

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND APPEAL NO. 159 OF 2021**

(Arising from the decision of Ilala District Land & Housing Tribunal at  
Mwalimu House in Land Application No. 308 of 2018)

**JAMAL SAID..... 1<sup>ST</sup> APPELLANT**  
**SEIF MWANYANGE..... 2<sup>ND</sup> APPELLANT**  
**SHOMARI KIKWAMBA..... 3<sup>RD</sup> APPELLANT**  
**KASSIM NZOMOKE..... 4<sup>TH</sup> APPELLANT**

**VERSUS**

**KARMAL AZIZ MSUYA.....RESPONDENT**

Date of Last Order: 12.07.2022  
Date of Judgment: 15.08.2022

**JUDGMENT**

**V.L. MAKANI, J.**

The appellants are appealing against the decision of Ilala District Land and Housing Tribunal at Mwalimu House (the **Tribunal**) in Land Application No. 305 of 2018 (Hon. A.R. Kirumbi, Chairperson).

According to the application at the Tribunal, the appellants herein sued the respondent for trespassing into their plot located at Tabata Dampo within Ilala Municipality (the **suit land**), and demolished the structure built therein while knowing that the property was provided

as Wakfu property for the welfare of Muslim community within the area. The appellants said the suit land was acquired from the late Abdul Halfan Chuma in 2004 for purposes of building Madrasa. In their application the appellants said the 1<sup>st</sup> appellant herein was the supervisor and they constructed two classes with two toilets and the said Madrasa was known as Musan Inn Omur Islamic Nursery School which was inaugurated by former President Ally Hassan Mwinyi. He said the respondent demolished the Madrasa and built a commercial building therein.

The decision of the Tribunal was in favour of the respondent. Being dissatisfied with the decision of the Tribunal the appellants have filed this appeal with the following grounds:

- 1. That the honourable chairperson erred in law and in fact by delivering the judgment without taking into consideration the documents tendered by the appellant that the disputed land was a Wakf property which cannot be transferred.*
- 2. That the honourable Tribunal erred in law and in fact by relying on the testimony of DW1 that there was no madrasa while the appellant adduced the documentary evidence to prove the presence of Madrasa launched by the former President Ali Hassan Mwinyi of which it was supported by the evidence of DW3 of the said inauguration of the same.*

3. *That the honourable Tribunal erred both in law and in fact by delivering judgment without considering the opinion of the assessors, unevenly the opinion therein was not even read over presented by the Tribunal Chairperson.*
4. *That the Tribunal's Chairperson erred in law and in fact by not taking into consideration that the heirs in the pleadings means the WSD of the respondent were ready to compensate another land in lieu of the disputed one thought they neglected to heed on their aim.*
5. *That the honourable Trial Chairperson erred in law and in fact by delivered (sic) the decision on some documents tendered as evidence was not related to Madrassa while the said Wakf w was not handed over to the Registered Trustee well known to the law but person and thus there is no organ in Tanzania established to supervise the properties of Wakfu*

The appeal proceeded by way of written submissions drawn and filed by Mr. Ubaid G. Hamidu, Advocate for the appellants, and Ms. Catherine Lyasenga, Advocate for the respondent

In his submissions in chief, Mr. Hamidu gave a background of the matter and in the first ground he said at the Tribunal the matter was proved on balance of probability as required by the law. He said **Exhibits P1** and **P6** were tendered and admitted without any objection from the respondent. **Exhibit P1** was the Wakf document and **Exhibit P6** was the document from Baraza Kuu Tanzania which

was signed by Amir Mussa Kundercha whereby the parties signed to show that they agreed the suit land was Wakf land. He said considering that **Exhibit P6** is taken to be an affidavit then the parties were saying nothing but the truth according to religious beliefs. He said the Chairperson turned around and ignored some of the documents which was equal to disqualifying the beliefs of the appellants. He said the Chairperson in his judgment said there was no administrator or Mutawalli for the said Wakf as provided for under the law and recognised by the Wakf Commission of Tanzania. He said the said Commission remains to be a creature in the books of law as it has never been formed in this country.

As for the second ground, Mr Hamidu said the Chairperson disregarded the evidence of the appellants and they produced documentary evidence that there existed Madrasa in the suit land. He said the Chairperson disregarded the invitation letter to the former president, the photographs of the demolition and inauguration event as well as the testimony of the appellants and **DW3**. He said the evidence of **DW3** that the former president inaugurated the Madrasa and also the documents were enough evidence to convince the Chairperson of the existence of Madrasa within the suit land. Mr.

Hamidu said the registration of the Madrasa was not among the disputed issues and the absence of its registration could not thwart the existing Madrasa. He submitted that the Chairperson negligently repudiated to heed to the evidence of the appellants contrary to the truth.

Regarding the third ground of appeal, Mr. Hamidu submitted that the opinion of the assessors was neglected and was not reduced into writing. He said the presence of the assessors in court was like flowers decorating the Tribunal. He relied on the cases of **Ameir Mbarak & Azania Bank Corp. Limited vs. Edgar Kahwili, Civil Appeal No.154 of 2015 (CAT-Iringa) (unreported)** and **Edina Adam Kinona vs. Absolom Swebe, Civil Appeal No. 206 of 2017 (CAT-Mbeya)** (unreported) where it was stated that failure to call upon the assessors to give opinion and let the parties know the contents of the assessor's opinion was a resinous defect. He said the records are clear that there nothing that was done by the Chairperson as the opinion of the assessors was not given and there is nothing in the file to ascertain that the assessors read out the opinion to the parties. He said there were irregularities in the judgment which

disqualifies it as a judgment and the said judgment should therefore be quashed and set aside.

He said Written Statement of Defence (the WSD) is pleadings and in the WSD of the respondent at paragraph 7 the Administrator of the late Abdul Halfan had agreed with the applicants to purchase and give them alternative premises for the Madrasa purposes. Mr. Hamidu was wondering why the Chairperson didn't go through the pleadings instead of turning around things which had already been agreed upon by the parties and conclude that the suit land was not existing. He said the judgment deserves to be quashed as it was wrong.

As for the last ground, Mr. Hamudi submitted that the Wakf Commission is established under section 142 of the Probate and Administration of Estates Act CAP 352 RE 2002. He said in actual sense the institution is not existing and that is why it was impossible for the Wakf property to be registered. He concluded by praying for the appeal to be allowed with costs and the judgment of the Tribunal be quashed and set aside.

Replying to the submissions, Ms. Lyasenga said according to **Exhibit P1** (the Wakf documents), the names of the appellants herein, the description of the property and to whom the wakf is given are not stated expressly. She said the documents shows that the appellants did not even have locus to sue the respondent in Land Application No. 305 of 2018 as their names are not stated as trustees as defined in section 140 of the Probate and Administration of Estates Act. She cited the cases of **Khanan Said Aljabry v.s Nevumba Salum Mhando, Misc. Land Appeal No. 81 of 2021 (HC-Land Division)** (unreported) where the issue of locus standi was addressed.

Ms. Lyasenga pointed out that the 1<sup>st</sup> appellant in his testimony said he received the suit land as Wakfu by virtue of being a leader of Masjid Hawaa (a Mosque). She said in that respect the Board of Trustees of Masjid Hawaa were the ones supposed to sue the respondent. She further said that one of the Trustees who testified Hamis Mpola (General Secretary of the Mosque) said the suit land was not given to the Mosque as wakf but they were given another place to build Madrasa by the late Abdul Chuma. She thus said the appellants had no locus to sue the respondent. She said **Exhibit P6**

is a document not recognised by the laws of Tanzania and so cannot validate the suit property to be wakf. The only institutions, according to Ms. Lyasenga, recognised by the law to resolve land disputes as per section 3(1) and (2) of the Land Disputes Court Act CAP 216 RE 2019 and section 167 of the Land Act CAP 113 RE 2019 are Ward Tribunals, District Land and Housing Tribunals, High Court, and the Court of Appeal. So Baraza Kuu Tanzania is not among those recognized to solve land disputes in Tanzania. So, the Tribunal did not err in law and fact in dismissing Land Application No. 305 of 2018.

Ms. Lyasenga consolidated the second, third, fourth and fifth grounds of appeal. She said these grounds of appeal have no merit because the appellants failed to prove before the Tribunal that they are legally recognized representatives of the purported Madrasa inaugurated by the former president. She said Madrasa is supposed to be incorporated under section 2, 3 and 8(1)(b) of the Trustees Incorporation Act, CAP 318 RE 2002, meaning that Madrasa cannot be owned by individuals thus **Exhibits P3** and **P4** cannot be relied upon. In conclusion, Ms. Lyasenga said since the appellants have no locus standi and this principle is a jurisdictional issue the appellants have failed to show how their right has been affected, therefore the



Tribunal did not err in law and fact in dismissing the application. She prayed for the appeal to be dismissed with costs.

I have gone through the rival submissions by Counsel and the record of the Tribunal. The main issue for consideration is whether the appeal has merit. I will consider the grounds of appeal together.

The main claim by the appellants is that they were given land as wakf by the late Abdul Halfan Chuma and the main evidence is **Exhibit P1**. On the other hand, the respondent's evidence is that the suit land is not wakf and was sold to him by the administratrix of the estate of the late Abdul Halfan Chuma, one Shann Abdul Khalfan. Mr. Hamidu Counsel for the appellants said that **Exhibits P1** and **P6** were duly admitted without objection, so the turn around by the Chairman was questionable. I wish to state at the outset that a document may be admitted in evidence as an exhibit, but its evidential value is the most important thing to support the case which has to be assessed and evaluated by the court. In this present case the Chairman assessed **Exhibit P1**. He said at page 16 of the type written judgment that:

*"the applicants tendered Exhibit P1 to show that the land in dispute was given to them as Wakfu property.*

*However, in this document, it is not expressly stated that the said land is given to the applicants."*

I agree with the Chairman, that the evidential value of **Exhibit P1** in support of the appellants' case is very minimal because the said exhibit does not show the addressee, the description of the land, the size or the location of the land. The exhibit also does not state that the alleged land was given as Wakf as claimed by the appellants. It is therefore strange for the appellants to state that the land by the late Abdu Halfani Chuma was given as wakfu while none of the names of the appellants appear in the said **Exhibit P1**. So, the said exhibit is not helpful to the appellants.

The appellants also complain that the Chairman did not look into other exhibits such as **Exhibit P6** which is a letter from the Baraza Kuu la Jumuiya na Taasisi za Kiisalamu Tanzania. Mr. Hamudi further pointed out that the said letter stands as an affidavit. But with due respect to learned Counsel, the said **Exhibit P6** is not an affidavit but a letter to the Chairman Incharge of Ilala District Land Tribunal. The letter states that there is a judgment by the said Baraza Kuu but that judgment which is alleged to be on oath is not attached. It is therefore a misdirection to state that the said exhibit stands as an affidavit.

Further, it is also difficult to rely on such a document since it has already been established that the late Abdu Halfan Chuma did not give the suit land to the appellants.

The photographs are not supportive of the appellants case either because apart from the known image of the former president Ali Hassan Mwinyi, the photographs have no relevancy whatsoever to the dispute at hand. In the said photographs, the former president is seen to be in an event of inauguration, but the link to the Madrasa claimed by the appellants is not they he may have as well been inaugurating something else and somewhere else. The invitation letter (**Exhibit P4**) which has no corresponding acceptance cannot be conclusive evidence that the former president attended the inauguration of the Madrasa. Further the photograph showing the name **Al-Madasatu Mus-ab Bin Omeir and Nursery School** on a wall in itself is not proof that there was any inauguration in respect of the said Madrasa as alleged by the appellants. There were also photos of demolition but, there is no relevancy of the photographs with the dispute at hand.

It was also the submission of Mr. Hamudi that the Chairperson did not consider the testimony of **DW3**. But looking at the judgment the evidence of this witness was considered, and the Chairman made a reasoning out of it that the late Abdu Chuma gave a piece of land to Masjid Hawaa where a Madrasa was constructed, and it is still operating. It was the 1<sup>st</sup> appellant's testimony that he was given the suit land as he was the leader of Madrasa of Masjid Hawaa, but according to **DW3** who is the Trustee and General Secretary of Masjid Hawaa the 1<sup>st</sup> appellant has never been a leader of the Mosque and so the alleged claim that he was given land as Wakfu has no legs to stand on.

As for the procedural complaint that the opinion of the assessors was not read out to the parties and there was no written opinion in the file, it is on record that there are written opinions by the assessors namely Jokha Salum and T. Mwalasya and the said opinions were read out on 30/03/2021 in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and also in the presence of the Legal Officer of the respondent's advocate. So, the precarious allegation by Counsel that the assessors were mere decorations in the Tribunal without perusing the record is

hazardous especially when it comes from learned Counsel who is also an Officer of the court.

In totality and for the reasons aforesaid, I don't find fault in the decision of the Tribunal. The appeal is therefore dismissed for want of merit.

It is so ordered.



*V.L. Makani*

**V.L. MAKANI**  
**JUDGE**  
**15/08/2022**