Simfukwe expressed their opinion that as the dispute between the parties essentially revolved around the division of matrimonial assets and the parties professed Islamic faith and celebrated their marriage under Islamic law, it is the Kadhi Court which had jurisdiction to resolve the dispute and not the High Court. In the circumstances, they argued that, though the deceased's (plaintiff's) case was instituted as a normal civil suit, it could not be tried together with the appellant's counter

claim which centred mainly on distribution of the disputed house allegedly acquired jointly during the subsistence of the parties' marriage.

In this regard, both prayed that as the proceedings before the trial court are a nullity, the same should be nullified, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) followed by the direction that the dispute between the parties be dealt with by the competent court in accordance with the applicable law.

Having heard the counsel for the parties, the crucial matter for our determination is whether the High Court had jurisdiction to try the dispute between the parties. It is settled that the jurisdiction of the Court is conferred by a statute. Indeed, parties cannot, even by agreement, confer jurisdiction to the court which it does not have contrary to the requirement of the law. In this regard, section 4 (1) of CPD states:

*"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."*

Having closely examined the parties' pleadings lodged at the High Court of Zanzibar, we have no difficulty in agreeing with counsel for the

parties that essentially, the dispute between the parties involved the distribution of the matrimonial property allegedly acquired jointly during the subsistence of the marriage. Though, the deceased (plaintiff) instituted a suit claiming vacant possession as the normal suit, we are of the considered view that the amended written statement of defence and counter claim lodged by the appellant together with the reply to both the said written statement of defence and counter claim by the deceased, clearly turned the matter into a matrimonial dispute on the division of matrimonial assets acquired jointly during the pendency of the marriage. According to the record of appeal, the said marriage was celebrated under Islamic faith on 9<sup>th</sup> May 1996 and came to an end on 22<sup>nd</sup> November, 2015. The nature of the dispute between the parties is further substantiated by the issues reproduced above which were framed by the trial High Court of Zanzibar for the purpose of resolving the dispute which basically centred on the division of the matrimonial house allegedly acquired jointly by the parties.

In the circumstances, the High Court had no jurisdiction to try the suit and grant the reliefs as it happened. On the contrary, it is the Kadhi Court which had jurisdiction to do so. Thus, as the suit was instituted on 7<sup>th</sup> January, 2017 and trial commenced before the commencement of the

Kadhis' Court Act No. 9 of 2017 on 1<sup>st</sup> November, 2017, the appropriate law was the Kadhis' Court Act, No. 3 of 1985 R.E. 2006 which provided as follows under section 6 (1):

*"A Kadhis' Court shall have and exercise jurisdiction in the determination of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion."*

In the event, there is no doubt that the High Court had no jurisdiction to try Civil Case No. 4 of 2017, whose judgment is the subject of the instant appeal.

The Court was confronted with a similar situation in **Barke Haider Abdulrazak v. Haider Hussein Rashid**, Civil Appeal No. 299 of 2021 [2022] TZCA 367 [16 June, 2022: TANZLII]. Though it dealt with the provisions of section 5 of the Kadhis' Court Act, No. 9 of 2017, it stated as follows:

*". . . In effect what the trial court did was to make a division of the assets said to have been part of the matrimonial assets. With respect, we think the trial court overlooked the express provisions of section 5*

*(1) (f) of the Kadhis' Court Act which vests exclusive jurisdiction over all matters between Muslims relating to division of matrimonial assets if there is actual contribution. Had the trial court directed its mind to that provision, it would not have proceeded with the suit whose outcome had a bearing on its jurisdiction."*

The Court proceeded to nullify the proceedings of the trial court and set aside the decree for being a nullity, in terms of section 4 (2) of the AJA. Similarly, in the appeal at hand, we are satisfied that considering the nature of the dispute between the parties as reflected in the pleadings, the High Court of Zanzibar, with respect, wrongly assumed the jurisdiction it did not possess contrary to the provisions of section 5 of Act No. 3 of 1985 to order for distribution of the disputed house which was among the alleged properties acquired jointly by the parties during the pendency of their marriage.

As we have intimated above, though the deceased (plaintiff) instituted the suit as a normal civil case, the pleadings that followed between the parties completely changed the nature of the dispute into a matrimonial one, and therefore the High Court had no jurisdiction to try it and grant the reliefs sought by the parties. In **Tanzania Revenue Authority v. Tango**

**Transport Company Limited** (supra) the Court quoted the following paragraph from the Halsbury's Laws of England, Vol. 10, Para 314 in which the term jurisdiction is defined to mean:

*"The authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its discretion. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to area which jurisdiction extended, or it may partake of both these characteristics."*

Consequently, in terms of section 4 (2) of the AJA, we invoke the power of revision to nullify the proceedings and set aside the decree in Civil Case No. 4 of 2017. If the parties are still interested to settle the dispute, the same should be placed before the appropriate forum in accordance with the law for the time being, that is, the Kadhis' Court Act, No. 9 of 2017.

It is for this reason that we did not deem it appropriate to deal with the grounds of appeal in the memorandum of appeal placed before the

Court. In the end, considering the circumstances of the appeal, we make no order as to costs.

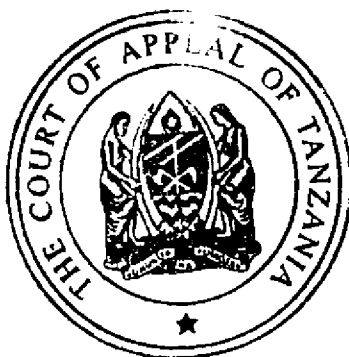
**DATED at ZANZIBAR** this 13<sup>th</sup> day of June, 2023.


F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

Judgment delivered this 13<sup>th</sup> day of June, 2023 in the presence of Ms. Mwanaidi Abdalla Mohamed, counsel for the Appellant and Mr. Gido Thomas Simfukwe, counsel for the Respondent, is hereby certified as a true copy of the original.



  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**