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IN THE PRIVY COUNCIL

No. 47 of 1950.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

- 1. FATUMA BINTI MOHAMED BIN SALIM
BAKHSHUWEN and
- 2. AISHA BINTI MOHAMED BIN SALIM
BAKHSHUWEN (Defendants Nos. 1 & 2)

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

- and -

10 MOHAMED BIN SALIM BAKHSHUWEN
 (Plaintiff) Respondent

CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal by special leave in forma pauperis from the Judgment and Decree of the Court of Appeal for Eastern Africa dated the 2nd March, 1949 affirming the judgment of the Supreme Court of Kenya at Mombasa dated the 26th August, 1948.

p.34.
 p.18.

2. The question raised by this appeal is the validity of two wakfs purporting to have been created by the Respondent on the 15th October, 1946 and the 8th May, 1947 respectively.

20 p.44.
 p.49.

3. The Appellants are the two daughters of the Respondent. By the wakf deeds in question the Respondent declared certain parcels of land situate in the province of Seyidie in the Colony of Kenya wakf properties and appointed himself the first trustee. The beneficiaries of the wakfs were the Appellants "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 Majod Takwa and by that time the trustee or trustees of the above mentioned mosques will take possession of the

30 p.44,1.34-
 p.45,1.3
 and
 p.50,
 11.27-40.

RECORD.

"said properties in the event of the extinction of my "future generations".

p.1. 4. On the 19th April, 1948 the Respondent commenced

THE PRESENT SUIT

Pp.52-54 in the Supreme Court of Kenya at Mombasa impleading the Appellants and one Mussa Khamisa and one Batulbai Sadullah to whom certain of the lands in question had been leased. Prior to the commencement of the suit the Respondent had expressed his readiness in the event of the wakfs being declared void to grant fresh leases to Mussa Khamisa and Batulbai Sadullah, and, save that a Defence was filed on behalf of Mussa Khamisa and that he was formally represented at the hearing in the Supreme Court, they took no active part in the proceedings. 10

p.1. 5. By his plaint the Respondent claimed inter alia a declaration that the said wakfs were null and void, submitting that

p.3, 11.21-35 "The aforesaid document" (that is the wakf deeds) "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". 20 30

p.5. 6. The Appellants filed their Defence on the 26th May, 1948. They contended that

p.6, 11.13-17. "The said Wakfs are legal and are not void ab initio or at all according to Mohamedan Law and according to the custom existing among Mohamedans in Mombasa, India and Zanzibar and elsewhere."

p.6,1.33. They counterclaimed for an account of the income and expenditure of the "Wakf" lands, alleging that the Respondent had failed to account to them for the profits therefrom. 40

RECORD.

7. The suit was heard by Mr. Justice Bartley in the Supreme Court of Kenya at Mombasa on the 12th August, 1948. The only oral evidence given was that of two witnesses called by the Appellants namely, Mohamed Said Kassam, the clerk to the Wakf Commissioners, and Mohamed Bin Ali Bashir, a Wakf Commissioner. The former produced the register of Wakf deeds registered under the Wakf Commissioners Ordinance. The latter said -
- Pp.12-18.
Pp.14,15.
P.14,1.9.
- 10 "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."
- P.14,
11.25-33.
- 20 8. The argument for the Respondent was mainly based on the judgment of the Judicial Committee of the Privy Council in Abdul Fata Mohamed Ishak & Ors. v. Rasamaya Dhur Clowdri & Ors. L.R. 22 I.A. 76 and the judgment of the Court of Appeal for Eastern Africa in Said bin Mohamed bin Kassim el Riemi and ors. v. Wakfs Commissioner for Zanzibar (1946) L.R. 13 E.A. C.A. 32, and followed the lines of his submission in Paragraph 5 of the Plaint referred to in Paragraph 5 above. The Respondent's Counsel further submitted that the Appellants had not proved the custom they relied on.
- Pp.15,16.
P.5,11.21-25.
P.16,1.6.
- 30 9. Counsel for the Appellants submitted that the wakfs were valid according to Mohamedan law, though he conceded that the Judge was bound by the judgment of the Court of Appeal for Eastern Africa referred to in the preceding paragraph and that the principles of wakf law were the same for the Shafi school (to which the parties in the present case belong) as for the Hanafi school. The parties in the Privy Council case reported in 22 I.A. belonged to the Hanafi School.
- Pp.16,17.
- 40 10. Judgment was delivered in the Supreme Court on the 26th August, 1948. After pointing out that the wakfs in question were of the same type as were considered by the Court of Appeal for Eastern Africa in the case above cited and declared to be illusory and consequently void and of no effect, the learned Judge said
- P.18.
- "Although the Court of Appeal case was governed by Ibathi law and Shafi Law governs this case it is common
- P.19,
11.3-36

RECORD.

ground that so far as this suit is concerned these two laws are identical.

The Court of Appeal founded its decision on the Judgment of the Privy Council, in the year 1894, in Abdul Fata Mahomed Ishak and others versus Rasamaya Dhur Chowhdri and others 22 Calcutta 619. In 1913 The Muslim Wakf Validating Act was passed in India Legislating for the validity of the type of Wakf which the Privy Council decision had held to be invalid.

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After the decision of the Court of Appeal for Eastern Africa referred to above, the Wakf Validating Decree 1946 (No. 5 of 1946) was passed in Zanzibar legislating for the validity of the type of Wakf which the Court of Appeal for Eastern Africa had held to be void whether such Wakf had been created before or after the Validating Decree.

I am of course bound by the decision of the Court of Appeal for Eastern Africa. I have been invited by the advocate for the respondents to express my views on the matter in issue but I am of the opinion that this would not be proper. The Court of Appeal may feel it open to it to reconsider its decision in view of the fact that the respondent was not represented at the hearing of the appeal.

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The respondents tried to establish a custom overriding the law as laid down but the evidence given fell far short of the evidence required to establish custom which must be from time immemorial and local, neither of which elements have been established."

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The learned Judge accordingly declared the wakfs null and void and dismissed the Counterclaim.

P.21 11. The Appellants appealed to the Court of Appeal for Eastern Africa (Sir Barclay Nihill, C.J.P., Edwards, C.J. and Bourke, J.) The Memorandum of Appeal was mainly based on the submission that the decision in Said bin Mohamed bin Kassim el Riemi & Ors. v. The Wakf Commissioners for Zanzibar was "wrong and contrary to law". No point was made in the Memorandum that the Court was not bound by this case as the parties to it did not belong to the Shafi School though this was later submitted at the hearing.

P.21, 1.25. Arguments were heard in the Court of Appeal on the 17th February, 1949. As in the Court below, Counsel for

Pp.22-34

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RECCRD.

the Appellants conceded that the law on the point was the same for all three schools of Mohamedan law. He did not **attack** the finding that the custom relied on had not been proved. His main point was that the wakfs were lawful according to Mohamedan law and that the Court was entitled to form its own conclusion on the point and was unfettered by authority. He relied on a passage in the Judgment of Hamilton J. in Talibu bin Mwijaka v. Executors of Siwa Haji 2 L.R.E.A. 33, wherein he expressed the views that the "law of wakf" "as originally understood by the Commentators and "jurists has in India since the commencement of the "latter half of last century been profoundly modified "by the decisions of the Privy Council", and that the decision in 22 I.A. was not binding on him. Counsel for the Respondent submitted that the wakfs in question were illegal and that such passages as there were in the commentaries apparently supporting the validity of such wakfs were based on mis-interpretations of the words of the Prophet. He contended that the mention of charity in the wakfs in question was illusory and pointed out that at any rate in India the Courts had applied the decision in 22 I.A. to a case governed by the Shafi School of law.

cf.P.26,1.35

Pp.22-34.

At the close of the arguments judgment was reserved.

12. On the 2nd March, 1949 all three judges of the Court of Appeal delivered judgments agreeing that the appeal should be dismissed. Sir Barclay Nihill, P. said -

Pp.34-40.

"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.C.A. 32) was wrongly decided in that the Court was not fully seized of the correct principles of Mohamedan 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 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

P.34,1.20-
P.35,1.41.

RECORD.

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. In my view however even had these authorities been cited and considered by this Court it could not have come to any other decision than it did, because that decision was based on the decision of their Lordships of the Privy Council in the leading case of Abdul Fata Mahomed Ishak and others versus Rasamaya Dhur Chowdhry and others (1894. 22 Indian Appeals 76). The effect of that case was to bind the courts in India, however unpleasing it may have been to Mohammedan practice and sentiment, to the principle that a perpetual family settlement expressly made as Wakf was not legal merely because there was an ultimate but illusory gift to the poor. Up to 1913 when the Government of India by express legislation validated this type of Wakf the Courts in India consistently followed, as they were bound to do, the principle enunciated by the Privy Council in the 1894 decision. When the same issue came before this Court in 1946 on an appeal from the High Court of Zanzibar the position was exactly the same as pertained in India between 1894 and 1913. Since 1946 the Government of Zanzibar has by decree and with retrospective effect declared that Wakfs of this type are valid. This, however, affords no relief to the appellants in this case because the appeal is from the Supreme Court of Kenya and the Wakf relates to the disposition of property situated at Mombasa. In the result therefore until the legislature in Kenya may, in its wisdom, see fit to enact legislation of a similar character to that enacted in India and Zanzibar, wakfs of this nature remain invalid in Kenya

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"Mr. Bryson has also invited us to distinguish between this Court's decision in 1946 and the present case because the former was governed by the Ibathi law and this case belongs to the Shafee school. This submission might be of service to Mr. Bryson had he not been bound to concede that so far as the principles to be applied to family wakfs are concerned there is no difference between the two schools. The Privy Council case of 1894 related to the Hanafi School of the Sunni sect but again the Indian decisions are to the effect that there is no difference in the law of wakf between the Shafi and Hanafi schools (see Mohamed Abdullah v. Abdul

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RECORD.

Rahman, 9 Bombay Law Reports 998 & Vol.6 (sic).
All India Digest Civil 1811 to 1911 in column
1603)."

The judgments of Edwards C.J. and Bourke J. were much
to the same effect.

Thus Edwards C.J

10 "The Abdul Fata case was decided in 1894 and in
1913 wakfs of the kind in question became valid in
India by reason of the passing there of a validating
Act. Although the Zanzibar case was governed by
Ibathi Law while the present case is governed by
Shafee Law it is common ground, according to the
learned trial judge, that, so far as this litigation
is concerned, these two schools of law are identical.
That statement has not been challenged by either
party in this appeal. The Privy Council decision
in the Abdul Fata case related to a Wakf governed by
the law of the Hanafi school but Mr. Bryson admits
20 that there is, on the subject of wakfs of the nature
of those now before us, no difference in law between
these two schools."

P.37,1.39-

P.38,1.4.

And Bourke J. -.

"In this appeal learned counsel for the appellants
has undertaken the formidable task of convincing
this Court that it ought not to follow its earlier
decision in Said bin Mohammad bin Kassim El-Riami &
Others v. The Wakf Commissioners, Zanzibar, 13
C.A.E.A.(1946) 32, which was founded upon the
judgment of the Privy Council in the case of Abdul
30 Fata Mahomed Ishak and others v. Rasamaya Dhur
Chowdhry and others, 22, Calc. (1894), 619. The
Court is invited instead to embark upon an open
inquiry involving a review and appreciation of
principles of Mahomedan law that appear to have
taxed the ingenuity of jurists and the comprehension
of courts in India prior to the decision by the
Privy Council

P.38,1.40-

P.39,1.12.

40 "In the Zanzibar case the Mahomedan law
applicable between the parties was the Ibathie law;
in the case that was followed determined by the
Privy Council it was the Hanafie law; and in the
present case it is the Shafie law. It is common
case that these three laws of the Sunni sects do not
differ in any material way in so far as they govern
the creation of wakfs. Nevertheless, it is argued

P.39,1.29-

P.40,1.12.

REPORT.

that because we are now concerned with Shafie law as distinct from Ibathie or Hanafie, that the earlier cases may be distinguished and put on one side while investigation of the legal aspects of the question is commenced anew with no obstacle in the form of binding authority to stand in the way of the conclusion sought by the appellants, namely, that a wakf of the type under consideration is good and valid. But the distinction, of course, is one without a difference. It matters not at all what name is given to the branch of Mahomedan law applicable to the parties since the relevant principles of that law are the same as and co-extensive with those of the law considered, interpreted and pronounced upon by the Privy Council in the case followed by this Court in its previous decision. In my opinion that law and its effect must be taken from the two earlier cases which constitute binding authority and there can accordingly only be one answer to the question, that is, that the wakfs the subject-matter of this litigation are invalid and void ab initio. I am further of the view that there is no substance in the ground of appeal to the effect that the appellants should be held to have established a custom overriding the law as laid down."

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13. A decree was accordingly passed on the said 2nd March 1949 dismissing the Appellants' appeal with costs.

14. On the 22nd March, 1949 the Appellants applied to the Court of Appeal For Eastern Africa for leave to appeal to His Majesty in Council in forma pauperis. On the 19th April, 1949 the Court of Appeal for Eastern Africa decided that it had no jurisdiction to grant the said leave. This was the only application made to the Court of Appeal for leave to appeal to His Majesty in Council. The Petition to His Majesty in Council leading to the leave on which the present appeal is based was not lodged until May, 1950. Article 177 of the Second Schedule to the Indian Limitation Act, 1877, which by the proviso to Section 41 of the Kenya Limitation Ordinance, No. 22 of 1934, is still applicable to the Colony, provides a limitation period of six months for the admission of an appeal to His Majesty in Council.

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15. The Respondent submits that the Decree of the Court of Appeal for Eastern Africa dated the 2nd March, 1949 is right and should be affirmed for the following among other

R E A S O N S

- (i) BECAUSE the said wakfs are not authorised or permitted by Mohammedan law.
- (ii) BECAUSE the wakfs in question were settlements in favour of dependants and only in the event of an eventual failure of dependants was there any provision for the mosques having any beneficial interest.
- 10 (iii) BECAUSE the ultimate gift to the mosques is illusory.
- (iv) BECAUSE the said wakfs offend the rule against perpetuities.
- (v) BECAUSE the said wakfs are void for uncertainty of objects.
- (vi) BECAUSE the same Mohammedan law applies in Kenya as, statute apart, in India.
- 20 (vii) BECAUSE the material law is the same and was conceded in the Courts below to be the same for the Shafi as for the Hanafi school of law.
- (viii) BECAUSE of the judgment of the Judicial Committee in Abdul Fata Mohamed Ishak & Ors. v. Rasamaya Dhur Chowdri and Ors. C.R. 22 I.A. 76.
- (ix) BECAUSE the said judgment of the Judicial Committee authoritatively settled the law in regard to wakfs of the kind in question and should be applied in the present case.
- 30 (x) BECAUSE the case of Said bin Mohamed bin Kassim and Ors. v. Wakfs Commissioners for Zanzibar I.R. 13 E.A.C.A. 32, which was decided prior to the creation of the wakfs in question, determined and correctly stated the law applicable.
- 40 (xi) BECAUSE the Appellants did not establish a local custom validating wakfs of the kind in question and there are concurrent findings to this effect.

- (xii) BECAUSE all the parties to the suit are Arabs.
- (xiii) BECAUSE the petition for leave to appeal to His Majesty in Council in forma pauperis was not lodged until fourteen months after the Decree of the 2nd March, 1949.
- (xiv) BECAUSE the judgments in the Courts below are, having regard to the law applicable, right and should be affirmed.

PHINEAS QUASS.

No.47 of 1950

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA

B E T W E E N

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

- and -

MOHAMED BIN SALIM
BAKHSHUWEN ... Respondent

CASE FOR THE RESPONDENT

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