IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPLICATION NO. 346 OF 2023

KURBANALI AHMED KHAKI.....APPLICANT

VERSUS

REGISTERED TRUSTEES OF JAMAE

MADINA TUL-ILM MADRASA .....1ST RESPONDENT

ALI ALIASAGHAR TAGHAVI.....2ND RESONDENT

AHMAD MOHAMAD RAMEZANI .....3RD REPONDENT

MAHDI MAHMOUD MASNAVI.....4TH RESPONDENT

MORTEZA GHOLAMREZA MOHAMMADALINEJAD SHANI .....5TH RESPONDENT

SEYED JAVAD SEYED MEHDI YA GHOUBI ASTANEHSARI .....6TH RESPONDENT

MRTADHA YUSUFALI ALIDINA .....7TH RESPONDENT

THE ADMINISTRATOR GENERAL .....8TH RESPONDENT

THE ATTORNEY GENERAL .....9TH RESPONDENT

RULING

6th & 28th July 2023

MKWIZU J

This court in this application is being invited to exclude the 2nd to 7th respondents above from being the trustees of the 1st respondent. The dispute in this application revolves around the leadership of the Trustee, the 1st Respondent a registered trustee of JAMAE MADINATUL-ILMMADRASA which found its way into the Trustee's law books in February 1995 by the move by the Applicant, KURBANALI AHMED KHAKI and Murtaza Akberali Dewji(deceased) as founder members through the original constitution

dated 28/9/1994 with the assignment of establishing an education institution. The founding constitution was, in terms of the averment in the affidavit restrictive to maintaining only Trustees with Permanent Reident in Tanzania.

It is further avred that, the 1st respondent managed to acquire plot No. 192 Magogoni Street in the Kigamboni area and solicited a partnership with Al-Mostafa University an education institution from the Islamic Republic of Iran to establish an Islamic University. To facilitate the partnership, the proposal was tabled to amend the original constitution 1994 to incorporate *inter alia* the qualification of the trustees to that of ordinary residency of the United Republic of Tanzania from that of permanent residency as it was before the amendment. This proposal was geared to accommodate the representatives of Al- Mostafa Univesity trusteeship positions in the 1st Respondent.

It is on the records that the said amendment was approved by the 8th respondent on 29th November 2010. Subsequently in 2022, the 2nd to 7th respondent applied for and were appointed trustees of the 1st respondent. The applicant is aggrieved with the 2nd to 7th Respondent's appointment. He believes that the appointment contravene the 1st Respondent's (1994) constitution and he thinks that that appointment could not have been done under the 2010 constitution which was obtained in contravention of the 1994 constitution and on which the residency requirement would have disqualified the 2nd to 7th Respondent. The applicant is now in court seeking the following orders:

1. ***DECLARATORY ORDERS*** *that the 2nd to 7th Respondent are not members of the Board of Trustee of the First Respondent because;*

a) *Their election contravened Article 6 (c): 6 (d) and 6 (h) (iv) of the 1st Respondent's 1994 constitution*

b) ***ALTERNATIVELY TO*** *1(a) their election contravened Article 6 (d); 6 (C) and 6 (I) (VI) of the 2ST Respondent's 2010 Constitution*

c) *The remote (virtual) AGM proceedings and subsequent elections that elected the 2nd to 7th Respondent were not held within Tanzania but were organized and conducted from Iran and in a manner and style inconsistent with the spirit of the Trustees Incorporation Act, and*

d) *That the election of the 2nd to 7th Respondent contravened provisions of section 17 (2) of the Trustee's Incorporation Act as it could not be monitored and supervised by the 1st Respondents Supreme Religious Organisation*

2. ***DECLARATORY ORDERS*** *that the 2010 Amendment to the Constitution that formed the basis of the election of the 2nd to 7th Respondents was passed in contravention of Article 11 of the 1995 Constitution*

3. ***DECLARATORY ORDERS*** *that the applicant is currently the only surviving member of the Board of Trustees of the 12th Respondent.*

4. ***INJUNCTIVE ORDERS*** *permanently restraining the 2nd to 7th Respondents in interfering with the affairs of the 1st Respondent*
5. ***ORDERS*** *that the cost of the application be on the 2nd to 7th Respondents on account of their active role in fueling the dispute and confusion surrounding the 1st Respondent*
6. ***FURTHER ORDERS*** *that the 8th Respondent jointly with the applicant should regularise the affairs of the 1st Respondent and facilitate the appointment of the new Trustees and*
7. *Other orders and reliefs THIS Honourable Court deems fit and proper to grant*

The application was made under section 26 of the Trustees' Incorporation Act read together with section 68 (c) (e) and Rule 2 (1) of order 37 of the Civil Procedure Code supported by an affidavit of the applicant KURANALI AHMED KHAKI.

The application was disposed of by written submissions. The applicant's counsel contended that the annual general meeting that proposed the changes to the 1994 constitution of the 1st respondent was illegal for contravening the provisions of section 17 (1) and (2) of the Trustees Incorporation Act and clause 8(a) (i), (ii)and (ii) (d) of the 1994 constitution stipulating additional procedures to those stipulated by the statute on how to conduct an AGM. He said, there is no evidence of the attendance of the BAKWATA, as the supreme organization of the 1st respondent in the meeting that passed the amendment to the 1994 constitution in compliance with section 17(2) of the Trustees Incorporation Act, no evidence of the presence of monitors from Government in the meeting that made the changes to the

constitution and the number of the trustees in attendance and no notice was issued convening the said meeting vitiating whatever changes made and the appointment of the trustees leaving the remaining founder member, the applicant, the only valid trustee of the 1st respondent.

Seemingly in the alternative, the applicant's counsel argued that even if it is to be concluded that the 2010 constitution is valid, still the appointment of the 2nd to 7th respondent would remain invalid for contravening Articles 6(c) of the 1994 constitution and /or Alleged 2010 constitution which restricts the number of the trustees to below five. He finaly pressed for the grant of the reliefs sought in the chamber summons.

The 1st to 7th respondents' counsel opposed the application. He was in support of the amendment effected to the 1994 constitution stating that the amendment was properly effected and accepted by the trustees including the applicant the found member, blessed by the chairman, the applicant, and the secretary, Murtaza Akberali Dewji(deceased) via a letter dated 18/10/2010. He termed the allegation of refusal by the applicant's co-founder to bless the amendment by the applicant a mere statement without proof faulting the applicant for failure to demonstrate any illegality in the 2010 constitution stating that these challenges brought to court at this later stage from 2010 when the said amendment was sanctioned is an afterthought to be disregarded.

In support of the appointment of the 2nd to 7th respondents as trustees of the 1st Respondent, the respondent's counsel said, the appointment was sanctioned by the 8th respondent. He maintained that, the applicant has

attempted to apply some dubious means to exclude the 2nd to 7 respondents by substituting their names with his relative's names the trick that was exposed by the 8th respondent indicating that he is not a trust worth person. He implored the court to hold that the applicant's prayers are unrealistic, misleading, and unfairly presented for the detriment of the 1st respondent.

He prayed for the declaration that the appointment of the 2nd to 7th respondent was properly done and correctly blessed by the 8th and 9th respondents and therefore legally surviving Registered Trustees entitled to carry on activities of the Trust and that the 2010 constitutional amendment was proper. He lastly invited the court to dismiss the application

The 8th and 9th respondents' submissions were also in opposition to the application. The learned State Attorney maintained that both the amendment to the 1994 constitution and the appointment of the 2nd to 7th respondent were properly done and approved. He said the 2010 amended constitution was legally made by members' resolution and sanctioned by the 8th respondent on 29th November 2010 after notification of the changes forwarded to her via the letter dated 18th October 2010 stating specifically that the amendment was made by Mutual agreement of all board members of the trust signed by the Applicant as a chairman of the meeting signifying that all members were properly notified and attended the meeting thereto. He insisted that all the requirements under sections 17 (1) and (2) of the Trustee's Incorporation Act and Articles 8(i) (ii) and (iii)(d) of the 1994 constitutions were observed.

The learned State Attorney submitted further that, the 2nd to 7th respondents were legally appointed trustees members following the legal amendment of the constitution dated 22nd December 2010. To him, the 2nd to 7th respondents maintain the same legal status as that of the applicant in terms of article 6(c) of the 2010 amended constitution. He in conclusion prayed for the dismissal of the application with costs.

I have perceptively and with a deserving concern considered the application and the corresponding written submissions by the party's counsels. The applicant litanies are premised on section 26 of the TIA. The section is couched thus:

> *"26. When any question arises as to whether a person is a member of a body corporate or as to the vesting or divesting of any property under the provisions of this Act, any person interested in such question may apply to the High Court* ***for its opinion on such question*** *and notice of hearing shall be given to such persons and in such manner as the court shall think fit, and* ***any opinion given by the court on an application under this section shall be deemed to have the force of a declaratory decree****."(emphasis added)*

The court's assignment under the above section is to give an opinion on whether a person is a member of a body corporate or as to the entrusting or divesting of any property under the Act. This is actually the kernel of the applicant's application, querying the lawfulness of the 2nd to 7th

respondents' appointment as members of the Board of Trustees of the First Respondent.

It is a fact not controverted that, with the 1994 constitution, the 1st respondent had only two founder members, the applicant and Murtaza Akberali Dewji(deceased). The 2nd to 7th respondents came into the trusteeship via the complained 2010 amendment. It is thus obvious that the legality or otherwise of the complained appointment will appropriately be traced from the point of amendment of the 1994 constitution.

The applicant contends that the 1994 constitution was amended in contravention of 17 (1) and (2) of the Trustees Incorporation Act and clause 8(a) (i), (ii), and (ii) (d) of the 1994 constitution. And on the other hand, the respondent asserts that the amendment 2010 was properly effected through the proper procedure blessed by the founder trustees, applicant inclusive. It is the law in civil litigation that whoever alleges must prove. This is the settled canon of the civil cases in our jurisdictions governed by section 11O of the Evidence Act. The applicant in this case bear that burden and the standard of proof is always in the balance of probabilities.

Section 17 of TIA allows the Administrator General, the 8th respondent in this application to authorize a change of names of trustees or trustees of a body corporate or organization incorporated under that Act provided that there is held a lawful meeting of the body corporate or organization to elect a person or persons as trustee of such a body corporate or organization and that meeting is monitored by any of Government

authorities, or relevant supreme authority in the case of religious bodies corporate or organizations, by their statutes, charter or instrument of that body corporate or organization.

I have appraised the application and the parties' urgings. The arguments that the amendment of the 2010 constitution was taken in contravention of section 17 of TIA and or Clause 8 of the 94 constitutions came belatedly in the applicant's written submissions. It is not at all supported by the applicant's affidavit apart from the statements made in the prayer section in the chamber summons. It is well settled that submissions are not evidence, they are meant to reflect and elaborate on the facts and/or evidence already indicated in the pleadings but not a substitute of the same. See **The Registered Trustees of the Archdiocese of Dar es Salaam v. Chairman Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported) where the court held

> *" . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to 8 contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

The applicant's affidavit being a substitute for oral evidence in an application ought to have contained all necessary facts and points that are necessary for the court's decision. The applicant's counsel submissions went ahead to manipulate issues that were not the applicant's area of concern.

The applicant's challenge to the 1st respondent's 2010 constitution is found in paragraphs 8, 9,10, and 11 of the supporting affidavit asserting refusal by Murtaza Akerali Devji to sign the proposed 2010 amendment and non-sanctioning of the said proposed amendment by the 8th respondent: The paragraphs reads:

8. *I state further in connection with the foregoing paragraph that while I was at that time in agreement with the proposed amendment my c- Trustee and co- Founder, Murtaza Akberali Devji was not in favor of the constitution and declined to sign on the ground that the proposed representatives were not permanent residents in Tanzania and their commitment to establish residence was not readily forthcoming and intimated that hw will resign if this were to take place*

9. *I state further that in spite of the refusal by the said Murtaza AKbarali Devji to sign and endorse the proposed 2010 amendment to the 1st Respondent constitution it was endorsed by me and the (4) other would be representative of Al Mostafa University who we intended to elect as Trustees of the 1st Respondent.* ***A copy of the proposed amendment to the constitution that the co-founder and co- Trustee Muratza Akberali Devji refused to sign is annexed herein as JMI – 03 and leave is sought to rely on as part of this affidavit.***

10. *That notwithstanding the refusal to sign by Murtaza Akberali Devji said the 2010 amendment the 1st Respondent constitution was submitted to the 8th Respondent for approval and as approval is currently pending.*

11. *That the proposed change of Trustee that accompanied the proposed amendment of the constitution was never sanctioned by the 8th Respondent and as recent as 2019 when I made inquiries I was informed by the 8th Respondent that only recognized Trustees of the 1st Respondent are original co-founders.* ***In support of the above contention I rely on the latter dated 21/06/2019 attached to this affidavit as JMI – 4 and seek that it forms part of this affidavit.***

The applicant ought to have confined his written submissions on the above grounds brought on why he is doubting the legality of the 2010's constitution. The applicant's submission under the circumstance explained above was analogous to deposition from the bar worth ignoring.

Reverting to the issues on this point raised in the affidavit. A thorough assessment of evidence by the parties has failed to accredit the issues on the refusal by the applicant's co-founder to bless the said amendment and the non-sanctioning of the proposed amendment by the 8th respondent raised in the affidavit. As rightly stated by the leaned State Attorney for the 8th and 9th respondents, the proposed amendments were brought to the 8th respondent's attention through a letter dated 18th

October 2010 signed by the applicant himself as a chairman and Mr. Murtaza Akberali Devji(deceased), his co-founder as a secretary. There is no sworn evidence presented to the court disowning the said letter by the applicant. In fact, the applicant admits to have consented to the proposed 2010 amendment and forwarding the said proposal to the 8th respondent for approval in the same year 2010. The applicant's affidavit is silent on how he obtained the signature of his co-founder, Murtaza Akberali Devji whom he claims to have refused to sign, and why the two founders members and the only Trustees of the 1st respondent by then kept on maintaining the 2010 constitution passed in 2010 for twelve years without any complaint, just coming to court in 2022, after the death of one of them in 2020. I, for the above reasons, do not find merit in the applicant's complaint. Like the learned State Attorney, I am convinced that this complaint is being brought as an afterthought.

To make it worse, the applicant's reply affidavit filed in court on 1/12/2022 diverged his main story on why the 2010 constitution is invalid. In paragraph 5,6,7and 8 of the reply affidavit, the applicants stated as follows:

5. *That in further reference to paragraph 6 of the counter affidavit in respect of the 2010 amendment,* ***I am now advised that the 2010 amendments were not proper on account of being effected without the approval of the annual general meeting of the first respondent following the***

refusal to attend by the other co-founder Murtaza Akberali Devji

6. *That in response to paragraph 7 of the counter affidavit, I reiterate the content of paragraphs 8 and 9 of my founding affidavit about the refusal by my co-founder Murtaza Akberali Devji to sanction the proposed amendment to the 1994 constitution through the annual general meeting of the 1st Respondent, I state further that Murtza Akberali Devji refusal to sanction the amendment through the Annual General Meeting was a surprise to me on account of his initial approval of the amendment during the meeting of the Board of Trustees as demonstrated by the Board Resolution dated 18/10/2010 annexed to the affidavit of the first to seventh.*
7. *That,in addition to above mention paragraph 6: I state that to the best of my recollection: the* ***Board Resolution dated 18/10/2010 recommending changes to the 1994 constitution was not presented sanctioned by the Annual General Meeting of the first Respondent on account of the resistance to its convening by my co-founder, Murtaz Akbarali Devij. ..***

8. *That, in response to paragraph 8 of the counter affidavit I reiterate wharf I averred in paragraph 9 of my founding affidavit I state further* ***that my co-founder had refused to sanction***

the holding of the AGM to pass the 2010 amendment to the constitution. *(Bold is mine)*

In terms of the above paragraphs, the 2010's amendment is invalid for want of a proper Annual General Meeting (AGM) after the refusal by the applicant's co-founder member to attend the same. I think this version is far different from the main ground presented in the main affidavit creating a serious ambiguity in the applicant's evidence sufficient to discredit his credibility.

It is also deposed in paragraph 11 of the supporting affidavit that by 2019 the 8th respondent had informed the applicant through a letter dated 21/6/2019 that the only recognized trustees are the applicant and his co-founding members (the deceased). I have gone through the said letter, as rightly stated in the 8th and 9th respondents' counter affidavit, the letter was instructing the applicant to comply with the laid down procedures. The naming of the applicant and his co-founder member in item 4 of the said letter came in while giving a historical background of the Trust and not a confirmation of the legally recognized Trustees of the 1st respondent at that particular moment as suggested by the applicant.

This takes me to whether the appointment of the 2nd to the 7th respondent was lawfully done under the 2010 constitution. It is the applicant's averments that (i) the election contravened the residency requirement in the 1st respondent's 2020 constitution,(ii) The remote (virtual) AGM proceedings and subsequent elections that elected the 2nd to 7th Respondent were

organized and conducted from Iran and in a manner and style inconsistent with the spirit of the Trustees Incorporation Act, and (iii)that the election of the 2nd to 7th Respondent contravened provisions of section 17 (2) of the Trustee's incorporation Act as it could not be monitored and supervised by the 1st Respondents Supreme Religious Organisation.

The residency requirement of the member of the trustee in the 1st respondent 2010 constitution is covered under Article 6 providing for *inter alia* the qualification of member trustee, the required number, mode of election, tenure, and secession. Articles 6(c) and (d) provide the number of trustees to be not less than 3 and not more than seven, residents of the United Republic except one who should be a citizen of the United Republic.The article is crafted thus:

> "*Article 6 (c) the trustee of the Jamae shall not be fewer than three persons or more than seven persons . They shall have the power to elect one trustee as the chairman of the Board of Trustees*
>
> *(d).All trustees must be residents in the United Republic of Tanzania with a minimum of one of the trustees being a Tanzanian citizen. All members of the Board of Trustees should be of a minimum age of 21 years.*
>
> *(e) in the event of a vacancy, new trustees shall be appointed at the Annual or Extraordinary General meeting except the founder trustees. The trustees shall hold office for a period of five years from the date of election and shall be eligible for re-*

election upon the expiry of such a period. The election of the Trustees will be on the recommendation of Jamae Al Mustafa Al Alamiah"

It is not in dispute that the complained trustees are seven in number, applicant inclusive, and therefore in line with the above article. There is no disclosure of the residency information of the 2nd to 7th respondents in this matter to assist the court in ascertaining the validity or otherwise of the complaint over the trustee's residency. This is a court of law where each fact presented for a decision, must be established by evidence. The courts have never and will certainly not engage in considering undressed assertions. This point therefore fails.

Next is the issue relating to meetings held virtually, organized, and conducted from Iran in a manner and style inconsistent with the spirit of the Trustees Incorporation Act. There is no doubt that the 1st respondent AGM dated 19th February 2022 was held online as exhibited by the minutes of the said meeting attached to paragraph 14 of the 8th and 9th respondents. The question to ask is whether such a recourse is restricted by the TIA or the 1st respondent's constitution for that matter. I have perused the law and the 1st respondent's constitution and there are no provisions restricting online meetings. This point also fails.

I will now move to the last point as to whether the election of the 2nd to 7th respondent was conducted in contravention of section 17(2) of the TIA. I will reproduce the said section for convenience:

> " *17 (2) In the case of* ***religious bodies corporate or organizations,*** *they shall each* ***be monitored by their respective relevant supreme authority in Tanzania by their statutes, charter or instrument*** *of that body corporate or organization."(emphasis added)*

Section 17 (2) prescribes a mandatory requirement for monitoring meetings of religious body corporate. Interpreting the same provisions, this court in **The registered Trustees of Noor Masjid Dodoma V Jafary Manyemba and 11 others**.DC Civil Appeal No 20 of 2020, (unreported) this court had this to say on page 12 of the typed decision.

> *"It has its context which is a change of names of trustees and meetings to that effect. It is my considered view that the* ***role of supreme authority, such as BAKWATA, in terms of sub-section (2) of section 17 of the Act is to monitor the process of change of names of trustees****. In other words, the role of such supreme authority is, therefore, to see to it that changes are executed by the constitutions of the religious bodies corporate or organization making the change"(bold is mine)*

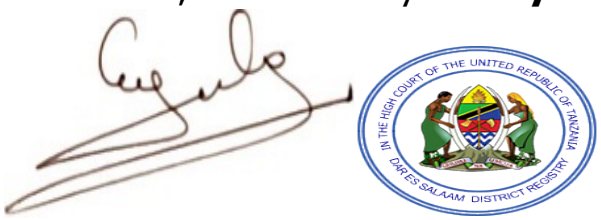
In terms of the facts deposed in paragraph 14, of the 8th and 9th respondents' counter affidavit, the 2nd to 7th respondents were elected in the meeting held on 19th February 2022. The minutes of the said meeting attached to that paragraph exhibit the presence of the representative from BAKWATA, by the name of Mr. Abdulkarim H. Majaliwa. And the changes were approved by the 8th respondent through her letter with reference No.

ADG/T1/1318/55 dated 14/4/2022 the facts which remain undisputed in both the reply affidavit and applicants' written submissions. I do not find merit in this claim as well.

This court is thus of the firm view that the applicant has failed to establish sufficient grounds in support of his application to the required standards. Consequently, the application is dismissed with costs.

Order accordingly.

Dated at **Dare es salaam**, this **28th** Day of **July 2023**



E. Y Mkwizu
Judge
28/7/2023