

~~THE PC~~
GI

27, 1951

IN THE PRIVY COUNCIL

No. 47 of 1950

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

FATUMA BINTI MOHAMED BIN SALIM
BAKSHUWEN and ANOTHER

(Defendants Nos. 1 & 2) Appellants

- and -

MOHAMED BIN SALIM BAKSHUWEN (Plaintiff)

Respondent

RECORD OF PROCEEDINGS

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

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellants.

HY. S. L. POLAK & CO.,
20-21 Took's Court,
Cursitor Street,
London, E.C.4.

Solicitors for the Respondent.

IN THE PRIVY COUNCILNo.47 of 1950ON APPEALFROM THE COURT OF APPEAL FOR EASTERN AFRICABETWEEN

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

- and -

MOHAMED BIN SALIM BAKHSHUWEN (Plaintiff) Respondent

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	<u>Plaintiff's Exhibits</u>		
1	Wakf Deed	15th October 1946	44
2	Wakf Deed	8th May, 1947	49
3	Copy of Letter, Plaintiff's Advocate to Mr.Musa Khamisa	5th April, 1948	52
	Copy of Letter, Plaintiff's Advocate to Batulbai Sadullah	9th April, 1948	53
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IN THE PRIVY COUNCIL

No.47 of 1950

ON APPEAL FROM THE 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
(Defendants Nos.1 & 2)
Appellants

- and -

10

MOHAMED BIN SALIM BAKHSHUWEN
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1

PLAINT.

Recd.19/4/48
(Id.) C.D.A.

In the Supreme
Court of Kenya

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA

No. 1.

CIVIL CASE NO. 86 OF 1948

Plaint

MOHAMED BIN SALIM BAKHSHUWEN Plaintiff

19th April 1948.

- versus -

20

1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 3. MUSSA KHAMISA, and
 4. BATULBAI SADULLAH wife of AHMED BUKHSH
- Defendants

PLAINT.

1. The Plaintiff is an Arab residing at Mombasa and his address for service is care of Mr. T. J. Inamdar, Advocate, Mombasa.

2. The Defendant No. 1 is an Arab lady residing at Kibokhoni, Mombasa. The Defendant No. 2 is an

In the Supreme
Court of Kenya

No. 1.

Plaint.

19th April
1948 -

continued.

Arab lady residing near the Majestic Theatre, Englani, Mombasa. The Defendant No.3 is an Indian residing at Macupa Road, Mombasa. The Defendant No.4 is an Indian residing at Lango La Kuinama, Mombasa.

3. (a) By a document dated 15.10.46 and registered at the Coast Registry, Mombasa, the Plaintiff created a Wakf of each and several properties known as :-

- (1) Plot No. 338, Section V, Mombasa, registered as No. C.R. 3234/8. 10
- (2) Plot No. 29, Section VI, Mombasa, registered as No. C.R. 3240/4.
- (3) Plot No. 180, Section V, Mombasa, registered as No. C.R. 6820/4.
- (4) Plot No. 319, Section V, Changamwe, registered as No. C.R. 3835/4.
- (5) Plot No. 146, Section VI, Changamwe-Miritini, registered No. C.R. 2314/4.
- (6) Plot No.107, Section IV, Mtongwe, registered as No. C.R. 374/5. 20
- (7) Plot No.108, Section XX, Mombasa, registered as No. C.R. 8035/6.
- (8) Plot No. 170, Section XVIII, Mombasa, registered as No. C.R. 5722/6.
- (9) Plot No. 128, Section VI, Changamwe, registered as No. C.R. 2110/4.
- (10) Plot No.383, Section II, Mtopanga, registered as No. C.R. 6876/4.
- (11) Plot No.210, Section V, Changamwe, registered as No. C.R. 6664/4. 30
- (12) Plot No. 185, Section III, Mwando wa Panya, registered as No. C.R. 4249/8.
- (13) Plot No. 175, Section III, Mtwapa, registered as No. C.R. 4329/9.

(14) Plot No. 172, Section III, Mwando wa Panya, registered as No. C.R. 4221/7.

In the Supremo Court of Kenya

(15) Plot No. 180, Section III, Mwando wa Panya, registered as No. C.R. 6808/7.

No. 1.

(b) By another document dated the 8th day of May 1947 and registered at the Coast Registry at Mombasa, the Plaintiff created a Wakf of (1) Plot No. 1048, Section VI, North of Port Reitz, registered as No. C.R. 9273/3.

Plaint.

19th April,
1948 -

continued.

10 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 Masjod Takwa of Mombasa. The Plaintiff appointed himself the first Trustee
20 and made further provision for successive Trustees.

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.
30 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.

6. On 13.4.48, the Plaintiff intimated to the Defendants Nos. 1 and 2 that the said Wakfs were void and to give their consent to Court's order to set aside the same. The said Defendants have
40 failed to give their reply.

7. After the creation of the said Wakfs, item No.7 under paragraph 3(a) hereof, i.e., Plot No. 108, Section XX, Mombasa, has been leased by the first Trustee to Defendant No.3 for a term of 99

In the Supreme
Court of Kenya

No. 1.

Plaint.

19th April,
1948 -

continued.

years commencing from the 1st day of January 1947. The said Lease is registered at the Coast Registry at Mombasa as No. C.R.9275/1. The Plaintiff in the same Lease covenanted personally and on behalf of his heirs, executors and assigns with the Defendant No. 3 that in the event of the said Wakf being held invalid and the said premises reverted to the Plaintiff, he, the Plaintiff personally shall at his own expense grant to the said Defendant No.3 a Lease of the said premises for a similar term and upon similar conditions as regards rent and otherwise as are contained in the Lease above referred to without payment of any further premium and to indemnify the Defendant No.3 as Lessee against any loss which the latter may sustain as a result of the said Wakf deed being held invalid. The Plaintiff by his letter dated 9.4.48 intimated to the Defendant No.3 that the Plaintiff will completely safeguard his rights and that he will obtain the Court's Order to expunge the said registration No. C.R.9275/1 only against the presentation for registration of a fresh Lease from him to the Defendant No.3 at his own cost. The Defendant No. 3 has failed to reply to the said letter.

10

20

8. Also after the creation of the said Wakfs, item 8 under paragraph 3(a) hereof, i.e., Plot No. 170 of Section XVIII, Mombasa, has been leased to Defendant No.4 by the first Trustee aforesaid for a term of 99 years commencing from 11.10.47 and registered as No. C.R.9325/1 at the Coast Registry at Mombasa. The Plaintiff intimated to the Defendant No.4 by his letter dated 9.4.48 that in case the original Wakf was set aside by the Court, the Plaintiff personally at his own cost would grant a fresh Lease on terms and conditions similar to those in the Lease he now holds. The Defendant No.4 has failed or neglected to reply to the said letter.

30

9. The existing Leases described in paragraphs 7 and 8 hereof are invalid since the Contracts to lease were not sanctioned by the Wakf Commissioner as required by paragraph 2 of Section 8 of the Wakf Commissioners Ordinance.

40

THE PLAINTIFF THEREFORE PRAYS FOR :-

- (a) A Declaration that the Wakfs of all those properties shown in paragraph 3 hereof are null and void.

- (b) A Declaration that the Leases referred to in paragraphs 7 and 8 hereof are also null and void;
- (c) An Order to transmit the Judgment or Decree of the Court to the Registrar of Titles, Mombasa, (i) to expunge the Wakf entries made in pursuance of two instruments of Transfer shown in paragraph 3(a) and (b) hereof and (ii) to expunge memorials relating to the Leases referred to in paragraphs 7 and 8 hereof;
- (d) costs; and
- (e) any further or other relief as the nature of the case may require. The Plaintiff is ready and willing to execute a fresh Lease in favour of each of the Defendants Nos. 3 and 4 hereof as stated in paragraphs 7 and 8 hereof.

In the Supreme Court of Kenya

No. 1.

Plaint.

19th April, 1948 -

continued.

10

Mombasa, this 19th day of April 1948.

20

(Sd.) T.J. INAMDAR.
Advocate for the Plaintiff.

Filed by:-
T.J. Inamdar,
Advocate,
Mombasa.

No. 2.

No. 2.

DEFENCE OF DEFENDANTS NOS. 1 & 2.

Defence of Defendants Nos. 1 & 2.

Rec'd. 26/5, 3.55 p.m.
(Id.) C.D.A.

26th May 1948.

30

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 86 OF 1948

MOHAMED BIN SALIM BAKHSHUWEN ... Plaintiff

- versus -

- 1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
- 2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
- 3. MUSSA KHAMISA, and
- 4. BATULBAI SADULLAH wife of Ahmed Bukhsh

Defendants

In the Supreme
Court of Kenya

No. 2.

Defence of
Defendants
Nos. 1 & 2.

26th May 1948.
continued.

DEFENCE OF DEFENDANTS NOS. 1 and 2

1. Paragraphs 1 and 2 of the Plaint so far as known are admitted. The address for Service of the Defendants Nos. 1 and 2 is care of the Chambers of Messieurs Christie and Bryson, Advocates, Mombasa.

2. Paragraphs 3 and 4 of the Plaint are admitted. The Wakfs so created are legal wakfs according to Mohamedan Law and according to the custom existing amongst Mohamedans in Mombasa. 10

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 ab 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.

4. The Defendants Nos. 1 and 2 are strangers to the matters contained in Paragraphs Nos. 8 and 9 of the Plaint. 20

5. In any event and without prejudice to the above the Defendants Nos. 1 and 2 state that the action is premature in that the Trustee of the said Wakfs who is a necessary party to the action, has not been joined as a Defendant.

6. Further in any event and without prejudice to the above the Plaintiff, being the Wakif and Mutuwalli of the said Wakfs is estopped for now seeking the aid of this Honourable Court to set aside the said Wakfs. 30

Counterclaim.

7. The Plaintiff in his capacity as Trustee of the said Wakfs has, from their inception, failed to account to the Defendants Nos. 1 and 2, as beneficiaries thereof, for the profits derived from the said Wakf properties. The said Defendants demand that the said accounts be prepared and that any sum found owing to them thereby be paid to them. 40

WHEREFORE the Defendants Nos.1 and 2 pray:

In the Supremo
Court of Kenya

1. That this Suit be dismissed with costs:
2. That an order be made that accounts be taken of the income and expenditure of the properties under the said Wakfs and that a Commissioner be appointed for this purpose:
3. That Judgment be entered against the Plaintiff in such sum as may be found due by the Commissioner,
and,
4. Costs.

No. 2.

Defence of
Defendants
Nos. 1 & 2.

26th May 1948 -
continued.

10

(sd.) CHRISTIE & BRYSON.
Advocates for Defendants Nos.1 & 2.

Dated, Mombasa this 26th day of May, 1948.

Filed by:

Messrs. Christie & Bryson,
Advocates,
Mombasa.

No. 3.

No. 3.

DEFENCE OF DEFENDANT NO. 3.

Defence of
Defendant
No.3.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA
CIVIL CASE NO.86 OF 1948

26th May 1948.

MOHAMED BIN SALIM BAKHSHUWEN ... Plaintiff

- versus -

1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 3. MUSSA KHAMISA, and
 4. BATULBAI SADULLAH wife of Ahmed Bukhsh
- Defendants

30

DEFENCE OF DEFENDANT NO. 3.

1. So far as known paragraphs 1, 2, 3 and 4 of the Plaint are admitted. The address for service of Defendant No.3 is care of the Chambers of Messieurs Christie & Bryson, Advocates, Mombasa.

In the Supreme Court of Kenya

No. 3.

Defence of Defendant No.3.

26th May 1948 - continued.

2. The Defendant No.3 is a stranger to the matters contained in paragraphs Nos.5 and 6 of the Plaintiff.

3. Paragraph 7 of the Plaintiff is admitted. In the circumstances hereinafter contained it was unnecessary to reply to the letter therein referred to.

4. The Defendant No.3 is a stranger to the matters contained in Paragraph 8 of the Plaintiff.

5. By the said letter dated the 9th day of April 1948 the advocate of the Plaintiff on behalf of the Plaintiff undertook to safeguard the Defendant No. 3's rights under the said Lease and that he would obtain this Honourable Court's order to expunge the said lease only against presentation of a fresh lease to the Defendant No.3 at his, the Plaintiff's cost.

10

6. The Defendant No.3 is a stranger to Paragraph 9 of the Plaintiff and states that it was the duty of the Plaintiff in his capacity as Trustee of the said Wakfs to obtain requisite sanction and that he is now estopped from attempting to set aside the said Lease on this ground. In any event the consent of this Honourable Court was, in Civil Case Number 5 of 1947 obtained to the granting of the said Lease to Defendant No. 3.

20

WHEREFORE the Defendant No. 3 prays:-

1. For an order that, in the event of the said Wakfs being declared null and void, this Honourable Court do order that the Memorial relating to the said Lease be not expunged from the Registry of Titles except against presentation of a fresh Lease from the Plaintiff to Defendant No.3 in similar terms.

30

2. For costs.

(Sd.) CHRISTIE & BRYSON.
Advocates for Defendant No. 3.

Dated, Mombasa this 26th day of May, 1948.

Filed by:
Messrs. Christie & Bryson,
Advocates,
Mombasa.

No. 4.

In the Supremo
Court of Kenya

REPLY TO DEFENCE OF DEFENDANTS NOS.1 & 2

Received
31 MAY 1948.
(Id.) H.E.A.

No. 4.

Reply to
Defence of
Defendants
Nos. 1 & 2.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA
CIVIL CASE NO.86 OF 1948

MOHAMED BIN SALIM BAKHSHUWEN. ... Plaintiff

31st May 1948.

- versus -

- 10 1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
3. MUSSA KHAMISA, and
4. BATULBAI SADULLAH wife of Ahmed Bukhsh
Defendants

REPLY TO DEFENCE OF DEFENDANTS NOS.1 and 2

1. The Plaintiff joins issue on Paragraph 2 of the Defence.
2. The Plaintiff joins issue on Paragraph 3 of the Defence.
20 3. As to Paragraph 5 of the Defence, the Plaintiff states that he has brought this suit in his personal capacity and he cannot sue himself as Trustee of the alleged Wakf. The beneficiaries are, therefore, properly joined as Defendants.
4. He joins issue on Paragraph 6 of the Defence.

DEFENCE TO COUNTER-CLAIM

5. The Plaintiff does not admit Paragraph 7 of the Defence. The Defendants did not acquire any rights under the said Wakfs which are void ab initio and the Defendants are not entitled to any accounts from the Plaintiff in his personal capacity. In any event, the Counter-Claim would only be maintainable against him as Plaintiff if he were suing the Defendants herein in his capacity as Trustee. Wherefore the Plaintiff prays that the Counter-Claim be dismissed with costs.
30

Mombasa, this 31st day of May 1948.

(Sd.) T.J.INAMDAR.

Filed by:- Advocate for the Plaintiff.

T.J.Inamdar, Advocate, Mombasa.

In the Supreme
Court of Kenya

No. 5.

REPLY TO DEFENCE OF DEFENDANT NO.3

No. 5.

Received
31 MAY 1948.
(Id.) H.E.A.

Reply to
Defence of
Defendant No.3

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA

31st May 1948.

CIVIL CASE NO.86 OF 1948

MOHAMED BIN SALIM BAKHSHUWEN ... Plaintiff

- versus -

- 1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN, 10
 - 2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 - 3. MUSSA KHAMISA, and
 - 4. BATULBAI SADULLAH wife of Ahmed Bukhsh
- Defendants

REPLY TO DEFENCE OF DEFENDANT No.3

1. The Plaintiff joins issue with the Defence of Defendant No.3 as to paragraphs 3 and 6 of the Defence.

2. The Plaintiff was and is prepared to completely safeguard the rights of Defendant No.3 as stated in paragraphs 7 and 8 of the Plaintiff and the said Defendant has put in his Defence only to secure costs out of the estate to which he is not entitled. 20

Mombasa, this 31st day of May 1948.

(Sd.) T.J.INAMDAR.
Advocate for the Plaintiff.

Filed by :-

T.J.Inamdar Esq.,
Advocate,
Mombasa.

No. 6.

In the Supreme Court of Kenya

PROCEEDINGS.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA

No. 6.

CIVIL CASE NO.86 OF 1948

Proceedings.

MOHAMED BIN SALIM BAKHSHUWEN

Plaintiff

6th May 1948
to 12th
August 1948.

- versus -

1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,

2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,

3. MUSSA KHAMISA, and

10 4. BATULBAI SADULLAH wife of Ahmed Bukhsh

Defendants

6.5.48.

6th May 1948.

Appearance entered by M/S Christie & Bryson,
Advocates for the Defendants.

Defence to be filed within 15 days from today

JOYCE RUGG GUNN.
Dist. Registrar.

3.6.48.

3rd June 1948

Mr. Inamdar, Advocate for the Plaintiff.

20 Clerk to M/S Christie & Bryson, Advocates for
the Defendants.

By consent hearing fixed for 28th and 29th
June 1948.

JOYCE RUGG GUNN.
Dist. Registrar.

28.6.48.

28th June
1948.

Budhdeo for Inamdar for Plaintiff.

Christie for Defendants.

30 Budhdeo. Inamdar ill ask that case be heard
tomorrow.

Christie. I agree.

Adjourned to tomorrow.

T.D.M.BARTLEY.

In the Supreme
Court of Kenya

29.6.48.

Inamdar for Plaintiff.

No. 6.

Bryson for Defendants.

Proceedings.

Inamdar ill.

6th May 1948
to 12th
August 1948 -
continued.

Adjourned to date to be fixed.

T.D.M. BARTLEY.

12th July 1948

12.7.48.

Clerk to Mr. Inamdar for Plaintiff.

Clerk to M/S Christie & Bryson for Defendants

By consent hearing fixed for 12th and 13th
August, 1948.

10

JOYCE RUGG GUNN.
Dist. Registrar.

12th August
1948.

12.8.48.

Inamdar for Plaintiff.

Bryson for 1, 2 and 3 Defendants.

4th Defendant not appearing.

Bryson. Preliminary objection para 5 of Defence.
Position. Plaintiff grantor and 1st and sole
trustee.

20

Defendants 1 and 2 immediate beneficiaries
Plaintiff suing as individual.

No trustee as rep. ultimate beneficiaries
a party to suit.

Defendants 3 and 4 granted leases under
Wakf.

Defendants 1 and 2 have children. Some-
one must be joined as Defendant to rep-
resent the ultimate beneficiaries.

Suggest Wakf Commissioners should be
joined as Trustees.

30

Wakf Commissioners Ordinance Chapter 28
S.9.

Where Trustee trying to set aside Wakf
he is acting against interest of
beneficiaries.

- Inamdar. By consent 2 Wakf deeds referred to in
 10 plaint put in and marked Ex. 1 and 2.
 Present beneficiaries only Defendants
 1 and 2.
 1948 Annual Practice p. 221 last para.
 (1932) 101 Law Journal Report Chancel-
 lory Division 338 Phillips, In re: Pub-
 lic Trustee v Meyer.
 Re probable beneficiaries p.238 Annual
 Practice persons contingently interes-
 ted.
 (1876/77) 4 Ch.D.413 Clowes v Hilliard.
 Present interest to uphold Wakf Defend-
 ants 1 and 2.
 Re Wakf Commissioners Ordinance S.9 not
 applicable.
 We have come to Court so no question
 that Trustee acting in improper manner.
- Bryson. Clowes v Hilliard (supra) p. 415.
 20 Children of 2 Defendants alive and they
 have existing interest.
 (Inamdar: there are living children of
 Defendant 1 and 2 all minors).
 Civil Procedure Rules Order 28, Rule 1.
- ORDER. In my view Section 9 of the Wakf Commiss-
 30 ioners Ordinance is not applicable and I see no
 reason for the Plaintiff joining the Commissioners
 as Co-Defendants. With regard to the Minor
 children of the Defendants being joined in my view
 this is unnecessary.
- T.D.M. BARTLEY.
- Re letter dated 27th July 1948 clerical errors can
 be rectified if considered. T.D.M. BARTLEY.
- Inamdar: As far as my case goes I only wish to
 address on points of law but I will if necessary
 call evidence in rebuttal of evidence of custom.
- Bryson. I call evidence on custom.

In the Supremo
 Court of Konja

 No. 6.

Proceedings.

6th May 1948
 to 12th
 August 1948 -
 continued.

Order.

In the Supreme
Court of Kenya

Defendants'
Evidence.

No. 7.

Mohamed Said
Kassam.

12th August,
1948.

Examination.

DEFENDANTS' EVIDENCE

No. 7.

MOHAMED SAID KASSAM.

MOHAMED SAID KASSAM affirmed states :-

Examined. Clerk to Wakf Commissioners. As Clerk I keep register of all Wakf deeds registered under the Wakf Commissioners Ordinance.

(See S. 7 of Ordinance).

I produce the Register (marked Ex.A) which starts from 1927. Some Indian Wakfs are registered. I have been clerk to Commissioners for 3 years and 8 months. I'm an Arab.

10

Cross-
Examination.

Cross-Examined. Ex. A contains Wakfs in favour of mosques, Charity and Religion. If Wakf vested in Commissioners it begins to operate immediately in favour of charities.

Re-Examined. Nil

T.D.M.BARTLEY.

No. 8.

Mohamed Bin
Ali Bashir.

12th August,
1948.

Examination.

No. 8.

MOHAMED BIN ALI BASHIR.

MOHAMED BIN ALI BASHIR affirmed states :-

Examined. I'm a Wakf Commissioner and have been for 15 years. I was born in Mombasa 60 years ago and have 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.

20

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 Cadhi Sheikh Elamin - his name was Sheikh Ali bin Abdulla. He made a Wakf of properties.

30

Cross-Examined. Arabs in whole of Kenya can make Wakfs which provide for generation to generation.

T.D.M. BARTLEY.

DEFENCE CLOSED.

In the Supremo Court of Kenya

Defendants'
Evidence.

No. 8
Mohamed Bin
Ali Bashir.
12th August,
1948 -

continued.

Cross-
examination.

No. 9.

PLAINTIFF'S COUNSEL'S ARGUMENTS.

Inamdar. I call no evidence.

Inamdar. It is agreed that if Wakf set aside my client is prepared to grant leases to Defendants 3 and 4 to put them in same position.

10

Correspondence put in by consent (marked Ex.3)

2 kinds Wakfs.

- (1) Private family Wakf.
- (2) Charitable or religious.

These provide family Wakfs.

Wakf from generation to generation void as offending rule against perpetuities.

Grant

Nearest relatives - contingent and uncertain.

Ultimate gift to charity illusory - cloak.

22 Indian Appeals 76 Abul Fata Mohamed Ishak & Others v. Russomoy Dhur & others.

1st prop laid down - substantial and not illusory.

In this case Wakf only to descendent and then to charity. Case decided 1894. Up to 1913 several judgments followed this case.

20

No. 9.

Plaintiff's
Counsel's
Arguments.

12th August
1948.

In the Supreme Court of Kenya

No. 9.

Plaintiff's Counsel's Arguments.

12th August 1948 -

continued.

Said bin Mohamed bin Kassim El-Riamo & others v. Wakf Commissioner, Zanzibar. E.A.No.1 of 1946.

This case same as present case.

Vol.6 All India Digest Col.1603 para 54.

Re custom. No custom proved.

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. Custom should be local - not for whole country. Vol.10 Hailsham 14, para 16. Evidence in this case is that custom is for whole of Kenya.

10

(1935) A.I.R. Bombay 371 at 374.

Reasonable: obviously not.

Hammerton v Honey 1876 24 Weekly Reporter 603. 17 E & E Digest 4 and 5 para 9.

These Wakfs incompatible with law of country.

20

Defence states Wakfs in accordance with both law and custom - this impossible.

(1866-68) 3 Madras High Court Reports 50 at p. 56-58 re legal necessity.

No.10.

Defendants' Counsel's Arguments.

12th August 1948.

No.10.

DEFENDANTS' COUNSEL'S ARGUMENTS

Bryson. Wakf perfectly lawful according to Mohamedan Law.

In case of Said bin Mohammed Wakf Commissioners not represented and case not argued on question of law.

30

First reaction of Court of Appeal Decision by Zanzibar Court was the passing of Decree 5 of 1946 on 20.6.46 - 3 or 4 months after Court of Appeal decision.

After Privy Council decision in 1913 a similar law passed by Indian Government.

Muslim Validating Act No.6 of 1913. Vide Mulla p.137 Principles of Mohamedan Law 6th Edition.

40

Refers P. 132 Mullia.

2 E.A.L.R.33 Talibu v. Exors of Siwa Haji
at p.36.

In the Supreme
Court of Kenya

No.10.

This case governed by Shafie law (agreed)
but principles the same in Shafie, Hanafi
and Ibathi sects. p. 231 Minhaj. These
Wakfs valid under that.

Defendants'
Counsel's
Arguments.

Ameerali 4th Ed. p.276 (1912). After Privy
Council Decision p. 287, p. 290, 303, 304.

12th August
1948 -

10

Usufruct to descendants and kindred a
charity in Mohamdan law. 306 at foot.

continued.

340, 341 at top. 344 consecration for
ones family and descendent 347.

Faiz Tyabji's Mohamedan Law 3rd Ed. (1940)
p. 592, 594.

Zanzibar Decree proper law in a case of
this kind.

20

"While I appreciate this Court bound by
Court of Appeal if Your Lordship would go
into the law you might express an opinion
on the matter."

Re Custom in Register produced all Wakfs
registered. I have read about 30 at be-
ginning and 30 at end. Out of those 75%
are of kind in this case. Register con-
tains about 15 similar to the ones in this
case.

30

Agree that proof of custom must be local
but might have similar custom in many
places.

Custom would only

I don't wish to pursue estoppel.

Here a Wakif setting aside his own Wakf.

Re 3rd Defendant whom I represent a lease.

We don't want costs but we want an order
of Court to Plaintiff to give us a lease.

In the Supreme
Court of Kenya

No.11.

PLAINTIFF'S COUNSEL'S REPLY.

No.11.
Plaintiff's
Counsel's
Reply.
12th August
1948.

Inamdar. Re 2 E.A.L.R.33 Obiter Dictum and
different to present case.
Re Minhaj. Saw same in each report ex-
cept that under Ibathi Law and Hanafi
law a man can provide for himself.
Privy Council Judgment deals with this
point.
Faiz Tyabji's Mohamedan Law p.482 para 480.
Custom not proved.

10

C.A.V.

T.D.M.BARTLEY.

No.12

No.12.

Judgment

JUDGMENT

26th August,
1948.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA
CIVIL CASE NO.86 of 1948

MOHAMED BIN SALIM BAKHSHUWEN

Plaintiff

- versus -

20

1. FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN.
2. AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
3. MUSSA KHAMISA, and
4. BATULBAI SADULLAH wife of AHMED BUKHSH

Defendants

26.8.48.

JUDGMENT.

The Plaintiff was the creator of two Wakfs
which he now seeks to set aside on the ground that
they are null and void.

The two Wakfs which are identical in terms
create the type of Wakf considered by the Court of
Appeal for Eastern Africa in Said bin Muhamed bin
Kassim el-Riemi and 12 others versus The Wakf
Commissioner for Zanzibar, Civil Appeal No. 1 of

30

1946 and the Court of Appeal held that the Wakf was illusory and consequently void and of no effect. Although the Court of Appeal case was governed by Ibathi law and Shafee Law governs this case it is common ground that so far as this suit is concerned these two laws are identical.

In the Supreme
Court of Kenya

No.12.

Judgment

26th August,
1948 -

continued.

10 The Court of Appeal founded its decision on the Judgment of the Privy Council, in the year 1894, in Abul 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.

20 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.

30 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.

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.

40 There will be judgment for the Plaintiff as prayed with costs against the 1st and 2nd Defendants. The Plaintiff however is to execute new leases in favour of the 3rd and 4th Defendants as agreed by him and to bear all the costs of the leases and the memorials relating to those leases are not to be expunged from the Registry of Titles except against presentation of the new leases to Defendants 3 and 4. The counterclaim of the 1st and 2nd Defendants is dismissed with costs.

Mombasa, 26th August 1948.

T.D.M.BARTLEY. J.

In the Supreme
Court of Kenya

No. 13.

SUBMISSIONS BY ADVOCATES
ON DELIVERY OF JUDGMENT.

No.13.

Submissions by
Advocates on
delivery of
Judgment.

26th August,
1948.

Bryson

asks that this judgment should be conditional in that decree should not be made effective by registration against the title for a period of three months and therefore in the event of a memorandum of appeal being filed until the decision of the Court of Appeal.

10

No authority.

Inamdar

Such condition cannot be imposed. Court's discretion cannot be invoked for such a purpose.

Doctrine of lis pendens. This doctrine covers all the difficulties of applicant.

S. 52 Transfer of Property Act.

Bryson

This covers further litigation.

I consider this application reasonable and I make the judgment conditional as requested.

20

T.D.M.BARTLEY.
26.8.48.

No. 14.

MEMORANDUM OF APPEAL OF DEFENDANTS Nos.1 and 2

In the Court
of Appeal for
Eastern Africa

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

No.14.

CIVIL APPEAL NO.33 OF 1948

(Original Mombasa Civil Case No. 86 of 1948)

Memorandum of
Appeal of
Defendants
Nos.1 and 2.

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

23rd November
1948.

- versus -

- 10 MOHAMED BIN SALIM BAKHSHUWEN Respondent
- (Original Plaintiff)

MEMORANDUM OF APPEAL

The Appellants, Fatuma binti Mohamed bin Salim Bakhshuwen and Aisha binti Mohamed bin Salim Bakhshuwen (the 1st and 2nd Defendants in the Court below) appeal to this Honourable Court from the Judgment of His Honour Mr. Justice Bartley delivered in His Majesty's Supreme Court of Kenya at Mombasa on the 26th day of August 1948 upon the following grounds:-

20

1. The decision of this Honourable Court in Civil Appeal Number 1 of 1946 (Said bin Muhamed bin Kassim el-Riemi and 12 others versus the Wakf Commissioners for Zanzibar), by which the learned Judge felt himself bound, is wrong and contrary to law.

2. The said Appeal was heard ex parte by this Honourable Court and the Law was not argued or considered therein.

30

3. The learned Judge, by following the decision in the said appeal, erred in law in holding that the two Wakfs were illusory, invalid and void ab initio.

4. In any event, the learned Judge erred in fact in holding that the evidence of custom fell far short of the evidence required to establish custom.

5. The learned Judge erred in dismissing the

In the Court
of Appeal for
Eastern Africa

Counter Claim with costs.

No.14.

Memorandum of
Appeal of
Defendants
Nos.1 and 2.

23rd November
1948 -

continued.

WHEREFORE THE APPELLANTS PRAY that the Judgment
of the Supreme Court of Kenya be set aside,
that the Respondent's suit be dismissed,
that the Appellant's counter-claim be
allowed with costs and that the Appellants
do have their costs in this Honourable
Court and in the Court below.

(Sd.) CHRISTIE & BRYSON,
Advocates for the Appellants.

10

Mombasa, this 23rd day of November, 1948.

Filed by:-

Messrs. Christie & Bryson,
Advocates for the Appellants,
Mombasa.

No.15

No.15.

Notes of
Arguments
taken by
Nihill, P.

NOTES OF ARGUMENTS TAKEN BY NIHILL P.

17th February
1949 and
2nd March 1949

17.2.49. Coram Nihill P.
Edwards C.J.
Bourke J.

20

Bryson for Appellants.
Inamdar for Respondent.

Bryson: Point settled in India by legislations
1936. Is a Wakf of this description
valid or invalid according to Mohammedan
law.

Conceded that these Wakfs are the same
kind as this Court held in Civil Appeal
1/1946.

XIII E.A.C.A. 32.

30

This case comes under the Shafi school.
Terms of Wakf identical in above case.
See Zanzibar validating Decree.

Abul Fata Mohamed Ishaki v. Chowdre, 22
Cal. 619 at p. 634.

1948 put the position back to 1894.

Vol. II E.A.L.R. 33 at p.35 Hamilton J.
Bases this appeal on same basis.

This case is governed by Shafi case.

Mirhaj Book 23 page 230.

Wilson Manual of Mohamedan Law p. 69.

Privy Council case was Ibathi school
(Hanafee law silent on this matter).

Wilson at p. 421.

I say that Mohamedan law is the law ap-
plicable to this Country.

Wilson at 421.

Ameer Ali Mohamedan Law 4th Edition
Vol.I. Wakf Ordinance Cap. 28.

1921 Order-in-Council Act 4(a).

XI K.L.R. 31.

1 E.A.L.R. 24. Privy Council.

See 4 Cap. 171.

Law applying to land in suitous Dominus

East Africa Order-in-Council 1902 at p.
31 of Order-in-Council volume Art.1 de-
fined Courts of Protectorate (once Kenya
as it is today).

Kenya Annexation Order-in-Council 1920.

Art II Referred to Art.1. of 1902 Order-
in-Council and said all the territory
except that part which forms part of the
Dominions of Sultan of Zanzibar because
Colony of Kenya.

Wilson's Mohamedan Law - Appendix D.

Kenya Colony & Protectorate (Boundaries)
Order-in-Council 21 10 miles inland
from Coast.

3rd Edition 1940 Faiz Tayabjee p.538.

22 Indian Appeals 26.

In the Court
of Appeal for
Eastern Africa

No.15.

Notes of
Arguments
taken by
Nihill, P.

17th February
1949 and 2nd
March 1949 -
continued.

10

20

30

In the Court
of Appeal for
Eastern Africa

No.15.

Notes of
Arguments
taken by
Nihill, P.

17th February
1949 and 2nd
March 1949 -

continued.

Kenya Colony Order-in-Council 1921 p.17.

Applications of the law to Wakfs must be
the law of the Shafi School.

East African Court of Appeal applied P.C.
Case which did not apply to Shafee
school.

Inamdar:

What is the true Mohamedan Law on sub-
ject of Wakf has been very much discussed.

1872 10 Bombay High Court at p.7.

Abdul Ghani Kassam v. Hussein Mir Amin 10
on p.12.

1893 20 Calcutta 116.

22 Indian Appeals 76 at p. 82, and
22 Calcutta 690. (Leading Case).

This case was fully before the Privy
Council in their 1894 case.

Tayabji Mohamedan Law 3rd Edition 582.

Ibathi School) applies Shias not in
Hanafi) sunnis. this case at
Shafee) all. 20

1912 Ameer Ali at 315. No difference be-
tween various School.

A Shafee case decided in Bombay High
Court.

All India Digest of Indian Cases 1811-
1911 on Column 1603.

1913 37 I.L.R. (Bombay - 447.)

Mohamed Abdulla v Abdul Rehman 9 Bombay
Law Reports 998.

No difference between Shafee and Hanafee 30
law of Wakf - therefore if one invalid
so is other. Settlements in favour of
descendents of settler with ultimate
benefit to poors.

COURT:

This most important case (All India Di-
gest of India Cases 1811-1911 on Column

1603) as it shows Shafee and Hanafee law
re Wakfs are the same

In the Court
of Appeal for
Eastern Africa

Adjourned to 2.15 P.M.

Sd. J.H.B.NIHILL P.

No.15.

2.30 P.M. Hearing Resumed.

22 Calc. 619 at p. 634.

Followed in India up to 1913.

1903 28 Indian Appeals 15.

1904 32 Indian Appeals 86.

10

Then came 1913 Act.

1927 54 Indian Appeals 372 (Privy Council
Case). (Wakf executed before 1913 Act).

1 E.A.L.R. 33.

Native Courts Regulations 1897. ? Are
these still in force.

repealed by Ord. 13 of 1907.

Whole basis of judgment based on N.C.Reg.

Parties in this case are Arabs and not
natives.

20

Mulla's Mohamedan Law p. 132.

BRYSON: E.A.Order-in-Council p. 31 at p. 41.

Art. 28(1) proviso.

Native Courts Regulations 1897.

Repealed by 13/1907.

& Proviso to Art. 4(2).

Submits this Court can distinguish P.C.
Case because it only applied to Hanafee
Sect.

JUDGMENT RESERVED.

30

2.3.49. Bryson for Appellant
Nazareth for Respondent.
Judgments delivered.

APPEAL DISMISSED.

Sd. J.H.B.NIHILL P.

Notes of
Arguments
taken by
Nihill, P.

17th February
1949 and 2nd
March 1949 -
continued.

In the Court
of Appeal for
Eastern Africa

No.16.

NOTES OF ARGUMENTS TAKEN BY EDWARDS C.J.

No.16.

17.2.49 Nairobi.

Notes of
Arguments
taken by
Edwards C.J.,

Coram: Sir Barclay Nihill M.C., K.C., C.J.,
Kenya, (P).
Edwards C.J., Uganda.
and Bourke J., (of Kenya).

17th February
1949.

Mr. Bryson for Appellants.
Mr. Inamdar for Respondent.

MR. BRYSON.

10

Is a Wakf of the description in this case
valid or invalid according to Mohamedan
Law ?

See Plaint.

There are 2 Wakfs (both similar).

Read Para 4 of Plaintiff...

Bartley J's judgment. He felt himself
bound by a previous decision of this
Court. Vol.13 E.A.C.A.L.R. Page 32.
C.A.1 of 1946.

20

I rest my whole appeal on the point that
Wakfs of this description are valid ac-
cording to Mohamedan Law. At the hearing
of the appeal the respondents were not
represented. I only appeared at a later
stage in the appeal - on a question of
costs (see P.33).

The true Mohamedan Law was not brought
to the notice of the Court in C.A.1/1946.
The P.C. decision was not based on the
Shafee School of Mohamedan Law.
I'll ask this Court to apply the princi-
ples of Shafee.

30

The P.C. Decision was based on Hanfi
School, although the law on the same
point is the same in all 3 schools in my
submission.

Three months after the decision, Zanzi-
bar passed a validating decree (see the
Bill - Zanzibar Legislative Council).

40

Preamble (1946).

Objects and reasons. That decree makes valid Wakfs as regards all schools of Mohamedan Law.

In the Court
of Appeal for
Eastern Africa

No.16.

HISTORY.

Before 1894 British Courts in India and P.C. were loath to agree to perpetuity - Abdul Fata 22 Calc. 619, P. 634 Sir Ameer Ali (after a P.C.) criticized the judgment and legislative was enacted in India. Between 1913 and 1946 Wakfs of this description were registered in Kenya.

Notes of
Arguments
taken by
Edwards C.J.,

17th February
1949 -

continued.

10

Vol. 2 E.A.L.R. Pages 33 and 35.

Sir Robert Hamilton's dictum.

1906 (before the 1913 Indian Validating Act).

I base this appeal on same basis as that of Sir R. Hamilton.

The "Mirhaj" is the law governing Wakfs.

20

This is a case of Shafee School. "Wakf" Mirhaj Book 23 p. 230 Foot of P. 231.

Wilson's Anglo-Mohamedan Law (5th Edition) Page 69. The P.C. Case was Hanfee.

is silent on question of Wakfs.

Wilson Page 421 top of P. 421.

Sir Ameer Ali's book "Mohamedan Law". a whole chapter Vol. I (4th Edition).

30

(1912) - one year before the Indian Validating Act.

Vol.I. E.A.L.R. P.24. Ameer Ali's book at P.287, 295, 305, 308, 315, 340, PP.273 & 274, 275, 276.

The words "piety and charity" have a much wider significance in Muslim religion and law than in any other system of law. Charity may include a provision for one's descendants and a wakf must not be

In the Court
of Appeal for
Eastern Africa

No.16.

Notes of
Arguments
taken by
Edwards C.J.,
17th February
1949 -
continued.

solely the worship of God. The reason to
add "to the poor" is to ensure that "wakf"
remains and is permanent even although
one's descendants die out. PP. 344 et
seq. deals specifically with the P.C.
Judgment in the Abdul Fata case.

I rely on the whole chapter of Sir Ameer
Ali's book.

Wilson's Anglo-Mohamedan Law. (see the
Appendix B).

Faiz Tayabjee on "Mohamedan Law" 3rd
Edition (1940) P. 538.

10

I make one observation on the Abdul Fata
case L.R. 22 Indian Appeals P. 76. Ameer
Ali's book.

Summarise: The application of the law to Wakfs
is that of the Shafee School. The P.C.
decision does not apply to Shafee School.
I ask that the appeal be allowed.

MR. INAMDAR. What is the true Mohamedan Law re
Wakfs? Much discussed before P.C. judg-
ment in 1894. Moslem jurists thought
gifts to children in perpetuity is charity.
The P.C. said that the Prophet did not
mean that. Vol. 10 Bombay High Court Re-
ports P.7 & P.12. All I.R. 1872 or 1873
?? Abdul Ghani Kassam v Hussein Mir ??

20

22 Indian Appeals P. 76. Abdul Fata Case
P.82, P.85
(22 Calcutta P. 690) " " "

30

See also 20 Calcutta P.116 (1893). Bikani
Mia v. Shuk Lal Poddar.

The mention of Charity is merely illusory.

Tayabjee's "Mohamedan Law." 3rd Edition
(1940) PP. 582 & 583 Para 418. All the
schools are same except that under Ibathi
one can provide for oneself.

Ameer Ali's book of 1912 is the same as
the one written in 1892. Ameer Ali's
book P. 315 (1912).

A Shafee case was decided by Bombay High
Court.

Digest of Cases of Indian High Court "All India"
 Digest Cases (1811-1911) Column 1603.
 Vol.37 Indian Law Reports Bombay Series (1913) P.447.

In the Court of Appeal for Eastern Africa

No.16.

2.15 P.M.

INAMDAR continues -

Notes of Arguments taken by Edwards C.J.,

17th February 1949 -

continued.

10

Shafee Law is the same as Hanafi.

Abdul Fata:- 22 Calcutta 619.

28 Indian Appeals 15 (1901-1902)

32 " "

The 1913 Musalmans Wakfs Validating Act was not made retroactive. In 1927 an appeal went to the Privy Council. 54 Indian Appeals 372 Wakfs held invalid.

Precepts after the death of the Prophet were misinterpreted. Tayabjee "Mohamedan Law" P.11 and P.12. Vol. 2 E.A.C.L.R. PP.33 and 35.

20

There were regulations in 1897. Native Courts Regulations 1897 and 1907. Native Courts Regulations 1897 repealed by No.13 of 1907.

The whole basis of Hamilton J's judgment has disappeared.

Courts Ordinance 1931.

Kenya Colony Order-in-Council (1921). 17 & 18.

Common Law in force in England 12/8/97.

30

See Laws of Kenya Chap. 171 & 172.

Mulla's "Mohamedan Law" (11th Edition) P.22 Para.26.

BRYSON replies:-

E.A.(1902) Order-in-Council Page 31 Art. 28 P.41.

(1897 Order-in-Council repealed). but see Proviso 1.

That proviso leaves intact any "law, practice or procedure".

In the Court
of Appeal for
Eastern Africa

No.16.

Notes of
Arguments
taken by
Edwards C.J.,

17th February
1949 -

continued.

The practice as regards Wakfs is to apply
Moslem Law.

The Mirhaj was never cited to the Court.
Sir Ameer Ali's book answers all Mr.
Inamdar's points.

ORDER:

C.A.V.

Sd. D. EDWARDS C.J.

17.II.49.

No.17.

Notes of
Arguments
taken by
Bourke J.

17th February
1949.

No.17.

NOTES OF ARGUMENTS TAKEN BY BOURKE J.

10

C.A. 33/48.

Bryson - Appellants.
Inamdar - Respondent.

BRYSON.

Point of great importance to Muslem com-
munity. 1913 Indian statute. The wakf
is identical with that in C.A.1/46 C.A.E.A.
P.32 13 C.A.E.A. Such a wakf is valid
according to Mohamedan law. Law passed
in Zanzibar 1946; But not here. Respon-
dents did not argue on appeal in C.A.E.A.
case The Mohamedan law not before Court.

20

Principles of Shafee law apply. P.C. ap-
plied? law, C.A.E.A. Ibathi Law. The law
same in all three schools - but no de-
cision in shafi. I did not appear in
C.A.1/46. Open to Court to reconsider
C.A.1/46. 3 months after decision Zanzi-
bar Decree. Reads objects and reasons.
This case between Arabs.

Before 1894 P.C. and English Courts ap-
plied English principles of law - dis-
liking perpetuity.

30

Great controversy in India after P.C.

decision. Eventually validating law.
Such wakfs extremely common here - Register before Court below. They have been registered.

In the Court
of Appeal for
Eastern Africa

Nearest case here is the wakfs.

No.17.

2 E.A.L.R. 33 1906. obiter Hamilton J.
P.35.

Notes of
Arguments
taken by
Bourke J.

Before Indian Acts. Base this case on
same followed as Hamilton J.

17th February
1949 -

10

Governing Code of law is the shafi.

continued.

P.230 Book 23 Mirhaj 231 foot sec.2.

Wakf in favour descendents... good - perpetuity for gen to gen. is good.

Wilson's Anglo-Mohamedan Law p.69 - "more strongly supported by shafee. P.C.Hanafee law - Code silent re this (?).

Wilson - p.421 id. re Shafee law. id.1912 Case.

20

Mohamedan law applies as in and not
P.C. decision.

All 3 laws same. But here shafee to be applied.

Sir Ameer Ali on Mohamedan Law - Mohamedan Law I Vol.I 4th Edn.

1912 - very earlier edition. P.273 4th Edn.

(Wakf Ordinance - What applies Mohamedan Law?)

(Order-in-Council ? Cap.28).

30

1921 Order-in-Council Art.4 P.18. Apply English common Law that applied lex -- situ - land.

1 E.A.L.R. P.24. Re Mohd. Law applying.

XI K.L.R. P.30 marriage Ord. & Succession - Specific Legislation.

Ali - sup.

sup.274 P.C. gave "charitable" - English meaning instead of Mohamedan.

Sec.2 of the Chapter. This type of Wakf valid. P.287.

In the Court
of Appeal for
Eastern Africa

No.17.

Notes of
Arguments
taken by
Bourke J.

17th February
1949 -
continued.

All schools recognise validity of such
Wakfs.

P.295, 305 conclusion - deals to P.C.Case,
308, 315, 340.

Perpetuity is (necessary) and characteris-
tic of a Wakf - reason for including
"Poor". 343. Rely on whole chapter.
Member Sud community.

Appendix B Wilson Anglo-Mohamedan Law.

Faiz Tayabjee 3rd Edn. 1940 P.538 Mohd.
Law. Vol.2 In. Appeals P.76.

10

P.C. Case.

The wakf there went far beyond that in
this case.

Application of law between parties.

INAMDAR. 10 Bombay High Court P.7.

1873 P.7.

Abdul Gani Kassim v Hussein Miya P.12.
22 Indian Appeals P. 76.

P.C.
CASE.

22 Calc. 619

20

P. 85.

20 Calc. P. 116 1893.

B.M. v. Shuklal

Deals with what said by Ameer Ali.

Full B. held void - Ameer Ali. It was
before P.C. in 1894 case (i.e. 20 Calc.
116).

Admitted P. 582, 3. P. 480 Shafee law
Hanafee law.

Ameer Ali also in commentary says all sect
laws the same re wakfs - Sunni law - all
are sunni laws.

30

Ameer Ali sup. His opinions same right up
to 1912 P. 315 1912.

He says validity of wakf for descendents etc.

No difference in principles - no difference agreed here.

Bombay High Court Digest Cases.

Indian High Courts. A.I. Digest 1811-1911 para. 1603 column item 54. Shafee and Hanafee law - no difference 1910.(54)

P.C. dealt in Mohamedan law and interpreted it.

37 Bombay I.L.R. 1913 p. 447.

10

Shafee - held wakf wrong.

Below said principles same.

Mohd. Abdulla v. Abdul Rehman, All. I. Digest 1811, 1603 (54).

"shafee and Hanafee law of Wagf - There is no difference between the shafee and the Hanafee law in respect of settlements in favour of descendents of the settlor with the ultimate benefit for the poor in the case of failure of lineal male descendents. As such Wakfs are held to be invalid in the case of Hanafis it follows that they are invalid in the case of Shafees" 9 Bom. L.R. 998.

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P.C. Case (sup) followed by Indian Courts and P.C. 1894-1913 Validating Act.

28 Indian Appeals p.15.

1904 32 " " p.86.

The Act not made retrospective.

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P.C. 1927 54 Ind.Apps. P. 372. Held Wakf invalid. Wakf 1907-1.

P.11 Tayabjee's Mohd. Law, P.12.

E.A.L.R. (Sup.) Hamilton.

Obiter dictum of Hamilton J.

Gone - legislation same.

P. 17 and 18 Order-in-Council 1921 sec.2.

Powers in Courts. Courts Regulations.

Parties Arabs not Natives - Muslem Laws apply.

In the Court
of Appeal for
Eastern Africa

No.17.

Notes of
Arguments
taken by
Bourke J.

17th February
1949 -

continued.

In the Court
of Appeal for
Eastern Africa

No.17.

Notes of
Arguments
taken by
Bourke J.

17th February
1949 -

continued.

Mulla's Mohd. Law.

Cap.171 and 22 re marriage and successor.
Mohd. Law applied in case of gifts.

(Not necessary to determine Question re
Mohd. law applying?).

11th Mulla's Mohd.Law P.22) A gift in per-
" 26) petuity is bad
unless to char-
ity - commentary
Prophets pre-
cepts and Ameer
Ali.

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Judgment this Court rightly decided.

BRYSON. Thrown back on Order-in-Council Art.22 P.18
1902 Order-in-Council E.A. Art.28.

C.A.V.

No.18.

Judgment.

2nd March 1949.

Nihill P.

No.18.

JUDGMENT

NIHILL. P.

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 Moham-
medan 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 author-
ity 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 charit-
able uses, with a direction that the objects of

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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. 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. If the prohibition of this type of wakf is, as we have been assured it is, repugnant to Mohammedan practice and sentiment, it is for the leaders of that community to make representations in the proper quarter. Relief cannot be had from this Court.

Mr. Bryson, who appears for the appellants and who has argued his case with great care and determination, was fully alive to the difficulties

In the Court
of Appeal for
Eastern Africa

No.18.

Judgment.

2nd March 1949

Nihill P. -
continued.

In the Court
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Eastern Africa

No.18.

Judgment.

2nd March 1949

Nihill P. -

continued.

which confront him in this appeal. He has cited to us the old case of Talibu bin Mwijaka v. Executors of Siwa Haji 2 L.R.E.A. p. 33, where Sir Robert Hamilton (Hamilton J., as he was then) boldly declined to be influenced by the decisions of the Privy Council in Indian cases. Whilst there may be much in that learned judge's judgment to provide ammunition to those who seek an alteration of the law it is useless as an authority in face of the decision in this Court in the 1946 case.

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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 Rahman, 9 Bombay Law Reports 998 & Vol.6 (sic) All India Digest Civil 1811 to 1911 in column 1603). The learned judge in the court below could take no other course than he did and this appeal must fail. I have one observation to add which is obiter only but which, I think, should be said. It has always been regarded in this Court and in the Supreme Court of Kenya that in cases affecting personal status arising between Mohammedans the law to be applied is Mohommedan law as interpreted by judicial decision. Whether this rests upon a secure statutory basis in Kenya is however by no means easy to discover. Both learned counsel in this appeal showed great diligence in an endeavour to help the court on this point but they could point to nothing which I regard as conclusive. If our consideration of this appeal should result in the attention of the executive being directed to the law regarding wakfs as it now obtains in Kenya I make the suggestion that any such consideration might well conclude this wider question. This obiter should not be regarded as necessarily implying disagreement with any view expressed by the learned judges in Mistry Amar Singh v. Hazara Singh, 1946 Vol.XIII E.A.C.A.18 on the application of the proviso to section 4(2) of the Kenya Order-in-Council 1921 in certain circumstances.

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The appeal is dismissed with costs.

Sd. J.H.B.NIHILL P.

JUDGMENT: (Edwards C.J.):

In the Court
of Appeal for
Eastern Africa

No.18.

Judgment.

2nd March 1949

Edwards C.J.

This is an appeal from a judgment of the Supreme Court of Kenya at Mombasa whereby the plaintiff (respondent) succeeded in obtaining a declaration that two wakfs created by him were null and void. The two wakfs, which are identical in terms, are the type of wakf considered by this Court in Civil Appeal No. 1 of 1946 Said bin Muhamed bin Kassam and others v. The Wakf Commissioners Zanzibar, 13 E.A.C.A. L.R. 32. In that case this Court felt itself bound by the decision of the Privy Council in Abdul Fata Mahomed Ishak and others v. Rasamaya Dhur Chowdri and others, 22 Calc., 619. The learned trial judge in the case now before us felt himself bound by the decision in Civil Appeal No. 1 of 1946 but expressed the view that we may feel it open to us to reconsider our decision because of the fact that the respondent was not represented at the hearing of that appeal. This is true, in spite of the fact that at Page 32 of the report the name of Mr. Bryson appears as having represented the respondents. Mr. Bryson, who has appeared for the appellant in the present appeal, has satisfied us that he did not appear for the respondents in C.A. 1 of 1946 except at a very late stage on a matter concerning costs. He has, accordingly, now invited us to say that we need not be bound by the decision in C.A. No.1 of 1946 in view of the fact that this Court, when hearing that appeal, heard arguments on behalf only of the appellants. He further says that the present appeal is one from the Supreme Court of Kenya, while C.A. 1 of 1946 was an appeal from the High Court of Zanzibar. Subsequent to the decision of this Court in C.A. 1 of 1946 the Zanzibar Legislature passed a validating decree declaring valid wakfs of the kind in question and we understand that that decree has retrospective effect. 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

In the Court
of Appeal for
Eastern Africa

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Judgment.

2nd March 1949

Edwards C.J. -

continued.

a wakf governed by the law of the Hanafi school but Mr. Bryson admits that there is, on the subject of wakfs of the nature of those now before us, no difference in law between these two schools. Nevertheless, 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 piety 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.

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Mr. Inamdar, for the respondent, cited the case of Abdul Ghani Kassam v. Hussein Mir, Vol. 10 All India Reports (Bombay High Court) Pages 82 and 85 and Faiz Tayabjee Pages 582 and 583 and Sir Ameer Ali's book Page 315 and Vol. 37 Indian L.R. (Bombay series), 1913 Page 447 and Mulla's "Mohamedan Law" (11th Edn.) Page 22 Para 26. Notwithstanding Mr. Bryson's pressing invitation to us to disregard the decision in the Abdul Fata case I feel that, until their Lordships of the Privy Council themselves review the position or until the Kenya Legislature sees fit to pass validating legislation, this Court has no option but to act as it did when deciding Civil Appeal No.1 of 1946. I would, accordingly, dismiss this appeal with costs.

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Sd. D. EDWARDS.

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2nd March, 1949.

Bourke, J.

JUDGMENT: (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 Muhammad 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 Fata Mahomed Ishak and others v. Rasamaya Dhur Chowdri 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. That prospect would not daunt were it necessary to ascertain and apply the law apart from what is laid down in the two cases under reference. The extreme difficulty, however, that confronts the appellants in maintaining their contention will readily be recognised when it is stated that the wakfs the subject-matter of these proceedings are of the same kind and are open to the same objection as the wakfs considered in the cases referred to, which are relied upon for the respondent as binding authorities. I say open to the same objection, because it is not in dispute and, as is apparent from the copious references made to the works of commentators and to case law (see, for example, Mohamed Abdulla v. Abdul Rehman, 9 Bombay L.R. 998), could not well be in dispute, that precisely the same principles of law fall to be applied. 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 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

In the Court
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No.18.

Judgment.

2nd March 1949

Bourke, J. -

continued.

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Judgment.

2nd March 1949

Bourke, J. -

continued.

law considered, interpreted and pronounced upon by the Privy Council in the case followed by this Court in its previous decision. In my opinion the 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. I would dismiss the appeal with costs.

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2.3.49.

Sd. PAGET J. BOURKE.

No.19.

Decree.

2nd March 1949.

No.19.

DECREE.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

CIVIL APPEAL NO.33 OF 1948

(From Original Decree in Civil Case No.86 of 1948
of H.M. Supreme Court of Kenya at Mombasa)

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FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,

AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN

(Original Defendants) Appellants

- v -

MOHAMED BIN SALIM BAKHSHUWEN ...

(Original Plaintiff)

Respondent

This Appeal coming on the 2nd day of March, 1949, for hearing before His Majesty's Court of Appeal for Eastern Africa in the presence of J.E. L.Bryson Esq., Advocate on the part of the Appellants and of T.J.Inamdar Esq., Advocate on the part of the Respondent It is ordered that the appeal be and hereby is dismissed with costs.

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JOYCE RUGG GUNN

AG. REGISTRAR.

Dated this 2nd day of March 1949.

Issued this 7th day of September, 1950.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
CIVIL APPEAL NO. 33 of 1948

FATUMA BINTI MOHAMED BIN SALIM BAKHSHUWEN,
 AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN

Appollants

- v -

MOHAMED BIN SALIM BAKHSHUWEN

...

Respondent

In the Court
 of Appeal for
 Eastern Africa

No. 19.

Decree.

2nd March 1949

continued.

10 I hereby certify that the Bill of Costs of
 the Advocate for the above-named Respondent in the
 above appeal has been taxed and allowed at
 Shillings Three Thousand three hundred and forty
 four only (shs.3,344/- only).

Dated this 7th day of September, 1950.

JOYCE RUGG GUNN,
 Ag.Registrar,
 H.M.Court of Appeal for E.A.

No.20.

ORDER GRANTING SPECIAL LEAVE TO APPEAL.

AT THE COURT AT BUCKINGHAM PALACE

The 24th day of May, 1950

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

Lord President Mr.Secretary Henderson
 Lord Chamberlain Mr.Noel-Baker.

WHEREAS there was this day read at the Board a
 Report from the Judicial Committee of the Privy
 Council dated the 23rd day of May 1950 in the
 words following, viz.:-

30 "Whereas by virtue of His late Majesty
 King Edward the Seventh's Order in Council of
 the 18th day of October 1909 there was referred
 unto this Committee a humble Petition of (1)
 Fatuma Binti Mohamed Bin Salim Bakshawen (2)
 Aisha Binti Mohamed Bin Salim Bakshawen in the

In the Privy
 Council.

No.20.

Order granting
 Special Leave
 to Appeal.

24th May 1950.

In the Privy
Council.

No.20.

Order granting
Special Leave
to Appeal.

24th May 1950 -
continued.

matter of an Appeal from the Court of Appeal for Eastern Africa between the Petitioners Appellants and Mohamed Bin Salim Bakshawen Respondent setting forth (amongst other matters): that the Petitioners pray for special leave to appeal in forma pauperis to Your Majesty in Council against the Judgment of the Court of Appeal for Eastern Africa dated the 2nd March 1949 whereby that Court dismissed the Petitioners' Appeal against the Judgment of the Supreme Court of Kenya at Mombasa dated the 26th August 1948: that the Supreme Court granted the Respondent who was the Plaintiff in the action and who is the father of the Petitioners a declaration that two wakfs into which he had entered were null and void: that the principal grounds of Appeal are as follows:- (a) The Court of Appeal held that it was bound to follow the decision of the Judicial Committee of the Privy Council in the Indian case of Abdul Fata Mohamed Ishak & Ors. v. Hasamaya Dhat Choudhary & Ors. 28 I.A. 76 whereas (as the Petitioners submit) it should have held that Mohamedan law to be applied in East Africa or as between Arabs was not the same as Mohamedan law as interpreted by Judicial decisions in India; (b) The Court of Appeal held (it is submitted wrongly) that the aforesaid decision 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: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal in forma pauperis from the Judgment of the Court of Appeal for Eastern Africa dated the 2nd March 1949 or for such further and other relief as to Your Majesty in Council may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel in support thereof (no one appearing in opposition thereto) Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal in forma pauperis against the Judgment of the Court of Appeal for Eastern Africa dated the 2nd day of March 1949:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal."

In the Privy Council.

No.20.

Order granting Special Leave to Appeal.

24th May 1950 -
continued.

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HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of Kenya for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E.C.E.LEADBITTER.

Exhibits.E X H I B I T S

1.

1. - WAKF DEED, 15th OCTOBER 1946

Wakf Deed.

15th October
1946.

I, MOHAMED BIN SALIM BAKHSHUEN, of Mombasa, in the Colony and Protectorate of Kenya, being registered proprietor (subject however to such charges, leases and encumbrances as are notified by Memorandum hereunder written) of ALL THOSE pieces or parcels of lands mentioned in the SCHEDULES Nos. 1 to 15 hereunder, DO HEREBY declare, consecrate and dedicate, permanently the said pieces or parcels of lands as WAKF PROPERTIES and DO HEREBY transfer to myself as the FIRST TRUSTEE of the said WAKF (hereinafter called the "FIRST TRUSTEE" which expression where the context so admits shall be deemed to include the trustee or the trustees for the time being of this Wakf) ALL my right, title and interest in the said pieces or parcels of lands together with all the improvements being thereon as Wakf under the Mohamedan Sheria TO HOLD THE SAME upon the trust and subject to the conditions following :-

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1. All Government and Municipal rates, taxes and all charges for the upkeep of the said plots and buildings thereon shall be the first charge in the incomes of the said Wakf Properties and the trustee or trustees shall first pay out of the income, such rates, charges and taxes etc., as aforesaid before the application thereof in any way.

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 Mosquo, at Kibokoni, Konzi Mosque and Majod Takwa and by that time the trustee or trustees of the above

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mentioned mosques will take possession of the said properties in the event of the extinction of my future generations. I further declare that I hereby appoint myself to be the first trustee and after my death my children, Fatuma binti Mohamed bin Salim and Aisha binti Mohamed bin Salim aforesaid shall be jointly and severally trustees of the said Wakf properties should they or any of them dies the Wakf shall be administered by the one who remains alive for the time being and after his death the Wakf shall be administered by the person appointed by the surviving beneficiaries. The value of the said properties is estimated at Shs.79350/-.

The said property shall not be SOLD, CHARGED, MORTGAGED or GIFTED AWAY.

I hereby declare that I have taken possession of the Wakf properties as first trustee.

SCHEDULES REFERRED TO ABOVE

- 20 1. ALL THAT piece or parcel of land being plot No.338 of Section V situate in the Province of Seyidie at Mombasa Island containing point nought four nine of an acre (0.049) or thereabouts more particularly described and delineated on Deed Plan No.16845 attached to the Certificate of Ownership No.4429 and registered at Mombasa Coast Registry as No. C.R.3234/1, the value is estimated at Shs. Twelve thousand (Shs.12,000/-).
- 30 2. ALL THAT piece or parcel of land being Plot No.29 of Section VI situate in the Province of Seyidie at Mombasa Island containing point nought three five three of an acre (0.0353) or thereabouts more particularly described and delineated on Deed Plan No. 16984 attached to the Certificate of Ownership No.4435 and registered at Mombasa Coast Registry as No. C.R. 3240/1, the value is estimated at Shs.Twelve thousand (Shs.12,000/-).
- 40 3. ALL THAT piece or parcel of land being Plot No.180 of Section V situate in the Province of Seyidie at Mombasa Island containing point nought three seven nine of an acre (0.0379) or thereabouts more particularly described and delineated on Deed Plan No.21409 attached to the Certificate of Ownership No.8011 and registered at Mombasa

Exhibits.

1.

Wakf Deed.

15th October,
1946 -

continued.

- Exhibits.
1.
Wakf Deed.
15th October,
1946 -
continued.
- Coast Registry as No. C.R.6820/1, the value is estimated at Shs. Twelve thousand (Shs.12,000/-).
4. ALL THAT piece or parcel of land being Plot No.319 of Section V situate in the Province of Seyidie at Mombasa Island containing point nought two one of an acre (0.021) or thereabouts more particularly described and delineated on Deed Plan No.18342 attached to the Certificate of Ownership No.5030 and registered at Mombasa Coast Registry as No. C.R.3835/1, the value is estimated at Shs. Ten thousand (Shs. 10,000/-). 10
5. ALL THAT piece or parcel of land being Plot No.146 of Section VI situate in the Province of Seyidie at Changanwe-Miritini containing six point five four acres (6.54) or thereabouts more particularly described and delineated on Deed Plan No. 15494 attached to the Certificate of Ownership No. 3612 and registered at Mombasa Coast Registry as No. C.R.2314/1, the value is estimated at Shs. six thousand and five hundred (Shs. 6500/-). 20
6. ALL THAT piece or parcel of land being Plot No.107 of Section IIII situate in the province of Seyidie at Mtongwe containing six point six acres (6.6) or thereabouts more particularly described and delineated on Deed Plan No.8867 attached to the Certificate of Ownership No. 1600 and registered at Mombasa Coast Registry as No. C.R.374/1, the value is estimated at Shs. Six thousand (Shs. 6,000/-).
7. ALL THAT piece or parcel of land being Plot No.108 of Section XX situate in the Province of Seyidie at Mombasa Island containing nought point seven eight nine of an acre (0.0789) or thereabouts more particularly described and delineated on Deed Plan No. 32499 attached to the Certificate of Title dated 10th day of May 1933 issued by the Recorder of Titles at Mombasa and registered at Mombasa Coast Registry as No. C.R.8035/2 the value is estimated at Shs. Five thousand (Shs. 5,000/-). 30
8. ALL THAT piece or parcel of land being Plot No. 170 of Section XVIII situate in the Province of Seydie at Mombasa Island containing nought point nought three seven nine of an acre (0.0379) or thereabouts more particularly described and delineated on Deed Plan No. 29912 attached to the 40

Certificate of Title dated 21st day of November 1930, issued by the Recorder of Titles at Mombasa and registered at Mombasa Coast Registry as No. C.R. 5722/2, the value is estimated at Shs. Five thousand (Shs. 5,000/-).

Exhibits.

1.

Wakf Deed.

15th October,
1946 -

continued.

10 9. ALL THAT piece or parcel of land being Plot No. 128 of Section VI situate in the Province of Seyidie, at Changamwe Miritini containing four point one five acres (4.15) or thereabouts more particularly described and delineated on Deed Plan No. 15492 attached to the Certificate of Ownership No. 3408 and registered at Mombasa Coast Registry as No. C.R. 2110/1, the value is estimated at Shs. Four thousand (Shs. 4,000/-).

20 10. ALL THAT piece or parcel of land being Plot No. 383 of Section II situate in the Province of Seyidie at Mto Panga containing eighty nine acres (89) or thereabouts more particularly described and delineated on Deed Plan No. 13562 attached to the Certificate of Ownership No. 8066 and registered at Mombasa Coast Registry as No. C.R. 6876/1, the value is estimated at Shs. four thousand four hundred and fifty (Shs. 4,450/-). Subject to the rights of trees as endorsed on Certificate.

30 11. ALL THAT piece or parcel of land being Plot No. 210 of Section V situate in the Province of Seyidie at Changamwe containing by admeasurement point six seven of an acre (.67) or thereabouts more particularly described and delineated on Deed Plan No. 11957 attached to the Certificate of Ownership No. 7856 and registered at Mombasa Coast Registry as No. C.R. 6664/1, the value is estimated at Shs. One thousand (Shs. 1,000/-).

40 12. ALL THAT piece or parcel of land being Plot No. 185 of Section III situate in the Province of Seyidie at Mwando-wa-Panya containing by measurement point one two of an acre (0.12) or thereabouts more particularly described and delineated on Deed Plan No. 19117 attached to the Certificate of Ownership No. 5443, and registered at Mombasa Coast Registry as No. C.R. 4249/1, the value is estimated at Shs. five hundred (Shs. 500/-).

13. ALL THAT piece or parcel of land being Plot No. 175 of Section III situate in the Province of Seyidie at Mtawapa, containing point nine five of

Exhibits.

1.
Wakf Deed.
15th October,
1946 -
continued.

an acre (0.95) or thereabouts, more particularly described and delineated on Deed Plan No.19231, attached to the Certificate of Ownership No.5523, and registered at Mombasa Coast Registry as No. C.R.4329/1, the value is estimated at Shs. three hundred (Shs. 300/-).

14. ALL THAT piece or parcel of land being Plot No.172 of Section III situate in the Province of Seyidie at Mwando-wa-Panya containing point three seven of an acre (0.37) or thereabouts, more particularly described and delineated on Deed Plan No. 19105 attached to the Certificate of Ownership No. 5415, and registered at Mombasa Coast Registry as No. C.R. 4221/1, the value is estimated at Shs. Three hundred (Shs.300/-).

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15. ALL THAT piece or parcel of land being Plot No.180 of Section III situate in the Province of Seyidie at Mwando-wa-Panya containing point three five of an acre (0.35) or thereabouts, more particularly described and delineated on Deed Plan No. 19112 attached to the Certificate of Ownership No. 1999 and registered at Mombasa Coast Registry as No. C.R. 6808/1, the value is estimated at Shs. Three hundred (Shs.300/-).

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IN WITNESS WHEREOF I have hereunto subscribed my name this 15th day of October One thousand nine hundred and forty six.

MEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES

N I L

SIGNED BY THE SAID MOHAMED BIN)
SALIM BAKHSHUEN in the) (Signed in Arabic).
presence of) ???

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(Sd.) Chimanlal A. Patel,
Advocate
Mombasa.

LAND TITLES REGISTRY - COLONY OF KENYA
COAST DISTRICT, MOMBASA-REGISTERED NO. C.R.3234/8,
3240/4, 6820/4, 3835/4, 2314/4, 374/5,
8035/6, 5722/6, 2110/4, 6876/4, 6664/4,
4249/8, 4329/9, 4221/7 and 6808/7.

40

Presented 26.10.1946. (Sd.) R.A.HAWKINS.
Time 9 a.m. REGISTRAR OF TITLES.

(Seal)

Stamp Duty	Shs.800/-
do. 2 Counterparts ...	" 8/-
Penalty	" -----
Registration Fee	" 104/-
	<u>Shs.912/-</u>

Exhibits.

1.

Wakf Deed.

15th October,
1946 -

continued.

DRAWN BY:-
D.D.DOSHI,
Advocate,
P.O.BOX 549,
MOMBASA.

10

EAST AFRICA PROTECTORATE
WAKF COMMISSION
NO.10 of 1946
Produced by Ali Adam
Law Clerk,
Mombasa,

and registered at his request at the
Office of the Wakf Commissioners at
Mombasa in the presence of Mohamed
Said Kassim, Clerk to the Wakf
Commissioners.

20

Dated this 30th day of October, 1946

(Sd.) R.A.HAWKINS.
Secretary Wakf Commission.

Serial No.471.

2. - WAKF DEED, 8th MAY 1947

2.

I, MOHAMED BIN SALIM BAKHSHUWEN of Mombasa in
the Colony and Protectorate of Kenya being regis-
tered proprietor (subject however to such charges
leases and other encumbrances as are notified by
Memorandum hereunder written) of ALL THAT piece
or parcel of land containing by measurement six
point nought three (6.03) acres or thereabouts
known as Plot No.1048 (orig.No.145/3) of Section
VI situate in the Province of Seyidie at North of
Port Reitz more particularly described and deline-
ated on Deed Plan No.41376 attached to Certificate
of Title No. C.R. 9273 dated 18th day of March One
thousand nine hundred and forty seven and registered

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Wakf Deed

8th May 1947.

Exhibits.

2.

Wakf Deed

8th May 1947.

continued.

at the Coast Registry Mombasa as No. C.R. 9273/1 being desirous of consecrating the said piece of land as WAKF according to MOHAMED SHERIA DO HEREBY declare consecrate and dedicate permanently the said piece of land as WAKF PROPERTY and DO HEREBY TRANSFER to myself as the First Trustee of the said Wakf (hereinafter called the First Trustee which expression where the context so admits shall be deemed to include the Trustee or the Trustees for the time being of this Wakf) ALL my right, title and interest in the said piece or parcel of land as Wakf under the Mohamedan Sheria TO HOLD THE SAME upon the trust and subject to the conditions following :-

10

1. All Government and Municipal rates, taxes and all charges for the upkeep of the said plot and shall be the first charge in the income of the said Wakf Property and the Trustee or the Trustees shall first pay out of the income, such rates, charges, and taxes etc., as aforesaid before the application thereof in any way.

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2. The residue of the annual income after providing for payments as aforesaid will be distributed equally among the beneficiaries hereinafter mentioned viz. FATUMA BINTI MOHAMED BIN SALIM BAKHSUWEN and AISHA BINTI MOHAMED BIN SALIM BAKHSHUWEN 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 Property 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 said property in the event of the extinction of my future-generation, I further declare that I hereby appoint myself to be the first trustee and after my death, my children, Fatuma binti Mohamed bin Salim and Aisha binti Mohamed bin Salim aforesaid shall be jointly and severally trustees of the said Wakf Property should they or any of them die the Wakf shall be administered by the one who remains alive for the time being and after his death the Wakf shall be

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administered by the person appointed by the surviving beneficiaries.

Exhibits.

2.

The value of the said Property is estimated at Shillings Fifteen thousand (Shs.15,000/-).

Wakf Deed.

8th May 1947 -
continued.

The said property shall not be SOLD, CHARGED, MORTGAGED or GIFTED AWAY in any way whatsoever.

I hereby declare that I have taken possession of the Wakf property as First Trustee.

10 IN WITNESS WHEREOF I have hereunto subscribed my name this 8th day of May One thousand nine hundred and forty seven.

MEMORANDUM OF CHARGES LEASES AND OTHER ENCUMBRANCES

N I L.

SIGNED by the said Mohamed) (Signed in Arabic) ???
bin Salim Bakhshuwen in) i.e. Mohamed bin Salim
the presence of :-) Bakhshuwen.

(Sd.) D.D.Doshi
Advocate, Mombasa.

20

Stamp Duty	...	...	Shs.150/-
do. 2 Counterparts	...	...	" 8/-
Penalty	...	...	" -----
Registration	...	...	" 178/-

LAND TITLES REGISTRY - COLONY OF KENYA
COAST DISTRICT, MOMBASA - REGISTERED NO.
C.R.9273/3.

Presented 13/5/47
Time 9.49 a.m.

Sd. R.A.HAWKINS.
REGISTRAR OF TITLES.

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EAST AFRICA PROTECTORATE WAKF COMMISSION
No. 8 of 1947.

Produced by D.D.Doshi, Advocate, Mombasa.
and registered at his request at the Office
of the Wakf Commissioners at Mombasa in the
presence of Mohamed Said Kassim, Clerk to
the Wakf Commissioner, Msa.

Dated this 21st day of May, 1947.

Sd. R.A.HAWKINS.
Secretary Wakf Commission.

Serial No.482.

EXHIBIT 3.

Exhibits.

COPY OF LETTER, PLAINTIFF'S ADVOCATE TO
MR. MUSA KHAMISA.

3.

Copy of Letter
Plaintiff's
Advocate to
Mr. Musa
Khamisa.

5th April 1948.

To,
Mr. Musa Khamisa,
MOMBASA.

5th April 1948

Dear Sir,

Under instructions from my client Mr. Mohamed bin Salim Bakhshwan, I have to write you as follows:-

10

You know very well that my client as Trustee of Wakf gave you a Lease for 99 years of Plot No. 108 of Section XX, Mombasa. It appears that the said Wakf is not lawful and valid and consequently the Lease given to you in the basis of an invalid Wakf is also invalid.

My client proposes to set aside the said Wakf and incidentally the said Lease but he personally proposes to safeguard your rights by giving you a fresh Lease on the same terms and conditions of the present Lease at his own cost, in the event the said Wakf and the existing Lease are set aside by a Court of Law.

20

This letter is written to you in order to assure you that in any event, your present rights as Lessee will be completely renewed and that you will not be put to any additional cost out of pocket.

Your acceptance of the above proposal in writing within 48 hours of the receipt hereof will be much appreciated.

30

Yours faithfully,

(Sd.) T.J. INAMDAR.

TJI/AT.

COPY OF LETTER, PLAINTIFF'S ADVOCATE TO
BATULBAI SADULLAH.

Exhibits.

3.

9th April 1948.

To,
Batulbai Sadullah,
w/o Sheikh Ahmed Buksh.
MOMBASA.

Copy of Letter
Plaintiff's
Advocate to
Batulbai
Sadullah.

Dear Madam,

9th April 1948

10 Under instructions from my client Mr. Mohamed
bin Salim Bakhshuwien, I have to write you as fol-
lows:-

20 You know very well that my client as Trustee
of the Wakf gave you a Lease for 99 years commenc-
ing from 11.10.1947 of Plot No.170 of Section
XVIII, Mombasa. My client proposes to file a suit
in Court to set aside the said Wakf on the ground
that it is not valid in law as Wakf. If the said
Wakf is set aside, the Lease given to you as
30 aforesaid will also be set aside. My client, how-
ever, is willing and ready to completely safeguard
your rights and possession by giving you a fresh
Lease on terms and conditions similar to the Lease
you now hold. All the costs of expunging the
registration of the existing Lease and of making
and registering a fresh Lease on similar terms in
your favour will be borne by my client and the
said existing Lease in your favour will only be
expunged against presentation for the registration
of a fresh Lease on similar terms in your favour.
In the proposed suit, my client wants to safeguard
your existing rights completely at his own cost.

Your acceptance of the above proposal in
writing by noon on Saturday, 10th instant, will be
much appreciated. If you fail or neglect to com-
ply with this request and if any costs of litiga-
tion are unnecessarily incurred by you, my client
or the estate will not be liable to pay you the
same.

Yours faithfully,

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(Sd.) T.J. INAMDAR.

TJI/AT.

Exhibits.COPY OF LETTER, PLAINTIFF'S ADVOCATE
TO MR. MUSSA KHAMISA

3.

9th April 1948.

Copy of Letter
Plaintiff's
Advocate to
Mr. Mussa
Khamisa.

Mr. Mussa Khamisa,
Mombasa.

Dear Sir,

9th April 1948.

Under instructions from Mr. Mohamed bin Salim Bakhshuwani, I have to write you as follows :-

On 5th instant, I wrote you a letter on behalf of my client regarding a Lease to you for 99 years of Plot No. 108, Section XX, Mombasa, granted by my client to you as Trustee of the Wakf. Your said Lease contains a clause whereby it is agreed that if the Wakf deed referred to therein be held invalid, my client personally at his own expense will grant to you a Lease of the said premises on similar terms and conditions without payment of any premium and to indemnify you if there be any loss.

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My client proposes to file an action to set aside the said Wakf deed and in the event he succeeds, he is prepared to comply with all the terms and conditions contained in the said Lease. If the memorial registered as No. C.R. 9275/1 at the Coast Registry at Mombasa will have to be expunged, the same will be done against presentation of a fresh Lease granted to you personally by my client covering the same period commencing from 1.1.47 for a term of 99 years on similar terms and conditions as are obligatory on my client personally under the said Lease.

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It is the desire of my client to completely safeguard your rights and obligations under the present Lease if the Court sets aside the original Wakf.

It may be necessary to make you a formal defendant in the proposed suit but the Plaintiff will certainly safeguard all your rights so as to occasion you no cost of litigation.

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I shall be happy to know your views and comments in the matter by 4 p.m. on 12th instant.

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Yours faithfully,
(Sd.) T.J. INAMDAR.

TJI/GJV.

COPY OF LETTER, PLAINTIFF'S ADVOCATE TO
DEFENDANTS NOS. 1 and 2

Exhibits.

3.

13th April 1948.

Fatuma binti Mohamed bin Salim Bakhshuwon and
Aisha binti Mohamed bin Salim Bakhshuwon.
Mombasa.

Copy of Letter,
Plaintiff's
Advocate to
Defendants
Nos. 1 and 2.

Dear Mesdames,

13th April 1948.

Under instructions from your father, Mr.
Mohamed bin Salim Bakhshuwon, I have to write you
as follows :-

By one document dated 15.10.46 and another
dated 8.5.47, my client created Wakfs of several
properties detailed in the said documents for your
benefit and for the benefit of your children from
generation to generation in perpetuity and in the
event of the total extinction of your descendants,
for the benefit of my clients' nearest relatives
and failing them for the benefit of the three
mosques named therein. The documents create a
private family Wakf in perpetuity and the gift to
the nearest relatives of my client is uncertain as
to the objects and lastly, the gift to the mosques
is illusory and too remote. The said Wakfs are,
therefore, void from the inception.

The Court of Appeal for Eastern Africa in the
year 1946 in the case of Said bin Mohamed bin
Kassim El-Riyami versus The Wakf Commissioners
held that the Wakfs of this nature are completely
void. This case was followed by the Supreme Court
of Kenya Civil Case No. 40 of 1943 Kassam Suleman
Damji versus Husein Janmohamed and others. The
aforesaid Wakfs in your favour are void and my
client desires to obtain a Judgment of the Court
to that effect.

I call upon you to give your consent
for such Judgment. In spite of this request, if
any costs are unnecessarily incurred by yourselves,
you will be held liable for the same and the estate
will in no event reimburse you for the same. I re-
quest you to give your consent within 48 hours of
the receipt hereof authorising my client to obtain
such Judgment.

Yours faithfully,
(Sd.) T.J.Inamdar.

TJI/GJV.
