

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

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 301 OF 2021

MZEE OMAR MZEE APPELLANT

VERSUS

MWANAMVUA RASHID KILINDI..... RESPONDENT

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

(Sepetu J.)

dated the 2nd day of May, 2019

in

Civil Appeal No. 50 of 2017

JUDGMENT OF THE COURT

10th May & 16th June, 2022

LILA, J.A.:

The parties herein, Mzee Omar Mzee, the appellant and Mwanamvua Rashidi Kilindi, the respondent, were spouses who had contracted a Muslim marriage. It was alleged by the respondent that during the subsistence of their marriage they jointly acquired, among other things, a house situated at Mazizini Unguja and two plots not far from it. Upon divorce, the parties litigated before the High Court of Zanzibar at Vuga over the division of the house at Mazizini Unguja. Faced with the respondent's claims, the appellant questioned the court's jurisdiction to entertain the matter by way of a notice of preliminary

objection in his written statement of defence which was, however, withdrawn by Mr. Ishaq Shariff, learned advocate, who acted for the appellant before hearing could commence. The respondent succeeded. The High Court held that the house was jointly built and it further ordered that the tenants should not be disturbed until their respective tenancies were to expire whence the appellant shall let it to other tenants, the house be valued by a Government valuer and the respondent be paid 25% of the value thereof by the appellant after which he shall be the rightful owner of the house. It was also ordered that each party should bear its own costs. The appellant was aggrieved and accessed this Court armed with five substantive grounds of complaints.

Ahead of the hearing of the appeal, our reading of the nature of the claims as reflected in the pleadings on record, prompted us to satisfy ourselves on the propriety or otherwise of the High Court to adjudicate on it. In observance of the fundamental right to be heard, we engaged the parties on whether the High Court of Zanzibar was properly seized with the requisite mandate to adjudicate on the matter.

Admittedly, being laypersons and unrepresented, the parties had little material to assist the Court. The appellant was insistent that he had

raised that concern earlier but was not aware why it was not pursued by the learned counsel. He was, however adamant why the matter was not lodged before the Kadhi's Court because the marriage was solemnised in Islamic religion, both parties are Muslims and the subject matter of the case was division of a matrimonial property which matters are usually presided over by a Kadhi. He pressed the Court to order the matter be heard and determined by the Kadhi's Court. On the rival side, the respondent, apart from conceding that they contracted a Muslim marriage, she was firm that the High Court had mandate to hear and determine her claims.

As our starting point, it is trite law that the issue of jurisdiction is paramount and is a matter a judge or magistrate should satisfy himself first before presiding over a matter placed before him. The Court was categorical on this aspect in the case of **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No 84 of 2009 (unreported) where it stated that:-

"Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual

nullity of the proceedings in the event the objection is sustained.

*The law is well settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court suo moto, as it goes to the root of the trial (See, **Michael Leseni Kweka; Kotra Company Ltd; New Musoma Textiles Ltd. cases, supra**). Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests."*

From this exposition of the law, it is our considered view that the learned judge was obligated, at the earliest opportunity, to satisfy himself that the High Court had the requisite mandate to deal with the case the more so when the appellant had doubted it by way of an objection. In this case, even if there was inclination by the appellant's counsel to withdraw the objection on jurisdiction yet that did not relieve him of that duty for it is trite legal stance that jurisdiction is a creature of statute and parties cannot vest a court with a jurisdiction it legally does not have. Again, given its significance, we adopt the definition of jurisdiction as quoted in the case of **Tanzania Revenue Authority vs Tango Transport Company Ltd** (supra) that:-

"Jurisdiction' is defined in **Halsbury's Laws of England**, Vol. 10, para. 314 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 decision. 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 the area which jurisdiction extended, or it may partake of both these characteristics." (Emphasis added)

As already indicated above, the pleadings by the parties were suggestive that central to the dispute between the parties is division of a matrimonial asset, a house situate at Mazizini Unguja, between the spouses who are Muslims and who had contracted a Muslim marriage. For clarity we take pain to reproduce the relevant paragraphs as hereunder.

For the respondent, relevant are paragraphs 3, 6, 7, 8, 9, 17 and the relief part of the plaint which state, in Kiswahili, with an unofficial translation in the brackets, that:-

"3. Kwamba, Mdai na Mdaiwa ni mke na mume waliofunga ndoa yao kwa misingi ya dini ya kiislaamu huko Malindi Unguja mnamo mwaka 1994 na walibahatika kupata Watoto watatu (3)

na majina ya Watoto hao ni:- Rashid Mzee Omar (22), Aziza Mzee Omar (19) na Omar Mzee Omar (16). Naambatanisha kielelezo ZFL 'A' Na ZFL 'B' kuwa ni uthibitisho wa dai hili.

(The plaintiff and the defendant are wife and husband who contracted a muslim marriage in 1994 and were blessed with three children namely Rashid Mzee Omar (22), Aziza Mzee Omar (19) and Omar Mzee Omar (16). Exhibits ZFL 'A' and ZFL 'B' are hereby annexed to prove so.)

6. *Kwamba, mnamo mwaka 1994 Mdai na Mdaiwa walianza kujenga nyumba yao iliopo Mazizini Unguja kwa kushirikiana kwa hali na mali kufanikisha ujenzi wa nyumba hiyo kwa pamoja, Mdai na Mdaiwa walikuwa wanakusanya pesa zao kwa ajili ya ujenzi huo. Kwa sababu wote walikuwa ni wafanyakazi wa NBC Bank.*

(That in 1994 the plaintiff and the defendant started construction of their house at Mazizini Unguja each contributing money as they were NBC bank employees).

7. *Kwamba Mnamo mwaka 1995 Mdai na Mdaiwa walinunua kiwanja pembezoni mwa Nyumba yao kwa thamani ya Shilingi laki nane (800,000/=) kwa kipindi hicho na kwa sasa kiwanja hicho kina thamani ya shilingi milioni themanini (80,000,000/=) na mipaka yake ni kama ifuatayo:-.....*

(That in the year 1995, the plaintiff and the defendant bought a plot adjacent to their house at TZS 800,000/= then, but now it is valued at 80,000,000/= and is bordered by....)

8. Kwamba, baada ya ujenzi kukamilika Mdai na Mdaiwa walienda kuhamia katika Nyumba yao iliopo Mazizini Unguja, Nyumba ambayo walijenga kwa jitihada na nguvu za Mdai kwani Mdai alikuwa mstari wa mbele ili kuhakikisha ujenzi wa Nyumba hiyo unaendelea vizuri kwa kuwasimamia mafundi hatua baada ya hatua kwani mdai alikuwa ameachishwa kazi na Mdaiwa aiikuwa bado yupo kazini. Kwa hiyo Mdaiwa alikuwa hana mkubwa wa kushughulikia ujenzi na Mdai aliusimamia ujenzi huo hadi kukamilika. Na kwa sasa nyumba hiyo ina thamani ya shilingi milioni mia mbili hamsini (250,000,000/=) na mipaka ya nyumba hiyo ni kama ifuatavyo.....

(That upon completion of the house they shifted and lived in the house at Mazizini Unguja which they built through joint efforts and the plaintiff was the main supervisor as she was still employed but the defendant had been dismissed from employment and he had no elder person to do so. The house is now valued at TZS 250,000,000/= and is bordered by...)

9. Kwamba, mnamo mwaka 2000 Mdai na Mdaiwa walinunua kiwanja chengine kilichopo kusini mwa nyumba yao waliokuwa wanaishi, chenye thamani ya shilingi elfu sitini (60,000/=) kwa kipindi hicho na kwa sasa kina thamani ya shilingi milioni sitini (60,000,000/=) na mipaka ya kiwanja hicho ni kama ifuatavyo...

(That in the year 2000 the plaintiff and the defendant bought another plot located south of the house at TZS 60,000/= which is now valued at TZS 60,000,000/= and is bordered by...)

17. Kwamba kutokana na jitihada na mchango mkubwa alioutoa Mdai kupitia kwa Mdaiwa juu ya ujengaji wa nyumba, ununuzi wa viwanja Pamoja na kutegemewa katika familia, ni vyema kwa nyumba iliositishwa kukodishwa iendelee kukodishwa ili Mdai aweze kupata kodi ya kumuendeleza kulipia ada ya skuli kwa mtoto wao kwani kwa sasa mtoto huyo amesitishwa masomo kutokana na kushindwa kulipa ada ukizingatia mwaka huu anafanya mtihani wa darasa la kumi na mbili.

(That since the house was built through joint contributions, buying of plots and being depended by the family it is better that the house which the letting of which had stopped, it be rented so as enable the plaintiff get money for school fees to a child who has been suspended from school for failure to pay school fees as he is due for form four examinations...)

HIVYO, mdai anaiomba Mahkama hii tukufu kutoa uamuzi na amri kama ifuatavyo:-

(a) Mahkama imuamuru Mdaiwa awaache wapangaji waendeleo kuishi katika nyumba waliojenga pamoja kati ya Mdai na Mdaiwa

Au

(b) Mahkama imuamuru Mdaiwa amlipe Mdai asimia 50% ya thamani ya nyumba hiyo ikiwa Mdai anataka kuiuza nyumba hiyo.

(c) Amri nyengine halali na zenye manufaa kwa mdai.

(d) Gharama za mahkama ni juu ya mdaiwa."

(Wherefore, the plaintiff prays for the following reliefs:-

(a). The defendant should let the tenants continue letting the house they built jointly.

Or

(b) The court should order the defendant to pay the plaintiff 50% of the value of the house if he wants to sell it.

(c) Any other reliefs the court may deem just be awarded.

(d) costs of the case.)

For the appellant, the relevant paragraphs of the written statement of defence are paragraphs 2, 3, 5, 6, 7, 8, 18, 19 which states that:-

"2. KWAMBA, Mdaiwa hana pingamizi na maelezo yaliyo katika kifungu cha 1, 2, 3, 4 na 5 cha Hati ya Madai.

(That paragraphs 1, 2, 3, 4 and 5 of the plaint are not disputed)

3. KWAMBA, Mdaiwa anapinga vikali maelezo yaliyo katika kifungu cha 6 cha Hati ya Madai kwa kuendelea kusema kuwa mnamo mwaka 1994 Mdaiwa alikuwa tayari ameshajenga nyumba hiyo kwa gharama zake mwenyewe bila ya msaada wowote wa fedha kutoka kwa Mdaiwa.

(That the defendant disputed the contents of paragraph 6 and states that by 1994 the defendant had already completed building the house without any financial contribution from the plaintiff)

5. **KWAMBA**, Mdaiwa anaeleza Zaidi kuwa wakati wanahamia eneo hilo ilikuwa tayari nyumba imeshakamilika na ilibakia maeneo yanayohitaji matengenezo madogomadogo tu ambayo nilimaliza mwenyewe bila ya msaada wowote kutoka kwa Mdai.

(That at the time they shifted to the house it was already completed save for some few areas which he was able compete them without assistance from the plaintiff)

6. **KWAMBA**, Mdaiwa anapinga maelezo yaliyo katika kifungu cha 7 na kuthibitisha hilo anaeleza kuwa mnamo tarehe 5 mwezi wa Juni, 1995 Mdaiwa alikipata kiwanja hicho kwa njia ya Zawadi (Gift) kutoka kwa Ahmed Said Salum bila ushawishi wowote na kusajiliwa kwa Mrajis wa nyaraka kwa namba 549 A-3 vilevile Kiwanja kikiwa na Namba: 815 RE.U.65/276/XL kama usajili kutoka Kamisheni ya Ardhi ya 8/9/1984. **Hati ya Makubaliano ya Kuidhinisha Uhaulishaji (Kwa njia ya Zawadi) inaambatanishwa kama Kieielezo "MoM-2" Kuwa sehemu ya Majibu haya ya Madai.**

(That the defendant disputes the contents of paragraph 7 of the plaint and states that on 5th June 1995, the defendant was given the plot as a gift by one Ahmed Said Salum and registered it on 8/9/1984 as No. 549 A-3 and plot No. 815 RE.U.65/276/XL).

7. **KWAMBA**, Mdaiwa anapinga vikali kabisa na hakubaliani na maelezo yaliyo katika kifungu cha **8** cha Hati ya Madai na kusesitiza kuwa Mdai hakuwai kufanya jitihada za aina yoyote wala kuingiza msaada wa fedha wakati wa ununuzi huo kwani nyumba ilikuwa imeshajengwa na Mdaiwa kwa gharama zake na

ilibakia matengenezo madogo madogo tu nayo yalimaliziwa baadae na Mdaiwa.

(That the defendant denies the contents of paragraph 8 of the plaint and sates that he built the house alone without any financial contribution from the plaintiff as by then the house was already completed save for minor areas which he personally constructed).

8. **KWAMBA**, Mdaiwa anapinga vikali kabisa na hakubaliani na maelezo yaliyo katika kifungu cha **9** cha Hati ya Madai na kufafanua kwamba Kiwanja hicho kipo katika miliki ya Mdaiwa ambacho amekipata kutoka Serikalini (Kamisheni ya Ardhi) kwa utaratibu kukiombea na kufanya malipo mnamo tarehe 24/07/2000 kama utaratibu unavyoelekeza kikiwa na waraka wa Kiwanja namba 121-unit 34(H.D). Hati hiyo kutoka Kamisheni ya Ardhi na Mazingira sambamba na stakabadhi kwa Pamoja zinaambatanishwa kama Kielelezo "MoM-3" na Mdaiwa anaomba kutumika kwa kielelezo hicho kama ni sehemu ya Majibu haya. *(That the defendant disputes the allegation in paragraph 8 of the plaint and states that he personally secured the plot from the Governmant and paid for it on 24/07/2000 as was directed by Circular No. 121-unit 34(H.D). The relevant receipt is hereby tendered as exhibit "MoM-3")*

18. **KWAMBA**, Mdaiwa anapinga vikali kabisa na hakubaliani na maelezo yaiyo katika kifungu cha **17** cha Hati ya Madai na kueleza sio tu mchango mkubwa Mdaiwa hakuwa na aina yoyote ya mchango katika mali zangu kuanzia ununuzi mpaka ujenzi

wenyewe na nathubutu kusema kwamba mali hizi ni miliki yangu na haina uhusiano wowote na Mdai.

(That the contents of paragraph 18 of the plaint is disputed and the defendant states that there was no any contributions in the acquisition of the assets from the plaintiff)

19. **KWAMBA**, *Mdaiwa anaendelea kutoa ufafanuzi zaidi kuwa suala mtoto lina pahala pake pa kushughuliwa na atafute pahala sahihi pa kufanya au kupeleka madai yake."*

(That, the defendant insists that the claims have a specific forum which deal with them and the plaintiff is to take her claims to it.)

It needs no binocular to appreciate a plain fact that central in the parties' pleadings is distribution of the assets acquired by the parties to the suit during subsistence of their marriage. Stated in other words, the claim is based on division of assets acquired when the parties were still in a matrimonial relationship and both parties are muslims.

It is noteworthy that according to the record of appeal, the respondent lodged his claims in court on 20/10/2017 which was before the Kadhi's Court Act No. 3 of 1985 was repealed and replaced by the Kadhi's Court Act No. 9 of 2017 which became operational on 1/11/2017. Therefore, it was the Kadhi's Court Act No. 3 of 1985 which was applicable then. Section 6(1) of it provided for matters of division of matrimonial assets if there is actual contribution as among the matters

under its exclusive jurisdiction to hear and determine. The same provides:-

"A Kadhi's Court shall have and exercise jurisdiction in the determination of questions of muslims law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the muslim religion"

In the instant appeal, there is no doubt that the controversy arose from division of matrimonial assets between the parties who are Muslims, contracted a muslim marriage and the house the subject matter of the case is alleged to have been acquired during the subsistence of such marriage. The Kadhi's Court was therefore the only proper forum to adjudicate on the matter and, under section 10(3) of the Kadhi's Court Act No. 3 of 1985, an appeal against its decision lied to the High Court of Zanzibar whose decision was final as, in terms of then then section 99(b) of the Constitution of Zanzibar, no appeal could lie to this Court on matters of Islamic law which began at the Kadhi's Court (see **Naima Hamad Ali and Another vs Shinuna Kheir Juma and Four Others**, Civil Appeal No. 47 of 2011(unreported)).

For the foregoing reasons, obviously, this matter ought to have been lodged before the Kadhi's Court and the High Court lacked

jurisdiction and hence it overstepped its mandate by allowing it to be filed before it and entertaining it as a court of first instance. That being a jurisdictional flaw, it is a fatal error rendering both the proceedings and judgment of the High Court a nullity.

We, accordingly, allow the appeal on the above ground and, invoking the powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019, hereby quash the proceedings and set aside the judgment of the High Court and the consequential orders issued. If still interested to pursue her claims, the respondent has to do so in strict compliance with the law. Each party shall bear its own costs.

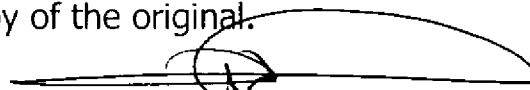
DATED at **ZANZIBAR** this 15th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June 2022 in the presence of the Appellant in person and in the absence of the Respondent but one Suleiman A. Juma, son in law of the Respondent appeared, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL