

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

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

CIVIL APPEAL NO. 299 OF 2021

**BARKE HAIDAR ABDULRAZAK APPELLANT
VERSUS**

HAIDAR HUSSEIN RASHID..... RESPONDENT

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

(Mwampashi, J.)

**dated the 12th day of November, 2020
in
Civil Case No. 50 of 2014**

JUDGMENT OF THE COURT

8th & 16th June, 2022

MWANDAMBO, J.A.:

The High Court of Zanzibar sitting at Vuga tried a suit instituted by the appellant Barke Haidar Abudulrazak for an assortment of reliefs against the respondent Haidar Mohamed Hussein Rashid. The trial court granted only one out of the bulk of the reliefs which aggrieved the appellant, hence the instant appeal.

The cause of action grounding the appellant's suit on the reliefs claimed is not so easy to comprehend as shall become apparent later in this judgment. The appellant and the respondent were, at all material

times from 1995 a married couple having celebrated their marriage under Islamic rites. However, that marriage did not survive beyond 2013 when it was dissolved. It is not entirely clear from the record whether there was any decree of divorce issued by a competent organ in accordance with the relevant law applicable to the parties.

It was common ground that during the subsistence of the marriage, the couple bought a house on Plot No. 9/43 Vikokotoni area in Zanzibar, henceforth, Vikokotoni house through their joint efforts. It is equally not disputed that at some stage later, the respondent had the house demolished to pave way for a construction of a two-storey commercial building christened as Azhar Centre accommodating shops and sundry businesses. There was a sharp dispute on whether the construction of the commercial building was a result of joint financial contribution between the parties during the subsistence of their marriage. So was the acquisition of other properties in Zanzibar including Mtendeni Guest House and a plot of land at a place called Makunduchi as well the businesses run by the respondent in which the appellant claimed to be a partner and thus entitled to profits accrued from them.

The appellant's case through her pleadings was that the respondent used the jointly owned properties for his own benefit without involving her in the affairs of the joint businesses was created a partnership between her and the respondent who refused to account for the profits in such businesses. The appellant alleged also that the respondent had, through forgery, mortgaged their jointly acquired Vikokotoi house as security for a loan from a commercial bank without her consent and converted the proceeds thereof for running businesses for which she was allegedly denied her share of the profits earned. At the end of it all, the appellant asked the trial court to grant a number of reliefs, including, an order against the respondent to account for the business conducted at Azhar Centre and Mtendeni Guest House, an order for a share of profits in the partnership businesses, management rights in the partnership business, a declaration that Azhar Centre was a property jointly owned by both parties. In addition, the appellant claimed monetary compensation under different heads.

Not amused, the respondent denied the appellant's allegations in toto. Whilst admitting that the Vikokotoni house was acquired during the subsistence of the marriage, he claimed that he only included the appellant in the deed of sale without her having made any contribution towards the

purchase of that house. He claimed further that the house he acquired was, but a small structure and in a dilapidated state. The respondent denied any contribution from the appellant in the construction of Azhar Center and any of the businesses capable of creating a partnership with the appellant entitling her to any proprietary rights.

Out of the nine issues framed in the suit, the trial court found all against the appellant except the second one which was framed thus; who, between the parties purchased house No. 9/43 situated at Vikokotoni. Not surprisingly, the trial court found sufficient evidence to find that the house was jointly acquired by the parties. That notwithstanding, the trial court found no sufficient evidence proving that Azhar Centre standing on Plot No. 9/43 was a joint property between the appellant and the respondent. It thus answered the first issue against the appellant. Ultimately, having found no convincing evidence on the appellant's claims in Mtendeni Guest house business subject of issue number three, plot of land at Makunduchi area (issue number four) and joint partnership businesses subject of issues five, six, seven and eight, it dismissed them all. Instead, it ordered the respondent to compensate the appellant in respect of Vikokotoni house a sum of TZS 25,000,000.00 as her share in the house equivalent to 50% of its current value had it not been demolished as of the date of judgment.

Dissatisfied with the trial court's decision, the appellant preferred the instant appeal predicated on five grounds of appeal through M/s. Rukazibwa & Associates Advocates. The learned advocates supported the grounds of appeal with written submissions filed ahead of the hearing to which Mr. Rajab Abdalla Rajab, learned advocate representing the respondent resisted by way of his written submissions filed in Court in opposition to the appeal.

At the hearing of the appeal, we heard oral submissions from Mr. Jambia Said Jambia, learned advocate for the appellant stressing on some aspects in the written submissions. So did Mr. Rajab for the respondent in opposition.

Before the learned advocate for the appellant wound-up his oral submission, we invited him to address the Court whether, in the light of the pleadings combining two causes of action it was appropriate for the trial court to try the suit and grant the relief for the appellant as it did. We did so being convinced that the appellant's claims were based on two distinct causes of action justiciable before different forums. Mr. Jambia appeared to be conceding that since the properties in dispute were acquired during the subsistence of the marriage, such properties were subject of distribution

following divorce upon a petition before a court with competent jurisdiction. Mr. Rajab had a similar stance.

For a start, there is no dispute that the parties to this appeal professed Islam faith. They were a married couple who celebrated their marriage under Islamic law. The dispute on the acquisition of a number of properties and businesses run by the respondent, in particular, Azhar Centre, had their foundation from their marriage. Whilst there can be no denying that through that relationship or otherwise parties could have created a partnership for running businesses, their dispute involving the division of properties allegedly acquired during the subsistence of the marriage, must be dealt with in accordance with the law applicable to the parties, in this case, Islamic law. This takes us to section 6(1) of the Kadhi's Court Act, No. 9 of 2017 which states:

"The Kadhi's Court shall have exclusive jurisdiction over all matters and proceedings between parties who are Muslims relating to:

- (a) marriage, divorce and other related issues;*
- (b) personal status;*
- (c) maintenances and custody of children;*

- (d) *wakf or religious charitable trusts and gifts inter viro;*
- (e) *wills and inheritance;*
- (f) ***division of matrimonial assets if there is actual contribution;*** and
- (g) *any other matter in respect of which jurisdiction is conferred to Kadhi's Court by any written law."* [emphasis added]

It is clear from the above that one of the disputes to be dealt with by the Kadhi's Court is distribution of assets jointly acquired by the parties during the subsistence of their marriage. Indeed, the Kadhi's Court has exclusive jurisdiction in such cases. This takes us to section 4(1) of the Civil Procedure Decree Cap. 8 of the laws of Zanzibar, the CPD which 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."

Although the appellant's suit was framed as one for enforcement of business partnership rights, it had, for all intents and purposes, a provenance from the marriage bringing about a claim for division of assets said to have been acquired jointly during the subsistence of the marriage which could only be litigated before the Kadhi's Court. The Court has

underscored the requirement to be satisfied with jurisdiction before entertaining any matter in many cases including; **Faniel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 20 others**, Civil Appeal No. 8 of 1995 (unreported) in which it held:-

"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."

See also; **Richard Julius Rukambura v. Issack N. Mwakajila & Another**, Civil Appeal No. 3 of 2004 (unreported). We have no doubt that had the trial court have regard to the above, it would not have proceeded with the suit in the manner it did without satisfying itself of its jurisdiction in relation to the part of the suit falling outside of its mandate.

We appreciate that there could have existed a partnership between the parties prior to or after the dissolution of the marriage whose breach created a distinct cause of action under the law of contract enforceable by

way of a civil suit before the High Court. Order II rule 1 of the CPD which deals with the framing of suits provides thus:

"Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and prevent further litigation concerning them"

All what the rule says is that one or several causes of action may be joined in one suit. However, there could be cases of misjoinder of causes of action which may warrant the court invoking the provisions of Order II rule 6 of the CPD by ordering separate trials. It is trite that misjoinder of causes of action happens where the right to reliefs does not arise out of the same transaction neither there is existence of a common question of fact or law in a suit. See for instance: **Buiké Estate Coffee Ltd & 2 Others v. Lutabi & Another** [1962] EA 328 and **Yowana Kahere & Others v. Lunyo Estates Ltd** [1959] EA 319 both from the High Court of Uganda interpreting an identical rule in the Civil Procedure Rules of Uganda which we consider to be reflecting a correct interpretation of the corresponding provision under the CPD.

It has been mentioned earlier on that though the appellant's suit was framed as one arising out of enforcement of contractual rights from a

partnership, the foundation of it arose from a matrimonial relationship between the parties. Now, as we have already seen above, any dispute over enforcement of matrimonial rights fell under the exclusive jurisdiction of the Kadhi's Court in terms of section 5 (1) of the Kadhi's Court Act. There can be no dispute thus that the trial court lacked jurisdiction to try such a suit to the extent it involved claims founded on a cause of action from a matrimonial relationship. Indeed, the matter became complicated by the fact that the two causes of action were fused into one though in effect quite distinct from each other. All factors being equal, these could not have been tried in one suit warranting an order for a separate trial in pursuance of Order II rule 6 of the CPD. Nonetheless, the position here did not warrant that course of action considering that one of the causes of action fell outside the jurisdiction of the trial court. It is plain that the trial court assumed that the suit was founded on one cause of action or at best, two of them in which it had the requisite jurisdiction and hence the order against the respondent to pay the appellant TZS 25,000,000.00 as her share in Vikokotoni house acquired jointly during the subsistence of the marriage. In effect, what the trial court did was to make a division of the asset 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 Kadhi's 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 trial of a suit whose outcome had a bearing on its jurisdiction. The net effect is that the proceedings and the resultant award it made in favour of the appellant were a nullity for lack of jurisdiction. Accordingly, we are constrained to exercise the Court's revisional power under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] by quashing the proceedings, judgment and decree of the trial court as we hereby do for being a nullity by reason of lack of jurisdiction on the relief granted in favour of the appellant.

Going forward, having held that part of the appellant's claims in the suit were founded on a cause of action outside the jurisdiction of the trial court, we are constrained to remit the record to that court. This order is aimed at placing the trial court in the position to exercise its power under Order II rule 6 of the CPD to make such an order, including the amendment of the plaint, if the appellant is minded, so as to bring her suit within the jurisdiction of the High Court on such terms as it may consider just.

As the issue raised by the Court suffices to dispose the appeal, a discussion on the grounds in the memorandum of appeal has been rendered superfluous. Considering the nature of the order we have made; each party shall bear his own costs. Order accordingly.

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
JUSTICOF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence of Mr. Jambia S. Jambia, learned counsel for the appellant and Mr. Rajab A Rajab, learned counsel for the respondent is hereby certified as a true copy of original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL