IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 245 OF 2022

THE REGISTRED TRUSTEES OF
THE ISLAMIC SOLIDARITY CENTER.....APPELLANT

VERSUS

JAABIR SWALEHE KOOSA.....1ST RESPONDENT
YAHYA ABDI MWASHA .....2ND RESPONDENT
KADRI AROUN KIMARO .....3RD RESPONDENT
HAJI ABUU KIMARO .....4TH RESPONDENT
TWAHA SADALA URASSA .....5TH RESPONDENT

(Appeal from the decision of the Judgment and Decree of the High Court of Tanzania at Moshi)

(Mutungi, J.)

dated the 23rd day of July, 2020
in
Civil Appeal No. 01 of 2020

.....

JUDGMENT OF THE COURT

13th & 18th March, 2024.

MAIGE, J.A:

In the District Court of Hai, the appellants sued the respondents and each of them for the following reliefs. **First**, declaration that they had illegally and unlawfully trespassed and caused nuisance into the plaintiff's premises. **Second**, permanent injunction to restrain them and or their agents of any kind from interfering with the affairs and all facilities or assets owned by the appellant. **Third**, payment of general damages at the tune of TZS 200,000,000.00.

The factual allegations constituting the claim briefly stated, are as follows. The appellant is a religious institution duly incorporated under the laws of Tanzania. In that capacity, it owns and runs Mudio Islamic English Medium Primary School and Mudio Islamic Seminary School both of which being located within the District of Hai. It was alleged that, purporting to be members and leaders of the appellant, the respondents have been unlawful interfering with the appellant's operation of the schools to the extent of disrupting the management thereof and causing some parents losing confidence in the same.

In the written statement of defence, the respondents, aside from refuting the claim, they raised a notice of preliminary containing four points. Of relevancy, for the purpose of this appeal, is the first point that *"the court has no jurisdiction to hear and determine the matter at hand."*.

In their submissions before the trial court, the respondents through their counsel argued the said point based on two propositions. **First,** because the value of the claim was based on general damages which could not be the basis for determining the pecuniary jurisdiction of the trial court, the proper forum should have been the primary court in terms of section 18 of the Magistrate's Courts Act. **Second,** since in accordance with clause 26 of the appellant's constitution which was pleaded and

attached to the amended plaint, the disputes of the appellant have first to be resolved by the Supreme Council of Organizations and Institutions of Tanzania (BARAZA KUU) or any other Islamic organization authorised by the said BARAZA KUU, the matter at the trial court was brought prematurely. In addressing the issue and having considered the submissions of both parties, the trial court held at page 200 of the record of appeal as follows:

> *"In the event I find the 1st point of objection to hold water thus this court has no jurisdiction basing on the plaintiff's constitution and basing on this court's reasoning on non-disclosure as to whether the court has jurisdiction to hear and determine this matter, as there is no specific damages indicating whether this court has jurisdiction or not."*

Having held that, the trial court found it useless to consider the remaining points of preliminary objections and accordingly dismissed the suit. Aggrieved, the appellant appealed to the High Court faulting it for: **one**, not holding that as the suit pertained to declaratory orders based on tort, it was unnecessary for the appellant to plead special damages; **two**, failing to understand that the claim being tortious, the trial court had jurisdiction to determine even if there was no claim for special

damages; **three**, determining a point of preliminary objection basing on a document which was not exhibited into evidence; and **four**, failing to understand that the trial court had jurisdiction to determine matters which are incapable of being estimated at monetary value.

The High Court (Mutungi, J) having heard the appeal, upheld the first, second and fourth grounds of appeal and held, which is not in dispute, that since the primary court had no jurisdiction to hear cases relating to tort, the trial court was, in that respect, the proper forum. On the third ground wherein the trial court was faulted for determining the issue of the suit being premature based on a document which was not tendered into evidence, the first appellant court held that since an annexure is part of pleadings, in determining a point of preliminary objection, the trial court is entitled to make a perusal on it and determine the point. Having casted a glance over the attached copy of the appellant's constitution, the first appellate court held that, it was a mandatory requirement under article 26 of the said constitution for the dispute to be referred to BARAZA KUU before institution of the suit under discussion. To the extent of that ground, therefore, the appeal was dismissed.

Once again aggrieved, the appellant has brought the current appeal faulting the first appellate court for: **first**, upholding that the trial court

had jurisdiction and at the same time holding that it was premature to determine the suit; **two**, holding that there was a proof that the matter was referred to BARAZA KUU while the suit did not go for full trial; **three**, relying on the constitution of the appellant which was not yet admitted; **four**, using the constitution of the appellant to uphold decision of the Respondent who are not the member of the appellant and hence are not beneficiary; and **five**, failure to appreciate that tortious actions can only be adjudicated by the court and not private entities. In his submissions, however, the appellant through his counsel did not argue the third ground, we take it that it has been abandoned.

In the conduct of the appeal, the appellant was represented by Mr. Edwin Silayo, learned advocate whereas the respondents were represented by Mr. Engelberth Boniface, also learned advocate. When we invited him to address us on the grounds of appeal, Mr. Silayo fully adopted his written submissions without further arguments and prayed that the appeal be allowed with costs. Mr. Boniface did not file any written submissions. However, we allowed him to address us orally which he did and at the end he prayed that the appeal be dismissed with costs.

Having carefully considered the rival submissions in line with what is on the record, it may be desirable to determine the merit or otherwise

of the appeal. We shall start with the second ground where the High Court is criticised in holding that there was a proof that the dispute had never been referred to BARAZA KUU despite the fact that the suit was disposed of before trial. It was submitted that as proof is done during actual hearing, and, the matter at hand having been disposed of at the preliminary stages, the High Court was wrong in holding that there was a proof of the matter not being referred to BARAZA KUU.

This issue cannot detain us. We have carefully gone through the judgment of the High Court and satisfied ourselves that; the word "proof" has not been used in the said judgment in the context of proof of a fact during trial as suggested by the counsel for the appellant rather, it was used to mean that the plaint and its annexures does not reveal that the dispute had ever been referred to BARAZA KUU in terms of article 26.0 of the appellant's constitution. In our view, therefore, the second ground of appeal is devoid of any merit and is hereby dismissed.

We turn to the first ground of appeal as to whether the High Court was entitled to consider the correctness or otherwise of the trial court's determination of the issue of whether the suit was instituted prematurely. The contention of Mr. Silayo in that respect is that the High Court having faulted the trial court for holding that it had no jurisdiction to entertain

the matter, it should have remitted it to the trial court for trial instead of proceeding to consider and uphold the trial courts' determination of the issue of suit being premature. His reason being that such determination by the trial court was made without jurisdiction. In response, it was submitted for the respondent that since both the issue of jurisdiction and prematurity of the suit were before the trial court and they were argued and decided upon, the High Court was entitled to consider the same after resolving the issue of jurisdiction.

In the first place, we agree with Mr. Silayo that as a matter of law, once the trial court had established that it had no jurisdiction to entertain the suit, it could not proceed to determine the issue of the suit being premature as that ought to have been determined by a court clothed with jurisdiction. The limitation however, does not, in our view, extend to the High Court as the first appellate court. We think, as the respective issue was raised and determined by the trial court along with the issue of jurisdiction, the High Court, as the first appellate court was entitled in terms of section 76(2) of the Civil Procedure Code to examine into whether the suit before the trial court was proper regardless of the improper approach taken by the trial court. In our judgment, it would have been quite illogical for the High Court to remit the matter to the trial

court for trial despite the fact that it had from the record established that it was premature and more so, where the parties were heard on the issue at the trial court. It is for that reason that we find the first ground of appeal without merit and we dismiss it.

We now proceed with the fourth and fifth grounds of appeal which in essence raise an issue as to whether the High Court was correct in holding that the suit was premature. It was submitted for the appellant that, the dispute between the parties being tortious, it was incapable of being dealt with by BARAZA KUU under article 26.0 of the appellant's constitution assuming, which was denied, that the respondents were members of the appellant. In support of that, we were referred to the case of **Ali Said Kurungu & Others v. the Administrator General, the Registered Trustees of Masjid Mabox-Mtoni Sokoni & Others** (Civil Appeal No. 148 of 2019) [2023] TZCA 17279 (TANZLII) to the effect that, for the rule of exhaustion of remedies to apply, the reliefs sought must fall within the purview of the dispute settlement machinery existing between the parties. In refutation, it was submitted, there being no definition of the term dispute in the appellant's constitution, article 26.0 would apply to any dispute, including tort.

Much as we are in agreement with the counsel for the appellant on the principle that parties cannot refer a dispute in an ordinary court without exhausting the available dispute settlement machineries, it is our view that, for such principle to apply, the respective dispute settlement machinery must be capable of dealing with the dispute. In this case, the dispute pertains to a tort of trespass and interference with properties. The appellant is claiming declaratory judgment, injunction and damages. The said dispute, we have no doubt, cannot be resolved by BARAZA KUU under article 26.0 of the appellant's constitution. We took the same position in **Ali Said Kurungu** (supra) and in reaching thereto, we observed:

> *"The relief sought included general and specific damages. How would BAKWATA deal with this issue of tort? We understand the second respondent (the Registered Trustees of Masjid Mabox Mtoni Sokoni) is a legal person which can sue or being sued. So is BWAKATA".*

Guided by the above principle, therefore, we are of the view that, because the dispute at issue is based on tort wherein the appellant as a juristic person is claiming declaratory judgment, injunction and general damages, the same does not fall within the disputes envisaged in clause 26.0 of the appellant's constitution. The fourth and fifth grounds of appeal thus have merit.

In the final result and for the foregoing reasons, the appeal succeeds to the extent of the fourth and fifth grounds and it is hereby allowed. Consequently, we quash and set aside both the ruling and orders of the trial court and the decision of the High Court and remit the matter to the trial court for hearing starting with the remaining three points of preliminary objections which were not heard. Costs in the present appeal shall abide the outcome of the suit.

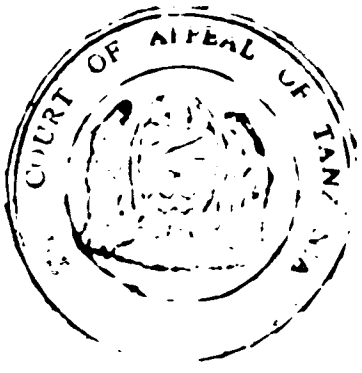
DATED at **MOSHI** this 16th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of March, 2024 in the presence of Mr. Edwin Silayo, learned advocate for the appellant and Mr. Engelberth Boniface, learned advocate for the respondent is hereby certified as a true copy of the original.



W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL