

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISGTRY
AT DAR ES SALAAM
CIVIL CASE NO 87 OF 2010**

THE REGISTERED TRUSTEES

MASJID QUIBLATAIN.....PLAINTIFF

VERSUS

SWAHIBA IBRAHIM SHAHA.....DEFENDANT

JUDGMENT

MKASIMONGWA, J.

The Registered Trustees Masjid Quiblatain (Plaintiffs) sue Swahiba Ibrahim Shaha (defendant) alleging that the late Mtumwa Shaha had bequeathed to the plaintiffs her 66.67 per cent shares of the proceeds from a house No. 20 on Plot No. 9 Block 39 along Sukuma Street, Kariakoo Area, Dar es salaam and that the Defendant is depriving them of their right to the ownership of the shares. It is also alleged that part of the house constituting 66.67 per cent share has been leased to tenants who operate lawful business and pay a total sum of Tshs. 4,900,000/= rent per month to the Defendant. They hence pray the court for the following: -

1. Order of the court declaring that seven rooms in the house in question are the property of plaintiff from the date it was bequeathed to them by waqf

2. The court orders, the Defendant to pay to the plaintiffs a total sum of Tshs. 602,000,000/= being arrears of their share proceeds of the property in question.
3. The court grants the plaintiffs with an order that the defendant effects perpetual payments in respect of their share in the property.
4. Costs of the suit.

The Defendant disputed the claims. She contended that the documents base of the claim were dubiously procured in the circumstances fit to be termed as forgery and that the plaintiffs had never assumed the right of ownership of 66.67 per cent shares of the said property or at all. The defendant also contends that the late Mtumwa Shah continued living in the suit premises before and after the date of the purported "WAKF" until her death and she was being taken care of by the defendant and other relatives in the way that suggested no existence of the "WAKF". The Defendant therefore prays the Court that it dismisses the suit entirely with costs.

When the suit came up for the Final Pre-Trial Conference the following issues for determination were framed.

1. Whether in October, 1998 Mtumwa Shaha bequeathed to the plaintiffs her 66.67 per cent shares of the proceeds from the House No. 20 on Plot No. 9 Block 39 along Sukuma Street, Kariakoo area, Dar es Salaam.
2. Whether the Defendant is depriving the plaintiffs of their right to the ownership of 66.67 per cent of the proceeds of the House No.

20 on Plot No. 9 Block 39 along Sukuma Street, Kariakoo Area Dar es Salaam from 1998.

3. What reliefs the parties are entitled to.

With a view to establishing the claims, the plaintiffs called two witnesses namely OMARY AWADHI HAMISI (PW1) and ZACHARIA MASHAKA MAFTAH (PW2). Whereas PW1 is one of the Trustees of the Masjid Quibtalain Rufiji and member of the Central Committee of the Mosque, PW2 is a retired Advocate of the High Court. In short the plaintiffs' case is to the effect that in Civil Appeal No. 32 of 1991 of the Court of Tanzania at Dar es Salaam one MTUMWA SHAHA was awarded by the Court 66.67 shares in the House No. 20 Sukuma Street, Kariakoo. As the house has ten (10) rooms, the Court clearly ruled that Mtumwa Shaha should be given 7 rooms share. This is by virtue of the judgments of the Court delivered on 25/10/1996 a copy of which was tendered in court by PW1 as exhibit and so admitted and marked **Exhibit P2**. Sometime in 1997/1998 when PW2 was still working as an advocate there came to his office Mtumwa Shaha, Lazaro Banzi and somebody Magwira. Lazaro Banzi was a clerk of one Mwajasho Rajabu. The latter was the advocate who had handled a case between Ibrahim Shaha and Mtumwa Shaha in the Court of Appeal of Tanzania. It is Lazaro Banzi who had introduced Mtumwa Shaha and Magwira who requested him to prepare a WAQF on the specific shares awarded by the Court of Appeal to Mtumwa Shaha. He prepared the WAQF paper which was signed by Mtumwa Shaha by printing her thumb witnessed by LAZARO BANZI and MR. MAGWIRA. The latter was one of the

Trustees of the Quiblatain Mosque. According to the WAQF Mtumwa Shaha left the property in question with the plaintiff. However, it was not absolute for prior to her death, the WAQF allowed her to enjoy the proceeds of the property and that was until she dies.

According to PW1, he and one Mohamed Omary Magwira (Deceased) who was the Chairman of the Board of Trustees of the Masjid Quiblatain were the signatories of the WAQF on the part of the Mosque. They signed it in the presence of Mr. Maftah (PW2) sometime in 1998. PW1 identified in Court the WAQF signed on 16/10/1998 and he tendered it as exhibit and the same was so admitted marked as **Exhibit P1**. Similarly, PW2 identified **Exhibit P1** in Court to be the WAQF he prepared under the instruction of Mtumwa Shaha.

The plaintiffs' case is also to the effect that Mtumwa Shaha died sometime later in 1999 and she is not survived by a child or husband and the plaintiffs were the administrators of estate of the late Mtumwa Shaha and that there is no any relative who administers it. However, the Defendant supervises and occupies the house in question and has not handed it over to the plaintiffs. The defendant occupies the house after she had trespassed on it and chased away the tenants following the death of Mtumwa Shaha sometime in 1999 and that since then the plaintiffs have not repossessed the house. As such they are seeking from the Court that they be given the right to own 7 rooms of the house, rent at the average of Tshs 3,000,000/= per month from 1999 to the date the case is determined.

On being cross examined, PW1 told the court according to **Exhibit P1** the deceased Mtumwa Shaha did administer the WAQF during her life time and that depended on the agreement reached. PW1 also told the Court that the mosque was to take over the administration of WAQF.

Again on being cross-examined PW2 told the Court that Mtumwa Shaha and Magwira signed the WAQF in his presence. He directed it to be signed by other Trustees of the mosque and he does not know if they signed it. He added WAQF may be absolute or otherwise. It is absolute when it relinquishes all the administration of the subject matter. It is not absolute if the maker retains some administration of the WAQF property for his/her gain. Absolute or non-absolute WAQF are all valid, and for a Muslim WAQF is WAQF. There is no distinction between absolute and non-absolute WAQF under Islamic rites.

On the other hand, the defence case is also made of the testimonies two witnesses namely SWAHIBA IBRAHIM SHAHA (DW1) and ALLY MUHIDINI MKOYOGORE (DW2). In short the defence case is as that, the suit premises were formally owned by MWANAHABASI SHAHA. Following her death, the same was bequeathed to HAMIS SHAHA and MTUMWA SHAHA. The latter died sometime in 1999 and following the death DW1 successfully petitioned the Court for letters of administration of the estate of the late Mtumwa Shaha. The matter was commenced in the Primary Court and it ended in the Court of Appeal. Sometime Mtumwa Shaha and Hamis Shaha issued a WAQF over a House No. 20 situated along Sukuma Street, Kariakoo in favour of the plaintiffs (Quiblatain Mosque). Ibrahim Shaha (Defendant's father) was not in favour of the

WAQF so he objected it in Court. The matter was conclusively determined by the Court of Appeal of Tanzania where HAMIS's WAQF was declared null and it was nullified on ground that since there were relatives in existence the property could not be issued by him as WAKF. Though they had issued WAQF HAMIS SHAHA and MTUMWA SHAHA remained living in the house together with tenants who paid them the rent. There was no time DW1 saw Mtumwa Shaha paying the collected rent to the plaintiff mosque. To the time of her death Mtumwa Shaha had only one tenant and for no known reasons the tenant was not paying rent. As the Administratrix of the estate of the late Mtumwa Shaha, DW1 did not find any communication between the late Mtumwa Shaha and the plaintiff mosque. As of recent Mzee Ibrahim lives in the house and that he has let part of it to tenants and collects rent. DW1 did not take part in leasing the house and that she does not know the amount of money collected as rent. There was no anytime the plaintiffs had approached the defendant claiming for the house in dispute and its proceeds.

DW2 is the Deputy Chief Kadhi. Sometime in 2017 the defendant came to the Chief Kadhi complaining over succession and Waqf. It is when he first came to know the Defendant. In the complaint, the Defendant said that the succession matter relating to the late MWANAHABASI SHAHA was not well conducted so she is aggrieved by the decision in the matter which decision DW2 does not remember its maker. It was shown that sometime in 1990s, BAKWATA Dar es Salaam Region had resolved the matter by stating that the succession and WQKF were not properly conducted and issued. DW2 was not among those who made that a decision.

As regards to the WAQF DW2 told the Court that the Defendant had a complaint against the WAQF document. After considering it the Chief Kadhi nullified it on ground that there was an errors done in the Probate Case. The Chief Kadhi also found that the WQKF by Mtumwa Shaha was conditional that she will administer it until she dies and that following his death the same should go to the plaintiff mosque. DW2 said in evidence that the WAQF should have transferred the title to its beneficiary from the giver. The condition given by Mtumwa Shaha was not proper for the giver of the WAQF is not required to benefit from it. The condition given by Mtumwa Shaha that she will remain in the house until she dies made the WAQF null and void. On being cross-examined DW2 told the Court that he was not among those who heard and determined the complaint brought to the Chief Kadhi by the Defendant sometime in 2017.

Along with the evidence the respective counsels representing the parties were granted leave to file their written submissions which again will be considered in the determination of this matter. Going by the evidence adduced it is evident that this matter revolves around the Property/House No. 20 or Plot No. 9 Block 39 along Sukuma Street, Kariakoo are in Dar es Salaam. Formerly the house was being owned by one MWANAHABASI SHAHA. Upon the death of that MWANAHABASI SHAHA the property was bequeathed to HAMIS SHAHA and MTUMWA SHAHA and going by the decision of the Court of Appeal in Civil Appeal No. 32 of 1991 (**Exhibit P2**), HAMISI SHAHA and MTUMWA SHAHA inherited the property at 50% share each. The Court of Appeal again going by **Exhibit P2** found that Hamis's portion comprised of 50% of the house was subject to inheritance

by MTUMWA and IBRAHIM. That made MTUMWA to have a total of 66.67% of the house.

Again going by the adduced evidence there is ample evidence that on the 16th day of October, 1998, a Deed of WAKF was made between MTUMWA SHAHA of house No. 20, Plot No. 9 Blok 30, SUKUMA STREET, KARIAKOO DAR ES SALAAM and THE REGISTERED TRUSTEES OF MASJID KIBLATAIN of P. O. BOX Number 15556 DAR ES SALAAM. The Deed was signed by MTUMWA SHAHA and PW1 among others witnessed by PW2. Part of the Deed waqf, which was admitted in evidence marked as **Exhibit P1** reads as follows

*"**WHEREAS** by order of the Court of Appeal of Tanzania in Civil Appeal Case Number 312 of 1991, the DONOR was awarded a Majority share, being 67% (Sixty-seven percent) equivalent to seven rooms (7) in the main house, House No. 20, Sukuma Street, on Plot No. 9 Block 39 Kariakoo, Dar es salaam (hereinafter called the PROPERTY) and DONOR makes the said property as an endowment ...*

***THIS DEED WITNESSETH** that I, MTUMWA SHAHA the said DONOR HEREBY DIVESTS myself of all ownership in respect of the said property and grant transfer and make WAKF on the day mentioned below against my signature of ALL THAT PROPERTY described above as that the trustees (MUTAWALI) for the time being of the WAKF and shall HOLD the same UPON TRUST subject to the rules hereinafter mentioned.*

- 1. I appoint myself as the first MUTAWALI (Trustee) for the administration of thus WAKF for the term of my natural life, which shall all along be known and designated as the WAKF OF MTUMWA SHAHA.*
- 2. After my death, the DONEE shall be the second MUTAWALI and shall administer the WAKF OF MTUMWA SHAHA for the maintain the WAKF and the MASJID KIBLATAIN for the benefit of the believers of the said MASJID KIBLARATIN generation after generation."*

Going to the issues for determination, the Court has to answer whether in October, 1998 Mtumwa Shaha bequeathed to the plaintiffs her 66.67 percent shares of the proceeds from the house No. 20 on Plot No. 9 Block 9 along Sukuma Street, Kariakoo area, Dar es Salaam. In that regard Mr. Twaha Taslima, advocate for the defendant submitted that the plaintiffs have never been bequeathed the shares of Mtumwa Shaha through Waqf as it is claimed. This is because for about three months from the date of creation of the purported Waqf to her death Mtumwa Shaha continued to live in that house and it is not evidenced by rent receipt or lease agreement from the date of the waqf the plaintiffs were receiving house rent or that they have an agreement with Mtumwa Shaha to live in their house. This was against the Islamic law as DW2 had stated in evidence that the donor of the waqf should not benefit from the waqf any more as it is no longer his or hers. Suffice it to say here that there was no waqf as the procedure has been flouted. Mr. Taslima referred the Court to

the **Academic's Legal Dictionary by S. L. Salwan and U. Narang, Academic (India) Publishers New-Delhi-110008** in which the term "WAQF" is defined to mean:

"Elimination of propriety ownership in the property and creations of trust of the property from religious purpose"

The learned counsel also referred the Court to the decision of the Court of Appeal of Tanzania in the case of IBRAHIM SHAHA VS. MTUMWA SHAHA (1992) TLR 211 where it was held that: -

"Since there is no evidence that Khamis was paying rent to the mosque the property had not been conclusively dedicated as Wakf"

As to the amount Mtumwa Shaha could have bequeathed by the Deed Waqf Mr. Taslima submitted that it ought to have not exceeded one third of the value of the estate. He got support of this from the decision in the case of HASSAN MATOLAA V. KADHI WA MSIKITI, MWINYI MKUU STREET (1985) TLR 53. In this matter Mtumwa Shaha granted 100% of the value of the property of the deceased which is unlawful hence the said Waqf is in effectual and illegal. I have considered the submission. In paragraph 4 of the Written Statement of Defence, the defendant alleged that the Waqf Deed (which was eventually tendered in evidence as **Exhibit P1**) was procured in circumstances fit to be termed as forgery. I have considered the defence case, and am of the view that there was no evidence adduced by the Defendant to substantiate the allegation. I have considered the evidence of PW2; the retired advocate who while in office drafted the Deed

which was duly signed by the parties thereto. There is nothing from it that persuades the Court to find that the WAQF DEED was/is a forged document. It is therefore a genuine document. The validity of the waqf is however faulted for it did not follow the principles under Islamic law. **One:** that the Donor of the waqf was benefiting from it. **Two:** that there were relatives who were taking care of the deceased. **Three:** that the value bequeathed exceeded that of one third of the value of the estate allowed by the law.

As to whether the Donor of the waqf, that is Mtumwa shaha, was benefiting from the waqf, DW1 told the court that:-

"After issuing the waqf ... Mtumwa Shaha remained living in the same and tenants paid rent which was consumed by Mtumwa Shaha ... there was no any time that I saw Mtumwa Shaha handing over the rent money to the plaintiff mosque".

While we have this story, on the other hand PW1 was cross examined by Miss Hawa, one of the advocates who represented the Defendant when the evidence of PW1 was being received and recorded by the Court. In response to the questions put during cross-examination PW1 was heard and recorded saying that:-

*"That Mtumwa died in 1999. The deceased was living in the disputed house to her death. She died in Muhimbili Hospital while she was being accommodated in the house in dispute. According to the 2nd paragraph in **Exhibit P1** the deceased did administer waqf during her life time. She did so by collecting*

rent and submitted it to the mosque. This was not done in writing. The deceased was living in one of the 7 rooms and the remaining 6 rooms were let to the tenants. The deceased was paying rent to the mosque. The mosque did not fix any amount for her to pay"

Essentially the evidence of PW1 on being cross-examined by the counsel for the defendant contradicts that of DW1 given in examination in chief. On the balance of probabilities on the evidence given the Court finds that although the deceased lived in the property she had offered as waqf she did not live therein rent-free. The fact that Mtumwa was paying rent for the room she was occupying in the property in dispute, she cannot be held to have benefited from the Waqf she had issued.

Secondly; as to the allegation that the waqf could not be issued for there were relatives who were taking care of Mtumwa Shaha, indeed there is no evidence given by the Defendant to that effect. What we have in evidence is the statement by DW1 on being cross examined by Mr. Kyaruzi advocate for the plaintiffs that: -

"We object Mtumwas' waqf because we, her relatives are alive"

In evidence but, PW1 on being cross-examined by Mr. Kelvin, advocate again representing the defendant, stated that:-

"The deceased died in 1999. It is the mosque that was taking care of the deceased when she was admitted in Muhimbili Hospital. The Mosque also did bear the costs for her burial".

Conspicuously the evidence on records betrays the allegation that there were relatives of the deceased Mtumwa Shaha who were taking care of her.

It was submitted by Mr. Taslima who got support in the decision in the case of HASSAN MATOLLA (*supra*) that the deceased could not give more than one-third of the value of the deceased person's estate. According to the decision, the deceased had a child to inherit from the father. This is not the case here for the deceased Mtumwa Shaha was not survived by a son or even a husband. Going by the evidence one can reasonably say that she was abandoned even by the relatives and only the plaintiff mosque took care of her. In that premises the principle enumerated in HASSANS MATOLLA case does not apply in the circumstances of this suit.

All in all, in fact though the validity of the waqf is questioned, the grounds on which it is so questioned have not been established by the defendants. As such the court finds the waqf given by the Mtumwa Shaha in respect of the house in dispute valid. This finding therefore leads the Court into answering the first issue for determination in the affirmative.

As for the second issue that is whether the defendant is depriving the plaintiff of their right to the ownership of 66.67 per cent of the proceeds of the house in dispute, I find from the evidence that it is not disputed that, the plaintiffs are not in actual possession of that part of the property constituting the 66.67%. In evidences the defendant admittedly contended that recently the house has been let to some tenants and that it is one

Mzee Ibrahim who has leased and collects rent from the tenants. DW1 does not know how much rent is collected from the house. This evidence, again leads the Court to affirmatively answer the second issue for determination.

As regards to the reliefs sought the findings of the court herein above entitle the plaintiff an order declaring that seven rooms in the house No. 20 on Plot No. 9 Block 39 Sukuma Street Kariakoo Area, Dar es Salaam to be the property of the plaintiffs from the date they were bequeathed to them by the late Mtumwa Shaha by Waqf, and it is so declared. The plaintiffs claim for a total sum of Tshs. 602,000,000/= being arrears of their share in the proceeds of the suit premises has not been established by the evidence adduced. There is only an assumption that the property earns money. We have but the evidence of DW1 that the house had remained unoccupied for years as it had deteriorated until recently when the defendant had renovated it. It is my opinion that the sum claimed being a specific claim has not established and it is accordingly dismissed.

The plaintiffs pray the Court that it grants them with an order that the defendant effects perpetual payments in respect of their share in the property. DW1 testified to the Court that:-

"No one has restricted the plaintiffs to live in the premises.

They by themselves have decided to be quiet"

Since the court has declared the plaintiffs to be rightful owners of the seven rooms of the house in question; the administration of the rooms should not be the business of the Defendants. It shall remain to be that of

the plaintiffs. As such it will be not fair if the Court shall order that the defendant effects perpetual payments in respect of the plaintiffs share in the property.

In that premises this suit succeeds only to the extent that it is declared that Seven Rooms in House No. 20 on Plot 9 Block 39 Sukuma Street, Kariakoo area, Dar es Salaam are the property of the plaintiff from the date it was bequeathed to them by Mtumwa Shaha by waqf. I have considered to the prayer for costs and find this to be a fit case for the Court to order that each party bears his/her own costs and it is so ordered.

Dated at Dar es Salaam this 5th of April, 2018.



E. J. Mkasimongwa

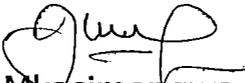
JUDGE

5/4/2018

Mr. Taslima: My lord, we pray to be recorded that we aggrieved by the judgment so this is to signify our intention to appeal to the Court of Appeal of Tanzania.

Order: The intention to appeal notice given by Mr. Taslima (advocate for the Defendant) is accordingly recorded.




E. J. Mkasimongwa

JUDGE

5/4/2018