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In the Privy Council.

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INSTITUTE OF ADVANCED
LEGAL STUDIES

UNIVERSITY OF LONDON
 W.C.1.
ON APPEAL
 FROM THE COURT OF APPEAL FOR EAST AFRICA
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

BETWEEN

FATMA BINTI HAFIDH (Plaintiff) - *Appellant*

AND

10 THE ADMINISTRATOR-GENERAL, Administrator of
 the Estate of HAFIDH BIN MUHAMMAD EL-BUSAIDI,
 deceased (Defendant) *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa (Sir Norman Whitley C.J., Sir George Graham Paul C.J. and Bartley J.) dated the 5th October, 1946, which set aside the judgment in the Appellant's favour of the High Court of Zanzibar (Sir John Gray C.J.) dated the 25th March, 1946, and dismissed with costs the action in which the Appellant claimed a share of the estate of Hafidh bin Muhammad el-Busaidi on the ground that by the law of the Ibadhi sect (which admittedly is the relevant law) the Appellant was entitled as the daughter of Hafidh by his slave concubine Panya binti Hassan to a share of his estate.

p. 55.

p. 37.

pp. 1-2.

2. The Chief Justice of Zanzibar in his reasons for judgment set out the relevant principles of Ibadhi and Zanzibar law under which if the Appellant's mother was the slave and concubine of Hafidh, and Hafidh had acknowledged the Appellant as his child, the Appellant is entitled to the same share of Hafidh's estate as if she were the child of a lawful wife.

pp. 21-25.

3. The Chief Justice of Zanzibar then examined in detail the evidence given at trial and set out why he accepted the evidence of some witnesses and rejected that of others. After a careful appraisal of the whole of the evidence the learned Chief Justice stated that he was satisfied that the Appellant's mother was the slave and concubine of Hafidh, and that by his conduct Hafidh had acknowledged his paternity of the Appellant.

p. 25, l. 42—
p. 33, l. 2.

p. 33, ll. 3-7.

p. 33, l. 8—
p. 36, l. 50.

4. The Appellant's mother had (as the Chief Justice held) become the slave concubine of Hafidh by gift from Hafidh's mother, but the Respondent contended that this gift was illegal and of no effect by reason of the Slavery Decree, 1890. The Chief Justice examined this contention and reached the conclusion that it was no answer to the Appellant's claim. Accordingly, the Chief Justice made a declaration that the Appellant is the daughter of Hafidh bin Muhammad el-Busaidi by his *suria* Panya binti Hassan and as such entitled to a share of her deceased father's estate, and he ordered the Respondent to transfer to her such share.

p. 36, ll. 1-5.

p. 47, ll. 32-38 ;
p. 49, ll. 18-40 ;
p. 54, ll. 15-17.

5. On the Respondent's appeal to the Court of Appeal for Eastern Africa the Court agreed with the findings of the learned Chief Justice of Zanzibar that Hafidh's mother had given the Appellant's mother to Hafidh as his slave concubine, and Hafidh had accepted the gift. Sir Norman Whitley C.J. and Bartley J. held that the gift was legal and effective, and disagreed with the view of Sir George Graham Paul C.J. that under the decrees dealing with slavery the transaction was illegal. The Court, however, reversed the other findings of fact of the Chief Justice of Zanzibar. 10

p. 47, l. 26—
p. 49, l. 4, p. 54,
ll. 15-17.

p. 49, l. 41—
p. 51, l. 29.

p. 46, l. 14—
p. 47, l. 26.

6. Sir Norman Whitley C.J. described the case as unusual and difficult. He accepted the views of the Chief Justice of Zanzibar on the credibility and reliability of the witnesses, but taking into account what he regarded as significant gaps in the evidence, Sir Norman Whitley held that "the extremely meagre evidence" is insufficient to establish that Hafidh acknowledged the Appellant as his daughter and that therefore she had failed to discharge the heavy onus which rested on her. 20

pp. 49-53.

7. Sir George Graham Paul C.J. in his reasons for judgment said that the onus upon the Appellant was a very heavy one and that to succeed she had to establish every one of four propositions :—

(1) That the Appellant's mother was given to Hafidh as a concubine and slave. 30

(2) That Hafidh accepted the Appellant's mother as a concubine and slave and treated her as such.

(3) That the Appellant was the issue of the slave concubinage, and

(4) That Hafidh acknowledged the Appellant as his daughter by his slave concubine.

p. 49, l. 36—
p. 51, l. 29.

p. 51, l. 30—
p. 52, l. 52.

p. 52, ll. 1-9.

8. Sir George Graham Paul C.J. differed from the other members of the Court in holding that illegality prevented the gift and acceptance of a slave from being effective, but, subject to this objection, he held propositions (1) and (2) to be established. He found it impossible, however, to accept as sufficient the facts which the Chief Justice of Zanzibar found proved in regard to the third and particularly the fourth proposition. Amongst other criticisms he discounted the weight of the evidence that the Appellant, unlike other children of slaves, had been taught the Koran at a fee paid in equal shares by Hafidh and Hafidh's mother, because no disinterested witness was called to say that no man would pay for having 40

a slave's child taught the Koran unless he were the father of that child. Similarly he found Hafidh's presence at the Appellant's marriage as of little or no weight in the absence of disinterested evidence that no man in Hafidh's position would be present unless the slave child being married was his daughter. In his opinion the facts found by the Chief Justice of Zanzibar did not justify the inference which the Chief Justice drew from them.

p. 52, ll. 10-19.

p. 51, l. 30-
p. 52, l. 52.

9. Bartley J. in his reasons for judgment set out the findings of the Chief Justice of Zanzibar. He disagreed with the finding that the Appellant's education was of a kind not usually given to the children of slaves, and indicated why he considered the other facts found to be insufficient to prove that Hafidh had acknowledged the Appellant as his daughter.

pp. 53-55.

10. The only record of the evidence is the note of the Chief Justice of Zanzibar. The Appellant respectfully submits that the Chief Justice of Zanzibar who was familiar with local conditions and habits was in a much better position than the judges of the Court of Appeal for Eastern Africa to draw proper inferences from the facts proved in evidence, and that his inferences were sound inferences which should not have been overruled.

pp. 8-19.

11. The Appellant therefore submits that the judgment of the Court of Appeal for Eastern Africa should be set aside and that the judgment of the High Court of Zanzibar should be restored for the following amongst other

REASONS

- (1) BECAUSE the evidence justified the findings of fact of the Chief Justice of Zanzibar.
- (2) BECAUSE the Chief Justice of Zanzibar drew the proper inferences from the facts found by him.
- (3) BECAUSE an appellate court should not have overruled the inferences drawn by the judge who saw the witnesses and was familiar with the social conditions of Zanzibar.

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FRANK GAHAN.

In the Privy Council.

ON APPEAL

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Africa.*

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Appellant

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Administrator of the Estate of
Hafidh bin Muhammad el-Busaidi,
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Case for the Appellant.

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