

37/1962

1.

IN THE PRIVY COUNCIL

No. 63 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

- (1) RIZIKI BINTI ABDULLA and
- (2) FAIZA BINTI ABDULLA Appellants

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 30 MAR 1963
 25 RUSSELL SQUARE
 LONDON, W.C.1.

- and -

- (1) SHARIFA BINTI MOHAMED BIN HEMED,
- (2) KULTHUMI BINTI MOHAMED BIN HEMED,
- (3) RUKIYA BINTI MOHAMED BIN HEMED,
- 10 (4) MWANA SHEH BINTI MOHAMED BIN HEMED,
- (5) SAID BIN SULEMAN BIN HEMED,
- (6) ALI BIN SULEMAN BIN HEMED,
- (7) GHUFERA BINTI SULEMAN BIN HEMED and
- (8) KHULTHUMI BINTI SULEMAN BIN HEMED Respondents

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CASE FOR THE RESPONDENTS

1. This is an appeal from an order, dated the 10th December, 1959, of the Court of Appeal for Eastern Africa (Forbes, V.-P., Gould and Windham, JJ.A.), dismissing an appeal from a decree, dated the 28th October, 1958, of the Supreme Court of Kenya, (Edmonds, J.), granting the Respondents a declaration that a certain wakf was null and void ab initio and consequential relief. Record
p.96

2. The following provisions of the Wakf Commissioners Ordinance, 1951 are relevant to this appeal: p.39

- 4. (1) Every wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say -
- 30 (a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or

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(b) if the maker of the wakf is an Ibathi or Hanafi Mohammedan, for his own maintenance and support during his lifetime,

is declared to be a valid wakf if -

- (i) it is in every other respect made in accordance with Muslim law; and
- (ii) the ultimate benefit in the property the subject of such wakf is expressly, or, in any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character:

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Provided that the absence of any reservation of the ultimate benefit in property the subject of a wakf for the poor or any other purpose recognized by Muslim law as a religious, pious or charitable purpose of a permanent character shall not invalidate the wakf if the personal law of the maker of the wakf does not require any such reservation.

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(2) No wakf to which sub-section (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf.

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16. (1) Subject to the provisions of sub-section (2) of this section all property the subject of any wakf which is under the control of the Wakf Commissioners shall be administered by the Wakf Commissioners in accordance with the intentions of the maker of the wakf if such intentions are lawful according to Muslim law and are capable of being carried into effect, and

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whether such intentions are ascertainable by reference to tradition or by reference to any other evidence lawfully obtainable.

- 10 (2) In any case where in the opinion of the Wakf Commissioners the intentions of the maker of a wakf are unlawful or unascertainable or are incapable of being carried out or where any surplus revenue remains after fulfilling the intentions of the maker of the wakf the Wakf Commissioners shall, in the case of a wakf Khairi, apply the property the subject of the wakf or any surplus property or revenue therefrom, as the case may be, for such benevolent or charitable purposes on behalf of Muslims as appear to the Wakf Commissioners proper, and in the case of wakf Ahli, shall apply such property or surplus property or revenue as aforesaid in such manner as the Wakf Commissioners think fit for the benefit of the beneficiaries of the wakf.
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21. (1) If, in respect of any wakf -
- (a) the intentions of the maker -
- (i) are unlawful or unascertainable, or
- (ii) are incapable of being carried into effect, or
- (iii) cannot reasonably be carried into effect, or
- 30 (b) the beneficiaries are unascertainable; or
- (c) any surplus revenue remains after making the payments required by section 20 of this Ordinance and after carrying into effect the intentions of the maker of the wakf,

40 the Wakf Commissioners shall pay into the Surplus Fund created under section 18 of this Ordinance the proceeds of sale of any such property the subject of a wakf as is

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mentioned in paragraphs (a) and (b) of this sub-section and any such surplus revenue as is mentioned in paragraph (c) of this sub-section.

- (2) The Wakf Commissioners shall have power to place on deposit in any bank or to invest in or upon such investments and securities as are allowed by law for the investment of trust funds any moneys standing to the credit of the Surplus Fund and income derived therefrom shall be paid to the credit of the General Administration Fund.

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pp.1-7

3. The Respondents issued their plaint in the Supreme Court of Kenya on the 10th February, 1958. The Defendants were the two Appellants, one Ali bin Mohamed (the first Defendant) and the Registrar of Titles, Coast Registry (the Fourth Defendant). The Respondents pleaded that by a document registered in the Coast District Land Titles Registry on the 3rd December, 1942, a woman named Khadija had declared a wakf of two pieces of land with the buildings and improvements thereon. She had appointed herself to be the first trustee of the wakf and after her the first Defendant. She directed that the expenses of maintaining the properties and administering the wakf should be paid out of the income of the properties, and one-tenth part of the balance of the income should be kept as a reserve for capital expenditure upon the properties. The balance of the income was to be divided each month between the two Appellants, the adopted daughters of the settlor, in equal shares. Upon the death of either of the Appellants, her share was to be divided equally among her sons and daughters and their issue per stirpes, brothers taking the same share as sisters; failing issue of either of the Appellants, her half share of the income was to be divided, as to one-third equally between the first four Respondents, each of whom and, failing her, her issue were to take one part, as to one-third, to the surviving Appellant or her issue per stirpes, and, as to the remaining third, between the children of the deceased brother of the settlor, including his adopted child, and, failing any of such children, their issue per stirpes. The settlor further directed that in all cases the issue of a beneficiary should, upon the beneficiary's decease, take the share that would have gone to the beneficiary, that brothers

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and sisters should share equally, and that the share of a beneficiary dying without issue should accrue to his surviving brothers and sisters. If the beneficiaries so appointed should die out or fail, the income was to be devoted to assisting poor Mohammedans, promoting the Mohammedan faith, educating Mohammedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the Prophet would approve. The Respondents pleaded that this wakf was null and void ab initio because :

- (1) After purporting to dedicate the two properties to wakf, the settlor continued in possession of them and enjoyed the income of them for her own absolute use up to the time of her death in April, 1952.
- (2) The two Appellants were in no way related to the settlor, so were not "Muslims" for the purposes of the Wakf Commissioners Ordinance. The settlor called them adopted daughters, but Muslim law did not recognise adoption.
- (3) If the Wakf Commissioners Ordinance did apply to the wakf, it was still void because it contravened section 4 in the following ways:
 - (a) It was not made for the maintenance or support of any person or of the family, children, descendants or kindred of the maker;
 - (b) In so far as the settlor made provision therein for her "adopted daughters" and their issue, the wakf was contrary to Muslim law;
 - (c) The ultimate gift to charity was to take effect, not on the extinction of the family, children, descendants and kindred of the settlor, but after the extinction of the sons and daughters, and the issue of sons and daughters, of the Appellants, and of the "adopted" child of the settlor's brother and the issue of that child;
 - (d) The ultimate gift was not for a religious, pious or charitable purpose of a permanent character.
- (4) The ultimate gift to charity was void for uncertainty.

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The Respondents alleged that, the wakf being void ab initio, the two properties subject to it formed part of the intestate estate of Khadija, and they were her heirs entitled to that estate. They claimed a declaration that the wakf was null and void ab initio, and certain consequential relief.

pp.7-11

4. Each of the Appellants filed a separate Defence, but the two Defences were in identical terms. They alleged that they were adopted daughters of the settlor, who throughout her life had stood in loco parentis to them. They denied that the wakf was null and void ab initio. In particular:

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(a) They denied that the settlor had enjoyed the income of the two properties for her absolute use, and alleged that she had been in possession of them only because she was the trustee of the wakf and had used the income for the maintenance and support of the Appellants. Alternatively, if the settlor had enjoyed the income of the properties for her absolute use, the Appellants alleged that that conduct amounted only to a breach of trust and did not invalidate the wakf.

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(b) They alleged that they had professed the Mohammedan religion since birth and were Muslims within the meaning of the Wakf Commissioners Ordinance. They also alleged that being the adopted children of the settlor, having been brought up, supported and maintained by the settlor throughout their lives, and the settlor having stood in loco parentis to them, they were members of the settlor's family and/or kindred of the settlor.

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(c) They alleged that the wakf had been made in all respects in accordance with the provisions of the Wakf Commissioners Ordinance and of Mohammedan law.

5. Neither the first Defendant nor the fourth Defendant filed any Defence.

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p.70; 1.41 -
p.71, 1.7

6. The following matters were agreed in the Court of Appeal:

(1) The Appellants were adopted by the settlor and brought up by her from infancy.

- (2) They were not related to the settlor by blood or marriage.
- (3) They were respectively 12 and 5 years old when the wakf was made.
- (4) They married at the ages of 13 and 19 respectively and both had issue living at the time of the hearing before the Court of Appeal.
- (5) No legal form or ceremony of adoption was ever performed in respect of either of them.
- 10 (6) In any event, adoption is not recognised by Mohammedan law and confers no rights of inheritance under that law.

7. The action was tried by Edmonds, J. on the 22nd, 23rd and 24th September, 1958. Evidence was given on both sides, which it is not necessary to summarise in view of the agreed matters set out above. Certain issues were framed, and the Learned Judge heard argument upon them. One of these issues was whether the wakf contravened section 4 of the Ordinance and was therefore invalid, because it was not made for the maintenance and support of any person. Edmonds, J. delivered a brief judgment on the 28th October, 1958, in which he said that the Court of Appeal for Eastern Africa, in the indistinguishable case of Sheikh binti Ali bin Khamis and Another v. Halima binti Said bin Nasib, had decided that issue in a sense favourable to the Respondents. Judgment had to be in conformity with that decision of the Court of Appeal, and the Respondents must succeed. The Learned Judge therefore declared that the wakf was null and void ab initio, and also ordered certain consequential relief.

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pp.15-16

pp.37-38

8. The Appellants appealed to the Court of Appeal for Eastern Africa. In their Memorandum of Appeal, dated the 3rd January, 1959, they alleged that the wakf did comply with the words "maintenance and support" in section 4(1)(a) of the Wakf Commissioners Ordinance, and alternatively that the income of the properties subject to the wakf was impliedly devoted towards their "maintenance and support". On the 11th September, 1959, further grounds of appeal were added, as follows:

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pp.41-44

pp.48-49

- (1) That the Supreme Court had had no jurisdiction,

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because jurisdiction to declare whether a wakf was lawful had been transferred by the Wakf Commissioners Ordinance to the Commissioners.

- (2) That, if the Supreme Court had any jurisdiction, it was only to declare whether a wakf was valid and not to declare it void ab initio.
- (3) That the Wakf Commissioners were the only parties competent to move the Court for a declaration as to the validity of a wakf. 10

pp.51-68

pp.69-94

9. The appeal was heard by Forbes, V.-P., Gould and Wingham, JJ.A., on the 3rd and 4th November, 1959. Judgment was given on the 10th December, 1959.

p.72, 11.9-37

10. The first judgment was given by Windham, J.A. He said that the main grounds upon which the Respondents had contended that the wakf was invalid were:

(1) That the settlor during her lifetime used the income of the properties for her own benefit; 20

(2) That the income was not given for the "maintenance and support" of any person within the meaning of section 4(1)(a) of the Ordinance, so that the wakf, which but for that section would be bad, was not saved by the section;

(3) That the words "any person" in section 4(1)(a) would not cover the children of the Appellants or the issue of those children, who were among the beneficiaries under the wakf;

(4) That the ultimate gift over to charity was not of a permanent character and was void for uncertainty. 30

The Learned Judge said that grounds (1) and (4) had not been strongly pressed in the Court of Appeal.

p.72, 1.38 -
p.76, 1.9

11. Windham, J.A. first referred to Sheikh binti Ali's case. That case had concerned a wakf, under which the income of various properties was to be "paid to" or to "go to" various beneficiaries. The Supreme Court of Kenya had declared that wakf void ab initio, on the ground that, apart from 40

section 4 of the Ordinance, it would be bad because of the remoteness of the ultimate gift to charity as decided by the Privy Council in Fatima binti Salim Bhakhshuwen and Another v. Mohammed bin Salim Bhakhshuwen (1952), A.C.L. The Supreme Court had held that the wakf was not saved by section 4, because a provision that income should be "paid to" or should "go to" the beneficiaries named was not a provision that it should be used for the "maintenance and support" of any person mentioned in the section. The Court of Appeal had upheld this judgment, on the ground that an absolute gift of income was something wider than, and different in kind from, a gift for maintenance and support. Subject to the contentions of the Appellant based on sections 16 and 21 of the Ordinance, the Learned Judge said that the Supreme Court, in the present case, had been right in holding itself bound by the decision of the Court of Appeal in Sheikh binti Ali's case, and the Court of Appeal ought also to follow it. He considered that the present case was indistinguishable from Sheikh binti Ali's case, the words "divided between" or "divided among" being quite as free from restriction regarding user as the words "paid to". The terms of the wakf had been reduced to writing, and there was no ambiguity or lack of clarity as to the intention in the provisions. Accordingly, under the Indian Evidence Act, section 91, extraneous evidence of the Settlor's intention was inadmissible. The Learned Judge rejected the contention of the Appellants that Sheikh binti Ali's case had been decided per incuriam, and so concluded that the rule of stare decisis applied and Edmonds, J. had been right in holding himself bound by that decision of the Court of Appeal.

p.76, 1.47 -
p.78, 1.26

p.78, 1.37 -
p.79, 1.48

12. The Learned Judge next considered the meaning of the words "either wholly or partly" in the two places in which they appear in section 4(1)(a) of the Ordinance. He held that a gift of income satisfied paragraph (a) if the whole of it, or part of it, was to be applied towards the maintenance and support of the beneficiary, whether or not the whole of it, or the part to be so applied, was enough to maintain and support the beneficiary without supplement from other sources. There was nothing in the terms of the wakf deed in the present case to bring it within section 4(1)(a) so interpreted.

p.80, 1.1 -
p.81, 1.7

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p.81, l.15 -
p.85, l.7

13. Windham, J.A. then turned to consider an argument, with which the Supreme Court had not found it necessary to deal, that the wakf was also invalid because of the provision that the income was to be paid, after the deaths of the Appellants, to their respective "sons and daughters and their issue per stirpes". The Appellants were not relatives of the settlor either by blood or by marriage. The gift to them for life was not invalid, nevertheless, because each of them was a "person" for the purposes of section 4(1)(a) of the Ordinance. However, the Court of Appeal had held in Amina binti Abdulla and Another v. Sheha binti Salim (1953), 21 E.A.C.A.12, that the words "any person" in section 4(1)(a) covered someone not related to the settlor, but did not cover the children or descendants of such a person. The Appellants had contended that their descendants could be brought within section 4(1)(a) if they (the Appellants) themselves were considered as members of the settlor's "family" for the purpose of that paragraph. The Learned Judge said that in a section of an Ordinance dealing with Mohammedan wakfs the word "family" had to be construed to mean what it would mean to a Mohammedan in connection with the disposition of his property. Mohammedan law did not recognise even legal adoption as conferring any right of inheritance. He considered cases decided under the Indian Act equivalent to the Wakf Commissioners Ordinance, and said that in none of them had it been held that adoption and dependency alone, without blood relation to the settlor, could bring a person within the operation of the section. In any case, the unborn children and issue of a person who resided with, and was dependant on, the settlor could not come within the meaning of section 4(1)(a). Consequently, the disposition in favour of the children of the Appellants and the issue of those children prevented the application of section 4(1)(a).

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p.85, l.8 -
p.86, l.6

14. For these two reasons, Windham, J.A., held that the wakf did not come within the saving provisions of section 4. It followed that the wakf was void ab initio on the same ground as the wakf which was held by the Privy Council to be void in Bhakhshuwen's case.

p.86, l.7 -
p.88, l.23

15. The Learned Judge then said that it had been argued on behalf of the Appellants that, even if the disposition to their issue was bad, the gift

of the income to the Appellants themselves for their respective lives was good, so that the income should be paid to them for their lives and the residue should then be paid to the Wakf Commissioners to be administered for charitable purposes. He held that the decision in Amina binti Abdulla's case showed this contention to be wrong. Apart from authority, it was also wrong on principle. A genuine intention to benefit religion or charity was a necessary prerequisite to every wakf. It had been held in Bhakhshuwan's case that dispositions of the income from generation to generation showed the ostensible intention to devote the income ultimately to religion or charity to be only illusory, a camouflage for family aggrandizement. Such an instrument, not disclosing a true intention to benefit religion or charity, was no wakf at all, and must be deemed to be void ab initio.

16. Finally, Windham, J.A. considered the submissions advanced by the Appellants under the additional grounds of appeal. The argument was that, because of section 21 of the Ordinance, neither the Supreme Court nor the Court of Appeal had jurisdiction to declare a wakf void ab initio or to order the property to revert to the settlor or his heirs, the jurisdiction of the Court being limited to declaring whether or not the wakf was valid. The Learned Judge set out sections 16 and 21 of the Ordinance. It was clear that section 16 could have no application to the present case, because the wakf was not under the control of the Wakf Commissioners, nor had the Commissioners expressed any opinion about the lawfulness of the settlor's intentions. It was argued that, if the intentions of the maker were unlawful within the meaning of section 21(1)(a)(i), the Supreme Court having declared them to be unlawful had exhausted its jurisdiction and it followed automatically that the Wakf Commissioners should take over the administration of the wakf, sell the property and pay the proceeds into the Surplus Fund created under section 18 of the Ordinance. Windham, J.A. said that there was nothing in section 21 or elsewhere in the Ordinance to deprive the Supreme Court or the Court of Appeal of jurisdiction to find that the religious or charitable objects of the settlor were illusory and in consequence the wakf was void ab initio. Whatever section 21 did cover, it did not cover an instrument declared to be void ab initio for lack of any genuine religious or

p.88, 1.24 -
p.92, 1.53

Record

charitable objects, and thus to be no wakf at all. The object of the section was rather to insure that where a settlor had shown a genuine intention to benefit religion or charity and put it into effect by dedicating property to the Almighty by a wakf deed, that intention should not be defeated by any difficulty or even illegality not going to the root of the dedication.

pp.93-94

17. For all these reasons, Windham, J.A. held that the appeal should be dismissed and the Order of the Supreme Court upheld. Forbes, V.-P., and Gould J.A. agreed with his reasoning and conclusions.

18. The Respondents respectfully submit that the wakf did not fall within the terms of section 4(1)(a) of the Ordinance, because it was not made, either wholly or partly, for the maintenance and support of the beneficiaries. It provided that the free balance of the income of the wakf properties should be paid to the various beneficiaries without any limitation of any kind of the uses to which the beneficiaries might put it. They might therefore, without any breach of the terms of the wakf, have devoted the whole of the income to purposes quite unconnected with their maintenance or support. A wakf under which this could be done cannot be said to be made for the maintenance and support of the beneficiaries. The Court of Appeal, in the respectful submission of the Respondents, was also right in holding that the gift of income to the children of the Appellants and the issue of those children prevented the wakf from falling within the protection of section 4. Even if the decision in Amina binti Abdulla's case, that the words "any person" in section 4 cover a person not related to the settlor, is right, those words cannot cover the issue of such a person.

19. For these reasons the wakf, in the Respondents' respectful submission, was not invalidated by the Ordinance. Apart from the Ordinance, it was invalid because the ultimate gift to charity was so remote that the charitable intent of the settlor was illusory. In substance, the effect was to give the property to the settlor's family or that of her "adopted" daughters. It was accordingly no true wakf, and was void ab initio. The absence of any genuine charitable intent invalidates the whole wakf; and makes it impossible to sever, and hold valid, the gift of income to the Appellants themselves.

20. The Respondents respectfully submit that for the Courts to have jurisdiction to declare a wakf invalid, but not to have jurisdiction to declare it void ab initio or to order that the property revert to the settlor or his heirs, would be so extraordinary a position that only plain and inescapable terms of a statute could be held to produce it. The Court of Appeal rightly held that there are no such terms in the Wakf Commissioners Ordinance.

21. The Respondents respectfully submit that the order of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the wakf was not made for the maintenance or support of anybody:
- 20 2. BECAUSE the wakf purported to confer benefit on persons not covered by section 4(1)(a) of the Wakf Commissioners Ordinance, 1951:
3. BECAUSE the wakf did not disclose a genuine intention of the settlor to benefit religion or charity:
4. BECAUSE the gift to the Appellants could not be severed from the other provisions of the wakf:
- 30 5. BECAUSE the Wakf Commissioners Ordinance, 1951 did not deprive the Courts of jurisdiction to grant the relief which in this case they have granted:
6. BECAUSE of the other reasons given by Windham, J.A.

J.G. LE QUESNE.

No. 63 of 1960

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA

RIZIKI BINTI ABDULLA
and ANOR.

v.

SHARIFA BINTI MOHAMED BIN
HEMED and OTHERS

CASE FOR THE RESPONDENTS

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