**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)**

**CIVIL APPEAL NO. 148 OF 2019**

**ALI SAIDI KURUNGU ..... 1ST APPELLANT**
**KHAMISI SALUMU ABDALLAH ..... 2ND APPELLANT**
**RAMADHANI M. LUKALI ..... 3RD APPELLANT**
**SALIM MOHAMED ABDALLAH ..... 4TH APPELLANT**
**KHALID SAID KITOGO ..... 5TH APPELLANT**

**VERSUS**

**THE ADMINISTRATOR GENERAL .....1ST RESPONDENT**
**THE REGISTERED TRUSTEES OF**
**MASJID MABOX - MTONI SOKONI ..... 2ND RESPONDENT**
**UST. ALI MOHAMED ALI ..... 3RD RESPONDENT**
**ALI MOHAMED MTULIA ..... 4TH RESPONDENT**
**ABUBAKAR SULTANI NGONDO ..... 5TH RESPONDENT**
**OMARI MPOTO KAPILIMA ..... 6TH RESPONDENT**
**SAIDI SHAHA KASU ..... 7TH RESPONDENT**
**SELA RAJABU ALI ..... 8TH RESPONDENT**
**SALUM RAMADHANI LUKALI ..... 9TH RESPONDENT**
**JUMA OMARI KAPU ..... 10TH RESPONDENT**
**SALIM KIFO MTAMBULO ..... 11TH RESPONDENT**
**IBRAHIM MUSSA REHANI ..... 12TH RESPONDENT**
**OMARI MBARAKA PAZI .....13TH RESPONDENT**

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania, at Dar es Salaam)**

**(Mlyambina, J.)**

**dated the 11th day of December, 2018**

**in**

**Miscellaneous Civil Cause No. 427 of 2018**

---

## JUDGMENT OF THE COURT

*10th February & 29th May, 2023*

**MWAMBEGELE, J.A.:**

On 11.12.2018, the High Court (Mlyambina, J.) dismissed on a preliminary point of objection Miscellaneous Civil Cause No. 427 of 2018 in

which the appellants herein sought recourse against the respondents on matters that will become apparent in due course. The appellants have come to this Court seeking to assail that ruling and its attendant drawn order.

The background to the dispute between the parties can briefly be stated. On 14.12.2015; the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth respondents were elected to the office of the Board of the Registered Trustees of Masjid Mabox Mtoni Sokoni (the second respondent). The appellants had the view that the election of the said respondents to that office was illegal and therefore their occupation of the office was unlawful. It is against this backdrop that a petition was lodged by the appellants in the High Court through Miscellaneous Civil Cause No. 427 of 2018 under section 26 of the Trustees Incorporation Act, Cap. 318 of the Laws of Tanzania (the Trustees Incorporation Act) seeking a number of reliefs. Before that petition could be heard on its merits, all the respondents, except the first, lodged a notice of preliminary objection comprising several points. The preliminary point of objection which succeeded was one on jurisdiction; that the High Court had no jurisdiction to entertain the matter. Having found and held that the preliminary point was meritorious, the High Court struck out the petition. It is against that ruling and the flanking drawn

order on which this appeal is premised. The memorandum of appeal has five grounds of complaint:

1. That the High Court erred in law by making a *per incuriam* decision and order without assigning reasons for departure from the earlier decision of the same court, Hon. I. D. Aboud, J. delivered on 22nd July 2011 in Civil Case No. 236 of 1989 regarding the status of the Registered Trustees of Masjid Mabox – Mtoni Sokoni and that of BAKWATA (Baraza Kuu la Waislam Tanzania);
2. That the High Court erred in law by making a finding and holding that BAKWATA Constitution is supreme among Islamic Congregation and that it bars their followers from filing suits before the courts of law before exhausting local remedies/procedures provided under their constitution;
3. That the High Court erred in law by relying on evidence and records to determine a point of Preliminary Objection;
4. That the High Court erred in law by not applying the Overriding Objective principle when dismissing the appellant's petition; and
5. That the High Court erred in law by ordering the appellants to channel their claims against all the respondents through BAKWATA

and in total disregard of the provisions of the Trustees Incorporation Act, Cap. 318, R.E. 2002.

At the hearing of the appeal before us, Mr. Mohamed Tibanyendera, learned advocate, appeared for the appellants. On the part of the respondents, while Ms. Jessica Shengena, learned Principal State Attorney, Messrs. Baraka Nyambita and Samwel Mutabazi, learned State Attorneys, joined forces to represent the first respondent, Mr. Mussa Kiobya, learned advocate, appeared for the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth respondents. Except for the first respondent, counsel for the parties had earlier on filed written submissions for or against the appeal on which they highlighted in their oral arguments the key aspects in the appeal.

Arguing in respect of the first ground of appeal, Mr. Tibanyendera submitted that the decision of the High Court was made *per incuriam* in that it departed from its earlier decision in **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others**, Civil Case No. 236 of 1989 (unreported) in which the same court held that the second respondent herein and Baraza Kuu la Waislamu Tanzania (BAKWATA) had the same status and that the only difference was that the latter had "some right to oversee some mosques, not all". That decision, Mr. Tibanyendera argued, was not

appealed against and therefore remains the correct position of the law unless revised or reversed by the Court. Mr. Tibanyendera thus contended that the impugned decision contravened the doctrine of precedent and *stare decisis*. He implored us to allow the appeal on this ground.

As regards the second ground of appeal, the appellants' counsel submitted that the High Court erred in making a finding that the BAKWATA Constitution is supreme among Islamic congregation and that it bars its followers from filing suits in courts of law before exhausting local remedies provided under their constitution. He submitted further that the learned High Court Judge did not read the whole of the BAKWATA Constitution but just read article 95 (2) and part of article 95 (1) and article 96 (1) thereof. He contended that article 95 of the BAKWATA Constitution deals with interference with BAKWATA activities. This is deciphered from the title to it which reads "KUINGILIA KATI NA/AU KUVURUGA SHUGHULI ZA BARAZA KUU", he argued. The dispute between the parties, he contended, did not involve any of the activities of BAKWATA as articulated under article 95. Besides, article 95 (1) (a) and (b) is a prohibition to BAKWATA at any level from referring any BAKWATA leadership dispute to the police, courts of law or any executive organ of the state apart from BAKWATA internal dispute resolution forums, he submitted.

The appellants' advocate added that article 95 (2) of the BAKWATA Constitution prohibits leaders and Muslims subscribing to BAKWATA Constitution from referring disputes involving BAKWATA directives or decisions to courts of law. He clarified that the restriction is on matters regarding leadership of BAKWATA and not against every dispute. The dispute between the parties in the High Court involved individuals and the second respondent (the Registered Trustees of Masjid Mabox - Mtoni Sokoni) and the conduct of the first respondent (the Administrator General of the United Republic of Tanzania). Besides, he argued, Trustees of Masjid Mabox Mtoni Sokoni is not one of the organs of BAKWATA in terms of article 78 (9) and (10) of the BAKWATA Constitution. The appellant's counsel thus contended that it would be wrong to determine issues of leadership of Masjid Mabox Mtoni Sokoni which has the same status as BAKWATA as per the decision of the High Court in **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** (supra).

As regards ground three of the appeal, Mr. Tibanyendera submitted that the High Court relied on evidence to determine the preliminary point. He argued that in determining that article 95 (2) of the BAKWATA Constitution barred referring to courts of law matters relating to elections of leadership of Masjid Mabox Mtoni Sokoni, he referred to the plaint filed in

court. That, he argued, was against the principle laid down in **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd** [1969] 1 E.A. 696 and **Samwel Kimaro v. Hidaya Didas**, Civil Application No. 20 of 2012 (unreported) in which it was held that a preliminary objection must raise a pure point of law which has to be argued on the assumption that all facts pleaded by the other side are correct.

In support of the fourth ground of appeal, the appellant's advocate submitted that the High Court should have applied the overriding objective principle to allow the parties resolve their dispute on its merits. He argued that the overriding objective principle was entrenched in our laws vide Act No. 8 of 2018 and section 3A was added to the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 and the High Court should have applied it.

Submitting in support of the last ground of appeal, Mr. Tibanyendera argued that the High Court erred in ordering that the appellants should channel their claims against the appellant through BAKWATA which was in total disregard of the provisions of the Trustees Incorporation Act. He argued that the BAKWATA Constitution has no dispute resolution mechanism, as such, the High Court had to resolve the dispute brought to it under the provisions of section 26 of the Trustees Incorporation Act. Having

made a finding that the High Court jurisdiction was not ousted, the High Court judge misdirected himself by finally ousting the jurisdiction by subjecting the parties to unknown procedures purported to be under the BAKWATA Constitution, he argued.

Having argued as above, the appellant's counsel prayed that the order of the High Court be quashed and an order for restoration of the trial on the merits of the case be made. He also prayed for costs and other relief or reliefs we may deem just to grant.

For the first respondent, Ms. Shengena resisted the appeal. Responding against the first and fifth grounds of appeal, she submitted that the High Court did not err in deciding as it did because it was faced with a question of jurisdiction. Thus the two cases; the present and **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** before Aboud, J. had distinct issues. She relied on **Tumaini Massaro v. Tanzania Ports Authority**, Civil Appeal No. 36 of 2018 (unreported) at pp. 11-12 thereof to buttress the point that a judgment of the court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. What was before the High Court in the matter the subject of this appeal is different from what transpired in **Trustees of Masjid Mabox**

**Mtoni Sokoni v. Abduldbard and Others** before Aboud, J. and thus the impugned decision cannot be said to be *per incuriam*, he argued.

Responding to the second ground of appeal, Ms. Shengena submitted that as BAKWATA is an overseer of the appellants, the latter are covered by article 95 (2) of the BAKWATA Constitution. Thus, she argued, in terms of section 17 (2) of the Trustees Incorporation Act, BAKWATA oversees and supervises the appellants and other Muslim institutions. She added that, in assailing the High Court's decision, the appellant relied on the decision in **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** (supra) which was decided in 2011 but there is a recent decision of **Abbas Kihemba and Another v. Sheikh Issa bin Shaaban Simba and Another**, Civil Case No. 46 of 2006 (unreported) which is a more recent decision of the same court in which it was observed at p. 184 of the record of appeal that the dispute of individuals challenging removal of leaders from BAKWATA was a clear religious dispute and the High Court held that the dispute was prematurely instituted in a court of law. She thus argued that the second ground of appeal lacked merit.

As regards ground three which is a complaint that the High Court used evidence to decide a preliminary objection, Ms. Shengena submitted that the

complaint was without basis and relied on the case of **Ali Shabani and 48 Others v. Tanzania National Roads Agency (TANROADS) and Another**, Civil Appeal No. 261 of 2020 (unreported) to bolster up the point that preliminary objections are not decided in abstract.

In response to ground four, the learned Principal State Attorney submitted that the overriding objective is not meant to ignore existing procedures. To buttress this proposition, she cited to us **Mondorosi Village Council and Two Others v. Tanzania Breweries and Four Others**, Civil Appeal No. 66 of 2017 (unreported) in which we held that the overriding objective should not be applied blindly. She added that the question before the court was one on jurisdiction to which the overriding objective does not apply.

On the basis of the above arguments, the learned Principal State Attorney implored us to dismiss the appeal with costs.

For his part, Mr. Kiobya for the remaining respondents adopted his reply written submissions and had nothing useful to add in clarification. In the written submissions, Mr. Kiobya submitted in reply to the first ground of appeal that the argument that the High Court decision was made *per incuriam* because it departed from its previous decision in **Trustees of**

**Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** (supra) is a misconception. He argued that the matter before the High Court was not whether the second respondent had the same status as BAKWATA but whether it had jurisdiction to determine the religious dispute before it. In the premises, he argued, the allegation that the High Court departed from its decision in **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** (supra) does not arise. After all, the learned counsel went on, that decision was not brought to the attention of the High Court and is in conflict with other decisions decided after it; for instance, **Muhamad Rafik and 11 Others v. The Adhoc Committee Sunni Muslim Jamaat Dar es Salaam**, Civil Case No. 119 of 2012 (unreported) in which the High Court stated that BAKWATA is a supreme authority for Muslims in Tanzania entrusted with monitoring how Islamic religious organizations operate within their established constitutions. Mr. Kiobya submitted further that it is the law in this jurisdiction that once there are conflicting decisions of the High Court, the court is supposed to follow the more recent one. To buttress this stance, Mr. Kiobya cited our decision in **Arcopar (O.M.) S.A v. Harbert Marwa and Family Investments Co. Ltd and Three Others**, Civil Application No. 94 of 2013 (unreported) in which we so held.

In view of the above, the learned counsel submitted that the decision of the High Court in **Trustees of Masjid Mabox Mtoni Sokoni v. Abduldbard and Others** (supra) was no longer good law and thus it cannot be said that the decision was made *per incuriam*. The learned counsel urged us to dismiss this ground of appeal.

In response to the second ground of appeal, Mr. Kiobya submitted that BAKWATA is governed by its Constitution which prohibits its followers from instituting any legal proceeding in courts of law under article 95 (2). He argued that the words "mtu yeyote" used in the article mean that any person of a Muslim congregation is barred from instituting disputes without channeling the same through the dispute mechanism under the BAKWATA Constitution. He clarified that the dispute the subject of this appeal was between the first and second appellants who were members of the Board of Trustees together with three other persons against the Registered Trustees of Masjid Mabox Mtoni Sokoni which is affiliated to BAKWATA and therefore it is wrong and misleading to say that Masjid Mabox is not an organ of BAKWATA.

Mr. Kiobya went on to submit that the prohibition under article 95 (2) aims at preventing Muslims from impeding the right to worship and thus

being in line with article 19 (2) of the Constitution of the United Republic of Tanzania, 1977 which precludes courts of law from determining disputes from religious institutions. He added that all Muslim trustees incorporated in this country, including Masjid Mabox Mtoni leadership, are subjected to BAKWATA supervision. The learned counsel thus concluded that the High Court lacked jurisdiction to entertain the matter and it rightly so declined to entertain it. He thus implored us to dismiss this ground as well.

Mr. Kiobya attacked the third ground of appeal that the High Court Judge did not use evidence to determine the preliminary objection. He argued that the argument was one on jurisdiction and the High Court so found in favour of the respondent and struck out the petition. The principle laid down in **Mukisa Biscuit Manufacturing Co Ltd** (supra) on what a preliminary point of objection entails, was therefore not offended, he concluded.

As regards ground four, that the High Court ought to have applied the overriding objective principle not to dismiss the petition so that the dispute between the parties could be resolved on its merits, Mr. Kiobya argued that the petition was not dismissed but struck out and added that the principle was not introduced in order to do away with the entrenched principles and

practice of the court. He emphasized that the question of jurisdiction is very fundamental that the court could not overlook it. He cited our decision in **Mondorosi Village Council and Two Others** (supra) to buttress this position of the law.

In respect of the last ground, Mr. Kiobya's response was a reiteration of the submissions in respect of the second ground of appeal. He, in essence, argued that the High Court did not disregard the provisions of section 26 of the Trustees Incorporation Act, but opined that it was incumbent upon the appellants to channel their complaint through the mechanism enshrined in the BAKWATA Constitution. He added that the BAKWATA Constitution of 1999 Revised Edition of 2008 has a dispute resolution mechanism stipulated under articles 27, 39, 49 and 63. The appellants' allegation that the BAKWATA Constitution has no dispute resolution mechanism is therefore without basis, he argued. The learned counsel also added that despite the argument that the petition was filed under section 26 of the Trustees Incorporation Act, section 17 of the same Act required the appellants to give the first respondent (the Administrator General) and BAKWATA space to resolve the dispute.

We have considered the heavily contending arguments by the learned counsel for the parties. Having so done, we think the central issue for determination is whether the High Court had jurisdiction to determine the matter. This is the subject of grounds one, two and five of the appeal. Simply put, it is the contention of the appellant that the matter the subject of the dispute does not fall within the scope and purview of matters that can be dealt with by BAKWATA first while the respondents are at one that it does. The latter allege the courts of law are precluded from entertaining such a dispute.

We start our determination by reproducing article 95 (2) of the BAKWATA Constitution:

> *"Kwa kuwa msingi wa maongozi ya Baraza Kuu la Waislam wa Tanzania (BAKWATA) ni Quraan na Sunna, na kwa mujibu wa Katiba ya nchi ya 1977 ibara ya 19 kifungu namba 1, 2 na 3 ni marufuku kwa kiongozi yeyote au Muislamu yeyote kupeleka kesi yoyote inayohusu maongozi ya Baraza Kuu kwa mujibu wa Katiba hii katika vyombo vya Dola na Mahakama.*
>
> *Kadhalika vyombo vya dola au Mahakama havina haki kupokea mashtaka yoyote yanayohusu utendaji na maamuzi ya vikao halali vya Baraza Kuu bila*

*kuzingatia misingi iliyotajwa hapo juu na sheria nyingine za nchi."*

Our literal translation would be:

*"As the foundation of BAKWATA leadership, the National Muslim Council of Tanzania (BAKWATA) is the Quraan and Sunna, and in line with article 19 (1), (2) and (3) of the Constitution of the United Republic of Tanzania, 1977, no leader or any Muslim shall file in any organ of the State or any court of law a case relating to the Council's leadership*

*And any organ of the State or court of law shall not receive any complaint relating to execution of the Council's duties and decisions thereof without conforming to the basics explained above and any other law of the land."*

The reliefs sought in the petition the genesis of this appeal, as gleaned in the record of appeal, included declarations and damages, both general and specific. The question that pops up at this juncture is: do these reliefs fall within the scope of article 95 (2) of the BAKWATA Constitution? We must confess that the answer to this question has greatly exercised our mind. We say so because, much as we may wish all disputes emanating from, relating to or connected with religious misunderstandings should be resolved by

BAKWATA, we have serious doubts if article 95 (2) of the BAKWATA Constitution was meant to cover each and every dispute. Our understanding of the article is that the disputes envisaged by the provision were only those relating to BAKWATA leadership. This is decoded from the *chapeau* to the article and the words used therein. The chapeau reads: "KUINGILIA KATI NA/AU KUVURUGA SHUGHULI ZA BARAZA KUU" which means "Interfering with or Disturbing Council's Business". Now, we have serious doubts if the dispute between the parties to the petition the subject of this appeal has anything to do with the Council's leadership or business. If anything, we think it is far from it. This was a dispute between the appellants and the respondents on the appointment of the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth respondents on their appointment to the office of the Board of the second respondent (the Registered Trustees of Masjid Mabox Mtoni). The reliefs sought included general and specific damages. How would BAKWATA deal with this issue of tort? We understand the second respondent (the Registered Trustees of Masjid Mabox Mtoni Sokoni) is a legal person which can sue or be sued. So is BAKWATA.

While still on the same point, we wish to underscore that the provisions of section 26 of the Trustees Incorporation Act, permit any person to inquire in any court of law the status of any member of a body corporate like the

second respondent (the Registered Trustees of Masjid Mabox Mtoni Sokoni). That is what the appellants exactly did. We do not think that it was appropriate to blame them for taking that course of action. In answer to the first, second and fifth grounds of appeal, we find and hold that the subject of the dispute between the parties to this appeal did not fall within the scope and purview of matters envisaged by the provisions of article 95 (2) of the BAKWATA Constitution and therefore the High Court had jurisdiction to deal with it.

We now turn to consider the third ground of appeal which seeks to fault the High Court for not applying the overriding objective to deal with the matter instead of truncating it on a preliminary objection. We are not prepared to go along with the line of reasoning and conclusion of the advocate for the appellants. The issue at stake was one on jurisdiction of the court. We wish to remind the learned counsel for the appellants that the oxygen principle or sometimes called the principle of overriding objective does not apply to matters relating to jurisdiction. We have times without number held so in our previous decisions including **Mondorosi Village Council** (supra).

Next for consideration is the fourth ground of complaint which seeks to fault the High Court for relying on evidence to decide the preliminary objection. We will quickly dispose this ground as follows: when determining a preliminary point of object courts of law do not do so from abstract. They have somewhere on which to peg their arguments. As we held in **Ali Shabani and 48 Others** (supra), the decision cited to us by the learned Principal State Attorney:

> *"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."*

Given the above, we are satisfied that the High Court rightly decided the preliminary objection based on a pure point of law.

To recap, we find and hold that the dispute the subject of the present appeal did not fall within the prohibition of article 95 (2) of the BAKWATA Constitution. The matter before the High Court was one on jurisdiction to

which the overriding objective does not apply. The preliminary objection was appositely decided by not basing on any evidence but on facts pleaded.

On the whole, we find merit in this appeal and allow it. Consequently, we remit the matter to the High Court for continuation of the hearing on its merits. Costs in the present appeal shall abide the outcome of the suit.

**DATED** at **DAR ES SALAAM** this 26th day of May, 2023.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

W. B. KOROSSAO
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

The judgment delivered this 29th day of May, 2023 in the presence of Mr. Mohamed Tibanyendera for the Appellants, Mr. Mussa Kiobya, learned counsel for the 2nd to 13th Respondents, and in the absence of 1st Respondent is hereby certified as a true copy of the original.


R. W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**