
Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990)

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High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal no 70 of 1989)

Mwalusanya J

Previously reported: (1990) LRC (Const) 757

Resolution of conflicts between customary law and the bill of rights and court's powers on constitutional interpretation

Constitutional supremacy (17, 38)

Interpretation (interpretative powers of courts, 11-14, 16, 35; customary law, conflict with the Bill of Rights, recognition clause, 19, 29, 32; statutory interpretation, purpose of the legislation, 20-22, 24-28, 34)

Equality, non-discrimination (discrimination on the grounds of sex, inheritance, 7, 8, 10, 42)

Mwalusanya J

[1.] This appeal is about women's rights under our Bill of Rights. Women's liberation is high on the agenda in this appeal. Women do not want to be discriminated against on account of their sex. What happened is that a woman, one Holaria d/o 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 no one to take care of her, she sold the clan land on 24 August 1988 to the second respondent Gervazi s/o Kaizilege for Shs 300 000. This second respondent is a stranger and not a clan member. Then on 25 August 1988, the present appellant Bernardo s/o Ephraim 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, the first respondent to the 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 the first respondent was ordered to refund the Shs 300 000 to the purchaser.

[2.] Indeed the Haya customary law is clear on the point. It is contained in the Laws of Inheritance of the Declaration of Customary Law, 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 no male of that clan, women may inherit such land in full ownership.

[3.] In short that means that females can inherit clan land which they can use in usufruct ie for their lifetime. 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 tell us, in paragraph 561 and 562, that a male member of the clan can sell land but if he sells it without 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 as Hamlyn J was heard to say in the case of *Bi Verdiana Kyabuje and Others v Gregory s/o Kyabuje* (1968) HCD no 459 that:

Now however much this court may sympathise 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 courts to overrule 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 a 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 than in the courts of law.

[4.] The Tanzania Court of Appeal some 13 years later nodded in agreement with the above observations in the case of Deocres Lutabana v Deus Kashaga (1981) TLR 122 as per Mwakasendo JA. The rule that females in the Bahaya community do not have the rights to sell clan land was affirmed by the Tanzania Court of Appeal in Rukuba Nteme v Bi Jalia Hassani and Another (supra) as per Nyalali CJ and later in Haji Athumani Isaa v Rweutama Mituta (Court of Appeal of Tanzania, Civil Appeal no 9 of 1988, unreported) as per Kisanga JA. It appeared then that the fate of women as far as the sale of clan land was concerned was sealed. The position was as an 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 the 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 this trivial and vulgar way of union.

[5.] However the Senior District Magistrate of Muleba, Mr LS Ngonyani, did not think the courts were helpless or impotent to help women. He took a different stand in favour of women. He inter alia, 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 clan members are only to benefit or enjoy the fruits from the clan holdings. I may say that this was the old proposition. With the Bill of Rights of [1984] female clan members have the same rights as male clan members.

[6.] And so he held that the first respondent had the rights under the Constitution to sell clan land and that the appellant was at liberty to redeem that clan land on payment of the purchase price of shs 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.

[7.] Since this country adopted the doctrine of Ujamaa and self-reliance, discrimination against women was rejected as a crime. In his booklet *Socialism and Rural Development*, Mwalimu Julius K 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 equality with their fellow citizens who are men.

[8.] And as long ago as in 1968 Mr Justice Saidi (as he then was) pointed out the inherent wrong in this discriminatory customary law. It was in the case of *Ndewawiosia d/o Mbeamtzo v Imanuel s/o Malasi* (supra). He inter alia, 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 undeserving clansmen to flourish within the tribe. Lazy clan members anxiously await the death of their prosperous clansman 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 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, creed, race or colour.

[9.] 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.

[10.] What is more is that since the Bill of Rights was incorporated in our 1977 Constitution, see Act no 15 of 1984, by article 13(4) discrimination against women has been prohibited. But some people say that that is a dead letter. And the Universal Declaration of Human Rights, 1948, which is part of our Constitution by virtue of article 9(1)(f) prohibits discrimination based on sex as per article 7. Moreover Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 1979. That is not all. Tanzania has also ratified the African

Charter on Human and Peoples' Rights, 1981, which in article 18(3) prohibits discrimination on account of sex. And finally Tanzania has ratified the International Covenant on Civil and Political Rights, 1966, which in article 26 prohibits discrimination based on sex. The principles enunciated in the above-named documents are a standard below which any civilised 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.

[11.] Courts are not impotent to invalidate laws which are discriminatory and unconstitutional. The Tanzania Court of Appeal both in the case of Rukuba Nteme (supra) and Haji Athumani Issa (supra) agreed that the discriminatory laws can be declared void for being unconstitutional by filing a petition in the High Court under article 30(3) of the Constitution.

[12.] In the case of Haji Athymani Issa (supra), Kisanga JA pointed out that the constitutionality of a statute or any law could not be challenged in the course of an appeal by an appellate court. He said that the proper procedure was for the aggrieved party to file a petition in the High Court under article 30(3) of our Constitution. Equally here, as there is no petition under article 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 petition in the High Court under article 30(3) of the Constitution for the vindication of his or her right.

[13.] One more observation before I leave this topic. In the Haji Athumani Issa Case (supra) Kisanga JA seems to suggest that rules of the court' must first be enacted under article 30(4) of the Constitution before a citizen can file a petition under article 30(3) of the Constitution. However, that was just and obiter dicta as the decision of the case did not turn on the point. I wish to make certain observations on the point. It will be recalled that article 30(4) states that the authority may' make rules of the court and does not say it must' make them. That appears to envisage a situation whereby petitions may be filed without rules of the 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, 1955, as amended by Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 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 cases where an order of mandamus, prohibition or certiorari is sought.

[14.] It is now 22 years since that provision was made and yet the successive Chief Justices have yet to make rules of the court for the purpose. But that has not prevented nor deterred litigants from filing the necessary applications under the law. By parity of reasoning, when article 30(4) of the Constitution states that the authority may make rules of the court for filing petitions, in the absence of those rules of the courts it does not mean the courts are impotent to act. The High Court will invoke its inherent powers and use 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 AA Shariff* [1980] TLR 61 at page 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, wrong rules of the court may only render the proceedings a nullity when they result in a miscarriage of justice.

[15.] That was a conclusion reached by the Supreme Court of Mauritius in *Noordally v Attorney-General and Another* [1987] LRC (Const) 599 (Mauritius, SC) which was a petition under the Constitution. What happened in that case 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 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.

[16.] That approach was also made by the Privy Council in the case of *Mariapper v Wijesinha* [1967] 3 WLR 1460. 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.

[17.] If the Tanzania Court of Appeal is to regard the decision in *Haji Athuman Issa* case (supra)

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' (Vol 10, no 2 East African Journal, 1974, page 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 the 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 stare 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.

[18.] If the Haji Athumani Issa case (supra) is to be regarded as binding authority and not just an 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 years on end.

[19.] It has been provided by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 (Act no 16 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, 1984, ie the Bill of Rights'.

[20.] All courts in Tanzania have been enjoined to interpret that section in the course of their duties. And I think it is the section which the Senior District Magistrates of Muleba had invoked in hearing this appeal. In the book *Law and Its Administration in One Party State* by RW James and FM Kassam, the former Chief Justice of Tanzania, Mr Georges, says:

Apart from judicial review, the Courts can usually be depended upon to be astute in finding interpretations for enactments which will promote rather than destroy the rights of the individual

and this is quite apart from declaring bad or good.

[21.] The shape in which a statute is imposed on the community as a guide 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.

[22.] Prof BA Rwezaura of the Faculty of Law of University of Dar es Salaam in his article 'Reflections on the Relationship between State Law and Customary Law in Contemporary Tanzania: Need for Legislative Action?' (Vol 2 no 1 Tanzania Law Reform Bulletin, July, 1988, page 19) holds the view that courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation. He says:

It is also anticipated by section 5 (1) of the Constitution (Consequential, Transitional and Temporary Provisions), 1984, with effect from March 1988, 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 the provisions of the Constitution.

[23.] Now how should section 5 (1) of Act 16 of 1984 be interpreted by the courts? That is the big question.

[24.] Lord Denning MR (as he then was) in the case of *Seaford Court Estate Ltd v Asher* [1949] 2 KB 481 (CA) tells us what a judge should do whenever a statute comes up for construction. He says:

He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, 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 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 Col. Rep. 7a and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden.

[25.] In two more cases Lord Denning MR (as he then was) 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 *Buchanan & Co Ltd v Babco Ltd* [1977] QB 208; [1977] All ER 518 and the case of *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 (CA). In the latter case he emphasised that the days of strict literal and grammatical construction of the words of a statute were gone. He continued:

The method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the purposive approach (in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 881). In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision.

[26.] The Tanzania Court of Appeal has adopted the above purposive approach as shown in the case of *Bi Hawa Mohamed v Ally Sefu* (supra) as per Nyalali CJ. In 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 purposive approach the Court of Appeal of Tanzania arrived at a 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', Chief Justice Nyalali cited with approval the purposive approach of interpretation enunciated by Lord Denning MR (as he then was) in *Buchanan and Co v Babco Ltd* (supra) and stated:

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 where they end up applying the intention of the Parliamentary legal draftsman instead of the presumed intention of the Parliament concerned.

[27.] Now what was the intention of the Parliament of Tanzania to pass section 5 (1) of Act 16 of 1984 and what was the mischief that it intended to remedy?

[28.] 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 or be treated as modified so that they would be 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. We have 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 impart to the courts under section 5(1) of Act 16 of 1984 is loud and clear and needs no interpolations.

[29.] If Parliament meant otherwise it could have said so in clear words. Many countries in the Commonwealth which had to incorporate a Bill 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 Constitutions. For example in Sri Lanka article 18(3) of their 1972 Constitution clearly states that all existing law shall operate notwithstanding any inconsistency with the provisions of the Bill of Rights'. See the case of *Gunaratne v People's Bank* [1987] LRC (Const) 383 at page 398 (SL, SC).

[30.] In Trinidad and Tobago their 1976 Constitution in article 6 (1) clearly states: Nothing in the Bill of Rights shall invalidate the existing law' - and so in *Attorney-General v Morgan* [1985] LRC (Const) 770 at pages 783-984 Melsick CJ held that the Rent Restriction Act was protected from challenge by the above section. Other cases from Trinidad and Tobago on the same point are *De Freitas v Benny and Others*; [1976] AC 239 (PC) and *Maharaj v Attorney-General* [1979] AC 385 (PC).

[31.] The Constitution of Jamaica states: Nothing contained in any law in force immediately before the commencement of the Constitution shall be held inconsistent with the human rights provisions in the said Constitution.' And so the then existing law, even if it was oppressive, was saved as indicated in the two cases from Jamaica: *Director of Public Prosecutors v Patrick Nasralla* [1967] 2 AC 238 (PC) and the case of *Riley and Others v Attorney-General of Jamaica and Another* [1982] 3 All ER 469 (PC). And from the Cook Islands in the case of *Clarke v Karika* [1985] LRC (Const) 732 (Cook Is, CA), 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.

[32.] But 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 Grundnorm. 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 is section 4(1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provision) Order, 1980 and provides: That existing laws must be so construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.'

[33.] 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 that if indeed the provision in the Criminal Procedure Act 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 learned judge found it as a fact that the section in question was inconsistent with any provision in the Bill of Rights as article 13 of the Constitution allowed pre-trial 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.

[34.] 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 of that statute or law is void.

[35.] The reception clause of section 5(1) of Act 16 of 1984 has its parallel in the reception clause of the English common law introduced by the Tanganyika Order in Council of 1920. Both clauses give the mandate to the courts to construe the received law with some modifications and qualifications. The reception 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.

[36.] Mfalila J (as he then was) very correctly lamented in his 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:

If these colonial judges had wished they could have developed over the 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 responsible 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 a pity because in West Africa they had the 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.

[37.] It is for this reason that the colonial judges in criminal trials held that a customary law spouse was not regarded as a wife or husband for the purposes of evidence rules and as a 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 the case of *Rex v Amkeyo* [1917] 7 EALR 14 (by Hamilton CJ) and the case of *Abdulrahman Bin Mohamed and Another v R* [1963] EA 596 (Uganda) by Sir Ronald Sinclair P.

[38.] 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 a customary law marriage, contrary to the stand of the previous judges discussed above. But the hero of the construction of the reception clause of the English common law is Lord Denning MR (as he then was) who in *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA) (see also [1957] AC 253 (HL) said:

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 qualification. It has many principles of manifest justice and good sense which can be applied with advantages to people of every race and colour 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 these lands. It is a great task. I trust that they will not fail them.

[39.] 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 local circumstances did not permit.

[40.] I am inclined to think that if Lord Denning 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 are not suited to a country with a Bill of Rights. These offshoots must be cut away. The people must have a law which they understand and 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.

[41.] Therefore Lord Denning MR (as he then was) will wriggle in his chair to hear that some judges interpret the reception clause in section 5 (1) of Act 16 of 1984 as not to affect the content and the quality of the law existing prior to the enactment of the Bill of Rights. However, it should be noted that the reception clause in section 5 (1) of Act 16 of 1984 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 1985 to March 1988, the government was given a period of grace to put its house in order i.e. 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 eyebrows.

[42.] I have found as a fact that section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act 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 Inheritance of Holdings by Female Heirs (1944) made by the Bukoba Native Authority, which in rules 4 and 8 entitle a female who inherits self-acquired land of her father to have usufructuary rights only (rights to use for her lifetime only) with no power to sell that land, is equally void and of no effect.

[43.] 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 clansmen is subject to the fact 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 of the provisions of section 5(1) of Act 16 of 1984 and to have acted on them in the way it did.

[44.] From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers 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 the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field and not the elite women in town who chant jejune slogans for years on end on women's liberation, but without delivering the goods. To the male chauvinists they should remember what that English novelist 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 aught else on earth desirable? If the heart of a man is depressed with cares, The mist is dispelled when a woman appears.

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

[46.] At the hearing of this appeal, Mr Jacob Lazaro Mbasia who held the special power of attorney of the appellant, argued that the District Court was wrong to hold that the purchase price was shs 300 000 and not shs 30 000. However, upon 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 purchaser, there were two independent witnesses who witnessed the sale and these were Mr Abeli s/o Byalwasha (DW 4) and Mr Eliyeus s/o Balongo (DW 5). Both these witnesses testified that the purchaser paid out shs 300 000. The evidence of the only other witness who witnessed the sale, that of Mr Francis s/o Joseph (DW 3), 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 shs 30 000. You will note that Francis s/o Joseph (DW 3) 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 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 shs 300 000.

[47.] Like the District Court I hold that the sale was valid. The appellant can redeem that clan land on payment of shs 300 000. I give the appellant six months from today to redeem the clan land, otherwise, if he fails, the land becomes the property of the purchaser - the second respondent. The appeal is dismissed with costs. Order accordingly.