



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 334 OF 2004 (OS)

**IN THE MATTER OF: SECTION 2, 3, 37 AND 42 OF THE TRUSTEE ACT
CHAPTER 167 OF THE LAWS OF KENYA**

**IN THE MATTER OF: SECTION 2, 3, 10, 12, 16 AND 14 OF THE WAKF
COMMISSIONERS ACT CHAPTER 109 OF THE
LAWS OF KENYA**

AND

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT CHAPTER 21 OF
THE LAWS OF KENYA**

AND

IN THE MATTER OF WAKFS OF MWANATE BINTI MWIDAU

BETWEEN

MOHAMED BASSHEIKH..... APPLICANT

VERSUS

SHEIKH ALI MOHAMED MWINZAGU..... RESPONDENT

**Coram: Before Hon. Justice Mwera
Abubakar for the applicant
Maosa for the respondent
Court clerk – Chege**

R U L I N G

This Originating Summons (O.S) was filed on 28-4-04 under the following provisions of law: SS. 2, 3, 37 and 42 of the Trustee Act (Cap.167) and SS. 2, 3, 10, 12, 14, 16 of the Wakf Commissioners Act Cap. 109 the Laws of Kenya. The orders sought were laid out as per O.36 rr. 1. 6 Civil Procedure Rules and were in the main:

- a) That the appointment of Ali Mohamed Mwinzagu as trustee of the wakf (also spelt Waqf) of one Mwanate Binti Mwidau dated 23-3-2003 be revoked;

b) This court appoints Mohamed Basheikh and/or Abdulkadir Hassan Abdulaziz as the new trustee under the Trustee Act (Cap. 167) and

c) that the said Ali Mohamed Mwinzagu do pay into the court all the money he has received as trustee for proper accounting.

The Applicant Mohamed Basheikh then swore an affidavit appending such annexures as he deemed necessary. At the same time the applicant filed a chamber summons under O.39 rr. 1, 2, 3, 9, and O 36 r.12 Civil Procedure Rules and S. 3A Civil Procedure Act for orders that Ali Mwinzagu be restrained from acting as trustee of wakf properties of the said Mwanate Binti Mwidau and leasing or alienating any of them until this suit is determined. It was alleged in the grounds set out that Ali Mwinzagu had wrongly and illegally appointed himself as trustee of the wakf properties and that he was not a beneficiary thereof at all. That he had also disregarded the instructions stated in the wakf deeds and the relevant legal provisions. Further that the respondent was leasing out the said properties without regard to law and receiving monies therefrom for his personal use contrary to the wakf mandate. And that he was not keeping proper accounts of the received money at all.

Again there were annexures to the affidavit in support. However before any of the two (above) were heard the respondent Sheikh Ali Mohamed Mwinzagu filed and served a notice preliminary objection having four (4) points, which on being satisfied that they went to the root of the whole proceedings, namely the Court's jurisdiction, that notice was heard first. The points in it were:

1. that this suit was a nullity

2. that it was also subjudice in the light of the Kadhi's C.C. (S) 37/2003 where Mohamed Basheikh, the present applicant and others were the plaintiffs, suing Sheikh Ali Mohamed Mwinzagu (the respondent) and Sheikh Abdulkadir Hassan Abdulaziz whom the same applicant herein proposes in the Originating Summons to be appointed trustee in place of Sheikh Ali Mwinzagu.

3. that the Originating Summons did not fall in the form prescribed under O.36 Civil Procedure Rules (Mr. Maosa for the respondent did not appear to press this point much when the preliminary objection was argued) and

4. that the suit/O.S. is bad in law in that the reliefs sought cannot be granted under the provisions of law cited.

It should be added that the respondent filed a replying affidavit to the originating summons.

Mr. Maosa then proceeded to submit that all matters pertaining to wakf properties fall under and can only be entertained in whatever aspect under the Wakf Commissioners Act (Cap 109). That in case of a complaint as the one raised by the applicant in the Originating Summons it can only be investigated by the Wakf Commissioners by inviting and hearing all interested parties and thereafter rendering a decision. That such inquiry would cover appointment of a trustee or trustees and the way and manner in which the wakf properties or proceeds therefrom are being handled by the trustee. The court was further told that (with 2 properties involved Plots 431, 257) the respondent as the nearest relative is a proper trustee thereof unless the Wakf Commissioners say otherwise after an inquiry. That also that body can require the respondent to give account of the wakf property subject to the penalties set out under the law (Cap 109) and that thus this court has no jurisdiction to deal with that either.

Mr. Maosa in the alternative or further asked this court to stay proceedings here under S. 6 Civil Procedure Act in that there is already the K.C.C.37/2003 where the present applicant with other have sued the respondent with others (including the one here proposed trustee Abdulkadir Abdulaziz) And finally it was advanced that bringing this matter under the Trustee Act (Cap 167) was a fatal defect since the properties in issue are not ordinary trust assets. It was then added that this suit had been filed here by the applicant who had not consulted/informed other beneficiaries.

On the last point Mr. Abubakar's rejoinder was that the respondent had appointed himself a trustee over the assets in question without consulting other beneficiaries, who were said to be many (see the Chart at pp 11 of MB 1). That this court had unlimited jurisdiction in matters civil (and criminal) under S.60 of the Constitution and that even under S. 3A Civil Procedure Act this court would as well entertain this cause. That the definition of a Moslem (under S. 2 Cap 109) did leave room for a donor who was not a Muslim but professing Islam as a faith. What appeared the strongest plank in Mr. Abubakar's argument was that for a wakf property to fall under the management of the commissioners it must have been registered under SS. 10, 12 of Cap 109. That the properties herein are not shown to have been registered under those provisions of law and thus the commissioners cannot deal with them. That instead the properties are subject to normal and ordinary trusts under the Trustee Act (Cap. 167). The court was further told that the Wakf Commissioners Act (Cap. 109) did not provide for the process of appointing trustees and thus any question touching on that aspect needs come to this court. Mr. Abubakar was understood to say that the present wakf by Mwanate binti Mwidau was meant for public benefit (Wakf Khairi as opposed to Wakf Ahli) and not for an individual or a family. The counsel went over the wakf deeds (regarding the 2 plots in question) and remarked that the respondent fell far below the line of the descendants of the donor (Mwanate) to appoint himself a trustee. That the existence of another case was no bar to this one bearing the parties involved in either and the prayers sought.

The court then went over the pleadings as laid and the annexures in the light of the submissions. It then reminded itself of the approach required when dealing with a preliminary objection in any cause. While deprecating the practice of raising normal points to be argued in a matter as points of preliminary objection Sir Charles Newbold P. said in **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1969) EA 696, 701:**

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In this cause and in the light of the well known and much practised principle above this court's determination of the grounds raised in the respondent's preliminary point is as follows: (i) Jurisdiction: that this court lacks jurisdiction to entertain the whole suit/OS herein because the properties involved being subject to wakf of Mwanate Binti Mwidau, the way they are administered squarely falls under the Wakf Commissioners Act Cap. 109:

The general principle of law is that where a body exists under the law to deal with matters falling within that purview of law that body should be given all leeway and support do just that. This court has unlimited jurisdiction in all matters civil (and criminal) in Kenya but for whatever falls within Cap. 109 it shall let those institutions of bodies thereunder to handle that unless what is raised falls outside the province of those bodies/institutions. Law was not meant simply to look beautiful on the books. It must be allowed to follow the course set out. So if a property subject to wakf falls within the operations of Cap. 109, this court will let the commissioners appointed under that Act to handle the matter relating/involving that property.

The preamble to Cap. 109 reads:

"An Act of Parliament to make better provision for the appointment of Wakf Commissioners, to prescribe their powers and duties and to amend the law relating to Wakf property."

For whatever errors/corrections made in the pleadings, affidavits, annexures herein let them remain so until the determination of the originating summons. But for now this court is satisfied that Mwanate Binti Mwidau on 9.9.29 did "transfer as Wakf under Sheria" her right and interest in that parcel of land known as PLOT NO. 431 SECTION 1 NORTH OF MOMBASA ISLAND" to her children and down the lineage as she vowed. Prior to this on 10-4-1928 the same Mwanate had again by Wakf under Sheria transferred her PLOT NO. 257 SECTION V MOMBASA ISLAND to the same beneficiaries. In both cases she was the donor and original trustee and what followed should be subject to the trial. It can only

be said that subsequent trustees have been registered against this property in the proper manner.

But did these properties and particularly PLOT NO. 430 (also referred to as No.431?) become subject of Wakf under Cap 109? That Act says this in S.10:

“10. (1) The Wakf Commissioners shall keep in such form containing, such particulars as may be prescribed, a register of all property subject of a Wakf.

(2) Every trustee of property the subject of a wakf shall within two months from the date of the making of the wakf apply to the Wakf Commissioners to register it; -----“

The Act then stipulates how trustees of either type of Wakf (Khairi or Ahli) should go about applying to register the Wakf property. It appears from this Act that the procedure to appoint the trustees is not in the hands of the Commissioners who can nonetheless inquire into the constitution of a trustee of a Wakf (S.12). But having observed as above, is there evidence that the property (or properties) in question here ever come under the mandate of the Commissioners as per Cap. 109 by due registration? That evidence is not availed and thus this court is inclined to find that as things stand the properties in question do not fall within the province of the Wakf Commissioners. There appears no provision under Cap. 109 allowing the commissioners to deal with wakf property not registered under that Act. Indeed there appears to have been no application (S. 11 Cap. 109) to the Commissioners to take over the property of the late Mwanate and to administer the same. In such a situation parties interested in that property may access the High Court quite seemingly by any law applicable on matters affecting that property.

The Subjudice Rule: The case referred to while invoking S. 6 Civil Procedure Act is K.C.C.C. No. 37/2003 (It appears that there is even one more case before the Kadhi's court No. (S) 38/2003 which no party alluded to here). The record has it that on 12/5/04 the injunction application herein dated 28/4/04 came before Maraga Ag. J. for hearing. Apparently this court ran out of time and the learned Judge directed that fresh dates be taken in the registry. Interim orders were extended.

In a separate note attached to that chamber application and signed by His Lordship directed:

“The first limb of the prayer should be heard by oral evidence. Kadhi case should be heard first.”

Reading that chamber summons, reference is made to two cases KCCC No. 213/95 where Abdulkadir Hassan Abdulaziz seeks prayers including injunction against the present respondent Sheikh Ali Mohamed Mwinzagu in respect of plots of land other than those in question here. There is also reference to KCCC 38/2003 (above). It must have had something to do with determination of heirs to one Ahmed Mohamed Nasib (he falls in the progeny of Mwanate binti Mwidau). But then we have this KCCC 37/2003. In its amended plaint the applicant here with others seek declarations that they are the bona fide beneficiaries of the wakf of Mwanate binti Mwidau, Fatuma Ali and Sheikh Ali and that accordingly they have the right to appoint trustees of that wakf as against the present respondent and another. Which-ever of the particular case still pending before the Kadhi's Court, it must be heard first according to Maraga J's directions. So may that be the position.

Prescribed Form Under O. 36 C.P.R: This provision of law sets out the order to proceed by way of originating summons (O.S) in issues of estates as is the case here. But not much was placed before this court as to what was faulty with the form and thus it must be left to lie where it is. Relief Under the Cited provisions: This court has said enough above about the applicability of either Cap. 109 or Cap. 167 in the present cause and it looks like no more need be said.

In sum the preliminary objection as to the question of jurisdiction is rejected.

That on sub judice has been up-held on the basis of the directions by Maraga Ag. J. referred to above.

Orders accordingly.

Delivered on 29th September 2004.

J.W. MWERA

JUDGE