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In the Privy Council.

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ON APPEAL FROM THE COURT OF
APPEAL FOR EASTERN AFRICA

No. 51 of 1947
UNIVERSITY OF LONDON
W.C.1.
3 APR 1951
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN
FATMA BINTI HAFIDH
AND
THE ADMINISTRATOR - GENERAL ZANZIBAR
PROTECTORATE as Administrator of the Estate of
HAFIDH BIN MUHAMMAD el-BUSAIDI, deceased

UNIVERSITY OF LONDON
W.C.1.
- 6 AUG 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR THE RESPONDENT

1.—This is an Appeal from the Judgment and Decree of the Court of Appeal for Eastern Africa, dated the 5th October, 1946, setting aside the Judgment and Decree of the Chief Justice of Zanzibar dated the 25th March, 1946, whereby it was declared that the Plaintiff, who is the present Appellant, was the daughter of Hafidh bin Muhammad el-Busaidi by his *suria* (i.e. slave-concubine) Panya binti Hassani and as such entitled to a share of the estate of her deceased father the said Hafidh bin Muhammad el-Busaidi and whereby the Defendant, who is the present Respondent was ordered to transfer such share accordingly.

10 2.—The Appellant's mother, Panya binti Hassani (hereinafter referred to as Panya) was at one time the slave of Binti Juma, the mother of Hafidh bin Muhammad el-Busaidi (hereinafter referred to as Hafidh). The Appellant's case is that Binti Juma gave Panya as a *suria* to Hafidh, that the Appellant is the issue of the resultant slave concubinage, and that Hafidh during his lifetime impliedly acknowledged the Appellant as his daughter by his *suria* Panya. The Appellant was born in 1907 and Hafidh died in December, 1944.

3.—The principal issues to be determined in this appeal are:—

20 (a) whether the gift of Panya by Binti Juma to Hafidh was a legal transaction or whether it was prohibited by the Slave Trade (Prohibition) Decree of 1st August, 1890

- (b) whether, if the said transaction was illegal, the Respondent is entitled to plead or rely upon such illegality as a defence to the Appellant's claim.
- (c) whether the Appellant has discharged the onus of proving that Hafidh acknowledged her as his daughter.

4.—The material sections of the decrees dealing with the slave trade and slavery in Zanzibar are as follows :—

“ THE SLAVE TRADE (PROHIBITION) DECREE. (August 1st, 1890).”

“ 3. We declare that, subject to the conditions stated below, all slaves lawfully possessed on this date by our subjects shall remain with their owners as at present. Their status shall be unchanged.” 10

“ 4. We absolutely prohibit from this date all exchange, sale or purchase of slaves, domestic or otherwise. There shall be no traffic whatever in slaves of any description. Any houses heretofore kept for traffic in domestic slaves by slavebrokers shall be for ever closed, and any person found acting as a broker for the exchange or sale of slaves shall be liable, under our orders, to severe punishment, and to be deported from our dominions. Any Arab or other of our subjects hereafter found exchanging, purchasing, obtaining, or selling domestic or other slaves shall be liable under our orders to severe punishment, to deportation, and the forfeiture of all his slaves. Any house in which traffic of any kind in any description of slave may take place shall be forfeited.” 20

“ 5. Slaves may be inherited at the death of their owner only by the lawful children of the deceased. If the owner leaves no such children, his slaves shall, *ipso facto*, become free on the death of their owner.”

“ 9. Every slave shall be entitled, as a right, at any time henceforth to purchase his freedom at a just and reasonable tariff to be fixed by ourselves and our Arab subjects. The purchase-money on our order shall be paid by the slave to his owner before a Kathi, who shall at once furnish the slave with a paper of freedom, and such freed slaves shall receive our special protection against ill-treatment. This protection shall also be specially extended to all slaves who may gain their freedom under any of the provisions of this Decree.” 30

“ THE ABOLITION OF THE LEGAL STATUS OF SLAVERY DECREE.

(April 7th, 1897).”

“ 3. From and after this day of Zilkada, the District Court shall decline to enforce any alleged rights over the body, service, or property of any person on the ground that such person is a slave, but whenever any person shall claim that he was lawfully possessed 40

of such rights, in accordance with the Decrees of our predecessors, before the publication of the present Decree, and has now by the application of the said Decree been deprived of them, and has suffered loss by such deprivation, then the Court, unless satisfied that the claim is unfounded, shall report to our Government that it deems the claimant entitled, in consideration of the loss of such rights and damage resulting therefrom, to such pecuniary compensation as may be a just and reasonable equivalent for their value, and our Government shall then award to him such sum."

10 "THE SLAVERY DECREE. (July 6th, 1909)."

"2. From and after the commencement of this Decree our Courts shall not in any case recognize the status of slavery in our Islands of Zanzibar and Pemba.

"6. No claims for compensation under the provisions of the aforesaid Decree of 1897, or of this Decree, shall be entertained after the 31st December, 1911."

20 "7. All concubines lawfully held at the commencement of this Decree, although free, shall, together with their children, continue to be entitled to all the rights and privileges which they have previously enjoyed under the Mahomedan law, except that any concubine who shall leave her master without his consent shall sacrifice all such rights and privileges, including her right to the custody of her children by him. For the purpose of this article the word "concubine" shall mean a female member of the household who is an inmate of the harem."

5.—Case iv in Sir William MacNaughten's "Precedents of Inheritance" (8th ed.) reads as follows

30 "All the children of a person deceased, whether they are the offspring of a slave girl or a free married woman, are without distinction entitled to succeed to their respective share, according to the Law of Inheritance. But to establish the parenthood of children by slave girls it is necessary that that the father should acknowledge them if they are by different mothers; but if they are by the same mother the acknowledgement of the first-born is sufficient." p. 85

This passage was cited with approval in *Syud Mohummod v. Syud Ihait* (1848) 10 Indian Decisions (Old Series).

6.—On the 4th August, 1945, the Appellant instituted

THE PRESENT SUIT

40 alleging by her plaint that her age was about 37; that she was the daughter of Hafidh by Panya who lived with him and was his *suria* according to Ibadhi law; that she was brought up by Binti Juma; that she had the pp. 1-2

- RECORD
— same features and appearance as Hafidh; that she had applied to the Defendant (the present Respondent) to admit her as heir according to law and that the Defendant had referred her to Court as some of the heirs did not admit her claim. She therefore prayed for a declaration that she was the daughter of Hafidh and as such entitled to inheritance and that the Defendant as administrator of the estate be ordered to give her her share according to Ibadhi law. The plaint contained no averment that Hafidh had acknowledged her as his daughter.
- pp. 4-5 7.—By his written statement dated 13th September, 1945, the Respondent (inter alia) put the Appellant to proof of age. He denied that she was the daughter of Hafidh by Panya who, he averred, did not live with Hafidh and was not his *suria* according to Ibadhi law. He further pleaded that he had refused to admit the Appellant's claim because all the heirs, and not merely some of them, denied it in toto and he traversed all the remaining allegations in the plaint. 10
- p. 7, l. 35 8.—On the 21st February, 1946, the following issue was framed
“Is Plaintiff entitled to share of inheritance in an estate of Hafidh bin Muhammad el-Busaidi? Onus on Plaintiff.”
- pp. 8-9 9.—The witnesses for the Appellant gave evidence as follows (inter alia):— 20
- (a) The Appellant herself deposed that her father was Hafidh and her mother Panya. She had been brought up in Binti Juma's house and Binti Juma was her grandmother. In cross-examination she stated that she learnt the Koran at Binti Juma's house; that before she was born no other child was born to Hafidh; that when she got married she was 20 years old; that this was an advanced age for marriage; that she was married at Binti Juma's house and that Hafidh was present at the marriage.
- p. 9 (b) Malika Binti Ambari deposed that she herself had been a slave of Binti Juma; that the Appellant was the daughter of Hafidh; that the Appellant's mother was a slave girl given to Hafidh by his mother to keep as a concubine and that the Appellant was born and brought up in Binti Juma's house. 30
- p. 10 (c) Kidawa Binti Mamba deposed that he had been a slave to the father of Hafidh; that when Panya attained puberty Binti Juma gave her to Hafidh as a concubine; and that the Appellant was born at Binti Juma's house.
- p. 10, l. 44 (d) Khamisi Bin Jeta deposed that the mother of Binti Hassani gave birth to a slave girl who was given to Hafidh as a concubine and that he only knew the name of the slave girl as Binti Hassani. 40
- p. 11, l. 13 In cross-examination this witness stated that it was only about a year after the slave girl was given as a concubine that he saw the child (i.e. the Appellant) in Binti Juma's house.

- (e) Anasi Bin Feraji deposed that he had been a slave of Hafidh and that Panya was Hafidh's concubine. In cross-examination this witness deposed that he was present when Binti Juma gave Panya as a concubine to Hafidh and that Binti Juma said "this slave girl is the concubine of my son." p. 12, l. 5
- (f) Fatuma Binti Sultan deposed that she taught the Appellant the Koran at Binti Juma's house in the year of "Guns of Sunday" (i.e. the year of the attack of the Konigsberg on H.M.S. Pegasus at Zanzibar in September 1914); that she had done so at the request of Binti Juma who had said to her "teach my grand-daughter" and that Binti Juma and Hafidh each gave her Rs. 50 in the presence of the Appellant. In cross-examination this witness said that when she began teaching her (the Appellant) the girl was to her guess about 7 to 8 years old. pp. 12-13
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10.—The Respondent called five witnesses three of whom were former slaves of Binti Juma and one of whom, Nasibuyangu was the second wife of Panya's father. The evidence of these three witnesses was to the effect that the Appellant was born not earlier than 1911; that Panya was never a concubine of Hafidh and that the Appellant was not the daughter of Hafidh, nor born in Binti Juma's house; that the Appellant was not taught the Koran either by Fatuma Binti Sultan in Binti Juma's house and that Hafidh was not present at the Appellant's marriage. pp. 13-19

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Isa bin Said el-Kindi deposed that he had been employed by Hafidh as a clerk from October, 1939, until Hafidh's death in 1944; that he did not know the Appellant and did not ever remember having seen her at Hafidh's house. He produced a book belonging to Hafidh containing a number of manuscript entries. Two such entries (54 and 55) were inserted by himself on the instructions of Hafidh and referred to the birth of two legitimate children in 1942 and 1943. Two other entries, 50 and 51, report to be signed by the alleged father but neither the entries nor the signature are in his handwriting. Other entries in unknown handwritings record births, marriages, divorces and deaths in the family of el-Busaidi and events of public importance in Zanzibar. There is no entry in this book relating to the Appellant or to Panya. p. 19 pp. 60-64

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11.—The learned Trial Judge (Sir John Gray, C.J.), after referring to the decision in *Syud Mohummod v. Syud Ihait (supra)* and the passage from Sir William MacNaughten's "Precedents of Inheritance," set out in paragraph 5 hereof and to various other authorities arrived at the following conclusions :— p. 30, l. 3

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- (a) while it was essential that the Plaintiff should prove an acknowledgement of paternity by the person from whom she claimed to inherit, that acknowledgement need not be oral or p. 30, l. 3

RECORD

express but might be inferred from surrounding circumstances, and in particular from the conduct of the alleged father. In this case, when the Plaintiff was 9 or 10 years old, her alleged father paid Rs. 50 for her past instruction in the Koran. If the Plaintiff was merely the daughter of Binti Juma by an unknown father it was difficult to understand why Hafidh went to this trouble and expense, and the only reasonable explanation appeared to be that he thereby admitted that he was under an obligation to have the Plaintiff educated because he was her father. He was, therefore, of the opinion that evidence of this payment was evidence of 10 paternity of the Plaintiff.

- p. 33, l. 3 (b) He was satisfied upon the evidence that that the Plaintiff's mother was the concubine of Hafidh and that Hafidh had acknowledged paternity of the Plaintiff. In his view the evidence upon which he was prepared to act fully outweighed all evidence to the contrary.
- p. 33, l. 47 (c) In the absence of any specific pleading it was not open to the Defendant to impeach the validity of the forms and ceremonies whereby Binti Juma had given Panya to Hafidh.
- p. 35, l. 10 (d) The transaction in question, namely, the transfer of Panya to 20 Hafidh, was one prohibited by Article 3 of the Slave Trade, (Prohibition) Decree 1890. Under the aforesaid decree a slave although unlawfully obtained in contravention of Article 3, would yet not be entitled to freedom unless and until a special order of forfeiture was made. Therefore, notwithstanding the violation of the decree, the victim of the offence remained a slave.
- p. 35, l. 35
- p. 36, l. 7 (e) A person obtaining a slave by gift ought not to have been allowed to plead his own illegality as a defence to an action brought by the slave. If there had been no abolition of the legal status of slavery in 1909, and the Plaintiff's mother had endeavoured to 30 enforce her rights as a concubine, the father could not have pleaded his own illegal act as a defence to her claim.
- p. 36, l. 36 (f) In this case the Defendant stood in the position of the deceased person whom he represented. He could not, therefore, plead a defence which it was not open to that person to plead.
- p. 37, l. 10 The learned Chief Justice decreed the Appellant's claim accordingly.
- pp. 38-9 12.—The Respondent appealed from the aforesaid Judgment and Decree to the Court of Appeal for Eastern Africa.
- 13.—The Judgment of Sir Norman Whitley, Chief Justice, included the following passages :— 40
- p. 46, l. 23 " I have had an opportunity of reading the judgments of the learned Chief Justice of Tanganyika and my brother Bartley and I agree with them that the extremely meagre evidence is

insufficient to establish that Seyyid Hafidh did acknowledge the Respondent as his daughter, and that accordingly, since she failed to discharge the heavy onus which rested upon her in a claim such as this, the appeal should be allowed.” RECORD
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10 “ Everything was done openly and in those days it was perfectly usual and proper for a man to have a child by a slave concubine. So much so that if he acknowledged the child it would be entitled to share equally in his estate with children by wedded wives. In those circumstances if Seyyid Hafidh did acknowledge the Respondent surely there would be elderly persons of repute, friends of the family, who would know all about it and be available as independent witnesses. Yet not one was called. Fatuma binti Sultan, who taught Respondent the Koran, says that Binti Suma said ‘ Teach my grand-daughter ’ but she does not say that when Sayyid Hafidh paid her half of the fee he referred to that Respondent as his daughter.” p. 47, l. 2

20 The learned Chief Justice did not share the view expressed by Sir George Graham Paul, C.J., that, even if Hafidh did acknowledge the Respondent as his daughter, her claim to share in the estate would not be entertained by the courts for the reason that the claim was based on an illegal transaction. In his opinion there was no obstacle in law to the claim since the governing word in Article 3 of the Slave Trade (Prohibition) Decree 1890 was “ traffic ” and, in giving the slave to her son, Binti Juma did not, in his view traffic in the slave, but since the Respondent (i.e. the present Appellant) had failed to discharge the onus of proof the appeal should be allowed. p. 47, l. 26

14.—The Judgment of Sir George Graham Paul, Chief Justice, included the following passages :—

- 30 (a) “ It is true that express formal acknowledgement is not necessary and that acknowledgement can be proved by conduct. But the conduct must be such as to show unequivocally a deliberate acknowledgement by the deceased and in my view the unimportant incidents which the learned Chief Justice found proved, taken singly or together, fall a long way short of that standard.” p. 52, l. 45
- 40 (b) “ The date of the transaction is, of course, of importance for it is the law as it stood at that date which governs the transaction. The exact date of the transaction is not very clearly estimatable from the evidence but it may safely be taken that the date was between 7th April 1897 and 6th July 1909 which is sufficient to determine the material state of the Law under the Slave Decree.” p. 50, l. 9
- (c) “ The learned Chief Justice has found—and in my respectful opinion quite rightly found—that the transaction in question was one prohibited by The Slave Trade (Prohibition) Decree of 1st August 1890. It has been argued strenuously before this p. 50, l. 15

Court for the Respondent that the learned Chief Justice was wrong in so finding on the ground that the Decree in question did not prohibit the 'giving' of a slave, that it was aimed only at transmission of slaves for a valuable consideration. This argument was based on the *ejusdem generis* principle as applied to Article 4 of this Decree. But that *ejusdem generis* principle fails in effect in my opinion when the definite purposes of the Decree (particularly Articles 3, 4 and 5) are duly considered—most particularly the most important enactment in Article 5 which is in the following terms :—

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'Slaves may be inherited at the death of their owner only by the lawful children of the deceased. If the owner leaves no such children, his slaves shall, *ipso facto*, become free on the death of their owner.'

From the point of view of the slaves that was probably the most important provision of the decree—restricting as it did the duration of their status of slavery to the period of the lives of their particular owner at 1st August 1890 and of his or her lawful children. If the unqualified word 'obtaining' in Article 4 did not include obtaining by gift then any owner by giving away his slaves—perhaps even on his death bed childless—could defeat the emancipation given by Article 5, by passing on his or her slaves to a long line of inheriting owners. For that reason I respectfully concur in the view of the learned Chief Justice as to the meaning of 'obtaining' in Article 4 of this Decree.

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"The result of that reasoning is that the transaction in question was illegal.

"Now comes the question whether the illegality of the transaction which is the basis of her claim is fatal to the Respondent's claim. The learned Chief Justice has held that it is not. He puts the matter in this way :—

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'Here the Defendant stands in the shoes of the deceased person he represents. He cannot plead a defence which was not open to that person to plead.'

With great respect I find myself unable to accept that proposition. It is quite true that an administrator of a deceased person's estate does, broadly speaking, stand 'in the shoes of the deceased.' That is true as a general proposition but here the real issue is not between the Plaintiff and the administrator as representing the whole estate of the deceased. It is quite clearly on the pleadings an issue between the Plaintiff and the legitimate children. The administrator is only a nominal Defendant in the suit and it is in my view open to the legitimate children to plead as they do through the nominal Defendant that their legal rights as such cannot be defeated by an illegal transaction of their father."

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15.—Bartley, J. was of the opinion that the evidence was insufficient to establish that Hafidh did acknowledge the present Plaintiff as his daughter. p. 55, l. 7

16.—The Court of Appeal accordingly allowed the appeal and set aside the Judgment and Decree of the Trial Court as aforesaid. On the 28th November, 1946, the Appellant filed an application for leave to appeal to His Majesty in Council. Conditional leave was granted on the 10th February, 1947, and final leave on 21st August, 1947. p. 56 p. 57

17.—The Respondent respectfully submits that this appeal should be dismissed with costs and the Judgment and Decree of the Court of Appeal for Eastern Africa upheld for the following among other

REASONS.

1. Because the transaction whereby the Appellant's mother was given or transferred by Binti Juma to Hafidh was contrary to Article 3 of The Slave Trade (Prohibition) Decree 1890 and was, therefore, unlawful.
2. Because the Respondent, as representing the lawful heirs, was entitled to rely upon the illegality of the said transaction in resisting the Appellant's claim.
- 20 3. Because the onus lay upon the Appellant to prove that Hafidh acknowledged her as his daughter and she failed to discharge this onus.
4. Because the decree of the Court of Appeal was right.

DINGLE FOOT.

In the Privy Council.

No. 81 of 1947.

ON APPEAL FROM THE COURT OF APPEAL FOR
EASTERN AFRICA.

BETWEEN
FATMA BINTI HAFIDH ... APPELLANT

AND

THE ADMINISTRATOR-GENERAL
ZANZIBAR PROTECTORATE as
Administrator of the Estate of
HAFIDH BIN MUHAMMAD
el-BUSAIDI, deceased ... RESPONDENT.

CASE FOR THE RESPONDENT

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