

A disguised comment on this complaint. This is because this is not the appropriate forum to determine the Constitutionality or not of this piece of legislation or any of its provisions. If he thinks that it is so, then he must petition this court accordingly. The proper procedure is clearly spelt out in the Basic Rights and Duties Enforcement Act 1994 (Number 33).

In his submission, learned counsel Mr Mahatene had the unexpected audacity to label the Institute "an impositor" which "has got no immunity upon it at all". He predicated this startling accusation on his belief that it is not a Gazetted Organisation as required by the provisions of section 13(1) of Act Number 5 of 1986. Had he been industrious enough he would have found the answer to his predicament in G.N. Number 85 of 18 March 1988 already cited in this ruling. It is plainly provided therein for every one to see that the Institute enjoys "all the immunities and privileges set out in Part 1 of the Fourth Schedule" to Act Number 5 of 1986.

In the light of the above, I uphold the Preliminary Objection raised by the defendant. The defendant Institute enjoys full immunity from suit and other legal process. In the absence of explicit waive by its Director, I am enjoined by law to hold and rule that this court has no jurisdiction to entertain this suit *against it*. I accordingly strike it out with costs to the defendant.

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RAYA SAID MTHANA v. REGISTERED TRUSTEES OF BARAZA KUU LA WAISLAM TANZANIA (BAKWATA)

IN THE HIGH COURT OF TANZANIA
AT MTWARA

(Kaji, J.)

CIVIL APPEAL No. 7 OF 1996

(An Appeal from Civil Cause No. 20 of 1994, the decision of Lindi Resident
Magistrate Court dated 2 May 2000)

*Islamic Law – Wakf – Founder of the Mosque – Whether the founder of the
Mosque can dedicate the Mosque.*

Islamic Law – Wakf – Whether the founder of a Mosque is the owner.

*Societies Act – Registration of Civil Societies – Bakwata – Registered as Civil
society – Whether its Constitution is enforceable.*

The appellant was the daughter of the founder of Mosque in Lindi Town one Said Mthana Bin Jabir Ibn Saady, situated on plot number 1 Block F. The founder left Wakf dedicating 67 coconut trees which were along the same plot where the mosque is, to his children and grand children. Between 1988 and 1994 Bakwata took over the management and supervision of the said Mosque, on behalf of the Muslims. Bakwata argued that article 10(3) of its Constitution gives it power to do so. The appellant opposed the take over of the Management and supervision of the Mosque, on the ground that the management and supervision were dedicated to the family of the founder of the Mosque through the Wakf. The matter went through the District Commissioner, Regional Commissioner, and the Minister of Home Affairs in vain. The appellant then filed a suit in the Court of the Resident Magistrate at Lindi where she lost, hence this appeal.

Held: (i) The founder of the Mosque did not dedicate the Mosque in the Wakf; what he dedicated in the Wakf were only 67 coconut trees.

(ii) Article 10(3) of the Constitution of the respondent must be given a strict (limited) interpretation to the extent that it gives power to the respondent to manage

A and supervise Mosques that the respondent had constructed and those mosques which had been surrendered voluntarily to it by the founders for management and supervision.

(iii) The respondent had no automatic right to take over the management of the mosque in dispute.

(iv) In the circumstances of this case the respondent had better title to possess and manage the mosque than the appellant for the interest of peace and tranquility.

Appeal dismissed

JUDGMENT

(Delivered 5 May 2000)

D **Kaji, J.:** There is a mosque in Lindi Town situated on plot number 1 Block F. It was founded before 1920 by the late Said Mthana Bin Jabir Bin Saady for prayers by Moslems of Sunni or Shafi sect. It is the management and possession of this mosque which is in dispute in this appeal.

F It is in the record that before the year 1920, the late Saidi Mthana Bin Jabir Bin Saady erected that mosque on that plot for prayers by Moslems of Sunni or Shafi sect. In the year which would appear to be 1918, that is, the Islamic year of 1338 (according to Exhibits PE1 and PE2) the late Said Mthana wrote a Wakf (Exhibits PE1 and PE2) which would appear to have been understood to mean that he dedicated his 67 coconut trees to the use of that mosque, but he reserved in himself, his friend Abdallah Bin Umar Khamis Al Qassary and their children and descendants the right/power to manage the said mosque. Thus he managed that mosque till his death in 1920.

H After his death in 1920 his friend Abdallah Bin Umar took over the management till his death around 1924. Thereafter the management and administration of Said Mthana's estate was taken over by the Administrator General as per Administrator General's Cause Number 41 of 1924.

A In 1935 or thereabout, the young brother of Abdallah in the name of Abderehman Umar was appointed the guardian of the appellant Raya Bint Saidi Mthana and 2 others who were by then minors as per Probate and Administration Cause Number 16 of 1935 of the then His Majesty's High Court of Tanganyika at Dar es Salaam. The said Abderhman Umar took over the management of the said mosque as trustee of the said minors. Thereafter the management of the said mosque devolved around those two families until the "birth" of the respondent Bakwata around 1988 or 1993.

C Between 1988 and 1994, Bakwata took over the management and supervision of that mosque. By then there was chaos in that mosque. A sect calling itself Answar Sunna had emerged and was threatening to take over the management of that mosque from the Sunni or Shafi.

D Raya opposed the take over of the management of that mosque by Bakwata. The matter went through the District Commissioner's and Regional Commissioner's offices and later to the then Minister of Home Affairs, Mr Mrema. It would appear there was no compromise. Raya finally took the matter to Lindi Resident Magistrate's Court where she lost. Hence this appeal.

F Before both courts the crucial issue has always been as to what is the meaning of the Wakf, (Exhibits PE1 and PE2,) that is, whether it concerned both the mosque and the 67 coconut trees. And if so whether the late Said Mthana Bin Jabir Bin Saady dedicated the management of the mosque to devolve to his descendants and those of Abdallah Bin Umar Khamis Al Qassary. Also the legality of the respondent Bakwata in taking over the management and supervision of the said mosque.

H The said Wakf was written in Arabic (Exhibit PE1). But it was later translated into Swahili by the National Kiswahili Council. This was in 1995 (Exhibit PE2). The crucial words are as follows:

I Mimi Said Bin Muthana Bin Jabir Assaidy nimeweka Wakfu kwa ajili ya kutaraji thawabu kwa Allah ikiwa ni sadaka, miti ya minazi 67 ili kuendeshea msikiti huu unaoitwa "MASJID NUR." Minazi hii na (msikiti) ipo Lindi

- A katikati ya mji, katika sehemu ya Mkwajuni. Na miti hiyo iliyotajwa iko karibu na huo msikiti na imeelekea katika upande wa kusini. Na kila mti wa mnazi umewekewa alama yenye namba 256. ... Haiuzwi kwa ye yote wala kutolewa zawadi wala hairithiwi na mtu ye yote mpaka kiyama ...
- B Mwangelizi wa shughuli hizi ni mimi mwenyewe na Abdallah Bin Umar Khamis Al Qassary, kisha watoto wetu, kisha watoto wa watoto wao kadiri koo hizi hizi zitakavyokuwa zimeendelea mpaka siku ya kiyama. Na mimi nimeandika haya nikiwa katika hali ya siha nzuri na akili timamu.
- C Nilivyovitoa wakfu vikiwa ni mali yangu ... ”

Unofficial English translation:

- D I Saidi Bin Muthana Bin Jabir Assaidy have dedicated my 67 coconut trees to the Almighty God for his blessings. Those coconut trees will be for the use of a mosque called “MASJID NUR”. These coconut trees and (the mosque) are at the centre of Lindi Town at Mkwajuni. Those coconut trees are near that mosque and lined up south ward. Each coconut tree is marked number ... 256.
- E Those coconut trees are not to be sold to anybody or be given as a gift to anybody or to be inherited by anybody till the end of the world...
- F The supervisor of all these activities is myself and Abdallah Bin Umar Khamis Al Qassary, later our children, later the children of our children and descendants till the end of world. I have written all these while in good health and with sound mind. What I have dedicated (Wakf) are my properties.
- G According to the appellant, the true meaning of that Wakf is that the late Said Mthana dedicated the mosque and the 67 coconut trees. But he reserved himself, Abdallah, their children and descendants the right/power to manage the said mosque. But according to the
- H respondent, the true meaning of that Wakf is that, the late Said Mthana dedicated only the 67 coconut trees and reserved himself etc the power to manage the said 67 coconut trees. The respondent went on to argue that the late Said Mthana could not rightly dedicate the
- I mosque because once a mosque is built it becomes automatically the property of the Almighty God for the use of all Moslems to

offer prayers therein without any distinction of sect. In that sense a mosque being the property of the Almighty God is automatically a Wakf of a founder and the founder does not necessarily have to write any Wakf to that effect. Further that the Wakf itself (Exhibits PE1 and PE2) did not mention anywhere that the management of that mosque would devolve around himself, his friend Abdallah, their children and descendants. According to the respondent the activities mentioned in that Wakf were limited to the management and supervision of the 67 coconut trees to make sure that their proceeds were really used for the purpose which was intended, that is, for the use of the mosque.

In his well reasoned judgement, the learned trial Resident Magistrate concurred with the respondent. Raya was aggrieved.

I have carefully considered the arguments of learned advocates for both parties, the learned trial magistrate's reasoning together with the overall circumstances surrounding this case. I have also carefully read the Wakf (Exhibits PE1 and PE2). In my view the late Said Mthana did not dedicate the mosque in that Wakf. What he dedicated in that Wakf were only the 67 coconut trees. Had he intended to dedicate the mosque too he would have said so. Maybe he did not do this on the understanding that once a mosque is built it becomes the property of the Almighty God. In that respect a mosque is a Wakf in itself and the founder does not necessarily have to say so.

On whether the late Said Mthana reserved himself etc the right to manage that mosque in that Wakf, I am of the view that he did not do so. The activities upon which the late Said etc reserved the right to manage referred to the management and supervision of the 67 coconut trees which were dedicated in that Wakf. Those activities did not include the management of the mosque in which was not dedicated in that Wakf. Had the late Said Mthana intended the said activities to include management of the mosque he would have said so.

Therefore, if the appellant has any right or power to manage that mosque then that right or power is derived from somewhere else

A and not from the Wakf (Exhibits PE1 and PE2). The next question is whether the respondent Bakwata had any legal right to take over the management and supervision of that mosque.

B A mosque is a house of the Almighty God. It is the property of God. But we do not see the Almighty God dealing with the day-to-day activities in a mosque. Instead we see different people doing this on his behalf. There are the Imams who lead prayers, mosque committees which deal with day to day activities or the Mutawalis.

C Thus on the face of it, it would appear the right of management and supervision devolving around the founder and his family is just a matter of prestige and respect. It is a kind of reciprocity by the worshippers to the founder and his family and descendants. It is a

D kind of psychological satisfaction by the founder and his family and descendants that worshippers are appreciating the good work done by the founder, and are duty bound to respect him and his family and descendants. All these are worldly considerations. They are worldly

E materials or benefits. The kind of reward the founder and his family and descendants deserve after death is left in the hands of the mosque owner to decide, that is, the Almighty God. I am not sure whether

F it, one would be tempted to assume that if the right of management and supervision is taken away from the founder and his family and descendants, there is nothing the founder and his family and descendants will suffer materially, provided the takeover is proper and legal.

G In the present case the appellant Raya is complaining that the takeover of the management and supervision of that mosque by the respondent Bakwata was improper and illegal because there was no law empowering Bakwata to do so. In that respect she said that, since

H she is the eldest surviving child of the founder she has the right of management and possession of that mosque here on earth.

I On the other hand the respondent Bakwata is alleging that the takeover of the management and supervision of that mosque by Bakwata was proper and legal for the following reasons:

Firstly, Bakwata is the only recognized Islamic body at Lindi. Secondly, the management and supervision of all Islamic mosques throughout Tanzania is vested in Bakwata by virtue of article 10 of the Bakwata Constitution. The crucial issue therefore is as to whether the Bakwata Constitution is enforceable.

I had an opportunity to peruse the said Bakwata Constitution of 1993 especially article 10. That article says:

10. 1. ...
2. ...
3. Kufungua, kujenga, kusimamia na/au kusaidia kuendesha misikiti, mali za Wakfu, hospitali za afya, hospitali za dawa, zahanati au majumba mengine ya sadaka kama baraza kuu litakavyoona inafaa.
4. ...
5. ...
6. ...
7. ...
8. ...
9. ...
10. ...
11. ...

It is mainly from this article that the respondent Bakwata is claiming to have powers of management and supervision of the mosque in question.

I have carefully considered the arguments of both parties. I must admit that it has been very difficult for me to decide the legality of the Bakwata Constitution from which the respondent is alleging to have derived powers to take over the management and supervision of mosques. That Constitution appears to be a mere document made by Members of Islamic Community to guide their affairs. It does

- A not appear to be a part of any subsidiary legislation nor does it purport to have been made under the authority of any article of the Constitution of this Country. Bakwata was registered under the Societies Ordinance Chapter 337. Maybe one could argue that by being registered under
- B an Ordinance of this country, then its Constitution was legalized and it (Bakwata) legally assumed the powers contained in that Constitution. If this argument is to be entertained, then article 10(3) of that Constitution must be interpreted very strictly. It must be given a limited interpretation.
- C Its limited interpretation is that it gave powers to Bakwata to manage and supervise mosques which Bakwata had constructed, and those mosques which have been surrendered voluntarily to Bakwata by the founders for management and supervision. It is very unfortunate that
- D the respondent's advocate could not cite any proper provision of law which empowered Bakwata to grab all mosques and manage/supervise them.

- E There is no dispute that the mosque in dispute was not erected by the respondent Bakwata. There is no evidence that those who were managing that mosque surrendered voluntarily the management to the respondent.

- F There was ample evidence that before the management was taken over by the respondent it (i.e. management) was devolving around the founder Said Mthana and his friend Abdallah and their families. Of course this was through usage and not through the ambit of the Wakf (Exhibits PE1 and 2) as I have already stated earlier although
- G they thought and believed in good faith that their right to manage that mosque emanated from that Wakf.

- H Since there was no law authorizing the respondent to take over the management of that mosque by force, the respondent had no automatic right to take over the management of that mosque.

- I Since both parties had no automatic right to manage the affairs of that mosque, the only crucial issue is as to who between them had a better title to manage the affairs of that mosque. The mosque in question is the house of God. It is supposed to be sacred for

worshippers to pray to the Almighty God. It is not supposed to be a place for quarrels or the like. A

In the present case, under normal circumstances the management of that mosque should be placed in the hands of the founder Said Mthana and his friend Abdallah Bin Umar and their families and descendants who had been managing that mosque for many years. But according to the circumstances of this case, doing so would be very dangerous to peace and order in that mosque. There is an uncontroverted evidence that before the respondent took over the management, two rival groups had emerged, that is, the Sunni or Shafi who go to burial places praising the Almighty God loudly, and who prepare food (Hitima) at the mourning. The other group is the Answar Sunna or Kimumuna who go to the burial places praising the Almighty God silently and do not prepare food at the mourning. These groups were at logger-heads and each was fighting for the management of that mosque. This was not a happy situation. It was a very unhappy situation and very dangerous to a peaceful society. B C D E

The respondent is a public Islamic body. By taking over the management it acted as a mediator and peace keeper. There is evidence in the record that since the respondent took over the management there is peace and tranquillity in that mosque. Peace and tranquillity are very crucial in any civilized, peace loving society/country such as ours. There is no reason why Lindi should be an exception. F

Thus, although under normal circumstances the appellant Raya would have a better title to possess and manage that mosque by virtue of the founder (her father) and his family and friend having managed it for many years, yet under the circumstances of this case the respondent Bakwata has a better title to possess and manage that mosque for the interest of peace and tranquillity. I so hold. Appeal dismissed with costs. G H