

Fatuma Binti Mohamed Bin Salim Bakhshuwem
and another - - - - - *Appellants*

v.

Mohamed Bin Salim Bakhshuwem - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1951**

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD OAKSEY
SIR LIONEL LEACH

[*Delivered by* LORD SIMONDS]

This appeal, which is brought from a judgment of the Court of Appeal for Eastern Africa affirming the judgment of the Supreme Court of Kenya at Mombasa, raises a question as to the validity of two wakfs which the respondent purported to create by deeds of the 15th October, 1946, and the 8th May, 1947. It is the respondent himself who challenges the validity of the deeds: the appellants, who are his daughters, seek to sustain them.

By the first of the deeds in question the respondent as the registered proprietor of certain pieces of land in the Province of Seyidie which were mentioned in the Schedule thereto consecrated and dedicated permanently the said pieces of land as wakf properties and thereby transferred to himself as first trustee of the said wakf all his right, title and interest therein as wakf under the Mohamedan Sheria upon trust to make the payments therein mentioned out of the income thereof and to distribute the residue of such income among the beneficiaries thereafter named, viz.: the appellants and the survivor of them and after the death of such survivor to their "children and the survivors of them during their life times and thereafter in the same way to their children and to the children of their children from generation to generation in equal shares". And the deed proceeded, "In the event there is no descendant 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 Kikoboni, Konze Mosque and Majod Takwa and by that time the trustee or trustees of the abovementioned mosques will take possession of the said properties in the event of the extinction of my future generations".

By the second of the two deeds the respondent purported to create a wakf of certain other lands in the same Province in precisely the same terms.

Within a short time of the execution of these deeds the respondent commenced the proceedings, out of which this appeal arises, claiming that they created a private family wakf in perpetuity for the appellants

and their descendants and were void *ab initio* and that the ultimate gifts in favour of the mosques were illusory and too remote. The appellants contended that the wakfs were legal and "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". The suit was heard by Mr. Justice Bartley in the Supreme Court of Kenya at Mombasa on the 12th August, 1948. It appeared from evidence given by one of the Wakf Commissioners (a body appointed under the Wakf Commissioners Ordinance of the Colony) who produced the Register of wakf deeds, that a wakf to beneficiaries and their children from generation to generation and finally to a mosque was a common kind of wakf and so was a wakf to children from generation to generation and then to nearest relatives and then to a mosque. The learned Judge, holding himself bound by the judgment of the Court of Appeal for Eastern Africa in *Said bin Mohamed bin Kassim el Riemi v. Wakf Commissioners for Zanzibar*, L.R. 13 E.A.C.A. 32, pronounced against the validity of the deeds.

The appellants appealed to the Court of Appeal for Eastern Africa (Sir Barclay Nihill, C.J.P., Edwards, C.J. and Bourke, J.) and their appeal was unanimously dismissed. The learned President of the Court observed that for the appellants to succeed they must establish by cogent and overwhelming argument that the decision of the Court in the Zanzibar case, to which reference has just been made, was wrong because the Court was not fully seized of the correct principles of Mohamedan law applicable to such a case. He conceded that, as in that case the respondent Commissioner was not represented before the Court, a great deal of high authority from unimpeachable sources might not have been cited to the Court, but thought that in any case no other conclusion could have been reached in view of the decision of this Board in the leading case of *Abdul Fata Mahamed Istak v. Russomoy Dhur Chowdry*, L.R. 22, I.A. 76. That case had decided that a perpetual family settlement made as wakf was not legal merely because there was an ultimate but illusory gift to the poor. In this view the other learned Judges concurred.

In the present appeal learned counsel has challenged the correctness of the judgment under review on a number of grounds. He has boldly urged that the decision in 22 I.A. should itself be reviewed in the light of material which, as he says, was not brought, or not adequately brought, to the knowledge of the Board. He has further contended that, whatever binding force that decision might (but for supervening legislation to which reference will be made) be regarded as having in the Courts of India, in East Africa the Courts must be guided by, and have regard to, the general principles of the laws of Islam according to which a wakf for the benefit of the donor's family is valid. And finally he has contended that in any event the present case is distinguishable from *Abdul Fata's* case in that here (1) the parties are of the Shafi sect and (2) the donor had divested himself of all beneficial interest in the property.

With the last contention their Lordships can deal in a few words. It is plain from the judgments of the Courts below and from the notes of the arguments which appear on the Record that the case proceeded on the footing that no relevant distinction upon this point could be made between Shafi and Hanafi law. This might not have been fatal, if it had been shown to their Lordships' satisfaction that there was such a distinction which had for some reason been overlooked. But this was not done and, as their Lordships think, could not have been done. Nor is it for this purpose relevant to the question of the validity of the wakf that the donor divested himself of all beneficial interest in the property. It might, as their Lordships understand, be an additional reason in some schools of law for impeaching the deed if he had not done so, but the fact that he has done so cannot save it if it is otherwise invalid.

Their Lordships turn to the first ground of appeal. With the assistance of learned counsel they have carefully considered not only the so-called leading case (*Abdul Fata's* case in 22 I.A.), but numerous cases decided

before and after that date in the Courts of India and the Privy Council. In particular they have examined what truly might be called the leading case in this branch of the law, *Bikani Mia's* case, 20 Cal. 116, in which Ameer Ali J. in a long dissenting judgment brought all the resources of his great learning to bear in support of the validity of such a wakf as that now under consideration. There is no doubt that that learned Judge and Mahomedan lawyers in general who thought with him were convinced that the judgment was wrong. But it appears to their Lordships that, whatever views might have been entertained in the 18th and earlier centuries, by the end of the 19th the trend of judicial opinion was firmly set in favour of the view that such wakfs were invalid, and that the conclusions to which the High Court of Calcutta and this Board came were inevitable. And in many cases after 22 I.A. the same conclusion was reached. As Lord Robertson said in 28 I.A. at p. 23, "It will be so" [i.e. the wakf will be valid] "if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the testator's family." If the result was not acceptable to Moslem sentiment, it was to the Legislature that recourse must be had. And so in the event it happened, though after some delay. For by Acts of the Indian Legislature of 1913 and 1930 it was enacted that just such wakfs as these should be valid.

Their Lordships are asked, nevertheless, to say that *Abdul Fata's* case was wrongly decided and the well-known authority of *Read v. The Bishop of Lincoln* is invoked to justify a re-examination and restatement of the principles of Mohamedan law. This course they cannot adopt. It may well be that, since the decision in *Abdul Fata's* case was given, Mr. Justice Ameer Ali and other learned writers have elaborated the views so fully propounded in *Bikani Mia's* case, but it is impossible to suppose that what has been written since that date or, having been written before it, has now for the first time been brought to the notice of the Board could have achieved what Mr. Justice Ameer Ali's vigorous dissent failed to do. Nor does it avail the appellant that in parts of the world outside India where Mohamedan law obtains, whether in Africa or in Asia, such wakfs as these are considered to be valid. Their Lordships are not satisfied of the general truth of this proposition; but, even if it were so, that would not be such fresh light as would justify the Board in reversing its previous decision.

Finally, the position in East Africa itself must be considered. In Zanzibar there had been a number of cases in 1910, 1911 and 1923 in which the validity of such wakfs as these was brought into question. And in these cases, though for particular reasons the wakfs were held to be invalid, it would be fair to say that the assumption was that apart from such reasons they were valid. But in 1946 in the Zanzibar case reported in L.R. 13 E.A.C.A., to which reference has been made, the Court of Appeal for Eastern Africa held itself bound by the decision in *Abdul Fata's* case and pronounced against their validity. As a result of this decision the Legislature of Zanzibar passed a Wakf Validating Decree of the 20th June, 1946 (No. 5 of 1946), which materially corresponded with the Indian Acts of 1913 and 1930, and as recently as April of this year, since this case was before the Court of Appeal, passed an Amending Decree which does not affect the question.

It was, however, in the Colony of Kenya that the wakfs now in question were created and in that Colony there was at the date of the judgment given by the Court of Appeal no ordinance affecting them. Their Lordships have been told that since that date an ordinance has been enacted in terms similar to those of the Indian enactments and the Zanzibar decree, but whether it has yet been brought into operation in the Province of Seyidie is not clear. Their Lordships must assume, and give their opinion upon the assumption, that the rights of the parties are to be determined without reference to any ordinance dealing specifically with wakfs.

The question appears first to have come before the Court in Kenya in 1907. In that year in the case of *Talibu bin Mwijaka v. Executors of Siwa Haji* 2 E.A.L.R. 33, Hamilton J., after referring to the Native Courts Regulations of 1897 and the Order in Council of 1902 said, "These points taken together define the law which is to be applied by this Court in such cases as that now before me: that is to say that while on the one hand the Court is 'to have regard to and be guided by the general principles of the Law of Islam', on the other, whatever respect it may pay to the decisions of the Privy Council, it is not bound by those decisions. The importance of this liberty left to the Court is peculiarly illustrated in the present instance as the law of wakf as originally understood by the Commentators and Mohamedan jurists has in India since the commencement of the latter half of last century been profoundly modified by the decisions of the Privy Council. A study of the question shows that while the Mohamedan law, uninfluenced from outside sources, permitted perpetuities and the erection of wakfs for family aggrandizement solely, the influence of English Judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such wakfs are illegal, and it has now been clearly established that a wakf for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication, are invalid.

The Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same as when the Min Haj was written in the 6th century of the Hejira."

Their Lordships do not doubt that the learned Judge was correct in saying that the rights of the parties are governed by Mohamedan law, though it would not appear that this, now at least, rests in any way upon the Native Courts Regulations. But they cannot accept the theory which appears to underly his decision, that the interpretation of Mohamedan law given by this Board in a series of cases is confined to that law as applied or administered in India. On the contrary it has not been suggested that, apart from the differences existing among the Shafi, Hanafi and other sects, which have no present significance, Mohamedan law is not the same in East Africa as in India. The appellants have themselves relied on its universality and invoke the text of the Koran and the writings of learned commentators who expounded the law not of East Africa or any part of it but of the whole Moslem world. In these circumstances their Lordships are as little justified in reviewing *Abdul Fata's* case in an appeal from the Courts of Kenya as they would be in an appeal (if that were now possible) from the Courts of India. In the case of *Said bin Mohamed v. Wakf Commissioners* 13 E.A.C.A., p. 32, already referred to, the learned and experienced Judges of the Court of Appeal for Eastern Africa did not doubt that upon a question of Mohamedan law decisions of the Privy Council in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships are of opinion that this was clearly the correct view and that it must prevail also in appeals from Kenya.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

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DELIVERED BY LORD SIMONDS

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