



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY APPEAL NO. 36 OF 2018**

**FATUMA MOHAMED SALIM SHIRAZY.....APPELLANT**

**VERSUS**

**FATMA AHMED ABDULLA .....RESPONDENT**

**(Being an appeal from the Judgment and decree of the Hon. Kadhi Mwambele delivered on 3.8.2018)**

**Coram: Hon. Justice R. Nyakundi**

**Sherman Nyongesa for the appellant**

**J. S. Kaburu for the respondent**

**JUDGMENT**

This is an appeal emanating from the Judgment and decree of the Kadhis court dated 3.8.2018 in Succession Cause No. 222 of 2017. The dispute between the appellant and the respondent was based on Wakf property known as **Plot No. Mombasa/Block XVII/661** at Tononoka area.

The trial court upon hearing both parties decreed as follows:

- (1) That the petitioner, one Fatuma Ahmed Abdulla be reopened as a joint Mustawalii (Trustee) to the Wakf property.**
- (2) That an order for the respondent Fatuma Mohamed Salim Shirazy to pay the petitioner half amount of what she used in renovating the Wakf property.**
- (3) I decline to grant prayer (a) of the petition dated 17.10.2017. being a family matter I will make no such orders as to costs. Right of appeal thirty (30) days.**

Being aggrieved with the above order, the appellant filed an appeal based on the Memorandum of Appeal dated 27.8.2018

- (1) That the Learned Kadhi erred in fact and law in making a decision and issuing orders on issues that were neither pleaded by the petitioner in the petition filed before the Court dated 17<sup>th</sup> October 2017 nor subsequently prayed for on the part of the petitioner in her submissions.**
- (2) That the Learned Kadhi erred in fact and law in appointing Fatma Ahmed Abdulla, the petitioner, as a joint Mutawali (trustee) to the Wakf Property in the Judgment made on the 3<sup>rd</sup> day of August, 2018 in complete disregard of the clear wishes and intention of the deceased who declared and consecrated the Wakf property.**
- (3) That the Learned Kadhi erred in fact and law when he appointed the petitioner as a joint Mutawali of the Wakf property in complete disregard of a valid and registered Wakf Deed which duly appointed Fatuma Mohamed Salim Shirazy, the respondent, as the Trustee inspite of the Petitioner being the elder sister and present in Kenya with the deceased at the time of the declaration of the Wakf.**
- (4) That the Learned Kadhi in the appointment of the petitioner as a joint trustee failed to appreciate that the Wakf Deed in most unequivocal terms provides for mechanisms for the appointment of the successive trustees and the decision of the**

Kadhi grossly undermines frustrates and renders superfluous such a clear and functional mechanism for appointment of trustees to the Wakf.

(5) That the decision by the Learned Kadhi in the appointment of the petitioner as a joint trustee heralds the undesirable and unfortunate separation of the Wakf Property and by extension the emergence of disputes in the management of the Wakf Property and subsequent enforcement of the Wakf deed.

(6) That the Learned Kadhi erred in fact and law by making the decision directing the respondent to compensate the petitioner half of the amount she allegedly used in renovating the Wakf property when no appropriate evidence had been laid before the court as to the costs and basis for such unsanctioned repairs that were largely calculated for the petitioner's benefit as a tenant in the Wakf property.

(7) That the Learned Kadhi erred in law and in fact in making a decision that completely disregarded the evidence adduced before him and the issues clearly identified by the parties for his appropriate determination.

Both counsel were scheduled to file submissions in the matter. However, though counsel recorded the court never had the advantage of the legal perspective.

After having dispassionately considered the grounds raised on appeal, the averments in the Memorandum, I point the starting point is revisit.

### **The evidence at the trial**

**PW1 – Fatuma Ahmed Abdalla**, a resident of Mandadara and Tononoka testified that she is a beneficiary with her younger sister in terms of the Wakf property created by her late mother.

According to the petitioner she implored the court to alienate the property into equal share of three apartments each. The petitioner averred that the separation would accord better management of the property, given the fact that the Trustee lives in the United States of America.

The respondent on the other hand **Fatuma Mohamed Shiraz** deposed in her evidence that she is a trustee of the Wakf property left behind by her late mother. As regards the property, the respondent told the court that it was never meant to be sold but be available for the benefit of other beneficiaries and to generate income, to meet the purposes and objections set in the Deed. Further, the respondent stated that the petitioner has been collecting money from the properties which runs into Kshs.150,000/= she denied abiding the property to a trustee that it is dilapidated as alleged by the petitioner.

After having viva voce evidence, the Learned Kadhi visited the site and his observations; “the property has been evacuated, and there are no tenants. The petitioner also lives in one of the apartments.

### **Principles**

Pursuant to the above appeal, it is mainly centered on the Wakf Deed as donated by the deceased. It is worth noting that at this stage to remind myself of the various definition of a Waqf as defined by legal scholars **Yahya {2008}**, defines **Waqf** *“as an asset that has been withdrawn from circulation so that its yield can be used for charitable purpose. The asset becomes in alienable.”*

According to **Madhumba Solanki**:

**“The literal meaning of the Waqf is determination in the legal context Waqf means detention of a property so that its produce or income may always be available for beneficiaries named therein or charitable purposes.”**

In the case of **Kazim v A Asgardar Ali, {1932}** in the court observed that Waqf means:

**“Dedication of some specific property for a pious purpose or secession of pious purposes.”**

It is important to note where the circumstances give rise to the determination of the property as a Wakf certain key condition precedents are pertinent and include the following:

- (a) **Permanent dedication.**
- (b) **Competency of the Waqif**
- (c) **Soundness of mind**
- (d) **Majority**

Waqif has also an element of inalienable to the person himself or any other person it cannot be sold or given away to anybody with regards to **Mutawalii** – under the Wakf Act it is nothing but a manager of a Wakf. He or she is neither a trustee or owner of the property.

In the case of **Ahmad Arif v Wealth {1970 2SCR 20} Tah** commissions the court held:

**“That a Mutawali has no power to sell, mortgage or lease Wakf property without prior permission of the court or unless that power is explicitly provided to the Mutawalii in the Waqif.”**

In my considered opinion, a Waqif in its whole is similar to the making of a Will as the principle in the case of **Vaghella v Vaghella** as adopted in the case of **Banks v Goodfellow {1870} LR 5QB 549** the court held:

**“A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object, that no disorder of the mind shall poison his affections, permit. the senses of right or prevent the exercise of his natural faculties, that no insane decision shall inference his will in disposing property and bring about a dispersal of it which if the mind had been sound, would not have been made.”**

In this appeal the central issues revolve, on appointment of **Mutawalii** and payment of monies spent on renovations. That the issues can be compromised and determined together. In the instant appeal the jurisdiction of the court is clearly spelt out in the following cases: **Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR**. The discretionary to interfere with a Judgment of another court should be exercised judiciously as propounded in the case of **Mbogo v Shah {1968} EA 93**.

In the sense that the trial court has acted on wrong principles or has taken into account matters it ought not to have considered and in the result arrived at a wrong decision.

It is apparent that in this appeal without adherence to each ground in the Memorandum of Appeal as preferred would be adequately answered by the formulated two grounds.

### **Ground 1**

On reimbursement of money expended to renovate the property. On the broad spectrum of the petitioners case, from the record she never tabled any evidence in respect of special damage claim to renovate the property. Parties are bound by their pleadings.

In the case of **Trust Bank Limited v Paramount Universal Bank Ltd & 2 others Nairobi Milimani HCCC NO. 2013 OF 2011** the court held inter alia that:

**“It is trite where a party fails to call evidence in support of its case, the party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.”**

Its apparent that the trial court failed to give due weight to the reasons and objectives of the Waqif. This methodology used by the petitioner to renovate, without consultation with the trustee is incompatible with the Waqif Deed. There was no inspection report to establish the nature of the repairs, the bill of quantities and the work done to repair the premises.

To be reimbursed can by itself defeat the letter and spirit of the Waqif.

I have found as a fact from the record that the respondent did not produce any receipts or documentary evidence at all to confirm the allegations of an expenditure of Kshs.400,000/= in the plaint dated 17.10.17. In the case at the trial only extract copy of design and drawings was exhibited.

In the case of **Provincial Insurance Co. EA Ltd v Mordekai Mwunga Nandwa v Son CA CA 179 of 1995** the court emphasized that:

**“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”**

The respondent was awarded a half amount of what she used in renovating the Waqif property. In my view I do not think its advisable for the trial court to start venturing into the Waqif Deed to allow one of the beneficiaries to lodge a claim on compensation notwithstanding that such matters are provided for in the Waqif.

It is clear from the Waqif Deed that one of the prevailing purpose is deal with payment of rates and maintenance cost from income earned from tenants. In this case the assessment made by the trial court was pegged on non-pleaded claim of Kshs.400,000/=. I do disagree with the trial court that the 1<sup>st</sup> respondent was entitled to recover some damages in respect of repairs and maintenance which were done without involvement of the appellant. In the circumstances, this ground of appeal succeeds.

### **Ground 2**

The appellant is aggrieved with the trial court decision to appoint the petitioner as **Mutawalii**. In one respect this is an easy question to answer as one has to look within the confines of the Waqif Deed.

I have in mind that the Waqif Deed symbolizes ‘**a Will**’ which is an expression by a person of his or her wishes intended to take effect stipulated in the Will itself, mostly if not all only at death.

In our circumstances one question to ask is whether at the time the trial court made the decision to appoint the second **Mutawalii**, it is shown to be in accordance with the Waqif Deed. The Waqif is the main instrument to direct and govern the operation and give effect to the intention of the donor.

In a well reasoned Judgment, the Learned trial Kadhi emphasized that the question of **Mutawalii** was done for the best interest of the Waqif by Trustee by virtue of continued residence in the United States of American.

In contrast, to the concerns raised by the petitioner, it was noted by the Learned trial Kadhi, that on visit to their property, he found the property well maintained despite the absence of tenants. In exercise of the courts discretion it ought to be dictated by determining the deceased best interest. The factors to me to be taken into account when deciding what course of action in a person's best interest is as specified in the Waqif instrument.

In a persuasive authority in **REP {2009} Ewile 163**, the court observed that:

**“For many but not all people, it is in their best interests, that they be remembered with affection by their family as having done. The right thing by their will. This is something which the Judge is entitled to take into account as a relevant consideration alongside other factors so as not to do anything incompatible with the testators best interests.”**

This substantive principle though directed at statutory wills applies **Mutatis Mutandis** to ‘Waqif’ instruments. According to Waqif subject matter of this appeal its textual content is coalesced in the institution of Waqf as observed by **Cizaka {1998 – 49}** where he stated:

**“Muslims needed an institution that would enable them to perform all three of these good deeds. This institution was a Waqif which can, indeed, assure on going recurring charity for many years, even, centuries, after the death of the founder.” It can finance scholars whose lasting works would benefit mankind for a long period and the sawab that accrue to that would be shared by the Waqifs founder who had provided for their sustenance in the first place.**

**Finally, the management of the Waqf can be entrusted to the offspring of the founder so that while on the one hand, careful and loyal management is assured, on the other, the offspring would pray for the deceased for, thanks to his Waqf, he or she is not a destitute.”**

The elementary rule of Waqif construction is that its ownership permanently changes from being a private entity to divine consecration. Even on appointing of **Mutawalii** his or her position is that of a custodian to sustain and fulfil its designated causes. In determining the underlying pillars in a Waqif, a purposive approach is therefore necessary to give effect to the purpose and key values underpinning the making of the Waqif. Therefore, a trial court has to keep an open mind while dealing with the interpretation of the Waqif Deed and must be consistent with the founders vision and mission as willed in the Waqif.

I would on this juncture pause the question, whether the trial court in exercising discretion of providing a second **Mutawalii** did so in excess of jurisdiction and outside the four corners of the Waqif. Though it may be true that in the circumstances a need had arisen for a **Mutawalii**, it is not for the court in this type of instrument to go deeply to vary or add a new term not expressly provided for in the Waqif.

First, the need for a **Mutawalii** must satisfy certain key criterion in which his legitimate appointment is weighed against that of a Trustee. The second impendent is to be found in the Waqif itself which govern the implementation of terms and conditions set out by the founder.

This means that if the person appointed by the appellant through a power of attorney had mismanaged the property to the detriment of the beneficiaries, it was incumbent upon the Kadhi to call for accounts as a good measure of accountability.

In this regard, the point to have been ventilated was the duty of the appointed trustee, to do all things that ensures the property is in a state of revenue bearing enterprise.

It is not deducible from the impugned Judgment of the Kadhi that the powers confirmed upon the appellant to manage the property for the best interest of its founder has been rendered in effective by reason of her residence in the United States to warrant appointment of the respondent as **Mutawalii**.

It must be emphasized that a trial court which visited the site and made valuable observations, was under a duty not to appoint the petitioner as a **Mutawalii** of the Waqif. The court was not told that enhancing the appointment of the respondent was a management strategy to enhance accountability and governance of the Waqif.

In addition, it is on record that the respondent had petitioned the court for the property to be subdivided into equal share against the wishes of the founder. More importantly, I take the view that the appointment of the second **Mutawalii** in the name of the respondent was not a matter before the court at the time. I believe it is not in dispute that the court has jurisdiction to determine matters so pleaded in the claim to ensure protection of the rights of the claimants.

The true and only true basis of intervention by the Kadhi would be the principles and cannons of interpretation of the Waqif Law and the instrument itself. The distinctive feature of the contested Waqif was structured along the lines stated by **Layish A C 1983** the Malik Waqf according to **WILLS and WAQFIYYAL**

**“That the end users choice redefined his or her family members and descendants material base by restricting their rights of access to and ability to dispose of certain properties while committing them to follow a pre-determined formula for showing**

**the revenues or use of these properties.”**

Second, the endower could choose that individuals or whole times of descent can or cannot benefit from the use and the endowed property **(Doumani {1998[7]}** It appears, that the Kadhi ignored that under context of the petition filed by the respondent, her intention was to have the property distributed equally with the appellant. She was also alleged to have occupied one of the apartments and no evidence of rent payment was shown to the court.

Taking all the relevant issues into consideration, the circumstances of this case had not ripened for an appointment of a second **Mutawalii** against the mandate of the Trustee whose jurisdiction was confirmed by the founder in the Waqif instrument.

Keeping the above principles in mind, the appellant has demonstrated that this is a fit case for interference of the trial court Judgment for taking into account an irrelevant factor and applying wrong principles and at the end of it all, arrived at an erroneous decision.

To recapitulate, it seems to me that on the basis in which the matter was filed before the Kadhi’s court, he certainly did not consider that the Waqif Deed has a trustee who is fit to manage the Waqif property as provided for in the instrument.

It cannot be said that the exercise of his discretion to appoint a second **Mutawalii** and reimbursement of repair and maintenance costs was judiciously and reasonably exercised to satisfy the terms and conditions in the Waqif.

I will allow this appeal, set aside the Judgment dated 3<sup>rd</sup> August 2018 of the Learned Kadhi with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Naliaka for Nyongesa for the appellant
2. Ms. Nabwana for Kaburu for the respondent