

A (d) Wilful neglect on the party of the respondent.

(e) ...

B The appellant's complaints fell within the ambit of section 107(2)(d) of the Law of Marriage Act. As noted above, the learned District Magistrate was blinded from considering these by the assumption, which he made, that the Primary Court granted the Decree of Divorce solely on the ground that the respondent had failed to attend before the Conciliation Board. With respect, he erred. There was more than this on record to justify the Primary Court's decision. If he (the learned District Magistrate) was not in a hurry to write a brief and cursory judgment he would have found time to see the overwhelming evidence which the Primary Court considered in reaching its decision. C I hold that the Primary Court was justified in dissolving the marriage in this case. I restore therefore that decision and set aside that of the District Court. D

E Before me, the respondent pretended to be still in love with his wife. He revealed that she married another man after she was granted the decree of divorce by the Primary Court. She later divorced that other man too and is now with yet a different man. In the Primary Court, he (the respondent) agreed that his marriage with the appellant was ridden with conflicts and that they should be divorced. I fail to understand him now therefore when he says he would like her back. F The situation is almost impossible now, with the marriage she has contracted.

G It is for the above reasons that I allowed appellant's appeal in this matter.

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JUMA RAHISI NANYANJE v. SHEKHE FARISI

HIGH COURT OF TANZANIA
AT MTWARA

(Kyando, J.)

(PC) CIVIL APPEAL No. 24 OF 1985

(Appeal from the judgment of Newala District Court in DC Civil Appeal No. 21 of 1985)

Civil Practice and Procedure – Jurisdiction – Pecuniary jurisdiction of Primary Court – Whether a Primary Court may entertain a suit for recovery of a debt arising out of contract between natural persons exceeding the value of TZS. 10 000 000 – section 18(1)(a)(iii) of the Magistrates Courts Act 1984.

Family Law – Property – Property owned jointly between husband and wife – Death of one spouse – Property devolves on the survivor.

Contract of Sale – Jointly owned property between spouses – Death of one spouse – Whether the survivor upon whom the property devolves may dispose of such property.

F Farisi Mbwana and his wife jointly owned a house. After the death of the wife the husband sold the house to the appellant for TZS. 15 000 without informing his five children. One of the children successfully filed a suit in a Primary Court to recover the house on the grounds that their father could not validly sell the house which he jointly owned with their mother. An appeal by the appellant to the District Court challenging, among others, the jurisdiction of the Primary Court was not successful. G A further appeal was made to the High Court.

H **Held:** (i) The District Court Magistrate erred in holding that the Primary Court had pecuniary jurisdiction to entertain this matter by virtue of the provisions of section 18(1)(a)(ii) of the Magistrates Courts Act 1984;

I (ii) Since Farisi Mbwana and his late wife, the mother of the respondent, were joint owners of the house during her lifetime then, upon her death, and in the absence

A of evidence that she had bequeathed her share in it to some other person, property in the house devolved upon the husband;

B (iii) Since upon the death of the wife property in the house devolved upon the husband, he could deal with it as he wanted and, therefore, he could dispose of it by sale;

(iv) The sale of the house by Farisi Mbwana to the appellant was valid.

Appeal allowed

C Statutory provision referred to:

1. Magistrates' Courts Act 1984, sections 18(1)(a)(ii) and (iii)

JUDGMENT

D (Dated 03 October 1987)

E **KYANDO, J.:** This is a second appeal. The respondent Shekhe Farisi Mbwana had instituted a suit in the Urban Primary Court at Newala seeking to redeem a house which his father, Farisi Mbwana, had sold to the appellant, Juma Rahisi Nanyanje. He won in the Primary Court. The appellant was dissatisfied. He appealed to the District Court –
F against the decision of the Primary Court. The District Court upheld the decision of the Primary Court and dismissed appellant's appeal. Aggrieved by the decision of the District Court also, he is now appealing to this court.

G Here and in the District court the appellant has been represented by Mr Kumwembe, advocate. The respondent has been appearing in person.

H Briefly the respondent's father sold his house at Newala to the appellant, in 1983. the price at which the house was sold was TZS. 15 000. The house had belonged to Farisi Mbwana jointly with his wife, before the latter died in 1976. They, Farisi Mbwana and his late wife, were blessed with five children, the respondent herein
I being one of them. Farisi Mbwana sold the house to the appellant in

secrecy, without informing or consulting his children. In fact the children were not there when he sold the house. They had gone on safari. They came to know about the fact that the house had been sold alot later, when their father informed them that they were now tenants in the house and were to pay rent to the appellant as he had sold it to him. The respondent said he was surprised to hear this. He therefore filed a suit in the Primary Court to redeem the house. He told the Primary Court as follows:

Mimi nadai kurudishiwa nyumba iliyouzwa hapa Newala Mjini kwa huyu mdaiwa, kwa vile baba amemuuzia mdaiwa huyu bila ya halali yoyote, na nyumba hiyo ilijengwa kutokana na fedha za ushirika na ndoa baina ya baba na mama, na huyu mama hivi sasa ni marehemu, na baba alipouza nyumba hiyo hakutupa taarifa yoyote kuwa anauza nyumba hiyo na hata hisa ya huyo marehemu mama hakuwahi kutugawia, hivyo kuwa vile mimi sina mahala popote kwa kuishi, nadai mdaiwa arudishe nyumba hiyo katika mikono yetu nasi tayari kumrudishia mdaiwa fedha yote aliyonunulia myumba hiyo toka kwa baba maana baba ameuzwa kwa sisi bila ya kutufahamisha sisi watoto wake. Na sisi watoto tupo jumla watano na tunaishi katika nyumba hiyo hadi hivi sasa kwa vile hatuna sehemu ingine ya kuishi.

XXD by first Assessor

Wakati baba anauza nyumba hiyo mimi nilikuwa safarini na hakunieleza niliporidi mpaka baba akaanza kujiandaa kuhama hapa Newala na kwenda kuishi Mayao, na akasema hivi sasa mtamlipa pango huyu mdaiwa, mimi nikashangaa kwa vipi? Akasema hii nyumba niliuzwa, ndipo mimi nikatambua kuwa hii nyumba kumbe imeuzwa na kwamba imeuzwa TZS. 15 000.

Farisi Mbwana himself gave evidence for the respondent in the Primary Court. He confirmed that he had sold the house without consulting his children and it is clear from his evidence that he wants to support respondent's efforts to redeem it now.

As already stated, the Primary Court unanimously found for the respondent. It ordered the appellant to return the house to the respondent

A and that he in turn be refunded his TZS. 15 000. The appellant appealed to the District Court, as again already shown. There he lost again. In his appeal to this court he has set out three grounds of appeal in his Memorandum of Appeal which for convenience I produce below:

- B 1. The learned District Magistrate misdirected himself on the correct interpretation of sections 18(1)(a)(ii) of the Magistrate's Court Act 1984, and wherefore erred in holding as he did that the Primary Court from which the original appeal had originated, had pecuniary jurisdiction to entertain the suit.
- C 2. The learned District Magistrate erred in holding that the sale of the house between Farisi Mbwana and the appellant was not a valid contract without advancing any reasons to support such a holding.
- D 3. The learned District Magistrate misdirected himself on the meaning and use of the word "alimony" within the context of the instant case.

E The first ground arises from the decision of the District Magistrate on the following ground in the appeal to the District Court:

- (ii) That the trial court had no pecuniary jurisdiction to entertain and hear the suit as the value of the subject matter of the suit (that is the disputed house) exceeded the sum of TZS. 10 000

F In making this a ground of appeal the appellant had relied on sections 18(1)(a)(iii) of the Magistrate's Court Act 1984, which provides:

18(1) A Primary Court shall have and exercise jurisdiction

- G (a) in all proceedings of civil nature,
- (iii) for the recovery of civil debts arising out of contract, if the value of the suit does not exceed TZS. 10 000 (ten thousand). [emphasis supplied]

H In his decision on this ground the District Magistrate held that sections 18(1)(a)(iii) of the Magistrates Courts Act was not the one applicable to the present case. He held that sections 18(1)(a)(ii) was the one applicable. Section 18(1)(a)(ii) provides as follows:

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18(1) A Primary Court shall have and exercise jurisdiction :

- (a) in all proceedings of civil nature,
- (ii) for the recovery of civil debts, rent or interests due to the Republic, any District, City, Municipal or Town Council or Township Authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court for courts other than Primary Courts) right of occupancy, lease, sub-lease or contract, if the value of the subject matter of the suit does not exceed TZS. 20 000 (twenty thousand) ...

The learned District Magistrate reasoned thus in deciding on the ground just referred to herein above:

Section 18(1)(a)(ii) MCA'84 relates to recovery of civil debts, and which includes the right of occupancy to a subject matter which does not exceed the value of TZS. 20 000 The disputed sold house was sold for TZS. 15 000 The inferior court under the circumstances had pecuniary jurisdiction to entertain the suit.

With respect to the learned District Magistrate, in holding as he did nor the application of section 18(1)(a)(ii) of the Magistrates' Courts Act to this case he erred. Paragraph (ii) of section 18(1)(a) reproduced above relates to recovery of civil debts, rent or interest *due to the Republic or District, City, Municipal, Town Council or Township Authorities* under e.g. a right of occupancy, lease, contract etc. if that debt, rent or interest does not exceed TZS. 20 000 in value. The respondent in this case is not a Republic or District, City, Municipal Council etc. authority to come within the preview of the provisions of section 18(1)(a)(ii) of the Magistrates Courts Act. The District Magistrate therefore, as already held, erred in holding that the Primary Court had pecuniary jurisdiction to entertain this matter by virtue of these provisions of the law and Mr Kumwembe for the appellant is fully justified in complaining about his decision on the ground of jurisdiction.

Ground three in the Memorandum of Appeal to this court arises from the following paragraph of the judgment of the District Magistrate:

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A The evidence on record is that the respondent is among the born sons of Farisi Mbwana. Mbwana was married to their mother and the spouses succeeded to get five children in total. That during their matrimonial life they chanced to build in community a house which is now a subject matter
 B in this appeal. The allegation by Shekhe that the house was found (*sic*) by both of his parents, and his father has been evidently amalgamated with him. Shekhe had further testified at the inferior court, and which has not been denied by his father that the house was sold in-camera (*sic*).
 C That his agnates and himself were not informed of the purported sell (*sic*). *Inter alia* of these it was sold during his absence and his agnates. He and his agnates claim to redeem it as it was found jointly and thus they had alimony in it. [Emphasis supplied]

D Here again I agree with Mr Kumwembe that the use of the word alimony in the context of this case or as it appears in the above paragraph (the word appears again in the last paragraph of the judgment) was misplaced, such as the use of such other words as “amalgamated”,
 E “in camera” and “*inter alia*” in this paragraph. I think the problem here is one of language, i.e. lack of sufficient knowledge of the English language on the part of the learned District Magistrate. For his benefit the word “alimony” means allowance paid by a man to
 F his wife, or former wife, by a court order e.g. after legal separation or divorce. They way it has been used in his judgement in this case renders the paragraphs in which it appears incomprehensible.

G Finally, I turn to ground two in the appellant’s Memorandum of Appeal to this court. This, I think, is the crucial ground. The learned District Magistrate stated the issue on this grounds as follows:

H The *ratio decidendi* (*sic*) in this appeal is to whether Farisi Mbwana had the right to dispose the house in such a way and whether the purported sell (*sic*) was valid.

Both courts below held that the sale was invalid. In so holding the learned District Magistrate observed:

I It is not evidently rebutted by Mbwana in this case, I would rather refer him a seller, that he was married to the respondent’s mother, who is now

a deceased. The seller does not dispute the fact that he jointly found (*sic*) the house in dispute with the respondent’s mother during their young period (*sic*). It is not argued that during their marriage they were blessed children, including the respondent. So since it is conceded the house he obtained during the subsistence of a marriage there is a rebuttable presumption
 B that their beneficial interests therein were equal. The respondent together with his agnates are claiming of alimony what their deceased mother had shared with his father. Indeed I accede with their contention and thus Farisi had no right at all to dispose the house in such a way without contention
 C of his children. What Farisi did she sold the house in camera (*sic*) the sale (*sic*) which I declare it to be null and void. The respondent therefore has got the right to redeem the house on the benefit of other agnates.

D I have already explained the correct meaning of the word “alimony.” Here certainly respondent’s mother’s interest in the house during her lifetime was not “alimony” as she had not been divorced. Apart from this, I find it difficult to fathom the learned District Magistrate’s reasoning and conclusion in the paragraph I have just reproduced.
 E If, as is undisputed, Farisi Mbwana and his late wife, the mother of the respondent, were joint owners of the house during her lifetime, upon her death who inherited her interest in that house? Naturally her husband – the joint owner, in the absence of evidence that she
 F had bequeathed her share in it (the house) to some other person. Now if the house became the property of her husband Farisi Mbwana following her death, was he not entitled to deal with it in any manner he deemed fit? Was he not entitled to dispose of it by way of e.g.
 G sale, as he did in this case? Quite clearly he was. No evidence was led or accused showing how the children of the marriage acquired interest in the house to the exclusion of or during the lifetime of Farisi Mbwana. There is no evidence that their late mother bequeathed her share in the house to whom – by way of e.g. a will. The respondent’s
 H claim is based solely on the ground that their mother had a share in the house. With respect that share has now devolved upon their father, Farisi Mbwana, because he is still alive. When he sold the house he had full and complete rights to do so. If he was wrong in the view of
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A the respondent and the other children, that is a matter between them and their father, it is not one to affect the interests of the applicant in the house after he purchased it.

B There was no allegation of fraud practiced on Farisi Mbwana by the appellant when the former sold the house to him, i.e. the appellant. On the contrary, the evidence shows that it is Farisi Mbwana himself who went to the appellant and proposed to sell the house. There was no allegation of coercion against the appellant either in this transaction. C Nor has it ever been contended that Farisi Mbwana was of unsound mind when he sold the house. How then can the sale have been null and void? With deep respect to the two Lower Courts, the sale of the house to the appellant was perfectly valid. As I have said above D if Farisi Mbwana's children, including the respondent, are not happy about it they should blame their father. They should not seek to defeat the interests of another person who innocently purchased the house. They should perhaps claim a share in a TZS. 15 000 he (their father) E got for the house.

F For the above reasons, I hold that the sale of the house by Farisi Mbwana to the appellant Juma Rahisi Nanyanje was valid and the two courts below were wrong in holding that it was not. Their decisions are hereby set aside. The appeal succeeds with costs, here and in the two courts below. Order accordingly.

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MLIMANI FARMERS LIMITED v. TANZANIA BREWERIES LIMITED

HIGH COURT OF TANZANIA
AT ARUSHA

(Mroso, J.)

CIVIL CASE No. 16 OF 1988

Arbitration – Arbitrator's Award – Amount awarded by arbitrator negotiated downwards by decree holder's advocates – Whether proper.

Legal Profession – Holding Out – Advocate holding out before judgment debtor as still representing decree holder – Whether judgment debtor entitled to rely on such holding out by the advocate.

Legal Profession – Holding Out – Advocate holding out before judgment debtor as still representing decree holder and negotiates downwards the decretal amount in full settlement of the award and receives payment from judgment debtor on behalf of decree holder – Whether judgment debtor entitled to rely on such holding out by the advocate.

F The plaintiff, whose lawyers were Ngalo and Co. Advocates, was involved in arbitration proceedings with the defendant. The arbitration ended in the plaintiff's favour. More than a year after the conclusion of the arbitral proceedings the plaintiff filed an application in the High Court for execution of the Arbitral Award. The defendant pointed out that they had already settled the award by paying Ngalo and Co. Advocates, whom G they were made to understand, through their letters, that they were acting for the decree holders. After the close of the arbitration proceedings Ngalo and Co. Advocates, continued to hold themselves out as advocates for the decree holder and, communicating with the judgment debtor through letters, negotiated downwards the decretal amount H due to the decree holder and received the negotiated sum from the judgment debtor. The court considered the propriety of the actions of Ngalo and Co. Advocates.

Held: (i) Considering the background of Ngalo and Co. Advocates' role in the decree holder's case against the judgment debtor and the advocates' posture in the letters I