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IN THE PRIVY COUNCIL

No. 47 of 1950

ON APPEAL FROM HIS MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N

FATUMA BINTI MOHAMED BIN SALIM
BAKHSHUWEN and AISHA BINTI
MOHAMED BIN SALIM BAKHSHUWEN ... Appellants

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

- and -

MOHAMED BIN SALIM BAKHSHUWEN ... Respondent

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CASE FOR THE APPELLANTS

RECORD

1. This is an appeal by special leave in forma pauperis from the judgment of His Majesty's Court of Appeal for Eastern Africa, dated the 2nd March 1949, whereby the said Court of Appeal dismissed the Appellants' appeal against the judgment of Bartley J., in His Majesty's Supreme Court of Appeal at Mombasa, dated the 26th August 1948.
- 20 2. Special leave to appeal in forma pauperis was granted by an Order-in-Council dated the 24th May, p.41, 1.20. 1950.
3. That the principal issues raised by this appeal are as follows:-
 - (a) Whether the Court of Appeal were right in holding that they were bound to follow the judgment of the Judicial Committee of the Privy Council in the Indian case of Abdul Fata Mohamed Ishak & Ors. v. Hasamaya Dhat Choudhary & Ors. (22 Indian Appeals 76) or whether, as the Appellants submit, they should have held that, Mohamedan law to be applied in East Africa or as between

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Arabs was not the same as Mohamedan law as interpreted by judicial decisions in India.

- (b) Whether the Court of Appeal were right in holding that the aforesaid judgment in a case in which the parties belonged to the Hanafi School applied to the present case where the parties belong to the Shafi School.
- (c) Whether the present case is not distinguishable from Abdul Fata Mohamed Ishak's case inasmuch as in the present case the donor divested himself of all beneficial interest in the property. 10
- (d) Whether, even if the Court of Appeal were right in so holding, the said judgment of the Judicial Committee should now be followed.

p.44, l.1

4. On the 15th October 1946 the Respondent executed a document creating a wakf with reference to certain pieces or parcels of land situate in the Province of Seyidie in Kenya Colony and set out in the Schedule thereto. By the said document he referred to himself as First Trustee of the wakf all his right, title and interest in the said lands to hold the same upon trust and to pay the taxes and other outgoings and thereafter to apply the residue as follows:- 20

p.44, l.30.

"2. The residue of the annual income after providing for payments as aforesaid will be distributed equally among the beneficiaries hereinafter mentioned viz., (1) FATUMA BINTI MOHAMED BIN SALIM BAKHSHUEN and (2) AISHA BINTI MOHAMED BIN SALIM BAKHSHUEN and survivors of them during their life time and after the death of my last surviving child to their children and survivors of them during their life time and thereafter in the same way to their children and to the children of their children from generation to generation in equal shares. In the event there is no descendants left in existence the benefit of the Wakf Properties will go to my nearest relatives, failing, the income of the Wakf will go to Mwinyi Kombo Mosque, at Kibokoni, Konzi Mosque and Majid Takwa and by that time the trustee or trustee of the above mentioned mosques will take possession of the said properties in the event of the extinction of my future generations." 30 40

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5. On the 8th May 1947 the Respondent executed a further document creating a wakf with reference to another piece or parcel of land situate in the Province of Seyidie aforesaid. The beneficiaries were the Appellants and the material provisions of this document were precisely the same as in the aforesaid document of the 15th October 1948. p.49, l.25.
6. On the 19th April the Respondent filed a plaint in His Majesty's Supreme Court of Kenya impleading the Appellants and two Indians, named Mussa Khamisa and Batulbai Sadullah, to whom certain of the lands had been leased by the Appellants. Paragraphs 4 and 5 of the plaint read as follows:- p.1.
- "4. The Plaintiff created the aforesaid Wakfs of properties shown in paragraph 3(a) and (b) hereof in identical terms for the benefit of his daughters, the Defendants Nos. 1 and 2 and their children from generation to generation in perpetuity; and in the event of their total extinction, for the benefit of the Plaintiff's nearest relatives; and failing them for the benefit of Mwinyi Kombo Mosque, Konzi Mosque and Masjid Takwa of Mombasa. The Plaintiff appointed himself the first Trustee and made further provision for successive Trustees. p.3, l.10.
5. The aforesaid documents created a private family Wakf in perpetuity for the Defendants Nos. 1 and 2 and their descendants and, therefore, the said Wakfs are void ab initio. The said documents provide further that on total failure of the descendants of Defendants Nos.1 and 2, the benefit of the Wakf properties should go to the Plaintiff's nearest relatives in perpetuity. The said Wakfs are, therefore, void for uncertainty of objects. Lastly, the said documents provide that failing the Plaintiff's nearest relatives, the benefits of the Wakf properties were to go to the three Mosques aforesaid. The ultimate gift to the Mosques is indefinite, illusory and too remote and the said Wakfs are void ab initio." p.3, l.21.

The Respondent claimed (inter alia) a declaration that the wakfs of all the properties in question were null and void.

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- p.5, 1.30. 7. By their defence, dated the 28th May 1948, the Appellants pleaded (inter alia) as follows:-
- p.6, 1.7. "2. Paragraphs 3 and 4 of the Plaint are admitted. The Wakfs so created are legal Wakfs according to Modamedan Law and according to the custom existing amongst Mohamedans in Mombasa.
- p.6, 1.11 3. The contents of the said Wakfs mentioned in paragraph 5 of the Plaint are admitted. Quoad ultra denied. The said Wakfs are legal and are not void ad initio or at all according to the Mohamedan Law and according to the custom existing amongst Mohamedans in Mombasa, India and Zanzibar, and elsewhere. For this reason the Defendants Nos. 1 and 2 were unable to consent to the terms of the letter referred to in Paragraph 6 of the Plaint." 10
- p.14, 1.1. 8. Mohamed Said Kassam, Clerk to the Wakf Commission was called on behalf of the Appellants to produce the register of all Wakf deeds registered under the Wakf Commissioners' Ordinance. 20
- p.14, 1.20. 9. Mohamed Bin Ali Bashir, a Wakf Commissioner, gave evidence as follows:-
- "XD: I'm a Wakf Commissioner and have been for 15 years. I was born in Mombasa 60 years ago and lived here ever since. I'm an Arab. I am acquainted with contents of Wakfs. A Wakf to beneficiaries and their children from generation to generation and finally to a mosque is a common type of Wakf.
- A Wakf to children from generation to generation and then to nearest relatives and then to Mosque is a common type of Wakf. Those 2 kinds of Wakfs more common than one to individuals and then to the mosque. I know father of late Cashi Sheikh Elamin - his name was Sheikh Ali bin Abdulla. He made a Wakf of properties. 30
- XXD: Arabs in whole of Kenya can make Wakfs which provide for generation to generation,"
10. No evidence was called on behalf of the Respondent. 40
11. The Appellants' advocate drew the attention of

the Court to the contents of the register produced by Mohamed Said Kassam. The learned Judge's note of the argument on this point is as follows:-

"Re Custom in Register produced all Wakfs registered. I have read about 30 at the beginning and 30 at end. Out of these 75% are of kind in this case. Register contains about 15 similar to the ones in this case". p.17, l.22.

10 The learned judge made the following note of part of the argument of the Respondent's advocate:-

"Although it may be common to make such Wakfs this does not prove that Wakfs legal. If custom unlawful and against public policy custom would not be admitted." p.16, l.7.

12. The trial judge held that he was bound by the decision of the Court of Appeal for Eastern Africa in Said bin Muhamed bin Kassim el Riemi and Others v. The Wakf Commissioner for Zanzibar in which case a Wakf of this kind was held to be void and of no effect. He therefore gave judgment for the Plaintiff with costs against the Appellants (1st and 2nd Defendants). pp.18-19.

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13. The Appellants appealed to His Majesty's Court of Appeal for Eastern Africa. p.21.

14. The judgment of Nihill P. in the Court of Appeal contained the following passage:-

"NIHILL.P.

30 For the appellant to succeed in this case it is necessary for him to establish by cogent and overwhelming argument that the decision of this Court in Said bin Mohamed bin Kassam & others v. The Wakf Commissioners Zanzibar (13 E.A.A.C.A. 32) was wrongly decided in that the Court was not fully seized of the correct principles of Mohammedan Law applicable to that form of trust or disposition of property common to followers of the Prophet and known as a family or private Wakfs. I will say at once that a great deal of high authority from unimpeachable sources has been cited to us in support of the proposition that in every school of law applicable to the Sunni sect it has been held by eminent jurists from the earliest times that an

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appropriation of property to charitable uses, with a direction that the objects of such charity shall in the first instance be the appropriators and their descendants and on their failure, the general body of the poor is a good and valid appropriation. I will also concede that it is likely, because the respondent was not represented before this Court in the above mentioned appeal, that the Court did not have before them much of the authority that has been cited to us." 10

The learned judge held however that even had those authorities been cited and considered by the Court, the decision must have been the same because it was based on the decision of the Judicial Committee of the Privy Council in Abdul Fata Mohamed Ishak and Others v. Hasamaya Dhar Choudhary and Others 22 L.A. 76.

p.37
p.38

Edwards C.J. and Bourke J. also held that the Court was bound to follow the decision of the Judicial Committee of the Privy Council in Abdul Fata's case. The judgment of Edwards C.J. contained the following passage:- 20

"Mr. Bryson has invited us, in effect to say that we ought not to feel ourselves bound by the decision of the Privy Council in the Abdul Fata case. In support of his contention he has relied on the following authorities, namely a dictum of Hamilton J., (afterwards Sir Robert Hamilton C.J.) in C.C. 7 of 1903 Talibu bin Mwijaka v. Executors of Siwa Haji deceased; 2 E.A.L.R. 33 and 35., the "Minhaj" Book 23, Wilson's Anglo-Mohammedan Law (5th Edn.) Page 69 and 421, and appendix B and also Sir Ameer Ali's "Mohamedan Law" (4th Edition) published in 1912 (one year before the Indian Validating Act) Pages 24, 273 to 276, 287, 295, 305, 308, 315 and 340. In particular, he stresses the passage wherein it is stated that peity and charity have a much wider significance in Muslim religious law than in any other system of law. Mr. Bryson also cited Faiz Tayabjee's "Mohamedan Law" 3rd (1940) Edition Page 538." 30 40

15. The material passage in the judgment of Hamilton J. in Talibu bin Mwijaka v. Executors of Siwa Haji 2 L.R.E.A. 33 is annexed hereto as Annexure A. The

material section from the Order-in-Council setting up the High Court of East Africa and the Supreme Court of Kenya are also annexed hereto of Annexure B.

16. The Appellants respectfully submit that their appeal should be allowed and the judgment of the Courts below reversed for the following, amongst other,

R E A S O N S

- 10 1. BECAUSE the learned judges of the Court of Appeal failed to observe that the aforesaid judgment of the Judicial Committee of the Privy Council in Abdul Fata Muhamed Ishak's case dealt expressly with Mohamedan law as known and administered in India.
- 20 2. BECAUSE the learned judges should have held that Mohamedan law in East Africa was not necessarily the same as Mohamedan law as interpreted by judicial decisions in India and should have had regard to and been guided by the general principles of the law of Islam according to which a wakf for the benefit of the donor's family is valid.
3. BECAUSE the judgment of the Judicial Committee in Abdul Fata Mohamed Ishak's case was with reference to Mohamedans of the Hanafi School and does not therefore govern the present case in which the parties belong to the Shafi School.
- 30 4. BECAUSE the facts of the present case are distinguishable from those in Abdul Fata Mohamed Ishak's case inasmuch as in this case the donor divested himself of all beneficial interest in the property.
5. BECAUSE in view of the authorities cited before the Court of Appeal and referred to in the judgments of Nihill P. and Edwards C. J. the decision in Abdul Fata Mohamed Ishak's case should be reopened and should not now be followed.
- 40 6. BECAUSE the learned judges should have held that they were not bound to follow the decisions of the Judicial Committee of the Privy Council in Indian cases.

DINGLE FOOT.

S.A. TELLIS.

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Solicitors for the Appellants.

ANNEXURE "A"

TALIBU BIN MWIJAKA v. EXECUTORS OF SIWA HAJI. The material passage from the judgment of Hamilton J. is as follows:-

"The jurisdiction that is to be exercised by me the matter sitting in this Court as a successor of the old Chief Native Court is derived from the Native Courts Regulations of 1897, Article 3 of which reads as follows:-

"The Native Courts mentioned in Article 2(2) shall as far as practicable be guided by the Indian Civil Procedure Code and the Indian Penal and Criminal Procedure Codes, but both in civil and criminal cases they shall within the Mahomedan Coast Region, or in dealing with Mahomedans, also be guided by and have regard to the general principles of the law of Islam, and throughout the Protectorate be guided by and have regard to any native laws and customs not opposed to natural morality and humanity." 10 20

Articles 6 and 7 of the Regulations constitute a High Court "which shall be the highest Court of Appeal in civil and criminal matters from Native Court." The High Court as then constituted has been replaced by the Court of Appeal for Eastern Africa, but provision not having been otherwise made by Ordinance it remains under Article 28(1) of the Order-in-Council 1902, the ultimate Court of Appeal from native Courts created by the Native Courts Regulations, 1907. 30

These points taken together define the law which is to be applied by this Court in such cases as that now before me; that is to say, that while on the one hand the Court is "to have regard to and be guided by the general principles of the Law of Islam," on the other, whatever respect it may pay to the decisions of the Privy Council, it is not bound by those decisions. The importance of this liberty left to the Court is peculiarly illustrated in the present instance as the law of wakf as originally understood by the Commentators and Mahomedan jurists has in India since the commencement of the latter half of last century been profoundly modified by the decisions of the Privy 40

Council. A study of the question shows that while the Mahomedan law, uninfluenced from outside sources, permitted perpetuities and the erection of wakfs for family aggrandizement solely, the influence of English Judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such wakfs are illegal, and it has now been clearly established that a wakf for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication, are invalid.

The Mahomedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same as when the Min Haj was written in the 6th century of the Hejira. The wakfnama which has been produced in these proceedings is in the following terms:-

"It is declared that Sudi bin Muslim Elkilindini has given in charity to his children, their children and descendants his house which is at the quarter of Kilindini, neighbours on the East the house of Binto Mhamad bin Ali Sef, on the West the house of Binto Mhamad bin Afaa, on the North is facing the house of Adamji bin Ali, on the South the house of Mwanakimwinyi binto Kitoya, with its boundaries, ground and building, it belongs to his children both male and female, this is given in charity for ever, it cannot be sold, and is not to be given to anybody, to the resurrection day. And if anybody wants to change this after hearing of it the blame is on those who change it.

Agreed for this on the 7th Shawal, 1314.

Written by the poor of God Bushir bin Hamed bin Nahi.

This is true.

(Sgd.) Salim bin Khalfan on the 8th Ramathan, 1315.

This document on the face of it is a good document and valid according to the Mahomedan law in force in East Africa."

A N N E X U R E "B"

The East Africa Order in Council 1902 provides as follows:-

"15(2) Such civil and criminal jurisdiction shall, so far as circumstances permit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India, and the other Indian Acts which are in force in East Africa at the commencement of this Order except so far as may otherwise be provided by law."

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28. On the commencement of this Order the following Orders-in-Council shall be repealed, that is to say -

The East African Order-in-Council, 1897.

Provided as follows:-

(1) Where other provision is not made by Ordinance, any law, practice or procedure established by or under the said repealed Orders and all Acts of any legislature in India now in force in East Africa shall remain in force until such other provision is made."

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The Kenya Colony Order-in-Council 1921 (S.R.O.11 35 of 1921) provides as follows:-

"4.(1) There shall be a Court of Record styled His Majesty's Supreme Court of Kenya (in this Order referred to as "the Supreme Court") with full jurisdiction, civil and criminal, over all persons and over all matters in the Colony.

(2) Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, and doctrine of equity and the statutes of general application in force in England on the 12th day

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of August 1897, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities at that date save in so far as the Civil Procedure and Penal Codes of India and the other Indian Acts in force as aforesaid and the said common law doctrines of equity and the statutes of general application and the said powers, procedure and practice may at any time before the commencement of this Order have been or hereafter may be modified, amended or replaced by other provisions in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinances for the time being in force in the Colony.

Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary.

7. In all cases civil and criminal to which natives are parties, every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with an Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay.

S.11.(1) On the commencement of this Order the following Orders in Council shall cease to apply to the Colony, that is to say:-

The East Africa Order in Council, 1902 (a)
 The East Africa Order in Council, 1906 (b)
 The East Africa Order in Council, 1907 (c)
 The East Africa Order in Council, 1911 (d)
 The East Africa Order in Council, 1912 (e)
 The East Africa Order in Council, 1914 (f)
 The East Africa Order in Council, 1915 (g)
 The East Africa Order in Council, 1919 (h)

Provided as follows:-

(1) Where other provision is not made by Ordinance,

any law practice or procedure established by or under the said Orders and all acts of any legislature in India now in force in the Colony shall remain in force until such other provision is made."

No. 47 of 1950

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ON APPEAL FROM HIS MAJESTY'S
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B E T W E E N

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