

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

**LAND APPEAL NO. 176 OF 2023**

(Originating from Application No. 236 of 2018 in the Kinondoni

District Land and Housing Tribunal)

**ABDALLAH YAHYA alias MASJID HADHA.....1<sup>ST</sup> APPELLANT  
ALLY ABDALLAH.....2<sup>ND</sup> APPELLANT  
HUSSEIN JUMAA.....3<sup>RD</sup> APPELLANT  
YAHYA A. YAHYA.....4<sup>TH</sup> APPELLANT  
ABDULATIF YAHYA.....5<sup>TH</sup> APPELLANT**

***VERSUS***

**REGISTRATION INSOLVENCY AND  
TRUSTEESHIP AGENCY (RITA).....1<sup>ST</sup> RESPONDENT  
THE REGISTERED TRUSTEES OF THE  
NATIONAL MUSLIM COUNCIL OF TANZANIA (BAKWATA).....2<sup>ND</sup> RESPONDENT  
THE REGISTERED TRUSTEES OF  
ZAKARIA ISLAMIC CENTRE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

22/09/2023 to 27/09/2023

**E.B. LUVANDA, J**

Abdallah Yahya @ Masjid Hadha (First Appellant), Ally Abdallah (Second Appellant), Hussein Jumaa (Third Respondent), Yahya A. Yahya (Fourth Respondent) and Abdulatif Yahya (Fifth Appellant) are aggrieved by the decision of the trial Tribunal decreed ownership of the suit premises on Plot

No. 29 Block 37B in favour of the Registered Trustees of Zakaria Islamic Centre (Third Respondent) and adjudging the Appellants to accord vacant possession with immediate effect.

In the memorandum/petition of appeal, the Appellants raised two grounds of appeal: One, the trial Tribunal grossly misdirected itself in law and fact on the question of burden of proof and thus entered erroneous and unjust decision for not declaring the First Appellant lawful owner of the suit land; Two, the trial Tribunal erred in law and fact for entertaining the matter with serious irregularities and illegalities which led to miscarriage of justice.

Mtumwa Rajabu Kiondo and Emmanuel Richard Machibya learned Advocates for the Appellants submitted that the First Appellant tendered exhibit P1, P2, P3 to prove his ownership of the suit land and the same were not disputed by any of the Respondents and were appreciated by the Tribunal at last paragraph of page thirteen including first and second paragraphs at page fourteen. They submitted that the tribunal appreciated the evidence adduced and tendered by the Appellants is heavier than the Respondents but yet erred for not declaring that the First Appellant is the lawful owner, citing last paragraph page fifteen and first paragraph page sixteen of the judgment.

They submitted that the Tribunal misdirected itself due to the fact that even the records of the Tribunal shows that the disputed land belong to Masjid Hadha and not the Third Respiodnent who was registered in 1988 while the disputed land was registered in 1986 by the First Appellant upon applying from Kinondoni Municipal Council. They submitted that if Masjid Hadha was an institution its name would have started with the phrase the Registered Trustees of Masjid Hadha, arguing that the same is therefore not an institution whose property can be passed to the new registered institution the Third Respondent as its successor. They submitted that the First Applicant (sic, Appellant) has two names Abdallah Yahya @ Masjid Hadha, arguing that although there was an institution established by the First Applicant (sic, Appellant) in the name of Masjid Hadha Abdallah Yahya Development Centre, but the same was nullified. They submitted that the affidavits of names of the First Appellant which was not admitted, for lack of proper jurat, arguing the defect was curable under overriding objective, citing section 3A(1), (2) and 3B(1) (a), (b), (c) and (2) of the Civil Procedure Code, Cap 33 R.E. 2022 also Article 107(A) (2) (e) of the Constitution of the United Republic of Tanzania, Cap 2. The learned Counsel made reference to the testimony of PW6 who asserted that the First Appellant used the name of Masjid Adha, PW7 asserted that the disputed land belong to Masjid Hadha.

They submitted that the Respondent failed to prove ownership of the disputed land, for only testified oral evidence without tendering document for the late Khasim Tengeneza who alleged gave Waqf for construction of Mosuque. They submitted that exhibit D2 which was tendered by DW1 is dated 2000 but does not disclose ownership of the disputed land was registered in the name of the Late Khasimu Tengeneza who died in the year 2005 while the disputed land was allocated to the First Applicant (sic, Appellant) since 1985 supported by exhibit P1, P2, and P3. They referred to the testimony of DW1 arguing that he denied seeing the title deed; DW2 asserted that the Third Respondent was established in 1988 being two years after the disputed land was registered in the name of the First Applicant (sic, Appellant); DW4 alleged to have conceded a fact that Masjid Hadha is not an institution and to have never seen the Waqf transfer documents between the Late Tengeneza to the Third Respondent.

For ground number two, the learned Advocate submitted that there was no prayers on the pleadings that required (sic, requested) the Tribunal to declare that Masjid Hadha Mosque is under the control of Zakaria Islamic Centre, but the Tribunal itself erred in fact to make the findings to that effect, which was not pleaded by any of the parties.

In reply, Mr. Ashiru Hussein Lugwisa learned Counsel for the Second and Third Respondents submitted that efforts to prove alleged ownership, the First Appellant relied the letter of offer dated of 04/10/1986 exhibit P1 issued by Kinondoni District Officer in favour of Masjid Hadha, a building permit dated 30/05/1988 exhibit P2 and land rent receipt exhibit P3, arguing all these exhibits could not connect the First Appellant with the ownership of the property in dispute. He submitted that the Tribunal was thus right to rule against him in respect of his allegation of his purported ownership, of the suit property. He submitted that the said exhibits were issued to a different person other than the First Appellant exhibit P1 was issued to Masjid Hadha, and not Abdallah Yahya @ Masjid Hadha, as he baptize himself to that effect, arguing these two are different names. He submitted that on cross examination, the First Appellant who testified as PW5 failed to prove that his birth name is also Masjid Hadha, and failed to produce documents to connect himself with the said name. he submitted that the First Appellant attempted to rely on the evidence of affidavit which prepared while trial was under way to indicate that both names that is Abdallah Yahya Jumaa and Masjid Hadha refer to the same person, but was rejected on admission. He submitted that the argument by the Appellants that the Tribunal ought to admit the affidavit by virtue of overriding objective principle and Article 107A of the Constitution

arguing it wanting in merit and substance for it was not supported by any law, he submitted that the law support the decision of the Tribunal to reject it, citing order XIII rule 3 of the Civil Procedure Code, Cap 33 R. E. 2019. He submitted that the affidavit was rejected because it violated the fundamental rules relating to affidavits, in particular the jurat of attestation. He submitted that a plea of overriding objective which was not pleaded at the trial could not assist him where there are violation of specific legal requirements citing the case of **Capital Drilling (T) Ltd & Four Others vs. Sirili Ileti Mushi**, Misc. Commercial Application No. 16/2019; **Tanzania Railways Corporation & Another vs. Reuben Kyengu**, Misc. Labour Application No. 4/2021. He submitted that the First Appellants affidavit intended to mislead the Tribunal that his other name is Masjid Hadha so as to connect himself with the ownership of the suit property. He submitted that exhibit P2 and P3 also bears the name of Masjid Hadha and not Abdallah Yahya, arguing they were improperly relief by the First Appellant to support the alleged ownership of the disputed property. The learned Counsel supported a move by the Tribunal to frame a new issue as to whether the Masjid Hadha was the same person as the First Appellant, arguing it was because all documents tendered by the First Appellant bear the name of Masjid Hadha and not Abdallah Yahya @ Masjid Hadha. He cited order XIV rule 5(1) Cap

33 (supra); **Dominica Dominus Makukula & Three Others**, Civil Appeal No. 359/2020 CAT.

The learned Counsel submitted that what connect the Third Respondent to the ownership of the suit property is the Waqf exhibit D2. He submitted that DW4 explained under oath that the Third Respondent was registered by the First Respondent in 1988, as per a certificate of registration exhibit D3, where the initial registered trustees of the Third Respondent include the Late Kasim Tengeneza and the First Appellant. He submitted that the Late Tengeneza bequeathed the property in disputed by way of Waqf for the construction of a Mosque, a fact which was declared by the Third Respondent's constitution exhibit D4 at clause 3(1) where the First Appellant was also a signatory. He submitted that after the death of the Late Kassim Tengeneza, the First Appellant seized this opportunity to register his own institution under the name of Masjid Hadha Abdallah Yahya Development Islamic Centre, arguing it was done fraudulently to acquire the property in dispute for his own and his family. He submitted that after the First Respondent discovered this fraud after a complainant from the Second Respondent, the former de registered the said institution. He submitted that in view of that evidence, it was logical for the Tribunal to rule in favour of the

Third Respondent whose evidence was heavier than the concocted version of the Appellant's story.

For ground number two, the learned Counsel submitted that it was just and proper for the Tribunal to hold the way it did, because the property in dispute was not a private property neither was it owned by the First Appellant who claimed that he is called Masjid Hadha but failed to prove it, arguing that they conceded a fact that prayer was not specifically pleaded, but the court has discretion to award any matter even when it was not specifically pleaded. He cited Order VII rule 7 cap 33 (supra); consolidated **Holding Corporation vs. Grace Ndeana** [2003] TLR page 192.

Regarding an argument that it was wrong for the Tribunal to depart from its own findings, the learned Counsel submitted that when the entire decision is read in its holistic approach as opposed to the cherry picking approach by the Appellants, it will be realized that based on the Tribunal's analysis of the evidence on record, it was satisfied that the disputed premises belong to the Third Respondent and not the First Appellant.

Ms. Clementina Rishel learned State Attorney for the First Respondent submitted that the decision of the Tribunal was correct in both fact and law, arguing the Third Respondent managed to prove ownership of the suit



property by tendering exhibit D4 the Constitution of Zakaria Islamic Centre of 1988 on which it provide that the suit property is owned by the Third Respondent. She submitted that a letter of offer tendered by the First Appellant did not prove that he is the owner of the suit property since it is in the name of Masjid Hadha while the First Appellant's name is Abdallah Yahya. She submitted that there is no evidence or document whatsoever or identify card to prove that the First Appellant is called Masjid Hadha. She submitted that the affidavit of name which was not admitted by the Tribunal was prepared on 28/11/2018 while the suit Application No. 236/2018 was filed on 05/11/2018. She submitted that the conduct of the First Appellant to fraudulently change the name of the Third Respondent to the name of Masjid Hadha Abdallah Yahya Development Islamic Centre as per exhibit D5 establish the ill will and intention of taking away the property of the Third Respondent to make it as his own property. She submitted that the First Appellant was required to prove how he acquired the suit property and why was registered in the name of Masjid Hadha, cited the case of **Jacqueline Jonathan Mkonyi vs. Gausal Properties Limited**, Civil Appeal No. 311/2020 CAT.

For ground number two, the learned State Attorney submitted that the findings of the Tribunal were correct due to the act that Masjid Hadha is not

a personal name rather an institution name. she submitted that this can be proved from the conduct by the First Appellant when submitted to the First Respondent the changes of the name from that of Zakaria Islamic Centre (Third Respondent) to the new name of Masjid Hadha Abdallah Yahya Development Islamic Centre as per exhibit D5, which were nullified by the First Respondent after realizing that the First Appellant was the trustee of the Third Respondent and did the changes in deceitful ways trying to change the Mosque of the Third Respondent into a family Mosque.

On rejoinder, the learned Counsel for Appellants submitted that the First Appellant managed to tender documents exhibit P1 and P2 letter of offer and building permits, respectively which proves that the ownership of the disputed land Plot No. 29 Block 37B Kinondoni is Masjid Hadha the other names of the First Appellant.

They submitted that the Second and Third Respondents failed to prove their counter claim which was contained in their amended written statement of defence, argued they failed to tender a single document showing the Third Respondent is the owner of the disputed land Plot No. 29 Block 37B situated at Kinondoni Municipal Dar es Salaam.

On my part, regarding ground number one on the question of burden of proof, to my view the Tribunal is faulted for nothing. It is elementary rule of evidence that the onus of proof lies on who alleges existence of a certain fact in his favour. In the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) and Another**, Civil Appeal No. 118/2014, CAT at Mwanza, cited by the learned Counsel for Second and Third Respondents, at page 9, the apex Court ruled, I quote,

*"...in civil cases, the burden of proof lies on the party who alleges anything in his favour".*

It is the rule that, in civil cases parties to a suit cannot tie rather a party whose evidence is heavier than the other on the balance of probability is the one who must win, see **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 113, also cited by the Tribunal.

Herein, the First Appellant tendered a letter of offer dated 04/10/1984 exhibit P1, a building permit issued on 30/05/1988 exhibit P2, exchequer receipts for payment of land rent exhibit P3, to vindicate that he (Abdallah Yahya) is the lawful owner of the suit plot No. 29 Block 37B Kinondoni. However, the documentary evidence tendered by the First Appellant to wit exhibit P1, P2 and P3 bears the name of Masjid Hadha. It is to be noted that, at the trial,

the First Appellant failed miserably to prove ownership of the name Masjid Hadha. In an attempt to connect himself to the name Masjid Hadha, the First Appellant submitted to the First Respondent registration of an Institution styled Registered Trustees of Hadha and Abdallah Yahaya Development Islamic Centre which was registered on 31/12/2009, but was de – registered on 16/05/2018 via a letter exhibit D4. In the second attempt he affirmed an affidavit which was ruled by the Tribunal to be inadmissible. In deed to my view, it was inadmissible because was not even pleaded in the amended application filed on 05/11/2018, neither listed at paragraph 6(b) not annexed as among documents to be relief upon. Even if it could have been admitted could not assist the First Appellant, because in its contents, portray the name Masjid Hadha is reflected in the National Identity card (NIDA) of the First Appellant. But the First Appellant did not tender the alleged NIDA. On cross examination by the learned Counsel for the Second and Third Respondent, the First Appellant who testified as PW5 at the Tribunal, asserted that he did not tender in proceedings his birth certificate and stated that the name of Masjid Hadha is not among the names which he was given by his parent. Therefore the alleged affidavit was irrelevant as far as proof of the First Appellants name is concerned. To be precisely, the purported affidavit was concocted for deceitful purposes. Indeed on re examination, the First

Appellant conceded that Masjid Hadha is an institution, which fact defeat his stance that it is among of his individual and personal names. In view of this situation, after the First Appellant failed to prove ownership of the title in the name of Masjid Hadha the Tribunal was legally justified, to formulate a proposition as to who is Masjid Hadha under the circumstances, among the duo litigants. In a document of Waqf exhibit D2 where it is alleged the Late Kassim Tengeneza bequeathed the suit property to the Mosque, it was handwritten (in a neat handwriting) by the person who bequeathed and acknowledged by the First Appellant, I reproduce both versions,

*"Kassim Tengeneza Kinondoni Block 37B 16.04.88*

*MIMI MWENYE KUMILIKI KIWANJA HICHO CHA MSIKITI, NINA MRUHUSU KUJENGA YUSUFU ZAKARIA, KUJENGA NYUMBA HIYO YA MSIKITI PAMOJA NA MADRASA, NA PIA NAMRUHUSU AANDIKE JINA LAKE ZAKARIA. HAKUNA MTU YEYOTE ATAKAYE MSIMAMISHA KUJENGA JENGO.*

***Sgnd***

*KUHUSU KIWANJA NO. 29 BLOCK 37/B MIMI SHEIKH ABDALLAH YAHYA JUMA NINAYATHIBITISHA MANENO YA ND. KASSIM TENGENEZA KUWA NIYAHAKIKA NA KWELI HAKUTAKUA NA YEYOTE ATAKAE MZUIA NA UJENZI NA KULITAJA JINA LAKE KATIKA JENGO HILO.*

AHSANTE

***Sgnd***  
***16-04-1988***

Exhibit D2 is dated 16/04/1988, the Third Respondent was registered on 21/11/1988 as per a certificate of incorporation exhibit D3, reflect the name the Registered Trustees of Zakaria Islamic Centre. Along exhibit D2 and D3, the Respondents also tendered the Constitution exhibit D4 for Zakaria Islamic Centre, with specific objectives among others to build and maintain a mosque on Plot No. 29 Block 37B at Kinondoni that will offer praying accommodation for female and male worshipers, as per clause 3(i). At page 4 of exhibit D4, the First Appellant Sheikh Abdallah Yahya Juma, appeared at number three of the list of Trustees who certified true copy of the Constitution, and appended his signature thereon. It is to be noted that both exhibit D2 and D4 were admitted without any reservation or objection and no cross examination was forthcoming on the part of the First Appellant regarding his signatures featuring therein.

In view of that the Tribunal was justified to rule and declare the Third Respondent as the lawful owner of the disputed property.

An argument that exhibit P1, P2, P3, were issued in 1986, while the Waqf exhibit D2 and Constitution of Zakaria Islamic Centre were issued in 1988, is

baseless. This is because in exhibit D2, contextually suggest the Masjid was existing and the one bequeathed a plot, permitted or allowed it is construction. Nowhere in exhibit D2, said he is bequeathing an empty plot, I re reproduce the two first sentences, for appreciation.

*"MIMI MWENYE KUMILIKI KIWANJA HICHO CHA MSIKITI, NINA MRUHUSU KUJENGA"*

Therefore by the time of bequeathing a Mosque was underway that is why it was named a plot of a mosque. No wonder even in the constitution exhibit D4, at clause 3(1) used the phrase to build and maintain a Mosque. Another thing, among the seven witnesses paraded by the First Appellant at the trial, majority were sibling and family members: Yahya Abdallah Yahya (PW1) son and tenant since 2017; Ally Abdallah (PW2) son and tenant since 2017; Abdulatifa Jumaa @ Abdulatif Yahaya (PW3) son and tenant since 04/05/2018; Hussein Jumaa (electrician) (PW4) tenant since 07/09/2017.

Ground number two, the learned Counsel for Appellants faulted the Tribunal for making a finding that the Masjid Hadha is a mosque under control of Zakaria Islamic Centre, arguing it was not pleaded by the parties. To my view, the Tribunal is faulted for nothing, in First, Second, Third, Fourth and Fifth Applicant's joint written statement of defence to the Second and Third Respondents counter claim, at paragraph three, they avered that I quote,

*"Masjidi Hadha alias Abdallah Yahya is the rightful owner of the property on Plot No. 29 Block 37B Kinondoni subject of the instant Application No. 236 of 2018 before the Honourable Tribunal and that the said Masjid Hadha being bonafide owner of the said property LAWFULLY entered into the lease agreement with the second, Third, Fourth and Fifth Respondents in the counter claim".*

Therefore Masjid Hadha was pleaded solo in it is isolation.

The Appellants relien on an obiter dictum of the Tribunal reflected at page fifteen last paragraph from the bottom, where it erroneously by slip of a pen asserted that the evidence of the Appellants was heavier. I am saying it was an error by mere slip of a pen, because on the following paragraph at page sixteen the Tribunal declared the Third Respondent as the lawful owner. As alluded by the learned counsel for Second and Third Respondents, generally the flow of the Tribunal's findings tilt in favour of the Third Respondent.

In the upshot, the appeal is without merit whatsoever.

The appeal is dismissed on its entirety with costs.



**E.B. LUVANDA**  
**JUDGE**  
27/09/2023



Judgment delivered by virtual court attended by the Third Appellant, Mr. Swalehe Njoma learned State Attorney and Ms. Clementina Rishela learned State Attorney for the First Respondent and Mr. Ashiru Hussein Lugwisa learned Counsel for the Second and third Respondent and in the absence of the First, Second, Fourth and Fifth Appellants.



E.B. LUVANDA  
**JUDGE**  
27/09/2023