

THE LACUNA IN JUDICIAL SETTLEMENT OF  
ISLAMIC BANKING DISPUTES IN TANZANIA

BY

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## ABSTRACT

The appropriate dispute settlement mechanisms for Islamic banking pose critical legal challenges and raise great concern among legal fraternity and society. In Tanzania, there are various ways of solving Islamic banking disputes, which include judicial settlement, arbitration and mediation. However, the experience in Tanzania shows that judicial settlement is the most applicable method. This method to a certain extent, does not provide appropriate remedies to the disputing parties since some of the existing laws and courts' procedures do not accommodate the principles of Islamic banking. Therefore, this study aims to analyse whether the current judicial settlement of Islamic banking disputes in Tanzania provides the appropriate remedies for disputing parties. The study confines to the court structure, laws and procedures that govern Islamic banking disputes. The study analyses the situation by employing qualitative methods by adopting interviews from different respondents. The findings of the study show that the current judicial settlement of Islamic banking dispute does not guarantee appropriate remedies to the disputed parties since the laws exempt application of Islamic law in commercial transactions, the laws are silent on the unilateral promises, and the seller has no duty to inform the purchaser any defect of the goods. In addition, most of the laws contain provisions which allow interest, a debtor can be discharged from his debt without paying anything, after declared a bankrupt, and members of the company may avoid liability under a corporate veil. Again, the application of summary procedure denies defendant's right to be heard, expert opinion is required for foreign law only, and most of the judges have limited knowledge of the principles of Islamic banking. Therefore, the study recommends some measures to ensure judiciary settlement provides appropriate remedies in Islamic banking disputes. The measures include; establishing a Central Shariah Advisory Council, provide training for judicial officers and assign cases to judges who have knowledge of Islamic banking. Also there is a need for amendment of some provisions of laws to allow the application of Islamic law in commercial transactions, to recognise a unilateral promise, to make a bankrupt pay his debt and interest free in remedies. In addition, court procedure should be amended to make expert opinion binding to the court, to remove summary procedure and to allow payment of compensation (*ta'wid*).

## ملخص البحث

شكلت آليات تسوية المنازعات المتعلقة بالخدمات المصرفية الإسلامية تحديات قانونية حرجة، وتشير قللاً كبيراً بين الأخوة القانونية والمجتمع ككل. وتوجد في تنزانيا طرق مختلفة لحل النزاعات المصرفية الإسلامية، وتشمل التسوية القضائية والتحكيم والوساطة. ومع ذلك، تظهر التجربة أن التسوية القضائية هي الطريقة الأكثر تطبيقاً فيها، وهذه الطريقة لا توفر إلى حد ما سبل الانتصاف المناسبة للأطراف المتنازعة؛ لأن بعض القوانين وإجراءات المحاكم القائمة فيها لا تستوعب مبادئ الصيرفة الإسلامية، ومعظم المسؤولين القضائيين لا يفقهون الخدمات المصرفية الإسلامية. لذلك، تهدف هذه الدراسة إلى تحليل ما إذا كانت التسوية القضائية الحالية للنزاعات المصرفية الإسلامية في تنزانيا توفر سبل الانتصاف المناسبة للأطراف المتنازعة. وتقتصر الدراسة على هيكل المحكمة والقوانين والإجراءات التي تفصل النزاع المصرفي الإسلامي في تنزانيا. علاوة على ذلك، تحلل الدراسة الموقف من خلال استخدام الطريقة النوعية عبر مقابلات شخصية. ومن نتائج الدراسة أن التسوية القضائية الحالية للنزاع المصرفي الإسلامي في تنزانيا لا تضمن سبل الانتصاف المناسبة للأطراف المتنازعة عليها بسبب القوانين التي لا تسمح تطبيق الشريعة الإسلامية في المعاملات التجارية، وأنها صامتة على الوعود من جانب واحد، وليس للبائع مسؤولية لإبلاغ المشتري بأي خلل في البضائع، كما أن معظم القوانين تحتوي على أحكام تسمح بالربا، ويمكن إبراء ذمة المدين من الديون بدون أجر بعد إعلان إفلاسها، كما يجوز لأعضاء الشركة تجنب المسؤولية بموجب حجاب الشركات، وتطبيق الإجراءات الموجزة يحرم المدعى عليه من حقه في أن يسمع دعواه، كما أن المطلوب هو رأي الخبراء في القانون الأجنبي فقط مع أن معظم القضاة ليس لديهم علم بمبادئ المصرفية الإسلامية. لذلك، توصي الدراسة بأخذ ببعض التدابير التي تضمن التسوية القضائية وتوفير سبل الانتصاف المناسبة في النزاع المصرفي الإسلامي، وتشمل هذه؛ تعديل بعض القوانين؛ للسماح تطبيق الشريعة الإسلامية في المعاملات التجارية، والاعتراف بالوعد الأحادي، وسداد الدين للشخص المفلس، ورأي خبير ملزم، وإلغاء الإجراءات الموجزة، ودفع التعويض، وإنشاء المجلس الاستشاري الشرعي المركزي، وتدريب الموظفين القضائيين.

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## DECLARATION

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## **DEDICATION**

*To my late parents and my teachers*

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## LIST OF ABBREVIATION

AC	Appeal Case
All ER	All England Reports
C L J	Current Law Journal
Cap	Chapter
CIFCA	Center for Islamic Finance, Compliance and Advice
EA	East Africa
Et al	eat alia (and others)
EWCA	Court of Appeal of England and Wales
EWHC	High Court of Justice of England and Wales
F & F	Foster and Finlayson's Report
FMSLR	Federated Malay States Law Reports
HCD	High Court Digest
HCZ	High Court of Zanzibar
IFSB	Islamic Financial Service Board
IMF	International Monetary Fund
KBD	King Bench Division
LRT	Law Report of Tanzania
Ltd	Limited
MIMC	Malaysian International Mu'amalat Court
MLJ	Malaysian Law Journal
No.	Number
P.B.U.H	Peace Be Upon Him
QBD	Queen Bench Division
R. E	Revision Edition
S.A.W	Salla Allahu alayhi Wasalaam, (may the blessings and peace of Allah be upon him)
SACCO	Saving and Credit Cooperative
SGCA	Singapore Court of Appeal
TLR	Tanzania Law Report
TLS LR	Tanganyika Law Society Law Report
TLS	Tanganyika Law Society
TZS	Tanzanian Shilling
USD	United State Dollar
Vs	Versus (and)
Z L R	Zanzibar Law Report

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*Taylor v Caldwell* [1863] EWHC QB J1  
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# CHAPTER ONE

## INTRODUCTION

### 1.1 INTRODUCTION

The United Republic of Tanzania (Tanzania) is located in East Africa and surrounded by Kenya, Uganda, Rwanda, Burundi, Zambia Malawi, Mozambique and the Indian Ocean. Tanzania is a secular state<sup>1</sup> and its people are followers of different religions. The majority of them follow Islam and Christianity and others follow Hinduism and Traditionalist.<sup>2</sup> Unlike other parts of the world, Islam in Tanzania spread through trade many years ago when Muslims traders from different parts of the world visited the area for doing business with the local people.<sup>3</sup> Muslims traders used Islamic law in their daily life and settled their commercial disputes through the Islamic dispute settlement and this influenced the residents to use the same in those areas where Islam has spread largely until the European colonialists arrived.<sup>4</sup>

The United Republic of Tanzania (Tanzania) is a union between two sovereign states, which are Tanganyika and Zanzibar.<sup>5</sup> However, the country is neither unitary

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<sup>1</sup> Preamble, of the Constitution of the United Republic of Tanzania 1977. See also Mohammed, Makame Soud, "Prospect of Secularism and the Muslim Society of Zanzibar", *International Journal of Research and Innovation in Social Science*, vol. iii, no. v (2019): 308.

<sup>2</sup> Abel Majaliwa and William Amos Pallangyo, "The Influence of Religious Ethics on Preventing and Combating Corruption in Tanzania: The Christianity and Islamic Obligation", *The International Journal of Humanities & Social Science*, vol.5, no. 6(2017): 226. It should be understood that, Tanzania does not provide statistics on religious demography as a means to maintain unity among its people.

<sup>3</sup> Mohammed Bakari, "Religion, Secularism, and Political Discourse in Tanzania: Competing Perspective by Religious Organisations", *Interdisciplinary Journal of Research on Religion*, vol. 8 (2012): 6

<sup>4</sup> Hamidu Majamba, "Possibility and Rationale of Establishing Kadhi Courts in Tanzania Mainland", Paper prepared for presentation at the 20th REDET RMC Workshop Held in Council Chamber, University of Dar es Salaam, (2007): 2.

<sup>5</sup> Andrzej Polus and Wojcieh Tycholiz, "David versus Goliath: Tanzania's Effort to Stand Up to Foreign Gas Corporations", *Africa Spectrum*, vol. 54, no. 1(2019): 63.

nor federal but has a combination of both features.<sup>6</sup> Tanganyika is an inland country with a coastline of the Indian Ocean. Its population comprises of different ethnic groups such as Africans, Arabs, Asians and some Europeans. The location and natural resources in Tanganyika have created colonial interest from different European countries starting with the Germans followed by the British. On 9<sup>th</sup> December 1961, Tanganyika received its independence from the British. On the other hand, Zanzibar is an archipelago island in the Indian Ocean in East Africa.<sup>7</sup> The island consists of two major islands of Unguja and Pemba and other small islands. The location of the islands has made it into a cosmopolitan society,<sup>8</sup> due to the trade activities between Africa and Asia. On 10<sup>th</sup> December 1963, Zanzibar received its independence from the British. However, the first post-colonial government of Zanzibar lasted for only one month following the bloody revolution in 1964, which established a new government.<sup>9</sup>

Following the revolution of Zanzibar in 1964, the late President of Tanganyika Julius Kambarage Nyerere and the late President of Zanzibar Abeid Amani Karume signed the Articles of Union in which these two countries united and formed the United Republic of Tanzania (Tanzania) on 26<sup>th</sup> April 1964.<sup>10</sup> The nature of the union between Tanganyika and Zanzibar is neither unitary nor federal. It is a unique union since it accommodates some principles of the unitary and federal government. In 1965 through the Interim Constitution, the Union government added financial matters to be

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<sup>6</sup> Roop Sterling and et al, "The Politics of Continuity and Collusion in Zanzibar: Political Reconciliation and the Establishment of the Government of National Unity" *Journal of Modern African Studies*, vol. 56, no. 2 (2018): 247.

<sup>7</sup> Prendergast ME and et al, "Continental Island Formation and the Archaeology of Defaunation on Zanzibar, Eastern Africa." *PLoS ONE* (2016): 2.

<sup>8</sup>The People of Zanzibar are the mixture of Africans, Arabs, Persian, Indian and others.

<sup>9</sup>Erin E. Stiles, "How to Manage a Marital Dispute: Legal Pluralism from the Ground in Zanzibar", *UC Irvine Law Review*, vol. 6 (2018):285.

<sup>10</sup>Ethan R. Sander, "Conceiving the Tanganyika-Zanzibar Union amid the Cold War: Internal and International Factors" *African Review*, vol. 41, no.1, (2014): 35.