Epharahim v Pastory & another
HIGH COURT TANZANIA
MWALUSANYA J
Date of Judgment: 22 February 1990 Case Number:
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Judgment
The First Respondent inherited clan land from her father by a valid will. Later she sold the land to the Second Respondent who was not clan member. The Appellant, the First Respondent's nephew, claimed a declaration that the sale of the land by his aunt was void as females under Haya customary law had no power to sell land. The Primary Declaration of Customary Law (see page 761 post) which provided that women could inherit clan land for use during their life, but might not sell it, and that any such sale would be null and void. The district court took a different view, holding that since the incorporation of the Bill or Rights into the Constitution Women clan members had the same rights as men. The Appellant appealed to the High Court.
Held: Appeal dismissed.
Discrimination against women or no ground of sex had been prohibited by the Bill of rights and by the Universal Declaration of Human Rights, both of which had been incorporated into the Constitution, and by the Convention on the Elimination of All Forms of Discrimination against Women, by the African Charter on Human and People's Rights and by the International Convention on Civil and Political Rights all three of which had been ratified by Tanzania. It is clear that the customary law under discussion flew in the face of the Bill or Rights as well as the international conventions to which Tanzania was a signatory. Nevertheless, courts were not impotent to invalidate laws which were discriminatory and unconstitutional. It had been provided by section 5(1) of the Constitution (Consequential, Transitional & Temporary Provisions) Act that with effect from March 1988 the courts should construe the existing law, including customary law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the "Fifth Constitutional Amendment Act that is Bill of Rights. All courts in Tanzania had been enjoined to interpret that section in the course of their duties. Adopting the purposive approach of interpretation, sometimes referred to as the schematic and teleological method, the courts should ask what was the intention of the Parliament of Tanzania in passing section 5(1) and what was the mischief that it intended to remedy. There could be no doubt that Parliament wanted to do away with the oppressive and unjust laws of the past. It wanted all existing laws (as they existed in 1984) which were inconsistent with Bill of Rights to be inapplicable in the new era or be treated as modified so that they were in line with the Bill of Rights. Many countries in the Commonwealth had expressly indicated what they wanted to be the position of the existing law after the introduction of a Bill of Rights in their constitutions. Tanzania did not wish to adopt similar provisions which 'saved' the existing law operating prior to the introduction of the Bill of Rights and any existing law that was inconsistent with the Bill of Rights should be regarded as modified such that the offending part of that statute of law was void. Section 20 of the Rules of Inheritance of the Declaration of Customary Law was discriminatory of females in that, unlike their male counterparts, they were barred from selling clan land. That was inconsistent with Act 13(4) of the Bills Rights of the Constitution, which barred discrimination on the ground of sex. Therefore under section 5(1) of Act of number 16 of 1984, section 20 of the Rules of Inheritance (and any similar customary law) was now modified and qualified such that males and females had equal rights to inherit and sell clan land. Females just like males could now inherit clan land or self-acquired land of their fathers and dispose of the same when and as they liked. The disposal of clan land to strangers without the consent of the clansmen was subject to the fiat that any other clan member could redeem that clan land on payment of the purchase to the purchaser. That now applied to both males and females. The district court was right to take judicial notice of the rpovisions of section 5(1) and act on them as it did (see pp 762-763, 765, 766, 767, 768, 770, 771, post). Dicta of Lord Denning MR in *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481 at 499, *Nyali Ltd A-G* [1955] 1 All ER 646 at 653 *James Buchanan & Co v Babco Forwarding and Shipping (UK) Ltd* [1977] QB 208 and *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 at 228, considered.
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Per curiam article 30(4) of the Constitution stated that the authority "may" make rules of court governing the filling of a petition under article 30(3) for a declaration that a discriminatory law be declared void for

being unconstitutional. Rules of had yet to be made for that purpose, but the absence of such rules of court did not mean that the courts were impotent to act. The High Court would invokes its inherent powers and use the available rules of the court. After all rules of procedure were the handmaidens of justice and should not be used to defeat substantive justice. Therefore failure to invoke the correct rules of the court could not defeat the course of justice, particularly where human rights were at stake. Wrong rules of court might only render the proceedings a nullity when they resulted in a miscarriage of justice (see pages 763-764 post) *Kariapper v Wijesinha* [1967] 3 All ER 485, *General Marketing Co Ltd v Shariff* [1980] TLR 61 and *Noordally v A-G* [1987] LRC (Const) 599 considered. Dictum of Kisanga JA in *Haji Athumani Issa v Twentama Mututa* (UR), Tan CA civil application number 9 of 1988 – doubted.

MWALUSANYA J: This appeal is about women's rights under our Bill of Rights. Women's liberation is high on the agenda in this appeal. Women did not want to be discriminated against on account of their sex. What happened is that a woman, one Holaria Pastory, who is the First Respondent in this appeal, inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had none to take care of her, she sold the clan land on 24 August 1988 to the Second Respondent, Gervazi Kaizilege, for TShs 3000 000. This Second Respondent is a stranger and not a clan member. Then on 25 August 1988 the present Appellant, Bernardo Epharahim, filed a suit at Kashasha primary court in Muleba District, Kagera Region, praying for a declaration that the sale of the clan land by his aunt, he First Respondent, tot he Second Respondent was void as females under Haya customary law have no power to sell clan land. The primary court agreed with the Appellant and the sale was declared void and he First Respondent was ordered to refund the TShs 300 000 to the purchaser.

Indeed the Haya customary law is clear on the point. It is on the point. It is contained in the laws of Inheritance of the *Declaration of Cusotmary Law* (GN Number 436 of 1963) which in paragraph 20 provides:

"Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However if there is not male of that clan, women may inherit such land in full ownership"

In short that means that females can inherit clan land which they can use it in usufruct that is for their life time. But they have no power to sell it, otherwise the sale is null and void. As for male members of the clan the position is different. Cory and Hartnoll in their book on Customary Law of the Haya Tribe tells us in paragraphs 561 and 562 that a male member of the clan can sell clan land but, if he sells it without the consent of the clan members other clan members can redeem that clan land. The land returns to the clan and becomes the property of the man who repays the purchase price. It will be seen that the law discriminates against women and Harnlyn J was heard to say in case of *Bi Veridana Kyabuje v Gregory Kyabuje* [1968] HCD n 499 that:

"Now however much this court may sympathize with these very natural sentiments, it is cases of this nature bound by the customary law applicable to these matters. It has frequently been said that it is not for court to over rule customary law. Any variations in such law as takes place must be variations initiated by the altering customs of the community where they originate. Thus, if customary law draws a distinction in a matter of this nature between males and females, it does not fall to this court to decide that such law is inappropriate to modern development and conditions. That must be done elsewhere that in the courts of law."

The Tanzania Court of Appeal some 13 years later nodded in agreement with the above observation in the case of *Deocres Lutabana v Deus Kashaga* civil application number 1 of 1981 (UR) per Mwakasendo JA. The rule that females in the Bahaya community do not have the right to sell clan land was affirmed by the Tanzania Court of Appeal in *Rukuba Ntema v Bi Jalia Hassani and Gervaz Baruti* (UR), mutuata civil application number 9 of 1988 (UR) per Ksisanga JA. It appeared then that the fate of women as far as sale of clan was concerned was sealed. The positions was as English novelist Sir Thomas Browne (1605-1682) had pointed out in his book Religio Medici where he said:

"The whole world was made for man but the twelfth part of man for woman: Man is the whole world, and the breath of God: woman and rib and crooked piece of man. I could be content that we might procreate like trees without conjunction or that there were any way to perpetuate the world without the trivial and vulgar way of union."

However the Senior Distridt Magistrate of Muleba Mr LS Ngonyania did not think the courts were helpless or impotent to help women. He took a different stand in favour of women. He said in his judgment:

"What I can say here is that the Respondents' claim is to bar female clan members on clan holdings in respect of inheritance and sale. That female members are only to benefit or enjoy the fruits from the clan holdings only. I may say that this was the old proposition. With the Bill of Rights of 1987 (Sic) female clan members have the same rights as male clan members."

And so he held that the First Respondent had the right under Constitution to sell clan land and that the Appellant was at liberty to redeem that clan land on payment of the purchase price of TShs 300 000. That has spurred the Appellant to appeal to this court, arguing that the decision of the district court was contrary to the law.

"Is the doctrine that women should not be discriminated against because of their sex part of out law?"

Since this country adopted the doctrine "Ujamaa and self-reliance" discrimination against women was rejected as a crime. In this booklet socialism and rural Development, Mwalimu JK Nyerere states:

"Although every individual was joined to his fellow by human respect, there was in most parts of Tanzania an acceptance of one human inequality. Although we try to hide the fact and despite the exaggeration which our critics have frequently indulged in, it is true that the women in traditional society were regarded as having a place in the community which was not only different, but was also to some extent inferior. This is certainly inconsistent with our socialist conception of the equality of all human beings and the right of all to live in such security and freedom as is consistent with equal security and freedom from all other. If we want our country to make full and quick progress now, it is essential that our women live in terms of full and quick progress now, it is essential that our women live in terms of full equality with their fellow citizens who are men."

And as long ago as in 1968, Saidi J (as he then was) pointed out that the inherent wrong in this discriminatory customary law. It was in the case of *Ndewawiosia Heamtzo v Imanuel Malasi* [1968] HCD n 127. He said:

"Now it is abundantly clear, that this custom, which bars daughters from inheriting clan land and sometimes their own father's estate, has left a loophole for under serving clansmen to flourish within the tribe. Lazy clan members anxiously await the death of their prosperous clansmen who happens to have no male issue and as soon as death occurs they immediately grab the estate and mercilessly mess up things in the dead man's household, putting the widow and daughters into a terrible confusion, fear and misery. It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, race or colour."

But the customary law in question has not been changed up to this day. The women are still suffering at the hands of selfish clan members. What is more is that since the Bill of Rights was incorporated in our 1977 Constitution (Vide Act number 15 of 1984) by art 13(4) discrimination against women has been prohibited. But some people say that is a dead letter. And the Universal Declaration of Human Rights (which is part of our Constitutions by virtue of art 9(10)(f), prohibits discrimination based on sec as per art 7. Moreover, Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination against women. That is not all. Tanzania has also ratified the African Charter on Human and Peoples' Rights which in art 18(3) prohibits discrimination on account of sex. And finally, Tanzania has ratified the International Covenant on Civil and Political Rights which in art 26 prohibits discriminations based on sex. And principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.

Petitions under art 30(3) of the Constitution to invalidate discriminatory laws.

Courts are not impotent to invalidate laws which are discriminatory and unconstitutional. The Tanzania Court of Appeal both in the cases of Rukuba Ntema and Haji Athumain Issa agreed that the discriminatory laws can be declared void for being unconstitutional by filling a petition in High Court under art 30(3) of the Constitution.

In the case of Haji Athumani Issa Kisanga JA pointed out that the constitutionality of a statute of or any law could not be challenged in the course of an appeal by appellate court. He said that the proper procedure was for the aggrieved party to file a petition in the High Court under art 30(3) of our Constitution. Equally here as there is no petition under art 30(3) of the Constitution, and so the question of deciding any

constitutionality of a statute or any law does not arise. When the issue of basic rights under the Constitution is raised or becomes apparent only after the commencement of proceedings in a subordinate court, it seems that the proper thing to do is for the subordinate court concerned to adjourn the proceedings and advise the party concerned to file a petition in the High Court under art 30(3) of the Constitution for the vindication of his or her right.

One more observation before I leave his Haji Athumani Issa Kisanga JA seems to suggests that "rules of the court" must first be enacted under art 30(4) of the Constitution before a citizen can file a petition under art 30(3) of the Constitution. However that was just an obiter dictum as the decision of the case did not turn on that point. I wish to make certain observations on the point. It will be recalled that art 30(4) states that the authority may make rules of court and does not say it must make them. That appears to envisage a situation whereby petitions may be filed without rules of court made for the purpose. That is not a new phenomenon. Under section 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Chapter 360) (as amended by act number 55 of 1968) it is provided that:

"The Chief Justice may make rules of the court prescribing the procedure and the fees payable or documents filed or issued in case where an order of mandamus, prohibition or certiorari is sought."

It is now 22 years since that provision was made and yet the successive Chief Justice have yet to have rules of the court for the purpose. That has no prevented or deterred litigants from filing the necessary applications under that law. By parity of reasoning when art 30(4) of the court states that the authority may make rules of the court for filing petitions, in the absence of those rules oft he courts, it does not mean the courts are impotent to act. The High Court will invoke its inherent powers and use of the available rules of the court. After all, the rules of procedure are the handmaidens of justice and should not be used to defeat substantive justice-see Biron J in (*General Marketing Co Ltd v Shariff* [1980] TLR 612 at 65. Therefore failure to invoke the correct rules of the court cannot defeat the course of justice, particularly when human rights are at stake. In other words, wrongs rules of the court may only render the proceedings a nullity when they result in a miscarriage of justice. That was a conclusion reached by the Supreme Court of Mauritius in (*Noordally v Attorney General* [1987] LLRC (Const) 599 which was a petition under the Constitution. What happened is that the Applicant did not apply in person as required by the Constitution, and the proper respondent was not cited and the application was not made according to the correct procedure as prescribed. Delivering the judgment of the court Moollan CJ held that, notwithstanding all those procedural irregularities, the court would disregard the errors since the case raised matters of great public interest and no useful purpose would be served by insistence on form other than to delay a decision on the merits. The court cited the decision of their earlier case in *Vallet v Ramgoolam* [1973] MR 29 at 33-35 where they had said:

"It is the court's duty to determine the validity of any statute which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the court. The court's primary concern, therefore, in any case where a contravention of the constitution is invoked, is to ensure that it be redressed as conveniently and speedily as possible ..."

That approach was also made by the Privay Council in the case of *Kariapper v Wijesinha* [1967] 3 All ER 485. It is a commendable approach which I hope will be adopted by the High Court of Tanzania as well as the Tanzania Court of Appeal. The primary concern of the court should not be as to whether the correct rules of the court have been invoked but rather to redress the wrong as speedily as possible.

If the Tanzania Court of Appeal is to regard the decision in Haji Athumani ISSA as the last word on the matter then it is only hoped that their conscience will be tempered by what the former Chief Justice of Botswana Aguda CJ had said in the article "The role of the judge with special reference to Civil Liberties' in 1974 EALJ vpl X number 2 at 158:

"If the Constitution entrenches fundamental rights these must be regarded as the basic norm of the whole legal system. Therefore all laws and statutes which are applicable to the state ... must be subjected as he occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the declared basic norm of the Constitution ... It is clear from this that there is no room here, for a rigid application of the common law doctrine of state decisis. It is submitted therefore that a court can refuse to follow the judgment of a higher court which was given before the enactment of a Constitution if such a judgment is in conflict with a provision of the Constitution. Also

the final court of the land must regard itself absolutely bound only by the Constitution and not by any previous decision of the same court."

If Haji Athumani Issa is to be regarded a binding authority and not just obiter dicta then the hopes of the masses of Tanzania that they would be saved by the Bill of Rights have been dashed. This is because the rules of the court may not be enacted for year on end.

The reception clause of section 5(1) of Act number 16 of 1984

It has been provided by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act (number 6 of 1984) that with effect from March 1988 the courts will construe the existing law, including customary law:

"with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the (Fifth Constitutional Amendment Act number 15 of 1984 that is Bill of Rights)."

All courts in Tanzania have been enjoined to interpret that section in the course of the duties. And I think it is the section which the Senior District Magistrate of Mueleba had invoked in hearing this appeal. In the book Law and its Administration in a One-Party State by RW James and FM Kassam (East African Literature Bureau, 1973) the former Chief Justice of Tanzania, Mr T Georges says at 49:

"Apart from judicial review, the courts can usually be depended upon to be astute in finding interpretations for enactment's which will promote rather tan destroy the rights of the individual and this is quite apart from declaring them bad or good."

The Shape in which a statute is imposed on the community as guided for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute. By statutory interpretation courts make judge-made law affecting the fundamental rights of a citizen.

Professor BA Rwezaura of the Faculty of Law of the University of Dr es Salam, in his article the "Reflection of the Relationship between State Law and Customary Law in Contemporary Tanzania: Need for Legislative Act? in Tanz Law Reform Bill volume 2 number 1 (July 1988), hold the view that courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation. He says at 19:

"It is also anticipated by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act number 16 of 1984 with effect from March 1988 that courts will construe existing law, including customary law, "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with provisions of the Constitution."

Now how should section 5(1) of Act 16 of 1984 be interpreted by the courts? That is the big question. Lord Denning MR in the case of Sea of Court Estate Ltd Asher [1949] 2 KB 481 tells us what a judge should do whenever a statute comes up for construction. He says at 499:

"He must set to work on the constructive task of finding the intention of Parliament and he must do this on only from the language of the state, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon*'s case (1584) 3 Co Rep 7a, and it is the safest guide today. Good practical advice on the subject was given about the same time by Pliwden ..."(Emphasis added).

In two more cases Lord Denning MR had to repeat his warnings as regards the use for the courts to invoke a purposive approach of interpretation which is sometimes referred to as the schematic and teleological method of interpretation. The two cases are James Buchanana and Co v Babco Forwarding and Shipping UK LTD [1977] QB 208 and Nothman v Barnet Council [1978] 1 WLR 220. In the latter case he emphasized that the days of strict literal and grammatical construction of words of statute were gone.He continued at 228:

"The literal method is now completely out of date. It has been replaced by the approach which Lord Dplock described as the "purposive approach" in Kammins Ballrooms Co Ltd v Zenith Investments Torquary Ltd [1971] AC 850, 899. In all cases now in the interpretation of statues we adopt such a construction as will "promote the general legislative purpose" underlying the provision."

The Tanzania Court of Appeal has adopted the above purposive approach as shown in the case of *Bi Hava Mohammed v All Sefu* civil application number 9 of 1983 (UR) per Nyalali CJ. There the High Court took a narrow view of a statutory provision with the result that the meaning attributed to the relevant part of the statute excluded the wife's domestic services in computing her contribution in building her husband's house. By applying the pruposive approach the Court of Appeal of Tanzania arrived at different conclusion.

And ex cathedra in a paper delivered to the First Commonwealth Africa Judicial Conference in the Gambia on 6 May 1986 entitled "The Challenges of Development to Law in Developing Countries viewed from the Perspective of Human Rights, Nyalali CJ cited with approval the purposive approach of interpretation enunciated by Lord Denning MR in *Buchanan & Co v Babco Ltd* and stated at page 19:
"By failing to give due weight to the reasons and objectives of a statute, this methodology (the literal construction), commonly used in common law countries misdirects the courts into a position when they end up applying.
Now what was the intention of the Parliament of Tanzania in passing section 5(1) of Act 16 of 1984, and what was the mischief that it intended to remedy?
There can be no doubt that Parliament wanted to do away with all oppressive and unjust laws of the past. It wanted all existing laws (as they existed in 1984) which were inconsistent with the Bill of Rights to be inapplicable in the new era treated as modified so that they are in line with the Bill of Rights. It wanted the courts to modify by construction those existing laws which were inconsistent with the Bill of Rights such that they were in line with the new era. Wee had a new grundnorm since 1984, and so Parliament wanted the country to start with a clean slate. That is clear from the express words of section 5(1) of Act 16 of 1984. The mischief it intended to remedy is all the unjust existing laws, such as the discriminatory customary law now under discussion. I think the message the Parliament wanted to impact to the courts under section 5(1) is loud and clear and needs no interpolations.
If parliament meant otherwise it could have said so in clear words. Many countries in the commonwealth which had to incorporate Bills of Rights in their constitutions have expressly indicated what they wanted to be the position of the existing law after the introduction of the Bill of Rights in their constitution. For example in Sri Lanka, art 18(3) of their 1972 Constitution clearly states that: "all existing law shall operate not withstanding any inconsistency with the provisions of the Bill of Rights" see the case of *Gunaratne v People's Bank* [1987] LRC Cons 385 at 398. In Trinidad and Tobago their 1976 Constitution in art 6(1) clearly states "nothing in the Bill of Rights shall invalidate the existing law" – and so in *AG v Morgan* [1985] LRC Cons 77783-784 J Kelsick CJ held that the Rent Restriction (Dwelling Houses) Act 1981 was protected from challenge by the above section. Other cases from Trinidad and Tobago on the same point are *De Freitas v Benny* [1976] AC 239 (PC) and *Maharaj v AG* [1979] AC 385 PC. The constitution of Jamaica states: "nothing contained in any law in force immediately before the commencement of Constitution shall be held inconsistent with the human rights provisions in the said Constitutions." And so then existing law even if it was oppressive was saved as indicated in the two cases from Jamaica, *DPP v Nasralla* [1967] 2 AC 238 PC and *Riley v AG of jamaica* [1983] 3 All ER 469. And from the Cook Islands in *Clarke v Karika* [1985] LRC (Const) 732, Speight CJ of the Court of Appeal held that the human rights provisions in their Constitution only declared rights already afforded by the existing statutory and common law, and so all the existing law had been saved intact.
Burt we in Tanzania did not want to adopt the above provisions which "saved the existing law operating prior to the introduction of the Bill of Rights. We wanted to start with a clean slate, a new grundorm. That was nice for the people. The people of Zimbabwe did the same when their constitution came into effect on 18 April 1980. And they had a similar provision like our section 5(1) of Act 16 of 1984 and theirs section 4(1) of the Zimbambwe Constitution (Transitional, Supplementary and Consequential Provisions) Order 1980 and provides:
"That existing laws must be so construed with such modifications."
In Zimbabwe in 1987 a certain provision in the Criminal Procedure and Evidence Act (Chapter 59) restricting the right to bail came into question as to whether it should not be construed as modified for being inconsistent with the right to liberty in the Bill of Rights. The case is Bull v Minister of Home Affairs [1987] LRC (Const) 547. In the High Court Sansole J agreed with the Applicant and if indeed that provision in the Criminal Act Procedure restricting bail was inconsistent with the right to liberty prescribed in the Bill of Rights then it would be taken to be modified such that it did not exist but was void. But the Judges found as a fact that the section in question was not inconsistent with any provision in the Bill of Rights as art 13 of the Constitution allowed pretrial detention without bail subject to the limitation that the period of detention was reasonable. And so the question of construing the section in the Criminal Procedure Act as modified did not arise. The Supreme Court of Zimbabwe (as per Beck JA) agreed with that reasoning at pages 555-566.
The above case from Zimbabwe is persuasive authority for the proposition of law that any existing law that is inconsistent with the Bill of Rights should be regarded as modified such that the offending part oft hat statute or law is void.

Parallel with the reception clause of the common law.

The reception clause of section 5(1) of Act 16 of 1984 has its parallel in the reception clause oft he English common law introduced by Tanganyika Order in Council for 1920. Both clauses give the mandate to the courts to construe the received law with some modifications and qualifications. The reception clause of the English common law said " the received law was subject to the qualification that it be applied so far as the circumstances of the territory and its inhabitants permit and subject to such qualifications as local circumstances may render necessary" Mfalila J very correctly lamented in this paper "The Challenges of Dispensing Justice in Africa according to Common Law" of the second Commonwealth Africa Judicial Conference in Arusha, Tanzania, 8-12 August 1988, where he said at page 10:

"If these colonial judges had wished they could have developed over years a version of the common law relevant to Africa as the reception statutes themselves stated. They could have done this by construing the reception statutes strictly, for instance in East Africa where only "the substance" of the common law and equity was received the colonial judges had even greater scope of creativity. They could have proceeded to create a body of laws responsive to the emergent demands of each territory. As one writer put it, "the colonial judges never approached the problem as one calling essentially for the exercise of a policy-making legislative power". This was pity because in West Africa they had he power to determine whether the limits of the local jurisdiction and local circumstances permitted the application of the received rules and to what extent. In East Africa they had the further power to decide whether a specific rule of English law was part of the "substance" of the common law and in all the territories they had the power to determine whether the statutes were of general application."

It is for this reason that for the colonial judge criminal trials a customary law spouse was not regarded as a wife or husband for the purpose of the rules of evidence and as result she or he could be compelled to testify against her or his spouse, whereas the common law counterpart could not be so compelled. That was so in *Republic v Amkeyo* [1917] 7 EALR 14 (per Hamilton CJ) and *Abdul-Rahman Bin Mohamed v Republic* [1963] EA 188 by Sir Ronald Sinclair p at 192-193.

But even under the reception clause of the English common law there were judges who liberally construed the provision under discussion. For example Sir Udo Udoma, then Chief Justice of Uganda, in Alai v Uganda [1967] EA 596 interpreted the phrase "any married woman" from the reception clause to include a wife of common law marriage as well as a wife of customary law marriage, contrary to the stand of the previous Judges discussed above. But the hero of the construction of the reception clause oft he English common law is Lord Denning MR who in *Nyali Ltd v A-G of Kenya* [1955] 1 All ER 646 said 653:

"This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualifications ... it has many principles of manifest justice and good sense which can be applied with advantages to peoples of every race and color all the world over; but it also has many refinements subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of Tanzania. It is great task. I trust that they will not fail therein."

The issue in the above case was that by the English common law applicable to Kenya, the Kenya government should be exempt from payment of a bridge toll at Mombasa. Lord Denning MR rejected that argument holding that the common law rule that the Crown had a prerogative not to pay tax was not applicable to Kenya as a local circumstances did not permit.

I am inclined to think that if Lord Dening MR was confronted with the present problem now at hand he would have unhesitatingly said:

"This wide provision should, I think, be liberally construed. It is a recognition that the law existing before the introduction of the Bill of Rights cannot be applied in the new era without considerable qualification. It has many principles of manifest justice and good sense which can be applied with advantages to the people of Tanzania but it also has many provisions which they will respect. The law existing prior to the introduction of the Bill of Rights cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of Tanzania. It is a great task. I trust that they will not fail therein."

Therefore Lord Denning MR will wriggle in this chair (not in the grave for he is still alive) to hear that

some judges interpret the reception clause in section 5(1) of Act of 1984 as not to affect the content and the quality of the law existing prior to the enactment of Bill of Rights. But it should be noted that the reception clause in section 5(1) affects only statutes and customary law existing prior to 1984 but does not affect any later law. And the position is understandable because for three years from March 198 to March 1988 the government was given a period of grace to put its house in order that is to amend all laws that were inconsistent with the Bill of Rights. And so the statutory interpretation that we have adopted here need not raise any eye-brows.

Women's liberation

I have found as a fact that section 20 of the Rules of Inheritance (GN number 436 of 1963) of the Declaration of Customary Law is discriminatory of females in that unlike their male counterparts they are barred from selling clan land. That is inconsistent with art 13(4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act number 16 of 1984, I take section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land. Likewise the rules governing the equal rights to inheritance of Holdings by female heirs 1944 made by the Bukoba Native Authority which rule 44 to 8 entitle a female who inherits self-acquired land of her father to have usufructury rights only (rights to use for their lifetime only) with no power to sell that land is equally void and of no effect. Females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like. The disposal of the clan land to strangers without the consent of the clans men is subject to the fiat that any other clan member can redeem that clan land on payment of the purchase price to the purchaser. That now applies to both males and females. Therefore the District Court of Muleba was right to take judicial notice oft he provisions of section 5(1) of Act number 16 of 1984, and to have acted on them the way it did. From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father's is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in other spheres. One thing which surprises me is that it has taken simple, old rural woman to champion the cause of women in this field but not the elite women in town who cant jejune slogans years on end on women's lib but without delivering the goods. To the male chauvinists, they should remember what that English writer John Gay (1685-1732) had said in the Beggar's Opera:

Fill every glass, for wine inspires us,
And fires us, with courage, love and joy,
Women and wine should life employ.
Is there ought else on earth desirous?
If the heart of a man is depressed with cares,
The mist is dispelled when a woman appears'

It is hoped that, from the time the woman has been elevated to the same plan as the man, at least in respect of inheritance of clan land, then the mist will be dispelled.

Conclusion

At the hearing of this appeal Mr Jacob Iazaro Mbasa, who held the special power of attorney of the Appellant, argued that the district court was wrong to hold that the purchase price was TShs 300 000 and not TShs 30 000. However, on perusal of the evidence on record I find that the district court was right. The record of the primary court shows that, besides the vendor and the purchaser, there were two independent witnesses who witnessed the sale and these were Mr Abeli Byalwasha and Mr Elizeur Balongo. Both these witnesses testified that the purchaser paid out was TShs 300 000. The evidence of the only other witness who witnessed the sale, that of Mr Francis Joseph, was very suspect. He conceded at the trial that he belonged to the clan of the Appellant and that he was not happy with the sale of their clan land by the First Respondent. When pressed to state what amount was paid by the purchaser he said it was TShs 30 000. You will note that Francis Joseph as a clan member had an axe to grind as he was not happy with the sale of their clan land. Therefore his evidence concerning the amount of the purchase price paid was suspect and was rightly ignored by the district court. Like the district court I hold that the clan land in question was sold for TShs 300 000.

Like the district court I hold that the sale was valid. The Appellant can redeem that clan land on payment of TShs 3000 000. I give the Appellant six months from today to redeem the clan land, otherwise of he fails the land becomes the property of the purchaser- the Second Respondent. The appeal is dismissed with costs.

Order accordingly.