

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 86 OF 2019

AMINA KARIM JETHA APPELLANT

VERSUS

WAKF AND TRUST PROPERTY COMMISSION

(As Administrator of the Estate of the late ALI SALIM ALI) RESPONDENT

**(Appeal from the Ruling and Order of the High Court of Zanzibar at
Vuga)**

(Issa, J.)

dated the 7th day of March, 2017

in

Civil Case No. 65 of 2016 (OS)

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JUDGMENT OF THE COURT

4th & 13th December, 2019

NDIKA, J.A.:

This is an appeal by Amina Karim Jetha, the appellant herein, against the ruling and order of the High Court of Zanzibar sitting at Vuga (Issa, J.) dated 7th March, 2017 made in favour of the respondent, the Wakf and Trust Commission (the Commission) as the administrator of the estate of the late Ali Salim Ali.

Briefly, in so far as is relevant the appeal arises as follows: it is common cause that House No. 1302 B at Darajani, Zanzibar (the suit

property) was previously owned by Mohamed Gulamhussein but that it was sold to Ali Salim Ali in 1994 by the Commission, acting as the administrator of the estate of the said Mohamed Gulamhussein who had passed away. Before that sale, the appellant occupied the property as a tenant and that her occupation continued uninterruptedly thereafter. In 1999, the said Ali Salim Ali passed away and was survived by his mother, a widow and four sons one of whom being Mohamed Ali Salim.

As the appellant continued occupying the suit property, Mohamed Ali Salim, acting as an agent of the Commission who was by law the administrator of the estate of the late Ali Salim Ali, took out an originating summons under Order X, rule 9 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD) against the appellant herein mainly seeking immediate vacant possession of House No. 1302 B situated at Darajani, Zanzibar and payment of TZS. 10,000,000.00 as general damages for refusing to yield up vacant possession.

In his ruling on the matter, the learned High Court Judge observed that the parties were at war on the issue of vacant possession of the suit property prayed for by the Commission's agent as well as the appellant's claim for compensation. After some analysis of the record before him, he dismissed the appellant's claim for compensation on the reason that it was

baseless. He then went on to declare that the agent was entitled to vacant possession of the suit property and then ordered the appellant to vacate the property within three months presumably from the date of that ruling, which was 7th March, 2017. However, he declined to grant general damages prayed as compensation for delaying succession to take place.

Aggrieved, the appellant has lodged this appeal on three main grounds of appeal with two alternative grounds as follows:

- "1. *That the High Court erred in law in entertaining the originating summons and the suit when it did not have subject matter jurisdiction in a matter of eviction of an inherited [sitting] tenant.*
2. *That the High Court erred in law in entertaining the originating summons which was not in relation to the determination of questions on issues affecting the rights or interest of the person claiming to be creditor, devisee, legatee, legal representative, or cestui que trust; or issues of ascertainment of any class of creditors, devisees, legatees, legal representatives, or others; or issues of furnishing of any particular accounts by the executors, administrators, or trustees and the vouching (when necessary) of such accounts; or issues of payment into court of any moneys in the hand of executors, administrators or trustees; or issues of directing the executors, administrators, or trustees to*

do, or abstain from doing, any particular act in their character as such as executors, administrators or trustees; or issues of approval of any sale, purchase, compromise or other transaction; and determination of any question arising in the administration of estate or trust.

3. *That the High Court erred in law in entertaining the originating summons suit by allowing the respondent to sue through an agent without complying with the law.*

IN THE ALTERNATIVE

4. *That the High Court erred in law in not following the procedure for dealing with originating summons suits rendering the proceedings, ruling/judgment and decree/order invalid and problematic.*
5. *That the High Court erred in law in referring in its ruling to documents not produced and admitted in the hearing to form part of the record."*

At the hearing before us, Mr. Salim Hassan Bakari Mnkonje, learned counsel, appeared for the appellant whereas Messrs. Haji Suleiman Tetere and Salum Bushiri Khamis, learned advocates, jointly represented the respondent.

Before the hearing began in earnest, Mr. Mnkonje notified the Court that the appellant passed away on 5th March, 2019 and on that basis he

applied informally under Rule 48 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) read together with Rule 57 (3) of the Rules that one Ms. Sabira Hussein Juma, an agent duly appointed by the Commission, also an administrator of the estate of the deceased appellant, be made a party to act for and on behalf of the deceased appellant's estate. As there was no objection from Mr. Tetere, we granted the said prayer and made Ms. Sabira Hussein Juma, the Commission's agent, the appellant in terms of Rule 57 (3) of the Rules.

In his submissions, Mr. Mnkonge addressed the grounds of appeal one after the other. Beginning with the first ground, he contended that the High Court had no jurisdiction to take cognizance of the matter which, according to him was, in essence, a landlord and tenant dispute that, by law, had to be heard and determined by the Rent Restriction Board in terms of the Rent Restriction Decree, Cap. 98 of the Laws of Zanzibar (the RRD). He added that the appellant and the said Mohamed Ali Salim who acted before the High Court as the Commission's agent fitted, respectively, in the definitions of the terms "tenant" and "landlord" as per section 2 of the RRD.

We should pause here to note that the aforesaid section defines the term "tenant" so broadly but in essence it states that the said term means

"any person occupying any premises under any agreement or arrangement for valuable consideration with the landlord or any other person." The same provisions define "landlord" to include, "in relation to any premises, any person, other than the tenant, who is or would be, but for the provisions of this Decree, entitled to possession of the premises, and any person from time to time deriving title under the original landlord."

As for the second ground of appeal, the learned counsel submitted that the originating summons procedure was only applicable to the matters expressly stipulated by Order X of the CPD. He was sturdy that landlord and tenant issues could not be legally litigated under the provisions of Order X of the CPD. It was his further submission that the matter was neither an administration of estate issue nor a mortgagee and mortgagor dispute.

Coming to the third ground of complaint, he criticized the course taken by Mohamed Ali Salim, acting as the Commission's agent before the High Court, for proceeding with the action, first, without presenting proof of his appointment as the Commission's agent; and secondly, without seeking and obtaining leave of the court in terms of Order III, rule 2 of the CPD to act as an agent. On the fourth ground, the learned counsel attacked the learned High Court Judge for maintaining and disposing of

the matter under the originating summons procedure even though it had occurred in the course of the proceedings that the matter had become contentious, the appellant's counsel having resisted the respondent's prayers for vacant possession of the suit property as he maintained that the appellant deserved compensation. According to Mr. Mnkonje, since the matter was no longer non-contentious, the learned High Court Judge had to convert it into a normal suit in terms of Order X, rule 12 of the CPD.

Finally, on the fifth ground, Mr. Mnkonje censured the learned High Court Judge for basing his ruling in favour of the respondent upon certain documents which were not part of the originating summons taken out by the respondent. He claimed that the said documents were extraneous matters because they were irregularly tendered and admitted. To substantiate his contention, he referred to the documents at pages 14 to 20 of the record of appeal.

On the other hand, Mr. Tetere submitted, on the first and second grounds of appeal conjointly, that the matter was not a landlord and tenant issue but an action for ownership and possession of the suit property, which was properly lodged in the High Court and determined under the originating summons procedure in terms of Order X, rule 1 (a) and (g) of the CPD. He added that the matter being a land dispute could

not be lawfully litigated before the Rent Restriction Board. The appellant, he also retorted, submitted to the jurisdiction of the High Court without any question.

However, on being probed by the Court, he conceded that there existed a landlord and tenant relationship between the appellant and the said Ali Salim Ali, the deceased. He also acknowledged that the said relationship survived the deceased's death.

As regards the third ground of complaint, the learned counsel denied that Mr. Mohamed Ali Salim, a duly appointed agent of the Commission in terms of section 34 (1) of the Wakf and Trust Commission Act (the Act), needed leave of the High Court in terms of Order III, rule 2 of the CPD. He contended that when sections 32 (1) and 34 (1) of the Act were read together, it would become clear that any duly appointed agent of the Commission would not require any leave of the court to mount a legal action on behalf of the Commission.

As for the fourth ground of appeal, Mr. Tetere valiantly argued that the originating summons procedure was followed by the learned High Court Judge to the letter. He supported the learned Judge's view that the appellant's claim for compensation had not derailed the action because there was cogent documentary proof that she had previously waived her

right to compensation having chosen to remain at the disputed property as a tenant. On that basis, Mr. Tetere submitted that the learned Judge rightly held that the matter was, by and large, non-contentious and resolved it finally on that basis.

On the complaint in the fifth ground of appeal, he refuted that extraneous documents were considered by the High Court. In the end, he urged that the matter be dismissed in its entirety.

In a brief rejoinder, Mr. Mnkonje maintained that the dispute was throughout a landlord and tenant relationship matter; and that it was unfit for resolution under the originating summons procedure in terms of Order X of the CPD. That, even if the matter could have been legally processed and resolved under that procedure, it must have ceased to be fit for it as it became contentious. He also maintained that any agent of the Commission requires leave of the court to be able to sue just as a holder of a power of attorney requires such authorization from the court.

We have painstakingly examined the record and taken account of the contending submissions of the learned counsel for the parties. As we shall demonstrate shortly, our resolution of the first and second grounds of appeal will sufficiently determine this matter.

We propose to begin with the first ground of appeal, which, as already indicated, is a complaint that the High Court erred in law in entertaining the action for eviction of an inherited sitting tenant over which it had no jurisdiction. In our view, this complaint raises two linked issues, the first being whether the dispute was a landlord and tenant relationship matter while the second is whether the High Court was the proper forum to adjudicate the dispute.

Beginning with the first issue on the subject matter of the dispute before the High Court, we recall that while Mr. Mnkonje contended that the subject matter of the action was undoubtedly a landlord and tenant claim, Mr. Tetere disagreed as he argued that the said action was, in essence, a claim for ownership and possession of land. However, on reflection after being queried by the Court, Mr. Tetere conceded that there existed a landlord and tenant relationship between the appellant and the said Ali Salim Ali, the deceased, and that the said relationship survived the deceased's death.

We entertain no doubt that the respondent's action in the High Court vide the originating summons taken out by Mohamed Ali Salim under Order X of the CPD against the appellant was essentially a landlord and tenant action. For a start, it is manifest on the originating summons itself

that the action was instituted for immediate vacant possession of the suit property. The reliefs prayed for were stated on the summons as follows:

- "(a) A declaration that House No. 1302 B situated at Darajani, Zanzibar be free from the Defendant's possession and occupancy; instead [it] be placed in possession of the Plaintiff as the lawful administrator of the [estate of the] deceased and proceed with the execution of succession to the legal heirs.*
- (b) An order that the Defendant immediately vacate from House No. 1302 B situated at Darajani, Zanzibar and takes all her belongings.*
- (c) An order that the Defendant pay the Plaintiff the sum of money to the tune of TZS. 10,000,000.00 being general damages [that] resulted from her act of delaying succession to take place after she refused to vacate from the said house despite being asked several times to do so.*
- (d) Any other order which this Honourable Court deems just and reasonable to [grant] the Plaintiff."*

Then, Paragraphs 6 to 8 of the Complaint annexed to the originating summons disclose the essence of the claim as follows:

- "6. *That before the sale of the said house, the Defendant [the appellant herein] was tenant of Mr. Mohammed Gulamhussein and after the sale in 1994 the late Ali Salim Al-mahrouk [Ali Salim Ali] agreed to rent the same to the Defendant for two years more.*
7. *That on 20th November, 1996 after two years passed from the date of the purchase the late Ali Salim Al-mahrouk wrote a letter to the Defendant and introduced three alternatives as follows:*

 - (a) To continue to be tenant to the agreement that the parties mutually agreed.*
 - (b) To vacate from the house subject to be paid costs of maintenance.*
 - (c) or to purchase the said house from Mr. Ali Salim Al-mahrouk. A copy of that letter is hereby attached and marked Annexure 'AS3' to form part of this Complaint.*
8. *That after the said letter the Defendant opted alternative (a) above and continued to live in the same house and paid monthly rent to the late Ali Salim Al-Mahrouk during all his lifetime until his death in 1999"*

The above averments confirm Mr. Mnkonje's assertion that the appellant was an inherited sitting tenant, her relationship with the late Ali Salim Ali necessarily being that of a landlord and tenant within the corresponding definitions of the terms by section 2 of the RRD and that, as conceded by Mr. Tetere, the said relationship survived the death of the owner, Ali Salim Ali. Although it is noticeable that in Paragraphs 9 to 13 of the Complaint, Mohamed Ali Salim averred that following the death of Ali Salim Ali the appellant declined numerous requests from the deceased's family to vacate the suit property so as to allow for "succession to be carried out", the said averments do not, in our considered opinion, turn the dispute into a succession or administration of estate matter.

Having answered the first issue in the affirmative, we now come to the question whether the High Court was the proper forum to adjudicate the matter. Our short answer to this issue is that the High Court had no jurisdiction over the matter in which the Commission's agent for the deceased's estate sought recovery of the demised premises from the appellant. In terms of section 7 (1) (i) of the RRD, the exclusive jurisdiction "to make orders for the recovery of possession of premises and for payment of arrears of rent" is vested in a Rent Restriction Board (the RRB) in relation to the area for which it is established.

With respect, we do not agree with Mr. Teterere that it is significant that the appellant acquiesced to the jurisdiction of the High Court in the matter. A court's jurisdiction is conferred by a statute and that parties cannot, expressly or by conduct, confer on a court the jurisdiction it does not have under the law. The issue of jurisdiction being so fundamental can be raised at any stage of proceedings. We thus agree with Mr. Mnkonje that the High Court wrongly assumed jurisdiction in the matter and thus its proceedings and ruling thereon were, without doubt, a nullity. Accordingly, we find merit in the first ground of appeal.

We turn to the second ground of appeal that the High Court erred in law in entertaining the dispute under the originating summons in respect of a matter not specified by Order X of the CPD.

At first, we would observe that "originating summons" refers to a special but limited summons that originates proceedings by certain persons over specified uncomplicated matters which can be disposed of summarily without any substantial dispute of fact. Order X, rule 1 of the CPD stipulates the persons who can take out such a summons and also specifies the matters for which the said procedure is applicable.

So far as is relevant to the instant appeal, an administrator of an estate of a deceased person is one of the persons expressly stated as

being entitled to take out such summons before High Court. It was not disputed that Mohamed Ali Salim, acting as the agent of the Commission, which was the administrator of the deceased's estate, had capacity in terms of sections 32 (1) and 34 (1) of the Act to take recourse under that procedure. The only question, as reflected in the third ground of appeal, was whether he needed leave of the court in terms of Order III, rule 2 of the CPD prior to his taking out of the summons. Assuming for a moment that he did not require leave of the court to do so, the question remains whether the procedure was applicable to the subject matter of the dispute.

Again, looking at Order X, rule 1 of the CPD, we note that it expressly states that the originating summons is only applicable to the matters specified in Paragraphs (a) to (g) of that rule. Mr. Tetere was emphatic that the action was properly made under Paragraph (a) and that, in the alternative, the matter should be found to have been lodged under Paragraph (g). While Paragraph (a) covers any matter raising the "question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, legal representative, or *cestui que trust*," Paragraph (g) concerns "determination of any question arising in the administration of estate or trust." The sticking issue here, then, narrows

down to whether the subject matter of the originating summons in the instant case fell under Order X, rule 1 (a) or (g) of the CPD.

With respect, we do not agree with Mr. Tetere that the instant dispute either related to determining a question directly affecting the rights or interest of the deceased's legal representative or adjudication of a question in the administration of the deceased's estate. As we stated earlier, the action under the originating summons was, by any yardstick, a claim for recovery of vacant possession of the demised premises from the appellant who happened to be an inherited sitting tenant. We would reiterate our view that the respondent's averments in Paragraphs 9 to 13 of the Plaint that the appellant declined numerous requests from the deceased's family to vacate the suit property so as to allow for "succession to be carried out" were inconsequential; they did not turn the dispute into a succession or administration of estate matter. We cannot help but wonder whether they were employed as a ruse to escape the jurisdiction of the RRB. In any event, we are satisfied that the instant matter was wrongly litigated and determined under the provisions of Order X of the CPD. We thus find merit in the second ground of appeal.

As our findings on the first and second grounds of complaint are sufficient to determine the appeal, we find no pressing need to deal with the rest of the grounds of appeal.

In the final analysis, we allow the appeal. In consequence, we hereby quash and set aside the High Court's ruling and order. In view of the circumstances of this matter, we order each party to bear its own costs.

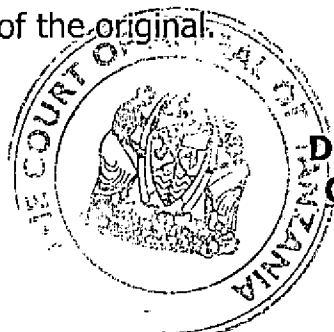
DATED at ZANZIBAR this 13th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 13th day of December, 2019 in the presence of Mr. Abdulkhaliq Mohamed Aley, counsel for the appellants and Mr. Haji Suleiman Tetere, Counsel for the respondent is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL