Proceedings of the International Symposium on

ISLAMIC CIVILISATION IN SOUTHERN AFRICA

Johannesburg, South Africa

1-3 September 2006

Istanbul

2009
Organisation of the Islamic Conference
Research Centre for Islamic History, Art and Culture (IRCICA)

Sources and Studies on the History of Islamic Civilisation; No. 18
ISBN 92-9063-191-0

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IRCICA Library Cataloguing in Publication Data

International Symposium on Islamic Civilisation in Southern Africa
(2006: Johannesburg, South Africa)
Proceedings of the International Symposium on Islamic Civilisation
in Southern Africa: Johannesburg, South Africa, 1-3 September 2006.-
Istanbul: Research Centre for Islamic History, Art and Culture, 2009.
476 p.; 24 cm.-(Sources and Studies on the History of Islamic
Civilisation; no.18)
Includes bibliographical references.
968--dc22

Design: Said Kasimoğlu

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Printing
EUROMAT www.euromat.com.tr
Crown and Crescent: Competing Policies on the Administration of Islamic Law on the East African Coast

Abdulkadir Hashim

Competing for Control: Early East African Coast

The East African Coast has been a scene of competing political hegemony since ancient times. The region is strategically located and has been privileged with abundant resources. Due to these factors, almost all powers of the time have struggled to influence and even control the major ports along its coastline. According to one of the oldest historical works on the East African Coast referred to as "The Periplus of the Erythrean Sea" the Ausanitic (East African) Coast was by ancient right subject to the sovereignty of whichever state had become paramount in Southern Arabia. As to when exactly Islam penetrated the African continent remains a subject of debate among historians. There is no argument, though, that Islam’s first contact with Africa was the Hijra (migration) to Abyssinia by a group of Muslims from Makkah during the time of Prophet Muhammad (peace be upon him).

As for the East African Coast, it is believed that Islam arrived here around 680 A.D. when Hamza `Abd al-Malik, a son of the Umayyad Khalifah of Baghdad, settled at Kiwayu (now Kismayu in Somalia). Later in 689 A.D. two princes of Oman fled from Oman after a long and bitter struggle against Hajjaj Ibn Yusuf, the Governor of Iraq. It was only in 1498 A.D. that the first European explorer, Vasco Da Gama, sailed along the East African Coast on his first voyage to India.

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2 *ibid.*
Later in 1505 A.D. Francis De Almeida seized Sofala, paving the way for the Portuguese to control the East African Coast. In 1660 A.D. people of Azania (East African Coast) appealed to the Imam of Muscat to be given assistance in driving out the colonialists. Subsequently, the Imam of Oman fought the Portuguese and drove them out of their stronghold, Mombasa. Fighting between the two rival powers of the time, the Portuguese and Omanis, continued between the 17th and 19th centuries to seek control of the East African coast. Finally in 1832 A.D. Sayyid Sa' id bin Sult a n, the ruler of Oman, transferred his headquarters to Zanzibar putting an end to the Portuguese threat.

After the Portuguese were driven out of the East African Coast, other Western Nations began to take an interest in the region. The British, French and German consulates were established in Zanzibar and trade agreements were entered into which applied to both Zanzibar and Oman. In 1884 Karl Peters, founder of the German Society for Colonisation, persuaded Tanganyika chiefs to enter into treaties with him despite the fact that some of the regions that he entered into agreement were regarded as dominions of the Sultan of Zanzibar.

On 3rd March 1885 the Imperial German Government declared a protectorate over the areas covered by Peter's agreements. Subsequently, the Sultan protested to the German Emperor but received no reply until 7th August 1885 when a German fleet of five warships appeared off the coast of Zanzibar. The Sultan was given a clear undertaking to withdraw his protests and later he signed an agreement to acknowledge the German Protectorate in Tanganyika including the port of Dar al-Salaam. In July 1890 a new arrangement was made between Britain and Germany whereby a British protectorate was declared over Zanzibar. In 1895 an agreement was made between Britain and the Sultan which provided that the ten mile strip should be administered by Her Majesty's (British) government.

**East African Coast under the British Protectorate**

British interests along the East African Coast were beyond acquiring natural resources. Bang describes the British personnel as "a new breed of men arrived: administrators, engineers, explorers and missionaries – individuals with objectives extending beyond the immediate goals of fresh provisions, water and
trade-opportunities. Contrary to their predecessors, the newcomers were here to stay.³ Among the objectives of the British in declaring the protectorate along the East African Coast were to keep away her rivals, the Germans and French, and to gain control of the region. Before gaining the title of a protecting power, the British entered the region gradually. In May 1887 the Imperial British East Africa Association obtained from the Sultan of Zanzibar a concession for a term of 50 years under which the Sultan surrendered His powers on the mainland. In terms of article II of the Concession, the Association was authorised ‘to pass laws for the government of districts and to establish Courts of Justice.’ The Judges were to be appointed by the Association or their representatives, subject to the Sultan’s approval; but all qadis were to be nominated by the Sultan.⁴ Provisions were incorporated in the agreement to safeguard the Sultan’s interests and those of His subjects. Article XI of the Concession stated the following: “it was understood that all public judicial, or Government powers and functions herein conceded to the Association or to their representatives shall be exercised by them only in the name and under the authority of the Sultan of Zanzibar”. The British Government promised to honour such safeguards by clearly adopting a non-interference policy in religious matters. In September 1888, a charter was granted to the Imperial British East Africa Company which provided in Article 11 that “the Company as such or its officers as shall not in any way interfere with the religion of any class or tribe of the peoples of its territories or of any of the interests of humanity, and all forms of religious worship or religious ordinances may be exercised within the said territories and no hindrance shall be offered except as aforesaid......” (and) “in the administration of Justice by the company to the peoples of its territories or to any inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong”.⁵

Due to a financial crisis, the Company collapsed and consequently surrendered to the Sultan its concessions. The British Government decided to buy out the Company’s assets and entered into an agreement with the Sultan. However,

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³ Bang, 2000, p.7
⁴ Hamilton, 1918, p.1
⁵ ibid.
provisions of this new agreement differed from the earlier one. By virtue of the new agreement, the administration of the Sultan’s mainland dominions was “entrusted to officers appointed direct by His Britannic Majesty’s Government to whom alone they shall be responsible. These officers shall have full powers in regard to executive and judicial administration.” This situation paved the way for the British to declare a Protectorate over Zanzibar in 1890. Prior to the declaration of the Protectorate in July 1890, the British Under-Secretary for Foreign Affairs in the House of Commons denied any intention of interfering with the Sultan’s authority, but spoke of ‘exercising a friendly influence’. It was made clear to the Sultan that the raison d’être for declaring a formal protectorate over Zanzibar was purely ‘defensive’. Hence, the British officials undertook not to interfere in Zanzibar’s internal affairs.

**Policy to Protect Islam**

By virtue of being the protecting power, Britain assumed the responsibility of protecting the religion of her subjects as well as of those within the Sultan’s dominions. The British mandate during the First World War to protect Islam transcended the East African Coast. When fighting was at its climax, Britain devised a policy to win the hearts of the Arabs by appearing as defenders of the Holy Places (Makkah and Madinah) against the Ottomans. The following declaration by the Secretary of State for the Colonies illustrates the British policy in regard to Islam and safeguarding of the Holy Places of Islam:

For many years Arabs chafing under Turkish misrule have looked forward to the day of reining their former freedom and revolts against Turkish domination in Arabia have been of frequent occurrence. The misdeeds of the present Government in Constantinople and its complete subservience to German influence have forced Turkey into a disastrous war and have brought matters to a climax. The Sheriff of Mecca and other ruling Chiefs of Arabia now have decided to throw the Turkish yoke and assert their independence. Great Britain has always viewed Arab aspirations sympathetically but hitherto to her traditional friendship with Turkey has compelled her to stand aloof. *It remains the fixed policy of Great Britain to abstain from all interference in religious matters and to spare no effort to secure the Holy Places of Islam from all external*
aggression. It is the unalterable point of British policy that these Holy Places should remain under independent Moslem rule and authority.6

Competing Policies on Sharīʿah

The Sultans and the British differed with each other in their approach towards the administration of Islamic law on the East African Coast. Sultan Barghash bin Saʿid (1870-1888) was seen to “exercise greater control over the judicial system in the coastal towns”.7 Barghash’s successor, Sultan Khalīfa bin Saʿid (1888-1890), did not compromise with his religion and wanted to implement sharīʿah in Zanzibar. Colonel Euan Smith who was the British Agent and Consul General at the time described him as a weak leader who did not comprehend things going on around the world outside Zanzibar.

In Zanzibar, the British administrators raised concerns about the implementation of the penal laws of Islam (ḥudūd). Despite the fact that Islamic Criminal Law was not being fully implemented in the Sultanate, the British objected to its application especially to its own subjects. A senior British administrator summoned the Arab Association to express its opinion as to the desirability or otherwise of the retention of adultery as an offence under the Zanzibar criminal law. The letter stated that “attention has been drawn to the fact that, although adultery is not a criminal offence by the law of most European countries, is and has been for many years a criminal offence by the law of Zanzibar and India”.8 The Secretary of the Arab Association replied: “Although adultery is not a criminal offence by the law of most European countries and it has been for many years a criminal offence in the law of Zanzibar, my Association could not see the proper reason of its withdrawal and regrets that the law is not rigidly observed”.9 The final response from Downing Street was “while I attach full weight to your recommendation and recognize that it is in accord with local

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7 Pouwels, 1987, p.134
8 Letter from the Ag. Chief Secretary to the Government J.P. Jones to the Secretary of the Arab Association, Zanzibar dated 25th May 1935, Zanzibar Archives, ZA62/47
9 Reply from the Secretary of the Arab Association, to Ag. Chief Secretary to the Government J.P. Jones Zanzibar dated 7th June 1935, Zanzibar Archives, ZA62/47

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Moslem opinion, yet I think that it would be well to consider the matter again. Sir Philip Cunliffe Lister pointed out it is generally considered that adultery ought not to be regarded as criminal offence and there might be serious difficulties where a European to be convicted of this offence on a criminal charge".

`Ulamā’ (Muslim scholars) on the East African Coast were privileged and accorded a special status in the court of the Sultan. During the establishment of the Sultanate, the Chief Qadis had served as the Sultans’ advisors and had exercised considerable influence over the Sultans in state affairs as well as in religious matters. However, this privilege ceased when Zanzibar was declared a British Protectorate in 1895.

After the death of Sultan Hamūd bin Muhammad (1896-1902), Prince `Alī bin Hamūd (1902-11) was nominated to be the Sultan. Due to his very young age, the British Resident in Zanzibar, Mr. Rogers, was nominated to be the Prime Minister and to act as the Regent until Sayyid `Alī bin Hamūd reached the age of 21 years in June 1905. Mr. Rogers ruled with full authority for around three years. He made some changes such as restricting the income of the Bayt al Mūl (Public Treasury) that was used by the Sultan to assist the poor. Instead, he ordered that such funds were to be paid to the Government and the Sultan had no power over them. It was during this period that British administrators entrenched themselves in the various Government departments.

Zanzibar Courts were reorganized in 1908 and British Officers were appointed to sit side by side with the qadis (correctly spelt qādis). Bang notes that "a review of the process during the reorganization of courts can be interpreted as a continuous devaluation of the qadi’s position within the legal system". Since the establishment of the Sultanate, the qadis had both civil as well criminal jurisdiction throughout the Sultan’s dominion. One of the policies adopted by the British in respect of the qadis was to water down their judicial powers. They limited the qadis’ jurisdiction to the Muslim law of personal status. One of the British judicial officers noted that:

10 Letter from the Officer Administering the Government, Downing Street to the British resident, Zanzibar dated 28th November 1935, Zanzibar Archives, ZA62/47
11 Note 3, pp.164
The qadis are unfitted both by education and outlook for dealing with criminal cases and their duties should be confined to their proper function of hearing civil cases between natives and advising on questions of Mohammedan law. It is not therefore proposed to give any criminal jurisdiction to qadis.\textsuperscript{12}

**Seeking Control over Waqf Properties**

Since the establishment of the British Protectorate polices were enacted to obtain control over the Waqf Commission. The British Resident had the mandate to nominate waqf commissioners before the Sultan ceremonially appointed them. When the Waqf Commission was established in 1905, members were appointed in proportion to their racial and religious background. The Waqf Commission was constituted by one European officer, one Sunni qadi and one Ibadi qadi and three other commissioners. The decree provided that “the appointed commissioners shall elect not more than three persons to be additional waqf commissioners subject to the approval of the First Minister”.\textsuperscript{13} However, in later years, the number of British officers in the Waqf Commission was doubled. On 2\textsuperscript{nd} October 1916 Sultan Khalifa bin Harub, on the recommendation of the British Resident, appointed four British officers and two qadis to constitute the Waqf Commission. The following names were gazetted: Frank Campbell McClellan, Stanley River-smith, Claude Dudley Wallis, William Maybury Keatinge (Secretary of the Waqf commission), Shaykh Ahmed bin Sumeit, and Shaykh Ali bin Mohamed.\textsuperscript{14}

Among the contentious issues relating to the administration of waqf properties on the East African Coast was the tradition of waqf ahlī, which is a form of religious trust created for the purpose of providing in perpetuity for the family, children, and descendants of the person who dedicates the property. British administrators regarded this type of trust as offensive to the English legal rule against perpetuity whereby successive life interests created by the waqf deed will include various individuals living and unborn. British judges opposed waqf

\textsuperscript{12} Memorandum on the proposed Zanzibar Courts Decree (1923) by Judge Tomlinson dated 26\textsuperscript{th} October 1922, pp.4, Zanzibar Archives, ZA/162/11

\textsuperscript{13} Waqf Decree 25\textsuperscript{th} August 1905 issued by Sultan Ali bin Hamoud

\textsuperscript{14} The Official Gazette of Zanzibar, 2\textsuperscript{nd} October 1916

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ahli on the ground that descendants of strangers to the creator of a waqf ought not to enjoy its fruits for ever. In consequence of this opposition by the British, waqf ahli was declared invalid by the courts.

In India waqf ahli was rejected on the ground that a perpetual family settlement expressly made a waqf is not legal merely because there is an ultimate gift to the poor. Muslims along the East African Coast protested against the decision of the courts to reject waqf ahli. In 1946 Sultan Khalifa bin Harub responded by enacting a decree to validate such waqf which would have been void under the English legal rule against perpetuity. The decree stated:

'Whereas doubts have arisen regarding the validity of waqf by certain of Our subjects and others professing the Muslim faith in favour of themselves, their families, children, destitutes, and kindred and ultimately for the benefit of the poor or for other religious, pious or charitable uses: and whereas it is desirable to remove such doubts: No such waqf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent character is postponed until after the extinction of the family, children, descendants or kindred of the person creating the waqf.'

The other policy adopted by the British administrators was to seek control over the Waqf Commission. Due to the demand for funds to support the First World War, the British took advantage of waqf funds in Zanzibar by investing them in war loans. For instance, in 1916 the Zanzibar Treasury invested six £100 Exchequer Bonds on behalf of the waqf Commissioners in Zanzibar at the interest rate of 5%. The Bonds were to be retained in Britain and the interest credited to the Waqf Commissioners' accounts. A further £700 was invested in the 1927 National War Loan Bonds on account of the Waqf commissioners in Zanzibar. The secretary of the waqf commission, who was by virtue of the post

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15 Abul Fata v. Russomy (22 I.A. 76)
16 Sec. 4 of the Zanzibar Waqf Validating Decree 22nd June 1946.
18 Letter from the Treasury, Zanzibar to the Crown Agents for the Colonies, London dated 11th January 1918, Zanzibar Archives, ZA/HD10/12
a British, donated Rs.500 towards the funds of the Royal Red Cross from the Waqf funds. Interestingly, there is no trace of any resistance on the part of the Muslim waqf commissioners regarding such investments and donations. The only response noted from the Muslim waqf commissioners was their objection to insure waqf properties against all risks on the ground that shari‘ah did not allow for the insurance of Waqf properties.

The zeal of the British administrators to control the Waqf Commission can be gauged from the following event. In 1912 the The Waqf Commission in Mombasa, Kenya, allowed Messrs. Costa Birr & Souza to erect an advertisement board on one of the burial grounds in return for annual rent. Since Muslim trust lands including the burial grounds are under the authority of the Waqf Commission, it had the authority to make this decision. Despite this, the Provincial Commissioner in Mombasa, who was a British officer, objected in the following words: “I desire to place on record my strongest disapproval of the erection of this advertisement in a Mohammedan burial ground. I am surprised that the Commissioners should consent to the resting place of the dead being profaned by a commercial notice of this kind”. He further noted that “unless your Committee can give me an assurance that no further erection of this nature will be permitted on the property and that the board in question will be removed ... I shall consider it necessary to report the matter to His Excellency as a lapse of duty by a public body.”

The Waqf Commission replied: “the Commissioners do not consider the burial round is desecrated by the board ...the Commissioners desire me to point out that sanction appears to have been given to the Government to place a lamp post on the said burial ground, also a telegraph post reaching 8 feet within the boundary of the boundary ground”.

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9 Letter from Secretary Waqf Department, Zanzibar to Manager, National Bank of India, dated 5th October 1918, Zanzibar Archives, ZA/HD10/9
10 Minutes of commissioners of Waqf on 10th March 1954, Zanzibar Archives, ZA/HD10/51
11 Letter from the Provincial Commissioner, Mombasa to the Secretary, Waqf Commission dated 31st May 1912 Kenya national Archives, KNA/PC/Coast/1/1/186
12 Letter from Secretary, Waqf Commission to the Provincial Commissioner, Mombasa dated 14th June 1912, Kenya national Archives, KNA/PC/Coast/1/1/186

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The matter was forwarded to the Chief Secretary who sent the *waqf* commissioners a letter containing the following threat:

His Excellency (Ag. Governor) considers that your letter is a most improper one to address to the Ag. Provincial Commissioner and he agrees with Mr. Tate that the Commissioners should not have approved of the erection of the advertisement board in a Mohamedan ground. Your letter appears to afford proof that the *waqf* commissioners are unaware that their commission is a semi-Government body, their secretary being granted an allowance from Protectorate funds and some of their members being Government servants. You should inform the commissioners, that in the event of any further letters being addressed to the Provincial Commissioner, similar in tone and matter to your communication of 14th June 1912, the allowance paid to their Secretary will be stopped and officials will not be allowed to serve as commissioners.23

In response to this threat, two *waqf* commissioners resigned in protest and one of them wrote to the Government as follows:

I have the honour to point out that the *waqf* commissioners were appointed by the Government to look after and protect the *waqf* property and interests by using their judgement and discretion according to the *shari’ah* and ancient customs, but from your letter under reference it appears that the *waqf* commissioners are mere instruments to carry out government orders and have no right to use their judgement and discretion. I regret I am unable to agree with this view of the position of a *waqf* commissioner and therefore request to be allowed to resign from my position as such.24

**Public Trustee**

Despite the fact that the British claimed to favour a policy of abstaining from interfering in religious matters, in practice this policy was not honoured. For instance the Public Trustee in Kenya suggested enacting a rule under section 11(2)

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23 Letter from the Ag. Chief Secretary to the Government, Nairobi to the Secretary, Waqf Commission dated 16th July 1912, Kenya national Archives, KNA/PC/Coast/1/1/186

24 Letter from Rashid bin Sood to the Secretary to the Government of East Africa, Nairobi dated 9th August 1912, Kenya national Archives, KNA/PC/Coast/1/1/186
of the Public Trustee Ordinance of 1925 providing that in the event of no claim forthcoming for the residue of an estate administered under Mohammedan law, the husband or the wife - when the sole heir - shall be permitted to receive an amount in excess of his or her legal share. Under Mohammedan law, unexpended balances were paid into the Bayt al-Māl (State Treasury). The main objective of the Bill was to ensure that the system of distribution, which was in accordance with the shari‘a, granted a bare share i.e. one fourth or one half, as the case may be, to the surviving husband or wife whilst the balance was retained for twelve years to be eventually paid to the waqf commissioners. This caused considerable difficulty to many poor widows and widowers. It was, therefore, proposed to give the Public Trustee the power to pay or transfer property to the husband or wife or wives surviving the deceased.

Muslim officials opposed the proposal on the ground that it “directly interferes with one of the fundamental principles of the shari‘a and such interference will certainly be considered as a step towards interference in religion which, we are sure, is not the object of the Government”. Due to the objections raised by the Qadi and Liwali of Mombasa, the British administrators opted not to proceed with the proposal. Instead, the Provincial Commissioner in Mombasa suggested that “the objections raised appear to be based mainly on the argument that the amendments proposed are at variance with the shari‘a. In view of the opinions expressed by the Qadi and Liwali we can see that the Bill as it stands might certainly be regarded as an attempt to interfere with the religious precepts of the Arabs: and that being so we consider that for political reasons it should not be proceeded with in its present form”.

Another concern of the British administrators was the unclaimed estates of deceased Muslims. The Public Trustee’s Ordinance, 1923, provides in section 11(3) that “all estates or portions thereof in respect of which no claim shall have been lodged with the Public Trustee shall lapse or be escheat to the Crown on

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25 Letter from Native Affairs Department, Nairobi dated 25th March 1926, Kenya National Archives, KNA/PC/Coast/2/3/12
26 Letter from the Liwali and Kashi, Mombasa dated 5th Amy 1932 to the Dirt Commissioner, Mombasa, KNA/PC/Coast/2/17
27 Letter from the Provincial Commissioner, Mombassa to the Colonial Secretary, Nairobi dated 6th May 1932, Kenya National Archives, KNA/PC/Coast/2/17
the expiry of twenty years from the date of the final account”. On the other hand, the *Waqf* Ordinance states in section 13 that “All property of deceased Mohammedans natives to which no claim can be established shall vest in the Commissioners, but no such property shall be handed over to the Commissioners without the sanction of the Court”. Out of this apparent conflict of laws the position appears that, after a certain period, all properties of deceased persons to which no claim is preferred are escheat to the Crown with the exception of property of “deceased Mohammedans natives” to which the provisions of the *Waqf* Ordinance will apply. The Public Treasurer objected to this privilege that was given to the deceased Muslims by stating that “it is difficult to appreciate why the property of the deceased Mohammedans natives should be singled out for special treatment”. The Treasurer further noted that “all the money due to the *Waqf* commissioners has been collected, but there is no way of checking whether all expenditure which should have been incurred to satisfy the intentions of the founder of any *waqf* has in fact been incurred ... It appears that these monies, some of which have been in the hands of the *waqf* commissioners for fourteen years, are virtually lying idle serving little useful purpose”.

In response to these criticisms, the Colonial Secretary directed that a committee of enquiry be established and that it recommends the need for an amendment of the *Waqf* Ordinance “so as to effect closer control on the expenditure from monies obtained under the *Waqf* Ordinance as suggested by the Treasurer”. The Secretary of the *Waqf* Commission responded by stating that “the commissioners do not see any reason for any committee of enquiry as everything is done according to the *Waqf* Ordinance and shari’a, all accounts being subject to complete audit by the Colonial Auditor”. Further criticism was directed against the *waqf* commissioners stating that: “The commissioners are bound to spend any *waqf* money left over after the intentions of the testator

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28 Memorandum on unclaimed estates of deceased Mohamedan natives prepared by the Treasurer dated 5th January 1933, Kenya National Archives, KNA/PC/Coast/2/17/1
29 Memorandum on unclaimed estates of deceased Mohamedan natives prepared by the Treasurer dated 5th January 1933, Kenya National Archives, KNA/PC/Coast/2/17/1
30 Letter from the Secretary of Waqf Commissioners to the Provincial Commissioner, Coast dated 8th September 1933, Kenya National Archives, KNA/PC/Coast/2/17/1
have been satisfied on 'such good or charitable purposes on behalf of Mohammedans as may appear desirable.' That implies that the money must be spent directly on charities, but what the *waqf* commissioners are doing is to pool such amounts and use them to buy land which they think likely to improve in value and then lease it for commercial purposes.\(^{31}\)

**Conclusion**

The history of the administration of Islamic Law on the East African Coast reveals that rulers in the region have adopted various policies with the ultimate objective of gaining power and control. During the Sultanate period the `ulamāʾ` were close to the Sultans and enjoyed considerable influence on religious as well state affairs. When Zanzibar was declared a British protectorate in 1890, the Sultan's foreign and local polices were influenced by the British administrators. The change of policy was effected gradually to ensure British control of the protectorate in political as well as religious affairs. The Sultans had to tolerate these changes, in order to please their protector on one hand, and to contain their subjects on the other. The paper sought to establish that with regard to the administration of Islamic Law on the East African Coast, there has been intense competition between the British administrators who struggled to protect their interests, on the one hand, and `ulamāʾ` who strove to preserve their religious loyalty, on the other. More interesting was the role of the Sultans who had to maintain a balance between these two contenders and retain a vestige of authority.

\(^{31}\) Letter from the Acting Provincial Commissioner, Coast to the Colonial Secretary, Nairobi dated 11\(^{\text{th}}\) May 1934, Kenya National Archives, KNA/PC/Coast/2/17/1
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