



REPUBLIC OF KENYA



**Khamis & 9 others v Aula & 3 others (Family Appeal 35 of 2018)  
[2022] KEHC 17157 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17157 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 35 OF 2018**

**JN ONYIEGO, J**

**DECEMBER 23, 2022**

**IN THE MATTER OF: THE WAKF OF MDIGO BIN TABIBU**

**AND**

**IN THE MATTER OF PLOT NO.2349/II/MN CR.NO.27313**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR DISSOLUTION OF THE WAKF**

**BETWEEN**

**HASSAN SOUD KHAMIS ..... 1<sup>ST</sup> APPELLANT**  
**SAID SOUD KHAMIS ..... 2<sup>ND</sup> APPELLANT**  
**MUNIRA SUDI HAMISI ..... 3<sup>RD</sup> APPELLANT**  
**AISHA SOUD HAMISI ..... 4<sup>TH</sup> APPELLANT**  
**AZIZA SOUD HAMISI ..... 5<sup>TH</sup> APPELLANT**  
**FATMA SOUD KHAMIS ..... 6<sup>TH</sup> APPELLANT**  
**ZUBEIDA SUDI KHAMISI ..... 7<sup>TH</sup> APPELLANT**  
**RUKIYA SUDI KHAMISI ..... 8<sup>TH</sup> APPELLANT**  
**SUDI ARUBAU MOHAMED ..... 9<sup>TH</sup> APPELLANT**  
**MWANAMVUA ARUBU ..... 10<sup>TH</sup> APPELLANT**

**AND**

**AULA ALI AULA ..... 1<sup>ST</sup> RESPONDENT**  
**MOHAMED JUMA MOHAMED ..... 2<sup>ND</sup> RESPONDENT**  
**ADAM MOHAMED OMAR ..... 3<sup>RD</sup> RESPONDENT**



*(Being an appeal from the judgement of the honourable Khamis Ramadhani –Senior Resident Kadhi, delivered on the 25th july,2018 in the Kadhi Court Civil Suit No.74 of 2017(Mombasa)*

## JUDGMENT

1. The 1<sup>st</sup> to the 8<sup>th</sup> appellant (original plaintiffs) were the children of the late Sudi Khamis Tabibu who was the son of Hamisi Mdigo Tabibu a son to Mdigo Bin Tabibu whose Wakf in respect to Lr2349/III/MN, Cr No 27313 is the subject of these judgment. By virtue of that relationship, the 1<sup>st</sup> to 8<sup>th</sup> appellant were great grand -children to Mdigo Bin Tabibu. The 9<sup>th</sup> and 10<sup>th</sup> Appellants (original 9<sup>th</sup> and 10<sup>th</sup> plaintiffs) were equally great-grand-children to Mdigo Bin Tabibu through their father Arubu Mdigo Tabibu.
2. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the trustees of the Wakf of Mdigo Bin Tabibu. Pursuant to several allegations of mismanagement revolving around the said Wakf, legal intervention through these proceedings was prompted.
3. Consequently, the appellants herein moved the Kadhi's court vide originating summons application filed on 30<sup>th</sup> march,2017,seeking orders inter alia; the respondents(defendants) to provide accounts of income of the property known as Plot No 2349/III/MN Cr No 27313 from 1993 to the date of the order; an order dissolving the Wakf Plot No 2349/III/MN Cr No 27313 and a share of the property be divided and registered in the names of the children of the late Sudi Khamisi who are grandchildren of Hamisi Mdigo Tabibu and great grandchildren of Mdigo Bin Tabibu and another share of the property be divided and registered in the names of Sudi Arubu Mohamed and Mwanamvua Arubu being the children of Arubu Mdigo Tabibu, grandchildren of Mdigo Bin Tabibu all being the beneficiaries of the Wakf of the Mdigo Bin Tabibu created on Plot No.2349 /III/MN Cr No 27313 since 1993;further orders by the court in respect of the Wakf and costs of the application.
4. Upon service of the summons, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their response through a replying affidavit sworn on April 27, 2017 thus defending the manner and style in which they were managing the estate and therefore opposing the prayer for dissolution of the Wakf. However, despite service of the summons, the 4<sup>th</sup> respondent did not enter appearance, file any response nor appear on the date scheduled for hearing.
5. By consent, on the October 24, 2017, parties through their respective advocates herein, agreed to dispose of the application by way of written submissions.
6. Having canvassed the application, the hon.Kadhi in his judgement delivered on July 25, 2018 dismissed the application with costs on the grounds that the application did not establish grounds for dissolving the Wakf of the late Mdigo Bin Tabibu neither did it adhere to Article 109 of the [Wakf Commissioner's Act](#).
7. Aggrieved by the judgement of the Kadhi's Court, the appellants herein appealed to this court through a memorandum of appeal dated November 23, 2018 and filed on November 30, 2018 thus citing the following grounds;
  - a. That the learned Kadhi erred in law and in fact in making a finding that the scribbles attached to the respondents' written submissions amounted to proper accounts, yet the same were not



properly on record, having been produced only in written submissions and clearly contrary to laws of production of evidence.

- b. That the learned Kadhi erred in law and in fact in giving due weight to the scribbles purported to be accounts of the Wakf despite his ambivalence of the veracity of the accounts as no supporting minutes of meetings or evidence of the distribution of the proceeds of the Wakf property was produced.
  - c. That the learned Kadhi erred in law and in fact in making a finding that complaints emanating from two families of the management of the Wakf by the trustees was not enough to demonstrate the need to dissolve the Wakf.
  - d. That the learned Kadhi erred in law and in fact in failing to appreciate the impeccable evidence and his own inference emanating therefrom, and instead found and/or arrived at a wrong and/or erroneous conclusion in dismissing the applicant's suit.
  - e. That the learned Kadhi erred in law and in fact by generally dismissing the suit.
8. The appellants urged the court to allow the appeal, set aside the judgement of the honourable Kadhi and substitute the same with an order allowing the dissolution of the Wakf.

### **Submissions**

9. The appeal was canvassed by way of written submissions. The appellants through their advocates Kenga & Company advocates filed their written submissions dated April 28, 2021. It was counsel's submission that the respondents failed to provide accounts of all income generated from the suit property from 1993 to date. That the attempt to sneak in unauthenticated documents purporting them to be the report on the accounts demanded at the submissions stage is against the law more particularly the [Evidence Act](#) hence reliance of such evidence by the hon Kadhi was an error.
10. Counsel further submitted that under order 37 rule 1 of the civil procedure rules, a Wakf can be dissolved and more specifically when the objective of the donor in the Wakf is not achieved. That the wakfed property is to benefit generations originating from the family tree of the donor. According to learned counsel, the [Wakf Commissioners Act](#) is clear in the manner in which transactions affecting a wakfed property should be handled. That section 14 of the said Act prohibits any contracts or agreements whose period is for over one year without sanction of the Wakf Commissioners.
11. Counsel further submitted that despite the court agreeing that the alleged transactions or contracts were being carried by the trustees, which is illegal, the learned Kadhi disallowed the appellants' claim on the reasoning that the complaints were representing a few members of the family yet that is not the rationale in deciding whether to dissolve a Wakf or not. That from the will that created the Wakf, it is clear that the suit property was initially Plot No 109/III/MN and that 45 acres out of the 81 acres were wakfed to cater for the male and female children of the donor and thereafter to their own children and to further children of the donor's generations.
12. Counsel submitted that it was not in dispute that the portions of land on the Wakfed property were sold and/or leased without the sanction of the Wakf Commissioners as the evidence of both parties captured transfers registered against the property. That the purchasers proceeded to erect structures as evidenced by scanned copies of photographs in page 37 to 47 of the record of appeal. That the wastage of the Wakf property against the intention of the donor of the Wakf are supposed to be stopped by dissolution of Wakf.



13. Counsel further submitted that no evidence was tendered to show that the appellants were represented by Mrs Tabu Ali for the Khamis family and Mrs Fatuma Harubu for the Harubu /Arubu family neither was their evidence that the purported representatives ever received any proceeds of the Wakf property on behalf of the appellants. According to learned counsel, the commissioners having not opposed the application, the hon Kadhi had no reason not to allow the same.
14. Counsel submitted that the intention of the creator of the Wakf was not being realized thus the same should be dissolved and all beneficiaries subjected to the normal succession process where the shares of each beneficiary shall be ascertained and distributed accordingly as per the Islamic law.
15. The respondents through their advocates Cootow & Associates filed their submissions dated May 19, 2021. It was submitted that the 1<sup>st</sup> to 3<sup>rd</sup> respondent were only bound by law to produce accounts of income of the property known as plot no 2349/MN Cr No 27313 upon conclusion of the matter. That the appellants were therefore required to first discharge their burden of proof which they failed. Counsel opined that the learned Kadhi found that the appellants had failed to prove their case and therefore the issue of production of accounts was rendered inconsequential.
16. In counsel's view, there is no dispute that the Wakf declaration is valid and does exist hence the respondents are the rightful trustees and administrators of the Wakf in question. That the appellants failed to demonstrate to the court how the respondents/trustees are mismanaging the Wakf to warrant dissolution. That none of the appellants is the head of the five families /beneficiaries of the Wakf as listed in paragraph 7 of the replying affidavit and reiterated in the judgement.
17. Counsel further submitted that the Wakf is intended to be perpetual and last forever hence the intention of the donor must be respected as much as possible taking into consideration of his or her objectives to the Wakf for the benefit of generations to come. That the appellants are championing such dissolution for their own selfish gain.

### **Kadhi's opinion**

18. The Chief Kadhi Alhmuhdar A.S Hussein sitting with the trial judge as an assessor gave the following opinion;

“In conclusion, it's my opinion that the trial court has failed to exercise its mandate to summon the commissioners to appear and give their testimonial evidence on the said Wakf where they would have heard a lot of information.

I m(sic) therefore of opinion that the retrial of the case could be the best remedy to this case, because the case was neither heard virtually nor physically, but only relied on written submissions by both parties which failed to gather enough information to reach a fair decision.”

### **Determination**

19. I have considered the record of appeal herein, rival submissions by both advocates and the opinion of the chief Kadhi. Issues that emerge for determination are:
  - a. Whether the parties were given the right to be heard.
  - b. Whether the Wakf should be dissolved
20. This being a first appeal, the duty of the court is to re-evaluate, re-asses and re-analyse the evidence on record a fresh and draw its own conclusion bearing in mind the fact that the trial court had the



advantage of listening to and seeing the witnesses testify before it and that it cannot review the decision of the trial court simply because it could have reached a different finding if it were hearing the matter for the first time. See the case of *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR where the court stated that;

“From these cases, the appropriate standard of review to be established can be stated in three complementary principles:

- i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

21. From the record of appeal, it is clear that there are numerous material facts that would have required witnesses testify on oath so that some of the issues raised via affidavit evidence and documentary evidence adduced through submissions would have been tested on cross examination and their probative value ascertained. A case revolving around disputed facts could not be resolved through submissions without calling witnesses and the makers of the documents attached to submissions. In advancing this position, I am guided by the holding in the case of *AHAD v CJE* [2019] eKLR where the court stated;

“Where, as here, facts appear to be contested, we see no reason why an opportunity should not have been availed for testing the conflicting facts as set out in the rival affidavits through cross examination.”

22. On the importance of fair hearing and procedural fairness, the court in the case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR stated;

“I have this to say it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time of disposition. Since the procedural directions are meant to serve substantial justice it follows therefore careful weight should be given to facially legitimate and bonafide reason for any procedural errors or omission in order to exercise discretion for the interest of justice.”



23. Although parties by consent agreed to dispose the matter through written submissions, the court had the authority to conduct a hearing through viva voce evidence. It's my finding that the parties herein were not given a chance to procedurally articulate their case before the Kadhi's court despite the matter being contentious. In my view, the trial process was not in compliance with the rules of evidence and procedure thus amounting to a mistrial. See the case of *SM v HGE* [2019] eKLR where the court stated;

“Where a trial process is wholly deficient or unsatisfactory, the appellate court should declare a mistrial, and order a retrial. An appellate court can order a retrial where the hearing by and the judgment of the trial court were so unsatisfactory as to amount to a complete mistrial. One other factor would be the unsatisfactory state of the trial court record (See *Chandaria v. Njeri* [1982] eKLR). The appellate court can also declare a mistrial where the proceedings were conducted by the trial court in an irregular manner (See *MMO v. FAH* [2017] eKLR). It would also be the case where the trial court failed to allow a party a chance to be heard on their defence as that would amount to a miscarriage of justice and a mistrial, and such would be a proper case to remand the matter to the trial court for the party to be properly heard (See *Jane Murugi Karanu v. Gabriel Gikonyo Ndirangu* [2008] eKLR). Where a trial court or tribunal determined a matter without giving an opportunity to either party to be heard (See *Duncan Kamau Kiriro v Japheth P Kimotho* [2013] eKLR.)”

24. Having found that the trial process in the Kadhi's Court amounted to a mistrial, I will not delve on the merits of the case in determining whether the Wakf should be dissolved or not.

25. Accordingly, I am inclined to allow the appeal and declare that the trial process in Kadhi Civil Suit No.74 of 2017(Mombasa) was a mistrial. Consequently, the judgement of the Senior Resident Kadhi Hon.Khamis Ramdhani delivered on July 25, 2018 is hereby set aside and the matter referred back for a full trial by way of viva voce evidence in Mombasa Kadhi's Court before another Kadhi other than hon. Kadhi Khamis Ramadhan.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 23<sup>RD</sup> DAY OF DECEMBER 2022**

.....

**J.N.ONYIEGO**

**JUDGE**

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