CIVIL APPEAL NO. 73 OF 2003- COURT OF APPEAL OF TANZANIA AT ARUSHA- RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.	**MR. ANJUM VICAR SALEEM ABDI Vs. MRS. NASEEM AKHTAR SALEEM ZANGIE (Appeal from the Decision of the High Court of Tanzania at Moshi- HC Civil Case No. 20 of 2001-(Munuo, J.)**	**Whether** following the demise of her husband the entire estate including the suit land devolved upon Respondent (i.e. wife of the deceased) and her four children (appellant inclusive) in accordance with **Islamic law** and values. **Whether Suit land** bequeathed to Respondent by the deceased through a duly executed Will. Rights of Women- Trial judge invoked Article 24 of the Constitution, Article 17 of the UDHRs, Section 3 (2) of the Land Act, 1999 and Article 15 (2) of the Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW). The latter provision *"confers equal rights to women in civil matters and*

		guarantees equal treatment before the courts and other tribunals over and above protecting women's contractual capacity". **Exclusion of Matrimonial Home from the administration of Estate of the Deceased in accordance with Islamic Law-** Revocation and/or validity of the grant of probatecan only be legally made and/or challenged under the provisions of the Probate and Administration of Estates Act, Cap. 352 and the Rules made thereunder. Similarly, the validity of the probate proceedings would only be competently challenged in an appeal to the High Court from the decision of the subordinate court granting probate and/or in revisional

		proceedings in the High Court either on its own motion or on application by an interested party. Whether the deceased died testate or intestate, its distribution to its beneficiary or beneficiaries, provided it was not disposed of by the deceased ***inter vivos,*** is governed by the laws on probate and administration of deceased estates. It was, therefore, wrong for trial judge to pick out only this property and give it to the respondent and then order that the residue of the estate *"be administered under Islamic Law"*. That partial distribution of the estate, in our view, was done prematurely.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.)

CIVIL APPEAL NO. 73 OF 2003

MR. ANJUM VICAR SALEEM ABDI ..... APPELLANT
VERSUS
MRS. NASEEM AKHTAR SALEEM ZANGIE ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 7th day of January, 2003
in
HC Civil Case No. 20 of 2001

JUDGMENT OF THE COURT

22 October & 30 November, 2007

RUTAKANGWA, J.A.;

The appellant is the first born in the family of the late Mr. Saleem Abdi Zangie (the deceased) and Mrs. Naseem Akhter Saleem Zangie (the respondent herein). The deceased died on 13th June, 1985 in London. In addition to his wife (the respondent) and the appellant, he was also survived by one other son Khalid and two daughters, all born of the respondent.

The deceased left behind an estate which included landed property. One such property was a parcel of land containing houses and a borehole described as Plot No. 27 Block JJJ Section III within the Municipality of Moshi or the suit land henceforth. It is this latter parcel of land which is the bone of contention between the appellant and the respondent in this appeal which emanates from Civil Case No. 20 of 2001 in the High Court at Moshi (the suit hereinafter).

It was the respondent who instituted the said suit against the appellant. The basis of the suit was that following the demise of her husband the entire estate including the suit land devolved upon her and her four children (appellant inclusive) in accordance with Islamic law and values. She further claimed that she and the two sons continued to live on the suit land while the two daughters who had secured permanent residence in England only visited them occasionally. However, in the year 2000 the appellant started problems. He cut off the supply of water from the borehole to the residential houses, unilaterally partitioned the main residential house into two sections and placed a notice at the main gate barring people, be they occupants or outsiders from hooting in order to have

the gate opened. She took all these acts by the appellant to be an unjustifiable interference in her right to a quiet possession and enjoyment of the suit land which she believed she had jointly acquired with the deceased and which was bequeathed to her by the deceased through a duly executed Will (Exhibit P1). She protested, but her protests fell on deaf ears. Instead of engaging in reprisals she resorted to the courts of law as shown above.

In the suit, the respondent prayed for the following reliefs:-

(a) A perpetual injunction against the appellant restraining him from arrogating the properties of the estate of the deceased to himself and harassing her and other family members;

(b) A declaration that she has a right to quiet possession and enjoyment of the matrimonial home;

(c) General damages for emotional anger, mental torture, pain and suffering;

(d) Costs of the suit.

The suit was firmly resisted by the appellant. He only admitted that he was the son of the deceased and the respondent. He, however, told the trial High Court that by a will duly executed by the deceased before the late advocate Trivedi in the presence of Eliud Mboya and Yusuf Lumerei on 13th January, 1983, the entire deceased estate, including the suit land, had been unreservedly bequeathed to him and his young brother Khalid. The said will was admitted in evidence as Exhibit D15. The said Eliud Mboya, testified in the case on behalf of the respondent as PW2 totally disowning Exhibit D15.

The appellant, who testified as DW4, went on to tell the trial High Court that on the strength of Exhibit D15, with his younger brother, they instituted probate proceedings in the Court of the Resident Magistrate at Moshi. This was Probate and Administration Cause No. 18 of 1986 (the Probate Cause henceforth). The two brothers were appointed by the said court as executors of the deceased Will dated 13th January, 1983 and were granted Letters of Probate (Exhibit D26) on 3rd February, 1987.

Although the appellant and his brother were granted Letters of Probate, his own evidence, and that of Hatizayo Mgalitinya (DW1), a Land Officer, Moshi Municipality, Taabu J. Nkya (DW2) the Assistant Registrar of Titles, Moshi, show that they had prior to the said grant of probate, successfully applied to be registered as the owners of the suit land. To prove this fact, the appellant tendered in evidence as Exhibit D7 the Certificate of Title in respect of the suit land. Exhibit D7 was signed by the appellant on 6th February 1986 and by Khalid on 8th February, 1986, before the late advocate Trivedi. Regarding the borehole the appellant testified to the effect that it was constructed by M/s M. A. Zangie & Company Limited between 1998 and 1999, that is long after the death of his father.

Concerning the claims of the respondent against him, he categorically told the trial High Court that his mother did not benefit from the estate save for sterling pounds 50,000 which their father had allocated to her. He accordingly prayed for the dismissal of the suit.

From the pleadings the trial High Court had framed the following issues:-

"(1) Whether the property on Plot No. 27 Block JJJ Section 3, Moshi Municipality was and is still matrimonial property.

(2) Whether the Plaintiff is entitled to half a share in the property described in issue one.

(3) Did the husband of the Plaintiff die testate?

(4) Is the Plaintiff entitled to any damages for harassment, mental anguish and other discriminatory malpractices from the defendant?

(5) Has the defendant effected development on the suit plot?

(6) To what reliefs are the parties entitled?"

In resolving these issues the learned trial judge doubted the authenticity of Exhibit D15 (the Will dated 13th January, 1983) which she took to be *"a creature of forgery"*. She then left the probating of it *"to the court which will deal with the succession of the estate of*

the deceased". Having so held she proceeded to annul the probate proceedings in Probate and Administration Cause No. 18 of 1986 as the Court of Resident Magistrate had no jurisdiction to entertain them. The learned trial judge then quashed and set aside *"all the transactions founded on the cause including the transfer and registration of the matrimonial property of the plaintiff in favour of the defendant"*.

Having eliminated the only basis of the appellant's claim of title over the suit land, the learned trial judge proceeded to invoke Article 24 of the Constitution of the United Republic of Tanzania, 1977, Article 17 of the Universal Declaration of Human Rights, Section 3 (2) of the Land Act, 1999 and Article 15 (2) of the Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW). The latter provision *"confers equal rights to women in civil matters and guarantees equal treatment before the courts and other tribunals over and above protecting women's contractual capacity"*. She then held as follows:-

> *"Issue 1 has to be answered affirmatively because the property on Plot No. 27 Block JJJ Section III has since the subsistence of the marriage of the late Zangie and the plaintiff, and until to date, been the matrimonial house of the said spouses. Because the late husband of the plaintiff did not specifically dispose of his share of the matrimonial house ….. the plaintiff being the surviving widow, is entitled to the entire matrimonial house for it was acquired through the joint efforts of the late Zangie and his widow. Issue two is thence resolved positively with a variation that the plaintiff is fully entitled to the matrimonial house on Plot No. 27 Block JJJ Section III."*

Issue No. 3 was answered negatively and the learned trial judge ordered that the deceased *"estate save for the matrimonial home of the plaintiff"* be administered under Islamic law. In order to promote reconciliation between the parties, the learned trial judge refrained from awarding any damages in the case. However, she issued a restraining order to the appellant barring him from *"interfering or in any way dealing with the property on Plot No. 27*

Block JJJ Section III Moshi". The appellant was also condemned to pay the respondent's costs in the suit.

The appellant was aggrieved. Through Mr. Joseph D'Souza, learned advocate, he has come to this Court, with eleven (11) grounds of complaint against the entire High Court decision. On the basis of the said eleven grounds of appeal the appellant is asking the Court to hold that the respondent's suit was time barred, or in the alternative, to order that the entire deceased's estate be administered under the provisions of the Probate and Administration of Estates Act, Cap. 352 R.E. 2002 and the property be distributed in accordance with Islamic law with the *status quo ante* being maintained. In the further alternative, the appellant prays for just compensation for all the un-exhausted improvements made on the 11-acre suit land.

The respondent, who was represented by Mr. Mughwai Alute, learned advocate, vigorously resisted the appeal. We were urged to dismiss it in its entirety with costs.

Although the appellant initially listed eleven grounds of appeal, when the appeal came for hearing, Mr. D'Souza abandoned two of them. The remaining nine grounds of complaint were ably canvassed by Mr. D'Souza. His arguments in support of the grounds of appeal were indeed refreshing. But so did Mr. Alute who displayed a lot of ingenuity in opposing the appeal. We cannot hope to do full justice to them but we pay sincere tribute to their visible efforts. We are saying so advisedly because after reading carefully the parties' pleadings, their entire evidence and the High Court's decision, we are of the decided opinion that the appeal can be disposed of on the basis of the second and fourth grounds of appeal taken together.

The two grounds of appeal read as follows:-

> *"(iii) The High Court erred in law in not ordering the parties to apply for probate or letters of administration and to let matters, issues and disputes as to the estate and its administration be decided in such proceedings under the Probate and Administration Act, Cap. 445.*

(iv) The High Court erred in purporting to make a division of matrimonial assets in a suit outside the ambit of s. 114 of the Law of Marriage Act, 1971".

Elaborating on these two grounds of appeal, Mr. D'Souza submitted that the power to order division of matrimonial property is exercisable only at the time of divorce or separation as provided in section 114 of the Law of Marriage Act, Cap. 29. This was not a suit for separation or divorce as the husband had long passed away before the suit was instituted, he argued. It was his further submission that the issue of division of matrimonial assets was mixed up with the issue of probate and administration of the estate. He went on to contend that the only remedy available to break the impasse the family members have found themselves embroiled in was to apply for proper letters of probate or administration under the provisions of the Probate and Administration of Estates Act, Cap. 352 R.E. 2002 and the estate be administered under Islamic law. Mr. D'Souza significantly pointed out that it is difficult to defend the orders of the High Court because the learned trial judge did not indicate whether she was exercising revisional jurisdiction in

overturning the probate proceedings in the Court of Resident Magistrate, Moshi and all the subsequent transactions founded on that cause. It could not have been so as the proceedings before her were neither appellate nor revisional, he argued in conclusion.

In response, Mr. Alute succinctly stated that the respondent was not seeking division of matrimonial property or assets in the suit. Her complaint was that as her interests were being threatened or interferred with by the appellant, they should be protected, he submitted. However, after observing that the High Court did not mix up the issues of division of matrimonial property and probate, but only made a *"decision in relation to the proprietary rights of the respondent in the suit house"*, he went on to assert that the High Court had the power to *"declare the plaintiff to be the owner of the suit property"*.

Mr. Alute's concluding assertion provides us with an appropriate starting point for our discussion. There is no gainsaying that the respondent never went to the High Court seeking division of matrimonial assets jointly acquired with her deceased husband. That

would have been inconceivable as well as risible as her husband had long passed away. Equally undisputed is the fact that the respondent was not asking the High Court to step into the shoes of the executor or administrator of the estate and divide it amongst the beneficiaries, of whom she is counted to be one. As already shown above, she was seeking a mere declaration to the effect that *together with her children*, who include the appellant, she has *"right to share in her deceased's husband's estate"*. Further to that declaration, as rightly put by Mr. Alute, she was seeking the court's intervention to protect her interests in the said estate against what she saw to be the appellant's overt acts of interference with them. That being the case can it be seriously argued or asserted that the High Court had the powers, in these particular proceedings, to declare the respondent as the sole and exclusive owner of the matrimonial home or the suit land because it was *"acquired through the joint efforts"* of the deceased and herself? Given these facts can it be convincingly and sustainably argued and/or held that the learned trial judge was right in annulling the proceedings in Probate and Administration Cause No.

18 of 1986 of the Court of Resident Magistrate, Moshi? Our short answer to each of these pertinent questions is in the negative.

We have provided a negative answer to the two questions for these two obvious reasons. **Firstly,** the validity or otherwise of the proceedings in respect of the said Probate and Administration Cause No. 18 of 1986 was not an issue in the suit in which the trial High Court was exercising original jurisdiction. The revocation and/or validity of the grant of probate to the appellant and his brother could only be legally made and/or challenged under the provisions of the Probate and Administration of Estates Act, Cap. 352 and the Rules made thereunder. Similarly, the validity of the probate proceedings would only be competently challenged in an appeal to the High Court from the decision of the subordinate court granting probate and/or in revisional proceedings in the High Court either on its own motion or on application by an interested party. The situation was different in Civil Case No. 20 of 2001.

Secondly, as we have already alluded to above, the suit land or the matrimonial home or property as the trial High Court labelled

it, formed part of the estate of the deceased following his death. Whether the deceased died testate or intestate, its distribution to its beneficiary or beneficiaries, provided it was not disposed of by the deceased ***inter vivos,*** was governed by the laws on probate and administration of deceased estates. It was, therefore, wrong on the part of the learned trial judge to pick out only this property and give it to the respondent and then order that the residue of the estate *"be administered under Islamic Law"*. That partial distribution of the estate, in our view, was done prematurely.

Indeed, after the learned trial judge had annulled the earlier probate proceedings (and all the transactions made on the authority of the annulled granted probate), the only logical thing to have been done was to advise the parties to apply for probate or letters of administration in a court of competent jurisdiction. Then all matters, issues and disputes in the administration and distribution of the estate would have been resolved therein, as correctly argued before us by Mr. D'Souza.

For the foregoing reasons, we are of the settled opinion that the learned trial judge erred in annulling the proceedings in Probate and Administration Cause No. 18 of 1986, the grant of probate, as well as all the transactions made on the strength of the granted letters of Probate. She was equally wrong in holding that the respondent was *"fully entitled to the matrimonial house on Plot No. 27 Block JJJ Section III"*, within the Municipality of Moshi.

We accordingly allow this appeal by quashing and setting aside the judgment of the High Court and all orders made therein. The *status quo ante* is hereby restored. Any person feeling aggrieved by the proceedings, decision and orders made in Probate and Administration Cause No. 18 of 1986 of the Court of Resident Magistrate, Moshi, is at liberty to appeal to or apply for revision in the High Court. If successful, proper proceedings under the Probate and Administration of Estates Act, Cap. 352 in respect of the entire deceased's estate should be instituted in a court of competent of jurisdiction, and the distribution of the estate shall follow in accordance with the governing law. As this is pitifully a family

dispute we order each party to bear his or her own costs in this Court and the High Court.

DATED at DAR ES SALAAM this 21st day of November, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR