

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LAND CASE NO.20 OF 2021**

**ZAINABU HUSSEIN LARUSAI** (*As a guardian of Said Hussein,*

*Abdu Hussein, Halima Hussein, Hanifa Hussein, Ally Hussein and*

*Hussein Hussein*) ..... **PLAINTIFF**

**Versus**

**THE REGISTERED TRUSTEES**

**OF AHLUL- BAIT CENTER.....1<sup>ST</sup> DEFENDANT**

**THE REGISTERED TRUSTEE**

**OF ANSAARUL IMAMIYYAH.....2<sup>ND</sup> DEFENDANT**

**SHEIKH ABDULRAZAK AMIR MSUYA@**

**ABDULRAZAK AMIR JUMA MSUYA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**14/12/2023 & 7/02/2024**

**GWAE, J**

The plaintiff, Zainabu Hussein Larusai has instituted this civil suit as a guardian of her six (6) children namely; Said Hussein, Abdu Hussein, Halima Hussein, Hanifa Hussein, Ally Hussein and Hussein Hussein. The plaintiff's suit against the defendants notably; the Registered Trustees of Alhul-Bait Centre (ABC), the Registered Trustees of Ansaarul Imamiyyah and Sheikh

Abdulrazak Amir Msuya, is based on the plaintiff's deed of gift (wakf) of the house located at Plot No. 39 Block "H" with a certificate of Title No. 9664 situated in Arusha Municipality now Arusha City (suit/disputed property). To avoid prolongation of the judgment, the defendants, the Registered Trustees of Alhul-Bait Centre, the Registered Trustees of Ansaarul Imamiyyah and Sheikh Abdulrazak Amir Msuya shall hereinafter be referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant respectively.

According to the plaintiff, the wakf made in 2001 was intended to the 2<sup>nd</sup> defendant and the same was to be approved by beneficiaries (plaintiff's six children) and some members of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The plaintiff further alleges that, on 27<sup>th</sup> November 2020, she astonishingly discovered that, the suit property had been fraudulently and without the requisite consent of the beneficiaries transferred to the 1<sup>st</sup> defendant instead of the 2<sup>nd</sup> defendant. Following the alleged transfer of the suit property to the 1<sup>st</sup> defendant, the plaintiff is now claiming against the defendants herein jointly and severally for;

1. A declaration that, the transfer of a landed property to the 1<sup>st</sup>

defendant was illegal and ineffectual and that it be transferred to the 2<sup>nd</sup> defendant as intended by the plaintiff and in the event the 2<sup>nd</sup> defendant refuses, the ownership revert to the plaintiff

2. Perpetual injunction restraining the defendants, their agents and any one acting under their authorization from meddling with the said suit property counter to the wishes of the plaintiff
3. General damages for mental anguish and suffering
4. Any other relief (s) and or orders that this court may deem fit to grant
5. Costs of the suit

Through joint amended written statement of defence, the defendants fervently denied to have fraudulently transferred the suit property by stating that, at no time before the institution of this lawsuit the plaintiff offered the same to the 2<sup>nd</sup> defendant. The defendants jointly avowed that, the plaintiff sometimes in 2001 approached one Ghulam Hussein now

deceased, former trustee of the 1<sup>st</sup> defendant together with 3<sup>rd</sup> defendant and informed them of her intention to donate by way of an unconditional gift (wakf) the suit property to the 1<sup>st</sup> defendant for construction of a Mosque thereon. According to the defendants, the wakf was in the fulfillment of the wishes of the plaintiff's late husband one Sheikh Hussein Said Larusai (hereinafter deceased) who was one of the 1<sup>st</sup> defendant's founders). The defendants also contended that in 2000 and 2001 as well as 2002, the 2<sup>nd</sup> defendant was not existent. According to defendants, it was formally incorporated on the 26<sup>th</sup> day of July 2006 and that, the said wakf was complete, unconditional and irrevocable after the plaintiff's execution of the deed of transfer followed by an authorization by a land officer.

However, the 1<sup>st</sup> defendant filed a counter claim against the plaintiff for a declaration that she is the lawful owner of the suit property acquired from the plaintiff on the 14<sup>th</sup> day of November 2001 by way of wakf and permanent injunction against the plaintiff and any other person acting under her instructions.

Alternatively, the 1<sup>st</sup> defendant claims against the plaintiff for the payment of Tanzania Shillings 651, 300,000/= being unexhausted developments made on the suit property after she had demolished the deceased's dilapidated tin, mud and stone house and replaced it with a modern two storey mosque and cost of the case.

The plaintiff filed her amended reply to the defendants' amended written statement of defence by admitting the intended fulfillment of the wishes of the plaintiff's late husband (A founder of the 1<sup>st</sup> defendant now deceased).

However, she replied that, the handing of the certificate of title to the 2<sup>nd</sup> defendant was made in understanding that, her registration would take place before the transfer otherwise she could not be registered as she did not have any other landed properties. She also disputed the amount claimed by the 1<sup>st</sup> defendant as an alternative prayer.

She reiterated in her both replies to the defendants' amended written statement of defence and the 1<sup>st</sup> defendant's amended counter claim that, the transfer of the suit property was forged on the following particulars;-

• **First**, the plaintiff's signature appearing in the deed of transfer differs  
• from other of her signatures in other documents that, she duly signed.

**Second**, names of the deceased's heirs in whose favour the title was held are missing and **Thirdly**, an identity of the state attorney purporting to have witnessed the transfer is missing and also the date and place of execution are not disclosed.

The plaintiff further disputed her awareness of the 1<sup>st</sup> defendant's ownership by stating that, she was under honest belief that, the suit property was under possession of the 2<sup>nd</sup> defendant.

In his reply to the plaintiff's amended WSD to the counter claim, the 1<sup>st</sup> defendant averred that, the value of the suit property has been admitted by the plaintiff through paragraph 19 (c) of her amended plaint. She also stated that, the consent of the deceased's heirs was neither necessary nor required, as the said deceased person had donated the suit property to the God Almighty unconditionally.

The plaintiff's suit and the 1<sup>st</sup> defendant's counter claim underwent several preliminary objections. Prior to my presiding over the matter on

13<sup>th</sup> July 2023, **Hon. Philip, J**, who was the presiding judge until on 22<sup>nd</sup> June 2023 when she was transferred to another duty station. More so, following the ruling delivered on 16<sup>th</sup> March 2023 by the trial predecessor, issues for court's determination were subsequently reframed after consultation with the parties' advocates. Throughout the trial of the case, Mr. Wilbad Massawe assisted by Ms. Fatuma Amir and Mr. Alute Mughwai assisted by Mr. Muhammadon Majura, all the learned advocates appeared in court representing the plaintiff and defendants respectively. The issues reframed are;

1. Whether the 1<sup>st</sup> and 3<sup>rd</sup> defendant had fraudulently and illegally transferred the ownership of the suit property to the 1<sup>st</sup> defendant from the plaintiff.
2. Whether the said wakf was conditional and revocable by the donor's successor in title
3. Whether the plaintiff had signed the transfer deed for the suit property and eventually transferred ownership of the property to the 1<sup>st</sup> Defendant.

4. Who between the plaintiff and 1<sup>st</sup> defendant is the legal owner of the suit property.
5. If issue No. 4 is answered in favour of the plaintiff, whether the 1<sup>st</sup> defendant is entitled to compensation to the tune of Tshs 651, 300,0000/= for the unexhausted improvements on the suit property.
6. To what reliefs are the parties entitled to

Hearing of the plaintiff's suit and 1<sup>st</sup> defendant's counter claim was conducted simultaneously. In proving her case and entering defence pertaining the 1<sup>st</sup> defendant's counter claim, the plaintiff summoned seven witnesses. The plaintiff's witnesses were as follows; Athumani Amiri Hamis (2<sup>nd</sup> defendant's member-PW1), Abdulraham Hussein Larusai (Plaintiff's son-PW2), Ales Shiyo (land officer-PW3), Zainabu Hussein Larusai (PW4), Martine Esakina Papa (forensic/handwritings expert-PW5), Doto Paul (a land officer-PW6) and Janeth Robert Mandara-(Rita's legal officer-PW7). The plaintiff also was able to tender the following exhibits;

1. Declaration of Trust known Answaarul Imamiyah Society Arusha made on 20<sup>th</sup> April 1998 (**PE1**)



2. 2<sup>nd</sup> defendant's certificate of incorporation dated 26<sup>th</sup> July 2005 **(PE2)**
3. Minute of the 2<sup>nd</sup> defendant's meeting held 21<sup>st</sup> June 2020 involving her members (80 attendants) whose agenda were Constitution and leadership change/election **(PE3)**
4. 2<sup>nd</sup> Defendant's constitution with its founder members namely; Abdallah Salum Abdallah, Sheikh Ghulam Okera, Sheik Abdurazaaq Amiri (3<sup>rd</sup> defendant-DW4), Abudhari Ali and Abbdallah Bashiri-DW3 **(PE4)**
5. The 1<sup>st</sup> defendant's Returns of Trustees for 2001, 2000 and 2002 indicating the following names as her trustees, Abasi Mohamed, Abubakary Salum Magwe, 3<sup>rd</sup> defendant, Gullam Hussein, Maulid Hussein Sombi and Ali Omar Saleh **(PE5)**
6. An application letter for official search of 29<sup>th</sup> November 2021 to the Arusha City Council written by one PW3 **(PE6)**
7. Plaintiff's Demand letter dated 11<sup>th</sup> May 2021 addressed to the defendants authored by Mawala's advocate & Company **(PE7)**
8. A transfer of right of occupancy by the plaintiff in consideration of natural love and affection to the 1<sup>st</sup> defendant bearing no plot number, title number, land office number, indicative of the year (2021) it was entered

- .. but undated (**PE8**)
- 9. A Certificate of registration of a forensic expert, Martin Esakina Papa-PW5 (**PE9**)
- 10. Forensic report and its Authentication dated 26<sup>th</sup> September 2023 by Hon. Sharon Deputy Registrar for a signature of one **Amota Nyasae**, a commissioner for oaths bearing no date (**PE10**)
- 11. Bakwata affirming letter dated 22<sup>nd</sup> October 2002 for construction of a mosque of Board of Trustees of the 2<sup>nd</sup> defendant addressed to RITA, Administrator General (**PE11**)

The oral evidence adduced by the plaintiff's side is to the effect that, it was the 2<sup>nd</sup> defendant through her trustees and others who approached the plaintiff in 2001 in order to be given a place to do prayers (sala). According to PW1, those persons whom she met at her residence were; Yusuph Kondo, Abdallah Salum, Abudhari Ali Bakari, Ghulam Okera, Seif, Pissii and Abdallah Bashiru (DW3).

It is further the evidence of PW1 and PW4 that, the certificate of title was handed over to the said 2<sup>nd</sup> defendant's members under common trust. According to PW1, PW2, PW3 and PW4, the ownership of the suit property

by the 1<sup>st</sup> defendant came into their knowledge through the 2<sup>nd</sup> defendant's meeting held on the 21<sup>st</sup> June 2020. After the awareness of the existing possession by the 1<sup>st</sup> defendant instead of the 2<sup>nd</sup> defendant, PW2 made necessary follow ups including official search (PE6) where it was disclosed by the land office (PW3) that, the ownership of the disputed property was transferred to the 1<sup>st</sup> defendant since 2001.

It is also the evidence by the plaintiff that, upon such discovery of questionable transfer of the property, there was examination of handwritings especially signature of the plaintiff appearing in the deed of transfer (PE8) by a forensic expert from the Republic of Kenya, PW5, who was approached by PW1 as the plaintiff's agent. According to PW5, the signatures appearing in PE8 purporting to be of the plaintiff was a forged one. PW5 told the court that, there is 70%-50% accuracy against error of his examination though when cross-examined by the defence counsel, he told the court that he faced limitations in his examination since he was supplied with copies of the as disputed signatures by PW1.

The plaintiff also testified that, the title of the suit property should revert to her since the 2<sup>nd</sup> defendant is not willing to accept it as wakf. However, when under the lead of Miss Fatuma Amir she replied she is not

interested in the property if, the same is used for religious prayers. It is further the plaintiff's evidence through herself, PW1, PW3 and PW6 that, there was no requisite consent on the part of the heirs of the deceased save that of one Hanifa Hussein who was aged 20 years by then (2002). Hence, according to them the transfer was illegal.

On the other hand, the defendants entered their defence by calling their four witnesses namely; Abas Mohamed Sabuni (the 1<sup>st</sup> defendant's founder and trustee-**DW1**), Felix Albert Kilewo who appeared for the 1<sup>st</sup> defendant (A retired authorized land officer from 2001 to 2002-**DW2**), Abdallah Bashir (2<sup>nd</sup> defendant's trustee-**DW3**) and one sheikh Abdulrazak Amir Msuya (1<sup>st</sup> defendant's trustee-**DW4**). It was the oral testimonies of the defendants' witnesses especially DW1 and DW4 that, the plaintiff revealed the intention of her late husband to give the 1<sup>st</sup> defendant as wakf and on condition that a mosque be built on the suit plot. Subsequent to disclosure of the deceased person's intent, the plaintiff called the 1<sup>st</sup> defendant's leaders/trustees namely; Sheik Ghulam Okera (now deceased), Abdallah Salum (deceased person), Sheik Hussein Sweile and 3<sup>rd</sup> defendant at her residence, to whom she handed over the certificate of title in the year 2001.

The defence by DW1, DW2 and DW4 is also to the effect that there was transfer of the right of occupancy of 14<sup>th</sup> November 2001 witnessed and duly signed by the commissioner for oath, donor/plaintiff and donee's representatives (Chairperson, Secretary and treasurer). The defence also testified that, after the signing of the transfer, all documents were handed over to the 1<sup>st</sup> defendant's trustee one Ghulam Okera who sent the same to Moshi for registration purposes.

The defence through DW4 also testified that, the plaintiff's giving or offering of the suit land followed by the transfer of the same was lawfully as the wakf was intended to the 1<sup>st</sup> defendant and not to the 2<sup>nd</sup> defendant. The defence via DW4 questioned the truthfulness of the plaintiff's claims on the basis that, she failed to call some of the vital witnesses whom she said were present during her alleged giving of the right of certificate of title. The said persons are; Yusuph Kondo, Abdallah Salum, Abudhaa Ghulam, Seif, Abdallah and others) especially those who are alive to date and they had been attending hearings of this suit. DW4 further pondered PW4's evidence in that, if truly she handed over the suit property to the 2<sup>nd</sup> defendant she could join them as plaintiff or she could take immediate action since she was aware of the construction between 2001 and 2004.

In support of the oral testimonies given by the defendants' witnesses, there were a number of exhibits that were tendered, these were;

1. The 1<sup>st</sup> defendant's certificate incorporation issued by the Administrator General of Trustee on 4<sup>th</sup> May 1998 and its rectified certificate inserting "L" after the word "AHLU" issued on 12<sup>th</sup> November 2021, (**DE1** collectively)
2. Returns of Trustees as in PE5 above which were admitted as DE2
3. Transfer of Right of Occupancy dated 14<sup>th</sup> November 2001 bearing Title Number 9664, Land Office Number 132412, at the back bearing the name and signature of an authorized land officer, DW2 (Kilewo) as well as consent whose fees were paid on 22<sup>nd</sup> March 2002
4. Deed of Transfer of Right Occupancy, Plot Number, with number 9664, F.D No. 14675 issued on 22<sup>nd</sup> May 2022 duly signed by assistant Registrar of Titles one Nkya by then (**DE4**).
5. Certificate of Occupancy issued in the name of the plaintiff as the Guardian of her children named herein on 26<sup>th</sup> November 1992. It also bears Title No. 9664, Land Office No.132412. At the back, it is indicative that the Right of Occupancy was transferred to the 1<sup>st</sup> defendant with filed document No. 14675 registered on 22<sup>nd</sup> May 2002 at 11:30 hrs by Assistant

Registrar of Titles (**DE5**)

6. Building permit on the suit land Plot No. 39 BLOCK "H" Arusha Municipality issued on 26<sup>th</sup> May 2002 (**DE6**)
7. Demand letter dated 11<sup>th</sup> May 2021 (**DE7**), which was also admitted as **PE7**
8. Valuation Report of Conducted dates of May 2021 (**DE8**)
9. RITA'S reply letter of 17<sup>th</sup> March 2021 to the 1<sup>st</sup> defendant's trustees letter of 30<sup>th</sup> January 2021 introducing new trustees namely; Abasi Mohamed Sabuni, Abubakar Salim Magwe, Abdurazak Amir Msuya, Ali Omar Swalehe and Maulid Hussein Sombi (**PE9**)
10. RITA'S letter of 31<sup>st</sup> March 2021 requesting Athumani Amir Hamis, PW1 to return of original letter dated 18<sup>th</sup> February 2021 addressed to the 1<sup>st</sup> defendant's trustees (**DE10**)

This is what briefly transpired during pre-trial and trial of the plaintiff's case and the 1<sup>st</sup> defendant's counter claim. After close of the parties' case on the 11<sup>th</sup> day of October 2023, the parties' advocates requested and obtained leave of the court to file their respective closing submissions. As I am not going to briefly reflect their final submissions except due consideration of the same while composing my judgment. In

that premises, it is apposite as of now to heartedly thank the learned advocates for the parties, for their industrious work towards making of this judgment.

Before embarking to the determination of the re-framed issues, I shall start with the issue of limitation of time as raised during preliminary hearings and during trial by the defence side as well as reflected in the defence closing submission. I am alive of the law with effect that a party to a proceeding must file his or her suit within the prescribed period as correctly submitted by the defence counsel.

In our present case, the plaintiff ought to have filed her suit within twelve (12) years' period from the date of accrual of action as provided under item 22 to the Schedule of the Law of Limitation Act, Cap 89, Revised Edition (LLA). This position of law was correctly and judiciously stressed in **Public Trustee and another vs. Wanduru** (1976–1985) 1 EA where it was stated;

*"The absent registered owner always retains the legal estate and this prime facie entitles him to resume possession from anyone in possession or actual occupation from the date (thereof) but if he does not exercise it he may not bring an action to recover the land after the end of twelve years."*



Nonetheless, in the present dispute between the parties, I am unable to certainly hold that the plaintiff's suit is time barred as was the case before **Hon. Philip, J** since the plaintiff's is found alleging that, she became aware of the transfer on 21<sup>st</sup> June 2020 when the 2<sup>nd</sup> defendant's members held its meeting. On the other hand, it is seriously farfetched as per building permit, DE6 issued on 26/5/2002, that the plaintiff and her children were not aware as of the plaintiff's ownership though that alone cannot be sufficient ground to justify the court to hold that, the plaintiff's suit is time barred. As such, in the circumstances and evidence adduced by the parties, the plaintiff is given the benefit of doubt in that aspect of limitation of time.

*Now to the 1<sup>st</sup> issue, whether the 1<sup>st</sup> and 3<sup>d</sup> defendant had fraudulently and illegally transferred the ownership of the suit property to the 1<sup>st</sup> defendant from the plaintiff.*

The plaintiff's claim of fraud of the transfer of the ownership of the suit property is premised in the alleged forged signature of the plaintiff through transfer of a right of Occupancy (PE8) as well as the forensic report accompanied by evidence adduced by PW2, PW4 and PW5. The defendants seriously disputed these accusations. It is always believed, that documentary evidence carries more weight than oral evidence unless tempered or

deployed by human beings taking into account of the modern technologies that we currently have.

In our instant case, upon examining PE8 where the plaintiff's stand is to the effect that, the transfer of ownership has been fraudulently and illegally made, I am from outset of the view that, the source of exhibit P8 is quite doubtful or questionable. I am of that view for an obvious reason that, PE8 is not indicative of what property was subject to the intended transfer since it does not show Title Number, Land Office Number and the date of its making and absence of the official stamps of Assistant Registrar of Titles unlike DE3. How can a transfer of right of occupancy be made or concluded without a reference of the subject matter of the intended property to be given to the 1<sup>st</sup> defendant or 2<sup>nd</sup> defendant as wakf as the case may be? The answer is to the negative side. The words "the right of occupancy registered under the above reference" appearing in PE8, in my considered opinion, does not save any legal purpose as far as the alleged forgery/fraud of transfer is concerned.

Correspondingly, the forensic examination report and authentication of Signature of one Amota Nyasae collectively admitted as PE10 do not carry any evidential weight due to the following reasons, **Firstly**, the expert, PW5

who conducted the forensic examination admitted that, he faced challenges or limitations while examining the disputed signatures since he was availed with copies of the same by PW1. **Secondly**, handwritings of a person may change from time to time depending on various factors such as sickness, age, mood and other factors as correctly testified by PW5 and the source of the samples in question (**PE8**) is so suspicious due to lack of some essential features as intimated herein. For the sake of clarity parts of PW5's testimony when cross-examined are reproduced herein under;

*"Signatures of a person undergo change gradually as time changes (natural variation) but the same should not go beyond control but there are factors such as mood, environmental factor, writing material etc. The signatures be samples or disputed must have been at different circumstances. Thus, there must be variation..... The documents were adequate for the purpose of examination. At page four of the report, it is indicated that there were limitations for those copies supplied to me. A photocopy must have limitation as opposed to other original form. The accuracy of my report is over 50 %".*

**Thirdly**, that the advocate and commissioner for oaths one Amota Nyasae did sign the forensic report, PE10 but he did not indicate the date

the matter was tabled before him and **fourthly**, integrity/demeanors of PW1 especially as exhibited by RITA's letter. I am holding that the integrity of PW1 is doubtful due to the alleged misrepresentation to be the 1<sup>st</sup> defendant's member or leader or trustee through the RITA's letter (DE10). Further to that, he is the one who supplied PW5 with copies of transfer of right of occupancy (PE8 being disputed signature) and other samples, which is in my view, not a genuine document and if genuine the same was not completed to effect the intended transfer.

Although I am alive of section 47, 49 and 75 of TEA, which provide for three additional evidence or modes of proof of disputed handwritings namely; opinion of experts including handwritings experts, the one who is familiar with writings of a person and that by the court through examination respectively. (See **Aziz S. Masai vs. Emmanuel T. Makene**, Civil Appeal No. 35 of 2021 2023 TZCA 17553 (28 August 2023, the judicial decision cited by the plaintiff's counsel). Thus, PW5 was expected to conveniently and credibly testify through his oral and documentary evidence (PE10) in order to form the basis for the court's determination in favour of the plaintiff but due to noted anomalies explained herein, the evidence of PW5 & DE10 is found of doubtful value.

It is enshrined principle of law that, for an allegation of fraud or forgery to stand it must be proved on a higher degree than ordinarily used to be in civil litigation, which is on the balance of probability. The Court of Appeal of Tanzania in **Twazihirwa Abraham Mgena vs. James Christian Basil** (As administrator of the Estate of the Late Christian Basil Kiria, Deceased), Civil Appeal No. 229 of 2018 (Reported Tanzlii) held that;

*"This is a pure allegation of fraud which in civil proceedings ought to be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases."*

The same position was also maintained in **City Coffee Ltd vs. The Registered Trustee of Iloilo Coffee Group**, Civil Appeal NO. 94 of 2018 (Unreported-CAT) where it was stated;

*"It is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."*

See also the cases cited by parties' advocates **Omari Yusuph vs. Rahma Ahmed Abdulkadr** [1987] TLR 169 and **Agnes Reuben Mswia**

**vs. Hilds Meshack Nyanginja**, Civil Case No. 16 of 2019 (unreported), High Court sitting at Arusha) as well as provisions of section 110 and 111 of TEA.

Being guided by the above judicial decisions, I am not convinced if the plaintiff has proved the alleged fraud in the transfer of the ownership of the suit property to the required standards to justify the court to safely hold the defendants (1<sup>st</sup> and 3<sup>rd</sup> defendant) liable for the alleged fraud. Equally, neither the plaintiff nor her witnesses named the 1<sup>st</sup> defendant's trustees or 3<sup>rd</sup> defendant to have fraudulently and illegally transferred the ownership in question. Further to that, the plaintiff pleaded to have instructed the 3<sup>rd</sup> defendant to rectify the memorandum of understanding regarding the wakf by removing personal names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's trustees but she never testified to that effect as well as her witnesses (See Paragraph 8 of the plaintiff's amended plaint).

The plaintiff has also premised her claim on illegality on the alleged missing of necessary documents such as Land Form 29, 30, 33 and 35 in the transfer of right of occupancy (PE8). Through my analysis of the parties' evidence pertaining this complaint, it is established that, the custodian of the 1<sup>st</sup> defendants document's documents was one Hussein Ghulam Okera. It is

also evidently clear that, the office of Registrar of Titles was shifted from Moshi to Arusha as substantiated by the evidence adduced by PW6 with effect that, some of documents might have got lost/misplaced. For the sake of clarity, parts of his testimony when re-led by his counsel, Miss Fatuma, is reproduced herein below;

*"According to the file in respect of the disputed plot, there documents that I have just mentioned are missing and that might be so because of the shift of the office of the Registrar from Moshi (Northern Zone) to Arusha. Attachments to the deed of transfer like valuation report, tax clearance, consent and the like are vital for avoidance of the unanticipated disputes."*

Another reason, in my considered view, that justifies me to hold that, the alleged missing of some documents on the part of the 1<sup>st</sup> defendant for the questioned transfer of the ownership of the suit property, is the fact that formerly, the procedures for transfer were different from the current ones. This position was confirmed by PW3 who glaringly clarified, that, former procedures adhered to in the transfer, were proper and recognized by the law. Nevertheless, the 1<sup>st</sup> defendant is also rescued under Regulation 4 of Land (Forms) Regulations, 2001 published on 4<sup>th</sup> May 2001 and **not** R. 5 as

• wrongly referred by the defence counsel in their closing submission.

Regulation 4 reads;

*"The forms contained in the Schedule may with the approval of the Commissioner, Registrar or authorized officer, be modified, adopted or altered in expression to suit the circumstances of each case; and any variation from such form not being a matter of substance shall not affect the validity or regularity of the form."*

According to Regulation 4 of the Regulation, a validity of the transfer of a right of occupancy shall not be affected by mere error or skip of certain forms provided that, the Land Commissioner or, Registrar of Titles, or land authorized officer approves the same. Thus, what matter is the substance of the transfer and the transfer exercise as a whole. For the reasons alluded herein above, the plaintiff's complaint's in this regard is found to have lacked merit. Hence, the 1<sup>st</sup> issue is negatively determined.

*Now to the court's determination of 2<sup>nd</sup> issue, whether the said wakf was conditional and revocable by the donor's successor in title.*

Although the wholly Quran is silent on the term "wakf" save to the term "charity" but according to section 140 of the Probate and Administration of Estate Act, Cap 352, Revised Edition, 2019 the word "wakf is defined;



*-----"Wakf" means an endowment or dedication in accordance with Islamic law of any property within Tanzania for religious, charitable or benevolent purposes or for the maintenance and support of any member of the family of the person endowing or dedicating such property."*

According to Wakf Act, 1954 the term "wakf" is well-defined to mean and I quote;

*"The permanent dedication by a person professing the Islam, of any property movable or immovable property for any purpose recognized by the Muslim Law, as religious, pious or charitable."*

According to the definitions above, "wakf" offered by wakif is generally an absolute and the same may therefore be in form of public, private, cash or corporate wakf. However, in my considered opinion, there are exceptions to the general rule depending on the purpose of the wakf.

As per the evidence given by the plaintiff and her son as well as that of defence (DW1 and DW4), it is clear that, the property was given for the purpose of building a mosque which is indisputably built and the same is being used for prayers by Muslims including the 1<sup>st</sup> and 2<sup>nd</sup> defendant's believers and any other Muslim. Hence, in my considered opinion, the "wakf"

was conditional as sufficiently established by PW4 who said that, the wakf was unconditional save to an erection of mosque in which prayers/sala would take place. I thus not buy an invitation by the defence counsel that, the wakf was unconditional at the time of entering or giving.

Similarly, the same piece of evidence was given by DW4 who testified that, the plaintiff did not give the 1<sup>st</sup> defendant any condition when giving the suit plot as wakf save construction of a Mosque. Therefore, it is not safe to hold that, the suit plot was given as wakf to either 1<sup>st</sup> defendant or 2<sup>nd</sup> defendant unconditionally. It follows therefore; the wakf was given with specific condition however, I find its conditionality ceased immediately after completion of construction of the mosque.

The plaintiff is however found asserting that since the 2<sup>nd</sup> defendant exhibits unwillingness to accept, the ownership should therefore revert to her as the original owner. Upon examination of the plaintiff's evidence, I have observed that her testimony is not worth of belief since the same is contradictory. I am holding so since she is found astonishingly stating that, she is not interested in the suit land since the wakf in question was intended for **religious prayers** meanwhile she is also found praying for the title to be reverted to her. I do not think her version is praiseworthy since the

condition for wakf had been accomplished by the 1<sup>st</sup> defendant since the year 2004.

Furthermore, PW4 is found testifying that, it was herself who offered the suit property out of love and affection and not her late husband. With due respect, this is also absurd since through her reply to the defendants' joint amended written of defence at paragraph 4, she plainly pleaded that, the disposition was in the fulfilment of the intention of her late husband. For easy of reference, paragraph 6 of the defendants' amended WSD and paragraph 4 of the plaintiff's reply to the defendants' amended WSD are quoted herein under;

Paragraph 6 of the defendants' amended WSD reads;

*"It was the plaintiff herself who approached one Ghulam Hussein Musa the former and deceased trustee of the 1<sup>st</sup> defendant and informed me of the intention to donate by way of unconditional gift the suit property for construction of Mosque thereon. The said Mosque was in the fulfilment of the wishes of the plaintiff's late husband one Sheikh Hussein Said Larusai who was the one of its first trustees"*

*Paragraph 4 of the plaintiff's reply to the defendants amended WSD reads;*

*"The contents of paragraph 5 and 6 are partly noted and partly contested. The said intention was not expressed by the plaintiff in early 2001 but rather it predates the said dates. The fact that the intended disposition was in fulfilment of the plaintiff's late husband's wishes, the late sheikh Hussein Said Larusai is not disputed."*

Looking at the defendants' averment at paragraph 6 and the plaintiff's reply thereof, the plaintiff or PW2 or both are precluded from denying that the wakf was given in the fulfilment of the true wishes of the deceased. Also, her demand letter through Mawala's advocate admitted as PE7 and DE7 in which it is indicative the wakf in question was in the fulfilment of the deceased's wishes. (See para. 5:2:2 of the demand letter). Therefore, the plaintiff's evidence and that of PW2 is found inconsistent with their pleadings and therefore incredible for constituting serious divergence between pleadings and evidence.

It is common ground that, parties to proceedings are bound by their own pleadings duly filed in courts and that, only departure is allowable through amendments of the pleadings after the leave being sought and obtained. I subscribe my holding by the case law in **Makori Wassaga vs.**

• **Joshua Mwaikambo** (1987) TLR 88 where the Court of Appeal of Tanzania held;

*“A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case”.*

See also the judicial decisions in **Lim vs. Camden Health Authority** (1979) 2 All ER 910 approved by our court in **Bonham v. Hyde Park Hotel Ltd** (1948) TLR 17

In the light of the above judicial precedents and Order VI Rule 7 of Civil Procedure Code, Cap 33, Revised Edition, 2019, I am justified to hold that the plaintiff's version that her late husband did not intend to offer the suit property during his life is inconceivable.

Pertaining to the issue on, whether the wakf is revocable. As earlier alluded, the wakf in question was conditional and therefore revocable if the intended mosque, as the conditional precedent for the gift in question, was not accomplished as intended by wakif/donor unless sufficiently established that the gift was induced by fraud or undue influence or misrepresentation, or mistake or it is against the public policy or illegality. This legal position

was correctly emphasized by my learned brother, **Mrosso J** as he then was in **Salum Mateyo vs. Mohamed Mateyo** (1987) TLR 111 where held;

*"So, in the absence of evidence to the effect that the respondent had reserved a power of revocation, and as there is no claim that the gift was induced by fraud, undue influence, mistake or misrepresentation, of was tainted with illegality, I am constrained to hold that the gift was absolute and irrevocable....."*

*Although the respondent has my sympathies in the sense that on the facts and the law of the case he is unable to take back the valuable gift which he had given to the appellant during their happier days."*

In instant matter, the plaintiff has endeavored to establish that her children, the deceased person's heirs did not sign the deed of transfer (PE8). consenting to the transfer of the suit property. Nonetheless, one Hanifa Hussein, her daughter whose consent conspicuously appears in right of occupancy of the suit land (PE8 & DE3) (See testimony of PW6 who told the court that, by the then the said Hanifa was aged 20 years and she consented to the transfer as reflected in PE8 & DE3. Since, the plaintiff was the guardian of her children as they were minors by then as testified by DW4 when probed by Miss Fatuma ("It is clear that, the plaintiff's children were not involved as

they were young persons"). It follows that, majority might still minors in 2001 during execution of deed of gift as it is sufficiently evident that, the said Hanifa consented and no any other evidence to their age in 2001. In line with the plaintiff's version of her evidence as well as that of her witnesses (PW1 and PW2), there are questions that follow, these are;

1. If the said Hanifa Hussein Larusai did not consent to the transfer as appearing in the CT (DE3) why she was not called to testify in order to disprove the transfer of the suit land via DE3?
2. If as asserted by the plaintiff and PW2 that the right of title was given to the 2<sup>nd</sup> defendant's trustees and the mosques was built under the 2<sup>nd</sup> defendant's administration, why not any trustee from the 2<sup>nd</sup> defendant who was called to appear before the court for testimonial purposes?
3. If the 2<sup>nd</sup> defendant's trustees were handed over the CT how came the same to be in the possession of the 1<sup>st</sup> defendant? Is there any explanation?
4. If the mosque was truly built by the 2<sup>nd</sup> defendant and if RITA's letter dated 22<sup>nd</sup> October 2002 affirming construction of the mosque on the suit land, was it possible for her (2<sup>nd</sup> defendant)

to abstain from taking against the 1<sup>st</sup> defendant any action taking into account of the said developments made thereon, the mosque with more than one flat ? And if was so, is there any reason for such abstinence?

5. If as per the plaintiff's evidence with effect that, she offered the suit property as wakf to the 2<sup>nd</sup> defendant not in writing but under common understandings why writing comes a vital requirement for the 1<sup>st</sup> defendant while there are necessary documents tendered by her? (The documents tendered by the 1<sup>st</sup> defendant including Transfer of Right of Occupancy, deed of transfer and Certificate of Title establishing that the plaintiff transferred the suit property to her meet the spirit provided under section 64 (1) (a) and (b) of the Land Act, Cap 113, R..E, 2019 for ascertaining terms and conditions of the transactions)
6. If the intent of the plaintiff or her late husband or both was for building a mosque, which is already there, why instituting this case while she said that the same would be used for religious prayers by Muslims including the believers of Shia denominations, the 2<sup>nd</sup> defendant's members inclusive



--7: Since it is evident that, the 2<sup>nd</sup> defendant was incorporated on 26<sup>th</sup> July 2005 through PE2, the question that follows is;- How could it be possible for the 2<sup>nd</sup> defendant to own property while it was non-entity in the eye of the law. (See **Registered Trustees of Islamic Propagation Center (IPC) vs. the Registered Islamic Center (tic) of Thaaqib Trustees**, (Civil Appeal No. 2 of 2020 [2021] TZCA 27 July 2021).

Accumulatively, when I assess the evidence in its totality and questions that I have paused herein, the possible answers to the above questions are obvious to the negative. Thus, I find that, the evidence of the plaintiff and her witnesses leaves a lot to be desired. Of course, it leads to apprehension that, the suit at hand is nothing but an afterthought.

*As to the 3<sup>rd</sup> issue, whether the plaintiff had signed the transfer deed for the suit property and eventually transferred ownership of the suit property to the 1<sup>st</sup> Defendant.*

After I have given less or no weight at all to the transfer of the right of occupancy tendered by the plaintiff (PE8). Equally having given weight to the transfer of the right of occupancy, DE3 dated 14<sup>th</sup> November 2001 and

its deed of transfer, DE4 as well as the Certificate of Title (DE5), the determination ought to be in favour of the defendants as I shall demonstrate hereinafter.

My due analysis of the plaintiff's evidence does not warrant a holding that, it was more probable that, the plaintiff gave the suit premises as a gift/wakf to the 2<sup>nd</sup> defendant than to the 1<sup>st</sup> defendant. The plaintiff's assertions that DW2's testimony (land officer's evidence) is of no value merely because of his age and the length of period since he retired. I am of that stance, simply because DW2 definitely testified during trial that, he personally saw the plaintiff in his office for the transfer of the right of occupancy purpose. In my view, the testimony of DW2 replaces that, of the one who is said to have witnessed the transfer between the plaintiff and 1<sup>st</sup> defendant as an attesting officer (State Attorney-commissioner for oaths). Therefore, in my increasingly view, it suffices to hold that, it was the plaintiff who signed the transfer through DE3 and the one who subsequently transferred the title of the suit property to the 1<sup>st</sup> defendant. In that view, the 3<sup>rd</sup> issue is answered in affirmative.

*Coming to the 4<sup>th</sup> issue, who between the plaintiff and 1<sup>st</sup> defendant is the legal owner of the suit property.*

Examining the parties' evidence, it goes without saying that, the suit property is currently the 1<sup>st</sup> defendant's property as it has been registered in her name since 22<sup>nd</sup> May 2002. More so, the land officer, PW6 told the court that, the transfer of the suit property was properly done on the 22<sup>nd</sup> May 2002. Hence, registration of transfer as indicated in the CT (DE5) which is conformity with section 41 (2) of the Land Registration Act, Cap 334, Revised Edition, 2019.

The registration of the transfer is evidently established by DW2 whose name is appearing in DE3 and PW6 whose testimony is to the effect that, the transfer and registration were proper. I am consequently of the firm view that, registration is an authentication of the ownership of a legal interest in a parcel of land. Hence, an act of registration of the land confirms transactions that confers or affects or terminates ownership or interest over it. It is further the established principle that once the registration process is completed, no search behind the register is not needed to establish a chain of titles to the property.

According to section 2 of the Land Registration Act, Cap 334, Revised Edition, 2019 defines owner as follows;

*....."In relation to any estate or interests the person for the time being in whose name that estate or interest is registered"*

Interpreting the above quoted section of the law The Court of Appeal of Tanzania in the case of **Amina Maulid Ambali and 812 others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported) had these to say;

*"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is provided that the certificate was not lawfully obtained"*

Basing on the statutory provisions and the above-cited precedents, it clearly sounds to me that in law, the 1<sup>st</sup> defendant in whose name the suit premises is registered is the owner unless the issues of fraud or forgery or illegality were established to the satisfaction of the court in terms of the standard of proof required in the first issue. The 4<sup>th</sup> issue is thus determined in favour of the 1<sup>st</sup> defendant.

*In the 5<sup>th</sup> issue, if issue No. 4 is answered in favour of the plaintiff, whether the 1<sup>st</sup> defendant is entitled to compensation to the tune of Tshs. 651, 300,0000/= for the unexhausted improvements on the suit property.*

As per the court's observations herein that, after the construction of the Mosque in the disputed plot as primary conditional wakf whose seizure was immediately after intended performance onwards. Thus, completion of the intended performance entitles the 1<sup>st</sup> defendant to the ownership of the suit property as earlier alluded. According to the evidence on record, I am satisfied that the 1<sup>st</sup> defendant has discharged her duty that she is the lawful owner of the disputed premises after she had fulfilled the purpose of the wakf in question. I would like to subscribe to the foreign decision in **Siraj Din vs. Ali Mohamed Khan** [1957] 1 EA 25 where it was stated;

*"The quantum of proof ordinarily required in civil litigation is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other."*

(See also the decision of the Court of Appeal of Tanzania in **Mwajuma Mohamed Said vs. Said Mohamed Said** (Civil Appeal No. 34 of 2022) [2023] TZHC 34 (25 July 2023) where the purpose of the wakf was found to be vital when it was clearly identified by the wakif as the case in the matter under consideration.

The proven act of the 1<sup>st</sup> defendant completing the wished construction of the Mosque on the disputed plot constitutes an absolute ownership of the suit property. More so, since the 1<sup>st</sup> defendant's prayer was in alternative and since the determination in the 4<sup>th</sup> issue has declared her the rightful owner, the 5<sup>th</sup> issue should not therefore detain me. The 1<sup>st</sup> defendant is not entitled to compensation for the exhausted improvements effected in the suit land as he is the lawful owner.

*Lastly, the court's determination on the reliefs that the parties are entitled.*

Reliefs to the parties is always dependent on the decision of the court just like "light follows the moon". Following the deliberations hereinabove. The plaintiff is not entitled to any relief she sought. However, the 1<sup>st</sup> defendant deserves a declaratory order that, she is the rightful owner of the suit property. As to costs, the winning party must have her or his costs borne by the losing party though sometimes depends of the circumstances of each case.

For the foregoing reasons, the plaintiff's suit entirely fails and the 1<sup>st</sup> defendant's counter claim succeeds. I thus make the following orders;



1. That, the 1<sup>st</sup> defendant is declared to be lawful owner of the suit property situated at Plot No. 39 Block "H" with a certificate of Title No. 9664 situated in Arusha Municipality now Arusha City since 4<sup>th</sup> day of November 2001 by virtue of gift/wakf
2. Permanent injunction is issued restraining the plaintiff, her children, agents and any other person from entering or otherwise disturbing the 1<sup>st</sup> defendant, its servants, agents or worshippers from peaceful enjoying and using the suit property
3. Costs of the case shall be borne by the plaintiff


It is so ordered

**DATED at DAR ES SALAAM** this 7<sup>th</sup> February, 2024 through video conference

  
**M. R. GWAE**  
**JUDGE**

**Court:** Right of Appeal fully explained.



  
**M. R. GWAE**  
**JUDGE**  
**07/02/2024**