# MWAJUMA ALI MTIPULA v. SHOMAR ALI MTIPULA

## COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Mroso, J.A.)

## ZNZ CIVIL APPLICATION No. 5 OF 2002

(In the matter of an intended appeal from the decision of the High Court of Zanzibar at Vuga, Dahoma, J., dated 31 October 2002 in Civil Appeal No.10 of 2002)

*Islamic Law – Jurisdiction of the Court of Appeal – Question of inheritance among Moslems coming within the jurisdiction of Kadhis' Courts – Whether Court of Appeal of Tanzania has jurisdiction over the matter – Article 96(2) of the Constitution of Zanzibar 1984.*

*Islamic Law – Jurisdiction – Respondent claims inheritance of a house under Islamic law – Applicant claims right of ownership of the house under contract of sale – Whether Kadhi's Court has jurisdiction to determine the question of sale.*

*Constitutional Law – Revision of decisions originating from and determined in Kadhis' Courts – Matter may entail interpretation of a provision of the Constitution of Zanzibar 1984 – Whether the Court of Appeal of Tanzania has jurisdiction to do so – Article 96(2) of the Constitution of Zanzibar.*

This is an application by Notice of Motion under rules 43, 44 and 46 of the Court of Appeal Rules 1979 for leave to appeal to the Court of Appeal against a decision of the High Court of Zanzibar. The respondent had filed an inheritance claim in the District Kadhi's Court over a house. The applicant disputed the respondent's claim and asserted that the house was sold to her by her late father before he died. The District Kadhi's Court found for the applicant and dismissed the respondent's claim. Dissatisfied the respondent appealed successfully to the Kadhi's Appeal Court. The applicant in turn appealed to the High Court which upheld the decision of the Kadhi's Appeals Court. She is aggrieved by that decision, hence, this appeal.

**Held:** (i) Both the Constitution of Zanzibar 1984 and the Kadhis' Courts Act 1985 make it plain that the Court of Appeal has no jurisdiction to hear cases on Islamic matters originating in the Kadhis' Courts;

(ii) The question of whether there was a sale and a purchase of a house or whether the applicant was competent to enter into a valid contract to buy the house are not Islamic matters or based on Muslim law; those were matters for the ordinary courts;

(iii) Since the Court of Appeal has no jurisdiction to interpret the Constitution of Zanzibar, one cannot go into the question if a revision case is or is not included in the words "kesi zozote" (in article 96(2) of the Constitution of Zanzibar 1984).

(iv) Granting leave to appeal as sought by the applicant would be giving occasion to this court to violate the provisions of article 96(2) of the Constitution of Zanzibar and section 10(3) of the Kadhis' Courts Act Number 3 of 1985.

***Application dismissed***

Case referred to:

(1) *Mohamed Rafik Ishak Ayoub and another v. Anwar Hussein Jaffar and two others,* Court of Appeal of Tanzania, Civil Appeal Number 35 of 1994 (unreported)

Statutory provisions referred to:

(1) Court of Appeal Rules 1979, rules 43, 44 and 46

(2) Kadhis' Courts Act 1985, sections 6(1) and 10(3)

(3) Appellate Jurisdiction Act 1979, section 4(2)

(4) Constitution of Zanzibar 1984, article 96(2)(b)

*Mr Ussi Khamisi Haji,* for the Applicant

*Mr Salim H. Mkonje,* for the Respondent

## RULING

(Dated 26 November 2004)

**Mroso, J.A.:** This is an application by Notice of Motion under rules 43,44, and 46 of Court of Appeal Rules 1979, for leave to appeal to the Court of Appeal against a decision of the High Court of Zanzibar, Dahoma, J. The applicant was represented by Mr Ussi, learned advocate, and Mr Salim H. B. Mnkonje, learned advocate, represented the respondent.

The respondent had filed an inheritance claim in the District Kadhi's Court over a house. The applicant disputed the respondent's claim and asserted that the house had been sold to her in 1994 by her late father Ali Mohamed Mtipula before he died in the same year.

The District Kadhi's Court found for the applicant and dismissed the respondent's claim. Dissatisfied, the respondent appealed successfully to the Kadhi's Appeal Court. That court held the view that there could not have been a valid sale of the disputed house because the applicant was aged 15 years at the time of alleged sale, which was not the age of majority and, therefore, presumably, she was not *sui juris* with capacity to contract. The sale was null and void and the house reverted to the estate of the deceased owner to be inherited.

The applicant in turn appealed to the High Court. Dahoma, J. sitting with four assessor upheld the decision of the Kadhi Appeals Court. He went further to hold that the applicant was not a legitimate child of the owner of the house whereas the respondent was, and that the respondent in fact inherited the house. The High Court dismissed the applicant's appeal. She is aggrieved by that decision and wishes to appeal to the Court of Appeal and, hence, this application for leave to appeal.

In arguing the application Mr Ussi Haji contends that the Kadhi's Court had no jurisdiction to adjudicate the issue of whether or not there was a valid sale of the house to the applicant. That issue is adjudicable in the ordinary courts only. In addition, Mr Haji argued

A that the Kadhi's Appeals Court had wrongly rejected evidence that was given before it on the authenticity of thumb prints which appeared on the sale document relating to the disputed house.

In support of the argument, that Kadhi's Courts have no jurisdiction
B beyond the matters specified in section 6 (1) of the Kadhi's Courts Act 1985, Mr Haji referred to a decision of this court, *Mohamed Rafik Ishak Ayoub and others v. Anwar Hussein Jaffar and others* (1) which, he said, was based on very similar facts. He said that in
C that case the Court of Appeal stepped into the shoes of the High Court of Zanzibar to quash decisions of Kadhi's Courts which had been obtained by fraud and in which the Kadhi's Courts had no jurisdiction. If leave to appeal is granted therefore, the Court of Appeal will be
D called upon to act in similar manner as in Civil Appeal Number 35 of 1994. The Court of Appeal would have jurisdiction notwithstanding the provisions of article 96(2) of the Constitution of Zanzibar 1984.

Mr Mnkonje submitted that in considering whether or not to grant
E leave to appeal, it is necessary to ascertain if the Court of Appeal will have jurisdiction to deal with the matter that will be appealed to it. He said the dispute has been taken to the Kadhi's Court and the appeal to the High Court originated from those proceedings. In addition,
F the question of inheritance among Moslems comes squarely within the jurisdiction of the Kadhi's Courts. Both article 96(2)(b) of the Constitution of Zanzibar 1984 and Civil Appeal Number 35 of 1994 according to Mr Mnkonje, show that the Court of Appeal has no
G appellate power over the High Court on Islamic matters originating in Kadhi's Courts. It would be futile, in his submission, to grant the applicant leave to appeal against the High Court decision to the Court of Appeal. He suggested that what the applicant could do would be
H to apply for revision in the Court of Appeal under section 4(2) of the Appellate Jurisdiction Act 1979. Since revision by the Court of Appeal of a matter originating in Kadhi's Courts is not prohibited either by the Kadhi's Courts Acts, 1985 or by the Constitution of
I Zanzibar, Mr Mnkonje believes the Court of Appeal would have jurisdiction to decide on Islamic matters originating in the Kadhi's Courts, as

the Court of Appeal did in Civil Appeal Number 35 of 1994 to which reference has already been made. A

Mr Ussi Haji agreed that an application to the Court of Appeal for revision could be an option for the applicant but an appeal is also another option on non-Islamic issues, like the question whether or not the house had been validly sold to the applicant. B

It seems to me clear that the Court of Appeal has no jurisdiction to hear cases on Islamic matters originating in the Kadhi's Courts. Both the Constitution of Zanzibar1984 (and the Issue of 2003) and the Kadhi's Courts Act 1985 make it plain. C

Section 96(2) of the Constitution of Zanzibar 1984 reads:

(2) Mahakama ya Rufaa haitakuwa na uwezo wa kusikiliza kesi zozote zinazohusiana na: D

(a) ...

(b) Mambo ya kiislam ambayo yameaza katika Mahakama ya Kadhi. E

Similarly, section 10(3) of the Kadhi's Courts Act 1985 provides:

(3) The decision of the High Court shall be final on matters of Islamic Law and shall not be subject to appeal to the Court of Appeal. F

This court in Civil Appeal Number 5 of 1994 confirmed that position when it said:

It is clear that this court has no jurisdiction to hear appeals emanating from the Kadhis' Courts on matters of "Islamic Law" or just "Islamic matters" as the Constitution of Zanzibar puts it. G

Section 6(1) of the Kadhi's Courts Act 1985 says:

6(1) A Kadhi's Court shall have and exercise jurisdiction in the determination of the question of Muslim Law relating to a personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion. H

The respondent who claimed he had inherited the house in dispute went to the District Kadhi's Court to vindicate his right to ownership I

of it. Such a dispute over inheritance was properly taken to the Kadhi's Court for adjudication. It turned out however that the applicant also claimed a right of ownership of the same house, in her case basing the claim on purchase. So, before the District Kadhi there were two important issues namely, whether the respondent had inherited the house or the applicant had bought it. The question of whether there was a sale and buying of the house or whether the applicant was competent to enter into a valid contract of buying the house are not by any stretch of imagination Islamic matters or based on Muslim Law. Those are matters for the ordinary courts. Unfortunately the trial District Kadhi's Court did not refer the issue of sale of the house to the ordinary courts for determination before it could consider the question of inheritance. The matter remained with the Kadhi's Courts until it got to the High Court.

The issue of inheritance was alive in all the courts, from the District Kadhi's Court to the High Court in which Sheikhs sat to assist the judge, as is required under section 10(2) of the Kadhi's Courts Act 1985. It could be said, therefore, that as far as the issue of inheritance was concerned, the High Court had sat as the final court as stipulated in section 10(3) of the Kadhi's Courts Act.

As already mentioned, the issue on whether or not there was a sale of the house to the applicant and the follow-up question that, if there was a sale, whether the sale was valid in law, were not adjudicable by the Kadhi's Court and yet the District Kadhi's court, the Appellate Kadhi's Court and the High Court sitting as the final Court of appeal in matters originating in Kadhi's Court, all considered the issue. But they had no jurisdiction over that issue. Can that issue go to the Court of Appeal for determination?

It seems to me that the *Rafik Ayoub* case (*1*) is distinguishable. First, in that case this court found that judgment in the Lower Courts had been obtained by fraud and the court felt that by all means such a judgment must not be left to stand, as it was void *ab initio*. And there was need to pronounce so. Secondly, the court found that throughout

the proceedings there was no issue on Islamic Law and the Kadhi's Courts had no jurisdiction right from the outset. It was then the Court of Appeal used its revisional powers to quash the decisions, which were reached without jurisdiction.

In the present matter the same thing cannot be said about the decision of the High Court and of the Kadhis' Courts. They had jurisdiction to adjudicate on the matter of inheritance and there could not be an appeal beyond the High Court. I may also add that the decision of this court in *Rafik Ayoub* is not entirely without difficulty. The court had used its revisional powers under section 4(2) of the Appellate Jurisdiction Act 1979 and, acting as the High Court, revised the decisions of the Kadhi's Appeal Court and of the trial Kadhi's Court. But the proceedings before the Kadhi's Courts were not before the court!

It has been argued that the Court of Appeal is only precluded from sitting as an appellate court in decisions originating in Kadhi's Courts but that it can sit to revise those decisions. That of course may entail interpretation of article 96(2)(b) of the Constitution of Zanzibar which speaks of "*kusikiliza kesi zozote*" not "*kusikiliza rufaa*" But since the Court of Appeal has no jurisdiction to interpret the Constitution of Zanzibar, one cannot go into the question if the revision case is or is not included in the words "*kesi zozote.*" Suffice it here to say that for me to grant leave to appeal, would be giving occasion to this court to violate the provisions of article 96(2)(b) of Zanzibar Constitution and section 10(3) of the Kadhi's Courts, Number 3 of 1985.

The application is dismissed with costs.