

A TALE OF THREE *SHAMBAS*  
SHĀFI'Ī-IBĀDĪ LEGAL COOPERATION IN  
THE ZANZIBAR PROTECTORATE  
PART I

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It is sometimes said that the Omani rule in East Africa did not lead to any influence of Ibādī law there. However, the political power structure led to a pragmatic situation where judges from various *madhhabs*, Ibādīs and Sunnis, made joint verdicts. The three documents presented in this article are examples of this, taken from the Sultanīc Court for Zanzibar and Pemba in 1908-09.<sup>1</sup>

At that time, Zanzibar was a British protectorate formally governed by Sayyid °Alī b. Ḥamūd al-Bū Sa'īdī (r. 1902-11), the ninth in line of Zanzibari-Omani rulers. His predecessors in the nineteenth century had transformed the island state into a cosmopolitan society where several religious and ethnic groups vied for opportunities.

The heterogeneity of the Zanzibari population was reflected in its legal system, which was designed to accommodate the majority Shāfi'ī population, the Ibādī Omanis and Shī'ī Indians as well as the community of non-Muslim European and Asian expatriates. In political terms, the system was also designed to give the British protectorate power ultimate control over the legal process, by incorporating Islamic legal officials into a highly formalized court system.

This took the form of two legal systems that came to exist side by side in Zanzibar; one Islamic, where law was

1 In this Part I of the article, we present the first of the three cases. Text and translation of the other two will follow in Part II, in *SAJHS*, 11, 2000.

applied by *qādīs*, and one British, where it was applied by British judges.<sup>2</sup> During most of the nineteenth century, Islamic law in Zanzibar had been implemented in a system where individual legal scholars would hear cases brought before them by members of the public. From the time of Sayyid Sa'īd b. Sulṭān (r. 1804-56) the sultan himself appointed legal scholars to serve as judges in the districts and in Zanzibar town. This structure was by its nature flexible, and did not have a fixed system of appeal. Individual cases would usually first be brought before one of the sultan's district *wālīs*, then, in the next instance, before the leading scholars in Zanzibar town, and ultimately before the sultan himself.

Parallel to this, another system was emerging, in which foreign consuls were granted jurisdiction over their own subjects, with supreme power being vested in the respective heads of state.

#### *The Protectorate system*

Zanzibar was placed under British protection in 1890. Shortly thereafter, the sultan agreed that British jurisdiction could be exercised by other than the consular officers. This paved the way for the formal establishment of Her Britannic Majesty's Court for Zanzibar in 1897. It exercised jurisdiction over any British subject (including Indians resident in Zanzibar) in all cases where such subjects appeared, as plaintiff or as defendant. After an exchange of diplomatic notes, other European and American nationals were placed under British jurisdiction. The rest of the population was defined as subjects of the sultan, and consequently under Sultanic jurisdiction.

The Islamic legal system of the pre-protectorate period was brought into more structured forms during the reign of Sayyid Ḥamūd b. Muḥammad (r. 1896-1902). Districts were

2 On what follows, see J.H. Vaughan, *The Dual Jurisdiction in Zanzibar*, Zanzibar: Zanzibar Government Press 1936. Cf. also, Eduard Sachau, 'Muhammedanisches Erbrecht nach der Lehre der Ibaditischen Araber von Zanzibar und Ostafrika', *Sitzungsberichte der Preußischen Akademie der Wissenschaften zu Berlin*, xiii, 1, 1894, 159-210.

defined and a *wālī* appointed to serve as judge in each district. A hierarchy of Sultanic courts was established to formalize the procedure of appeal. At its apex was the Supreme Court, presided over by the sultan himself, or by one of his ministers. Two *qāḍīs*, one Ibādī and one Sunni, were to give joint verdicts on appeal from the lower courts. Subordinate to the Supreme Court was 'The Court for Zanzibar and Pemba'. It consisted of two *qāḍīs*, again one Ibādī and one Shāfi'ī, and held unlimited jurisdiction in both criminal and civil cases. Subordinate to this court again were the District Courts, presided over by the *wālīs* appointed by the sultan. Provisions were also made for an 'Assistant Qadi Court', hearing petty cases whenever needed.

#### *The Jurisdiction Decree of 1908*

The dual system was essentially confirmed by the Jurisdiction Decree issued by Sayyid °Alī b. Ḥamūd on 4 November 1908.<sup>3</sup> However, significant limitations were placed on the Sultanic courts. Most importantly, the decree ordained that British judges now should serve as officers of the Sultanic courts together with the *qāḍīs*. This enabled the British judges to control and influence the legal process also in the Sultanic courts. In addition, criminal cases were entirely removed from the *qāḍīs*' scope; after 1909 criminal cases which fell under Sultanic jurisdiction were heard by British judges sitting without the presence of *qāḍīs*. As a result, the decree placed strict restrictions on the *qāḍīs*' influence, especially on their ability to establish legal precedence in the British way.

For the hearing of civil cases, the Sultanic court system was structured as follows:

#### 1) *The Supreme Court for Zanzibar and Pemba*

An appellate court sitting in Zanzibar, it consisted of a judge and assistant judges of the British court in addition

3 'The Jurisdiction Decree of 1908', in *The Laws of Zanzibar*, London: Waterlow & Sons 1922, 9-17.

to two *qāḍīs* appointed by the sultan, one Shāfi<sup>c</sup>ī and one Ibāḍī. The decree included the reservation that the two *qāḍīs* were not to ‘have any voice in the decision of the Court’.

2) *The Court for Zanzibar and Pemba*

A court consisting of a magistrate and two *qāḍīs*, again one Shāfi<sup>c</sup>ī and one Ibāḍī, to be selected by the judge of the British court. The court was ordinarily held in Zanzibar, but the decree also provided that sittings be held in Pemba at the times and places directed by the judge of the British court.

3) *District courts*

Courts consisting of the British District Commissioner/ Assistant District Commissioner and/or a *wālī/qāḍī* as appointed by the British court.

4) *Assistant qāḍī’s courts*

Assistant *qāḍī*’s courts could be established in the districts according to need. In these cases, the judge of the British court would appoint the *qāḍī* or assistant *qāḍī* who would hear cases alone.

### *The application of law*

The polymorphy of Zanzibar law is evident in the *Zanzibar Law Reports*,<sup>4</sup> which show a system that had to be flexible and undogmatic. There was little room for a ‘rivalry of the schools’ in a court where cases involving Shāfi<sup>c</sup>īs, Ibāḍīs and Ḥanafīs would be heard by the same judges and *qāḍīs* in the course of the same day.

This denominational heterogeneity of the Zanzibari Muslim population meant that several sets of law were applied in the Sultanic courts, according to the *madhhab* of the litigants. The *madhhab* affiliation of the individual *qāḍīs* also determined which rules were to be applied. Of the four leading

4 W. Murison & S.S. Abrahams, *Zanzibar Protectorate Law Reports 1868-1918*, London: Waterlow & Sons 1919.

*qāḍīs* who served in the higher Sultanic courts after 1908, three were Shāfiʿī and one Ibādī; an approximate reflection of the relative strength of the groups in the population.<sup>5</sup>

As a general rule, each *qāḍī* should administer law according to his school.<sup>6</sup> Evidently, this system was prone to formal problems, as a person could not be guaranteed to have his case heard before a *qāḍī* of his own school. From the available records, however, only minor differences can be traced in the civil cases where Ibādī and Shāfiʿī *qāḍīs* sat together in the Sultanic courts. Where differences occurred, evidence suggests that the *qāḍīs* consulted each other freely, seeking a consensus valid in both schools.

Despite the limitations placed on their jurisdictional powers, the *qāḍīs* based their rulings on the same legal texts after 1908 as before. For the Shāfiʿīs, the most important text was the *Minhāj al-ṭālibīn* by al-Nawawī,<sup>7</sup> with commentaries by, amongst others, Ibn Ḥajar al-Ḥaythamī.<sup>8</sup>

5 In 1907, it was estimated that about 80 per cent of the sultan's subjects were Shāfiʿīs; Murison & Abrahams, *Zanzibar Protectorate Law Reports*, 236. However, Ibādīs were disproportionately often represented as litigants in court, a result of them being (or having been) owners of substantial property, especially large plantations.

6 The provision that the *qāḍī* is bound by his *madhhab* is a guiding principle of Islamic law. A directive to this effect was formally laid down in a proclamation issued by Sayyid Saʿīd b. Sulṭān in 1845. The issue was brought up again in Zanzibar in 1914, where it was ruled that the *qāḍīs* were bound by their schools, and that the plaintiff had the right to bring his case before a *qāḍī* of his own school; see Vaughan, *Dual Jurisdiction*, 40. This in contrast to other mixed-*madhhab* situations, where it is often the defendant's *madhhab* that is determinant.

7 Abū Zakariyyā Yahyā b. Sharāf al-Dīn al-Nawawī (631-76/1233-78); *GAL*, I, 394-5, S I, 680.

8 *Tuḥfat al-muḥtāj li-sharḥ al-Minhāj*, by al-Ḥaythamī (d. 973/1567); *GAL*, II, 387-8, S II, 527; considered with the *Nihāyat al-muḥtāj* by Zayn al-Dīn al-Ramlī (d. 1004/1595) the basic works of Shāfiʿī *fiqh*. The *Minhāj al-ṭālibīn* itself remained the central Shāfiʿī legal text in the region throughout the colonial period; Joseph Schacht describes its widespread use from his visits in 1953 and 1963; J. Schacht, 'Notes on Islam in East Africa', *Studia Islamica*, xxiii, 1965, 117.

For the Ibādīs, the main legal text was *al-Nīl wa-shifāʾ al-ʿalīl* by ʿAbd al-ʿAzīz b. Ibrāhīm al-Muṣʿabī [Mzabī] al-Tamīnī (1130-1223/1718-1808). To this, the most frequently used commentary was *Sharḥ al-Nīl* by Muḥammad b. Yūsuf Aṭfiyyash (1236-1332/1820-1914).<sup>9</sup>

### *The qādīs*

As described above, the first two decades of the British protectorate, 1890 to 1908, saw a series of legal and administrative reforms coming into effect. One element that remained constant, however, was the *qādīs* themselves. The four *qādīs* responsible for the verdicts presented here were the chief *qādīs* of the Sultanīc court system. All four served this system for several decades, thus becoming institutions themselves within the colonial space. The *qādīs* had their legal powers continuously reduced, yet the system remained dependent on them to provide religious authority for its verdicts and administrative reforms.

Moreover, the *qādīs* were products of the tradition that had evolved at Zanzibar (and in East Africa) before the protectorate. One of them, Aḥmad b. Sumayṭ, had served as *qādī* during the reign of Sayyid Barghash (r. 1870-88) and Sayyid Khalīfa (r. 1888-90). At least three of the four came from families with a history of legal service under the Bū Saʿīdīs, meaning that they had fathers or close relatives who had functioned as *qādīs* in the pre-colonial era. In effect, the

9 *GAL*, S II, 892. It was published in ten volumes, Cairo 1305-43/1887-1924. The fact that the basic Ibādī legal texts in use were so contemporary—the author of the *sharḥ* still alive in Algeria when these cases were heard—is worthy of note. Another much used work on Ibādī inheritance law was the *Mukhtaṣar* of the Omani author Abū ʿl-Ḥasan ʿAlī b. Muḥammad al-Baṣyawī, which was printed in Zanzibar on Sultan Barghash’s order in 1886; Sachau, ‘Muhammedanisches Erbrecht’, 163. Sachau here translated a summary of it, which was re-translated into Italian by I. Guidi, ‘Il diritto ereditario musulmano secondo la dottrina degli arabi ibaditi’, *Rivista coloniale*, 1906.

four *qāḍīs* who were active around 1908 constituted a second generation, inheriting the positions that had previously been held by their fathers, uncles or teachers during the heyday of Bū Sa<sup>ʿ</sup>īdī rule.

*The leading Shāfi<sup>ʿ</sup>ī qāḍī: Aḥmad b. Sumayṭ (1861-1925)*

Aḥmad b. Abī Bakr b. Sumayṭ was undoubtedly the most influential East African Shāfi<sup>ʿ</sup>ī scholar of his time. He was born on Grande Comore to a Comorian mother and a father who had emigrated from Shibām in Ḥaḍramawt.<sup>10</sup> Being one of the ʿAlawī families of Ḥaḍramawt, the Sumayṭ clan had a history of piety and religious learning and could number several renowned scholars among its members. Their ascribed status as descendants of the Prophet made them revered as ‘holy men’ and performers of *karāmāt* both in their original and adopted homelands.

As a young man, Ibn Sumayṭ spent a period of learning in Ḥaḍramawt, studying both esoteric and exoteric sciences with the scholars of the *ṭarīqa* ʿAlawiyya, the particular Sufi order propagated by the ʿAlawī families. Thereafter, in 1882, he settled in Zanzibar where he was appointed *qāḍī*, a position he left after less than two years. Instead he travelled to Istanbul where he spent a year with an ʿAlawī scholar of Ḥaḍramī-Indian origin, Faḍl b. ʿAlawī b. Sahl, known as Faḍl Pasha (1824-1900).<sup>11</sup> He then proceeded to Egypt, Java and India before returning to Zanzibar in 1888. From that point on, he served virtually uninterruptedly as *qāḍī*.

In addition to his official tasks, Ibn Sumayṭ was an influential teacher, especially of higher level students. His

10 On the life of Aḥmad b. Sumayṭ, see A.K. Bang, ‘Sufis and Scholars of the Sea: The Sufi and Family Networks of Aḥmad ibn Sumayṭ and the *ṭarīqa* ʿAlawiyya in East Africa c. 1860-1925’, Ph.D. thesis, University of Bergen 2000.

11 On Faḍl Pasha, see Tufan Buzpinar, ‘Abdülhamid II and Sayyid Faḍl Pasha of Hadramawt: An Arab dignitary’s ambitions (1876-1900)’, *Journal of Ottoman Studies/Osmanlı Araştırmaları*, xiii, 1993, 227-39.

numerous disciples are described by Abdallah Saleh Farsy,<sup>12</sup> who stresses the lack of dogmatism in his teaching sessions.

Ibn Sumayṭ was also a productive author. Among his most substantial works must be mentioned the massive Sufi work *Manhal al-wurrād*,<sup>13</sup> a 364-page commentary on the poetry of the °Alawī *quṭb* °Abd Allāh b. °Alawī al-Ḥaddād (d. 1720) completed in the early 1890s. In 1902, Ibn Sumayṭ completed a new series of commentaries on the poetry of al-Ḥaddād in addition to one on a prayer by his Ḥaḍramī Sufi teacher °Alī b. Muḥammad al-Ḥibshī.<sup>14</sup> In 1909 he finished his most acclaimed work, *Tuḥfat al-labīb*, a commentary on yet another poem of al-Ḥaddād. In this, Ibn Sumayṭ incorporated the history of the *ṭarīqa* °Alawiyya, its shaykhs and scholars, and its representatives in East Africa.<sup>15</sup> Finally must be mentioned Ibn Sumayṭ's commentary on the *Minhāj al-ṭālibīn* of al-Nawawī.<sup>16</sup>

Aḥmad b. Sumayṭ died 7 May 1925. His funeral the following day was attended by an estimated 20,000 people, including the highest ranking British personnel, a fact that indicates his importance in the British-Bū Sa°idī legal system.

*The leading Ibādī qāḍī: °Alī b. Muḥammad al-Mundhirī (1866-1925)*

°Alī b. Muḥammad al-Mundhirī was born in 1866 in

12 Abdallah Saleh Farsy, *The Shafī°i Ulama of East Africa c. 1830-1970: A hagiographic account*, trans. & ed. R.L. Pouwels, University of Wisconsin: African Primary Texts III, 1989, *passim*.

13 *Manhal al-wurrād min fayḍ al-amdād bi-sharḥ abyāt al-Quṭb °Abd Allāh b. °Alawī al-Ḥaddād*, Mecca: Maktabat al-Mīriyya 1315/1897-8.

14 *Al-Kawkab al-zāhir, sharḥ °alā Nasīm ḥājir*, Cairo: Maktabat al-Madanī, 1381/1961.

15 *Tuḥfat al-labīb, sharḥ °alā Lāmiyyat al-Ḥabīb*, Cairo: Dār al-kutub al-°arabiyya al-kubrā 1332/1913-14.

16 *Al-Ibtihāj fī bayān iṣṭilāḥ al-Minhāj*, Cairo 1935 (2nd edn, Cairo, 1961). This work seems to have been left uncompleted; the latter sections are supplied by Ibn Sumayṭ's son °Umar.

Zanzibar.<sup>17</sup> His father, Muḥammad b. °Alī, served as an Ibādī *qāḍī* in the 1850s and 60s. The family was of Omani origin, and had settled in Zanzibar before the reign of Sayyid Sa°id b. Sulṭān.

°Alī b. Muḥammad's legal career started around the turn of the century, and from 1908 he was the chief Ibādī *qāḍī* in Zanzibar town. As the only Ibādī among the four main *qāḍīs*, al-Mundhirī carried a heavier workload than his Shāfi°ī counterparts, signing up to 300-400 verdicts a year.

Like his colleague Aḥmad b. Sumayṭ, °Alī b. Muḥammad authored several religious works. The most notable is a *risāla* in defence of Islam, written around 1890 in connection with a religious debate involving the Christian missionaries in Zanzibar.<sup>18</sup> He also wrote two short works on *tawḥīd*, entitled *Nūr al-tawḥīd* and *al-Širāṭ al-mustaqīm* as well as a *sharḥ* on the *Mukhtaṣar al-khiṣāl* by the eleventh-century Ḥaḍramī Ibādī author Abū Ishāq Ibrāhīm b. Qays al-Hamdānī al-Ḥaḍramī.<sup>19</sup>

*In his father's footsteps: Burhān b. °Abd al-°Azīz al-Amawī (1861-1935)*

Burhān b. °Abd al-°Azīz (known as Shaykh Burhān) was the son of the reputed °ālim °Abd al-°Azīz b. °Abd al-Ghanī

17 On the Mundhirī family, see Aḥmad b. Ḥamd al-Khalīlī, 'al-°Umāniyyūn wa-atharuhum fī 'l-jawānib al-°ilmiyya wa'l-ma°rifīyya bi-sharḥ Ifrīqiyya', *Proceedings of the Literature Society*, Muscat: Ministry of National Heritage and Culture 1992, 177-91, and Ibrāhīm Sughayrūn, 'Al-Ishām al-°umānī fī majallāt al-thaqāfiyya wa'l-fikriyya wa'l-kashf °an majāhil al-qāra al-Ifrīqiyya fī 'l-°ahd al-Būsa°idi', *ibid.*, 193-228.

18 R.S. O'Fahey & K.S. Vikør, 'A Zanzibari *waqf* of books: the library of the Mundhirī family', *SAJHS*, 7, 1996, 18. The *risāla* is entitled *Jawāb °alā 'l-risāla al-mansūba ilā °Abd al-Masiḥ b. Ishāq al-Kindī al-Naṣrānī*, and was completed by al-Mundhirī in 1891. Unfortunately, only fragments remain of this work, in the Zanzibar Archives ZA8/9. Al-Khalīlī states that a MS copy in held by the Omani Ministry of National Heritage and Culture.

19 Al-Khalīlī, 'al-°Umāniyyūn', 183-4.

al-Amawī, who was also his main teacher. Shaykh Burhān, like his father, maintained close relations with the Bū Sa<sup>‘</sup>īdī sultans, especially with Sayyid <sup>‘</sup>Alī b. Ḥamūd. Contrary to his father who was viewed with suspicion by the British, Shaykh Burhān was a trusted man within the British administration. During the First World War, he even served as an ‘intelligence officer’, providing the British with vital intelligence from German-held Tanganyika (Deutsch-Ostafrika). For this, Shaykh Burhān was invested with the Order of the British Empire (OBE) in 1919.<sup>20</sup>

*The ‘government man’: Ṭāhir b. Abī Bakr al-Amawī (1877-1938)*

Ṭāhir b. Abī Bakr al-Amawī (known as Shaykh Ṭāhir) differs from his three colleagues in that we know little about his origins and much about his official career. He was born in 1877 in Zanzibar, but his *nisba* indicates that he originated from Lamu (‘al-Amawī’ refers to Lamu), possibly of the same family that produced Burhān al-Amawī. In his youth, he studied with several members of the learned community of Zanzibar.

It seems that Shaykh Ṭāhir did not continue into further studies, but opted instead for an official career as a *qāḍī*. He was clearly ‘the man’ for the British authorities. For this reason he appears frequently in the colonial records from the period c. 1910-30, including the court records. We first encounter Shaykh Ṭāhir upon his appointment as ‘full Cadi’ of the Sultanate courts in 1907 after having been assistant *qāḍī* for some time. From that point until his resignation in 1933, he was one of the four main *qāḍīs* of the Sultanate courts.

Shaykh Ṭāhir had many public roles besides his legal duties, indicating his close association with the British representatives. From his various functions, it is evident that Shaykh Ṭāhir read and spoke English fluently. On occasion,

20 *Supplement to the Zanzibar Gazette*, 8 September 1919, ZA-BA104/34.

he would serve as interpreter, and he was one of the examiners for the Swahili Examinations required for British personnel in Zanzibar.<sup>21</sup> He was also a long-time member of the ‘Zanzibar Book Club’, sitting as member of the Executive Committee for 1921 and 1922 together with Major Pearce, the British Resident.<sup>22</sup>

### *Three conflicts over inheritance*

The cases presented in this and the second part of this article all stem from the ‘Sultan’s Court for Zanzibar and Pemba’, Zanzibar National Archive files HC8/1-140. These files contain an incomplete record of cases dating from 1898 to 1924.

All three cases involve the possession of *shambas*, that is, farms and farmhouses in the agricultural areas. Such *shambas* could be anything from large plantations that in earlier periods were worked by slaves to small farms barely producing a marketable surplus. The main produce would in any case be cloves and coconuts for export and vegetables for local consumption.

All three cases involve issues of inheritance, and in all three cases the problems involve a conflict between one female heir (or her descendants) and the male heirs, following from unclear divisions of the inheritance between the female and male heirs (in the last case, however, the female heir appears only as buyer). This is probably indicative of a social fact and the use of the legal system to attempt to correct it. In these cases, mostly without success. As is typical, the cases were largely settled in favour of the defendant, the person who had factual possession of the property.<sup>23</sup> It is clearly

21 Shaykh Tāhir took part in producing a booklet intended to prepare the students for examination: *Guide to Swahili Examinations*, Zanzibar: Zanzibar Government Printer, 1927.

22 *Supplement to the Zanzibar Gazette*, 14 March 1921, ZA-BA104/38.

23 Although not exclusively, in the last case the court transferred ownership of the smaller of the contested *shambas* to an Omani expatriate who returned to Zanzibar to claim his rights. We can also not say if the

stated by the judges that in the absence of acceptable proof to the contrary—or unless the claimant can show that he or she has consistently demanded her rights from the possessor over a length of time—the party that physical possesses the property shall be deemed the rightful owner.

Only the first of the three documents refers to *madhhab* identity. In the others, the decisions are made on the strength of the evidence, apparently without there being any difference in how the two *madhhabs* would cause them to be evaluated.

The records are in a clear hand written with only a few scribal errors and one or two colloquialisms. Two of them appear to be penned one of the judges, the third by a scribe. They are in the records accompanied by English translations (the first in typescript, the others in handwriting),<sup>24</sup> these are however of poor quality, ‘word by word’, and do not indicate that the English clerk has understood the detail of the arguments presented. We have however accepted the spelling of most non-Arabic names as they appear in these translations.

## I

*HC8/49*

Case no.: 249/1908.

Heard before HH the Sultan’s Court for Zanzibar and Pemba  
on appeal from the District court.

Plaintiffs: Sulaymān and Ḥabīb, sons of °Abd Allāh b.  
Sulaymān.

Defendant: °Adwān b. Ja°rūf.

Heard before Shaykhs °Alī b. Muḥammad al-Mundhirī and  
Burhān b. °Abd al-°Azīz al-Amawī.

This is the result of an appeal concerning the sale of a *shamba*

records have been edited in cases of a reciprocal claim to let the judge conform to a presumption of favouring the defendant.

24 In case I, the British judge was not in session, as noted below. In case II, only the judgement is translated, and in case III we also have only the judgement in Arabic.

(farm and farmhouse) on Pemba, at the time in the possession of °Adwān b. Ja°rūf. The plaintiffs, Sulaymān and Ḥabīb, claimed that the *shamba* had been sold unlawfully, as it was part of their inheritance and thus could not be transferred without their involvement. The defendant claimed to have bought the land in good faith.

This appeal verdict only summarizes the original case, so all details are not clear. It appears, however, that °Adwān had bought the *shamba* from one Khalaf. The plaintiffs were the heirs of Khalaf's sister Leza (Līza) and claimed that the *shamba* in question was part an inheritance Khalaf and Leza had received in common from their mother °Ā'isha. Khalaf had clearly denied that the *shamba* was part of this heritage and said that he had in fact bought the property from a third person, a Muḥammad b. Qāsim.

The defendant, °Adwān, had been able to bring witnesses to the fact that Khalaf had purchased the *shamba*, and thus had the right to sell it on, and the district court had found in his favour. The losing party had then brought the case up to the Court for Zanzibar and Pemba to appeal, and had brought in a lawyer who complained about certain procedural faults in the testimonies on which the case rested. The Sultanic court upheld the original decision and was moved to defend its position by referring to various legal texts.

The verdict is penned by the Ibādī judge, °Alī al-Mundhirī, but quotes in defence of his view both from a work of his own Ibādī tradition and from the *Minhāj* of al-Nawawī and an unnamed commentator to it. The opponent's lawyer makes a point of bringing in the Ibādī *Sharḥ al-Nīl*; although the judge's language seems to indicate that the lawyer belongs to the Shāfi'ī majority. In other words, each side tried to defend his view by referring to this being 'also the view of your authorities'. Apparently, the attempt is to arrive at a result that conforms to both schools; on principle or for reasons of argumentation.

The first point of the protest appears to be on the presentation of the defendant's witnesses. We cannot know

precisely what the lawyer wanted, the question is cut off after the initial statement. It would seem, however, that he sought to invalidate the witnesses that had verified that Khalaf had purchased, not inherited, the *shamba*, by pointing to the basic Sharḥīa rule that evidence is only required from the plaintiff. If the plaintiff's evidence is not accepted, the defendant is asked to make an oath for his claim, but does not have to provide evidence.<sup>25</sup> The court, however, states that this does not mean that evidence cannot be asked from the defendant. The correct order of witnesses in a conflict over ownership, is that the one who actually has possession of the object (has it 'in his hand')—the defendant—should present his witnesses last and only if the plaintiff has presented any. This gives the defendant a priority through the fact of his possession: If his witnesses are acceptable, the verdict should go in his favour.<sup>26</sup>

The second attempt to cut the ground under ḥAdwān's witnesses concerns the validity of a statement of ownership relations in the past. A witness should only state the situation at the time he was heard (here that Khalaf had possession of the property, not how he came by it in the past). If it refers to past events it must contain a phrase saying that it 'was in his property [from he acquired it] until he sold it', this was not the case in these witness statements.

The judges accepted the point of law that witnesses cannot make statements of past ownership, on this point only referring to Shāfiḥī sources (in particular al-Nawawī) that emphasize this. But this actually is more pertinent to his own witnesses'

25 For a discussion of the theory of evidence, see Mohammad Fadel, 'Adjudication in the Mālikī Madhhab', Ph.D, University of Chicago 1995, 143-65.

26 This conforms to a basic principle of 'entropy' that underlies Islamic law; things should continue 'as they factually are' unless there are positive reasons to change them. — It is the task of the judge to establish who is plaintiff and defendant; the plaintiff is not necessarily the one who initiates the case, but he who makes a claim contrary to an 'established fact or custom'—here, the fact of possession—hence, the burden of proof lies on him, cf. Fadel, 'Adjudication', 145.

statements that Leza had inheritance rights of property that she had never realized. What °Adwān's witnesses had testified to was that Muḥammad b. Qāsim had disposed of (*taṣarrafa*) the land by selling it, and that Khalaf had disposed of it for twenty years after that, neither being contested in this time, and such statements of past relations were specifically allowed.

As for the phrase that it had 'been in his property', they stated that as long as Khalaf had lived on the land for all these years and there had been no challenge to his ownership of it in that period, the phrase itself was redundant. Thus, priority is again given to the one who can show actual continuous possession of the object, here Khalaf.

A further technical point brought out by the lawyer was that the borders of the property were not stated by the witnesses; again this was conceded in principle, but as long as these borders were not contested by anyone and the witnesses were neighbours who would not have been confused as to which *shamba* they were talking about, this formality could not invalidate the judgement concerning ownership. The court challenges the plaintiffs to go out to Pemba and meet with the witnesses to decide if there were any problems with the identity of the property.

The lawyer's complaint that the inheritance from °Ā'isha had been ignored was thrown out partly because both stories could not be true and °Adwān had the stronger case, but also by his own legal argument: his witnesses claiming such past ownership had not included the statement that it had 'been their property until the present' which he himself had made a point was obligatory for such testimony. Other witnesses having denied knowledge that this *shamba* was part of the inheritance, the court felt free to ignore this and upheld the original court's verdict.

This case was heard without a British official as part of the quorum, as the session was held 17 June 1908, a few months before the decree requiring the presence of a British judge in the Sultanate court came into effect.

*Text*

جواب الاشكالات التى حصلت للمحامي عدي بن جمعة  
الرزعي في شهادات عدوان بن جعروف وفي الحكم بثبوت  
الشانبة له

أما قوله ان عدوان لا تلزمه بينة لانه منكر الخ فجوابه ان ذلك  
صحيح لكن محلّه حين ادّعيتم عليه فانكر فانه لا تطلب بينة  
منه بل تطلب منكم وأما بعد اقامتكم بينتكم على ما ادعيتم  
عليه فادعى هو فيه وجهاً يثبت له به ذلك الشئء فأنه يلزم  
ايضا استماعها منه

وشاهد ما قلناه في كتاب بيان الشرع قوله « واذا تنازع الى  
الحاكم رجلان يدعيان دابة هي في يد احدهما فان الحاكم  
يكلف البينة الذي هي ليست في يده فان احضر بينة امر  
خصمه بالدفع اليه وان احتج الذي في يده الدابة ان معه بينة  
أمره الحاكم باحضار بينته وأوقف الدابة فان احضر البينة  
حكم بالدابة للذي هي في يده ».<sup>27</sup>

وفي المنهاج قوله « ولو كانت ( اي العين ) بيده فاقام غيره بها  
بينته وهو بينةٌ قُدم صاحب اليد ولا تسمع بينته الا بعد بينة

27 The grapheme  $\delta$  is used in the ms for full stop. This (alone) is represented here by periods.

المدعي . اه فأوجب ان تُسمع بينة المدعى عليه بعد بينة المدعي .

وأما قوله وفي شرح النييل « ان من عمرارضا اشتراها فأتى مدع تسمية منها فان بين اخذها » . فجوابه ان هذه هي القاعدة في كل دعوى كانت في تسمية من الشيء او في كله فان المدعي اذا اتى بالبينة على دعواه استحق ذلك الشيء كله اذا اقامها على كله واستحق جزئه اذا اقامها على جزئه . فان اتى المدعى عليه ببينة على استحقاقه له بعد بينة المدعي سمعت بينته وقدمت على بينة المدعي على القاعدة التي بينتها لك من بيان الشرع والمنهاج .

وأما قوله اتى عدوان ببينة شراء خلف من محمد بن قاسم ولم تذكر انها (اي الشانبة) ملك خلف الى ان باعها ولا انتقال الملك من ليزه الى خلف الاخ . فجوابه ان هذا الذي ذكر في المنهاج من الشهادة بالملك السابق التي لا تجوز هو كشهادة ورثة ليزه انه كان ليزه في هذه الشانبة سهم وكانت الشانبة في حياة ليزه وبعد موتها في يد غيرها وغيرهم

وأما من كان شهادته بالشيء لمن كان الشيء في يده ويتصرف به كتصرف محمد بن قاسم بها بالبيع الى خلف

وتصرف خلف بها بعد شرائه لها بالفلسل<sup>28</sup> لها واستغاله<sup>29</sup> لها عشرين سنة ثم ببيعه لها الى عدوان هذا وثبوت يد عدوان فيها بشرايه لها وبتصرفه بها وبقولهم انه غصبها عليهم لأن من ادعى على احد غصب شيء فقد اقرّ له باليد فيه . فلا تكون تلك الشهادة من الشهادة بالملك السابق التي لم يعتبرها صاحب المنهاج .

وقد حكى شارحه القول بسماعها وهو الذي نراه استصحابا للملك الحاصل بالشراء ولم يصح من عليه فكيف وقد قوي ذلك شهادة بقاءه في يده وقد قال القاضي حسين في كتبكم بقبول شهادة من صرّح باعتماده استصحاب الملك السابق وقد قال الشارح « لو شهدوا ان هذه الداب<sup>30</sup> اشتراها من فلان وهو يملكها ولم يقولوا وهي الآن ملك المدعي قبلت » . فانظر ان هذا الشارح للمنهاج ممن يقول باشتراط ذكر الملك الى وقت الشهادة وقد قال هنا اذا شهدوا انه اشتراها ممن يملكها حكم بانها لمن شهدوا له بشرائها وان لم يقولوا وهي الآن ملكه .

28 Thus in text, for فصل .

29 Thus in text, for استغلاله .

30 Thus in text, for الدابة .

وشهود عدوان قد شهدوا أنّها اشتراها خلف من محمد بن قاسم فثبتت لخلف وان لم يقولوا وهي الى وقت بيعها ملك له . وشهدوا ان عدوان اشتراها من خلف الذي قد ثبت له الملك فيها بالشهادة التي ذكرناها وثبوت ملك محمد بن قاسم فيها بصحة تصرفه بها بالبيع بلا معارض له فيها حتى انتقلت من بائع الى بائع حتى وصلت الى عدوان بلا معارض له فيها من عشرين سنة .

وأما ذكر الحدود فنعم أنّهُ مّا يلزم في الدعوى والشهادة لكن قائده<sup>31</sup> ان يتعيّن الشئ وقد عيّنا هذه الشانبة بانّها التي اشتراها من خلف وباع خلف منها قطعة للبهري ولم تدعوا عليه غير هذه وقد عرفت حدودها واذا صار الشئ مشهراً متضحاً متعيّناً مع القاضي أنّه هو بعينه فلا تبطل [الشهادة به]<sup>32</sup> عنده بترك ذكر حدوده كما هو مذكور عند علمائكم على أنّه لم يفت بعد شئٍ فانّ هؤلاء الشهود هم في الجزيرة وجيران لهذه الشانبة فلنطلب منهم ان يوقّفوكم او من تأمنوه على هذه الشانبة وحدودها فتنظروا هل هي غيرها .

وأما قوله ان بينته أتت باسقاط حق ليزه حين ذكرت انها لم

31 Thus in text, for قاعدته .

32 Added in margin.

تخلف الشانبة . فجوابه ان بينته لم تذكر ذكر بل لما سُئل احد الشهود هل علمت ان عائشة خلفت شانبة اجاب انه لا يعلم ذلك ولم يكن حكم ثبوت الشانبة لعدوان بهذا بل بما ذكرناه في الحكم .

واما قوله ان عدوان اشتراها من خلف وخلف شريكنا الخ . فجوابه ان شهادتكم لما ادت<sup>33</sup> ان لكم سهما من هذه الشانبة لانها انتقلت الى خلف وليزه بالميراث من امهما عائشة وادت<sup>34</sup> شهادة عدوان ان هذه الشانبة له لانها انتقلت الى خلف بالشراء من محمد بن قاسم ثم اشتراها هو منه تعارضتا فقويت شهادة عدوان باليد .

واما قوله فبينه عدوان نافية الخ فليست كذلك بل هي شهدت على انها اشتراها من خلف وخلف اشتراها من محمد بن قاسم وعمرها عشرين سنة ثم باع قطعة منها للبهري ثم باع الباقي لعدوان . ثم ان شهادتكم بكونها خلفتها لهما عائشة من عشرين سنة لا تصح على قاعدتكم التي هي عدم قبول الشهادة بالملك السابق اذ لم يقل شهودكم وهي ملكها الى ان ماتت فورثها منها هؤلاء وهم

33 Thus in text, for ادعت .

34 Thus in text, for ادعت .

الى الآن يملكونها وقد اشترطت لصحة الشهادة بالملك السابق ان يقول الشهود كذلك . اذ لا فرق بين قولهم ورثها وبين قولهم اشتراها اذ كل واحد من الموروث والمشتري وغيرهما مما انتقل من شخص الى شخص بوجه من الوجوه يصح ان يكون من انتقل منه أو من انتقل اليه قد كان خرج من ملكه

فسقطت ايضا شهادتكم بذلك وبقيت الشانبة لعدوان بسبب اليد لكونها في يده اشتراها ممن كانت في يده بصحة الشراء ايضا ولم يبق لكم عليه الا اليمين انه لا يعلم لكم فيها حقا ولا أن شهوده شهدوا له بباطل في ذلك

وانقطعت دعواكم بذلك بحكم قضاة محكمة زنجبار والجزيرة الواضعين اسماءهم ادناه بتاريخ ٦ محرم ١٣٢٧ الموافق ٢٩ جنوري ١٩٠٩

صححه خادم الشرع علي بن محمد بيده

صحيح خادم الشرع برهان بن عبد العزيز الاموي بيده

### Translation

Answer to doubtful questions which occurred for the lawyer °Adī b. Jum°a al-Razī concerning the testimonies of °Adwān

b. Ja<sup>c</sup>rūf and the judgement confirming the *shamba* as his.

As for his [°Adī's] statement that evidence was not required from °Adwān because he was the one who denied [the charge] etc., then the answer is that this is true, but it is proper when you had made claims against him and he denied them. The evidence is not required from him, but from you. After you brought your evidence for what you claimed against him, he made a claim of a kind that confirmed this object [the *shamba*] for him. And it is also required to hear this from him.

An attestation for what we have said is in the *Bayān al-shar<sup>c</sup>*,<sup>35</sup> ‘If two people bring to the judge a dispute where both claim an animal, which is in the possession [fī yad] of one of them, then the judge charges the one who does not possess it to produce evidence. If he does present evidence, then he orders his adversary to rebut it. If the one who possesses the animal claims that he has evidence, the judge orders him to present his evidence and seizes the animal. And if he presents the evidence, then the animal is judged to go to the one who possesses it’.

And it is said in the *Minhāj*,<sup>36</sup> ‘If it (that is, the property) is in his possession, and someone else raises evidence for [that he owns] it which is [proper] evidence, then the possessor is preferred and his evidence is not heard until after the evidence of the plaintiff’. Thus it is necessary that the evidence of the defendant is heard after the evidence of the plaintiff.

As for his statement, ‘It is said in the *Sharḥ al-Nīl*,<sup>37</sup> “If someone lives on land that he bought, and a plaintiff brings an entitlement [*tasmīya*] for it and it is proven, then he can take it”’, the answer is that this is the basic rule for every claim, be it for the entitlement to things or for all of it. The

35 Muḥammad b. Ibrāhīm al-Kindī (d. 508/1114-15), *Bayān al-shar<sup>c</sup>* (publ. Muscat 1982-93), an Ibāḍī work on inheritance and succession law.

36 Of al-Nawawī, see note above: a basic Shāfi‘ī work.

37 Of Aṭfiyyash, see note above: a basic Ibāḍī work. The publication of the first Cairo edition of this work was yet completed in 1908.

plaintiff has, if he brings evidence for his claim, the right to that thing, all of it if he establishes it [the evidence] for all of it, and he has the right for a part of it if he establishes evidence for a part of it. But if the defendant brings evidence for his right to it after the evidence of the plaintiff, then his evidence is heard and is preferred over the evidence of the plaintiff, on the basis of what I presented to you from the *Bayān al-sharʿ* and the *Minhāj*.

As for his statement that ʿAdwān brought evidence of the purchase by Khalaf from Muḥammad b. Qāsim, but it did not mention that it (the *shamba*) was the property of Khalaf until he sold it, nor that the property had been transferred from Leza to Khalaf, etc., the answer is that this is what is mentioned in the *Minhāj* on the testimony of previous ownership, which is not allowed. It is like the testimony of Leza’s heirs that Leza had a share in this *shamba*, while the *shamba* was in the lifetime of Leza and after her death in the possession of other than her and them [the heirs].

As for one whose testimony concerning something is for the one who possesses the object and disposes freely from it—like Muḥammad b. Qāsim’s disposing of it in selling it to Khalaf, and Khalaf’s disposing of it after he bought it by dividing it up<sup>38</sup> and drawing the yields from it<sup>39</sup> for twenty years then by selling it to this ʿAdwān, and the affirmation of ʿAdwān’s possession of it through his purchase of it and disposing of it and by their saying that he [ʿAdwan] had unlawfully taken it from them—because one who claims that someone has unlawfully taken something has [thereby] affirmed that he has possession of it—then [all] such testimonies are not among the testimonies of previous ownership that the author of the *Minhāj* rejected.

Its commentator said concerning the statement ‘accepting

38 Reading *faṣl* for *fasl*, referring to his earlier sale of a part of it to al-Baharī, below.

39 Reading *istighlāl* for *istighāl*.

it' that 'this is what we regard as continuity<sup>40</sup> of ownership that is obtained by purchase. Those who oppose it are wrong. How could that be, when this testimony strengthens it remaining in his possession?' *Al-qāḍī* Ḥusayn in your books held that one should accept the testimony of one who by his support clarifies the continuity of the previous ownership. The commentator said, 'If they testify that he had bought these animals from someone while the latter owned them and do not say, "and they are now the property of the plaintiff", it is accepted'. Notice that this commentator to the *Minhāj* is among those who argue for restricting the mention of ownership to the [situation at the] time of the testimony, but he said here that if they testify that he bought them [the animals] from the one who owned them, then they shall be judged to belong to the one that the testimony shows bought them, even if they do not say 'and they are now his property'.

°Adwān's witnesses have testified that Khalaf had bought it [the *shamba*] from Muḥammad b. Qāsim, so it is affirmed that it belongs to Khalaf even if they do not say that this was his property until it was sold. They [further] testified that °Adwān had bought it from Khalaf, who the testimony affirms had ownership of it, as we mentioned. And Muḥammad b. Qāsim's ownership is affirmed by the truth of his having disposed of it by selling it without anyone opposing him, so that it was transferred from seller to seller until it came to °Adwān without anyone opposing it, over twenty years.

As for stating the boundaries [of the property], it is indeed accepted that this is among what is required in the claim and in the testimony. But the basic rule for it is that it specifies the object. They [the witnesses] have specified this *shamba* by saying that it is the one that was bought from

40 *Istiṣhāb*, the principle that a legal state of affairs is presumed to remain valid until there is reason to consider otherwise. Accepted in some form by all schools, the term and principle is most widely applied by Shāfi'is, Ḥanbalis and twelver Shī'is, cf. M.H. Kamali, *Principles of Islamic Jurisprudence*, Oxford 1997, 297-309, and Wael Hallaq, *A History of Islamic Legal Theories*, Cambridge 1997, 113-15.

Khalaf—Khalaf having sold a part of it to al-Baharī—and you [the plaintiffs] did not claim anything else, and its boundaries were known. If the thing becomes well known, obvious and evident to the judge that it is that very object, then the testimony of it is not falsified by its boundaries not being mentioned. This is as it is said among your scholars, although it was never given in a *fatwā* before. These witnesses are on the island [Pemba] and neighbours to this *shamba*, so we will ask them to acquaint you, or someone you trust, with this *shamba* and its boundaries, and see if these are different [from your understanding].

As for his statement that his evidence has brought about the elimination of Leza's rights when it mentioned that she [her mother °Ā'isha] did not leave behind the *shamba*, the answer is that his evidence did not mention anything [of this]. Indeed, when one of the witnesses was asked, 'Do you know that °Ā'isha had left behind a *shamba*?', he answered that he did not know that. The affirmation of the *shamba* for °Adwān was not judged on the basis of this, but on what we mentioned in the judgment.

As for his statement that °Adwān bought it from Khalaf and Khalaf is our partner, etc., the answer is that your testimony when it claims<sup>41</sup> that you have a share of this *shamba* because it was transferred to Khalaf and Leza by inheritance from their mother °Ā'isha, and °Adwān's testimony claims that this *shamba* belongs to him because it was transferred to Khalaf by purchase from Muḥammad b. Qāsim, then he bought it from Khalaf, then they are contradictory. The testimony of °Adwān is strengthened by his possession [of the *shamba*].

As for his statement that °Adwān's evidence is inconsistent etc., it is not so. Indeed it testified that it had been bought from Khalaf and Khalaf had bought it from Muḥammad b. Qāsim and lived on it for twenty years, then he sold a part of it to al-Baharī, then the sold the rest to °Adwān. Thus your testimony that °Ā'isha had left it to the two [Khalaf

41 Reading *idda'at* for *addat*, here and in the next sentence.

and Leza] twenty years ago is not admissible according to your own basic rule which is not to accept the testimony as to the previous ownership, since your witnesses did not say, ‘And it was her property until she died and these inherited it from her, and they have owned it until today’, since you stipulated for the admissibility of a testimony of the previous ownership that the witnesses say thus. There is [in this] no difference between a statement ‘he inherited it’ and a statement ‘he bought it’, when it is found true for both what is inherited and what is bought—and what is otherwise transferred from person to person in one or another manner—from the one from whom it has been transferred, or the one to whom it is transferred, that it has left his property.

Thus your testimony about this also falls, and the *shamba* remains °Adwān’s because of possession, as it is in his possession, he bought it from one who had it in his possession also by true purchase. And there only remains for you that you may ask an oath from him that he does not know of a right for you concerning it, and that his witnesses has not testified falsely in it.

And your claims are settled with this judgement of the judges of the Court for Zanzibar and Pemba, whose names are placed below, on the date of 6 Muḥarram 1327, corresponding to 29 January 1909.<sup>42</sup>

Verified by the servant of the Sharī°a °Alī b. Muḥammad by his hand.

[Signature] Confirmed by the servant of Sharī°a Burhān b. °Abd al-°Azīz al-Amawī by his hand.

42 That is, six months after the case was heard, according to the date on the case file.