



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO. 141 OF 2016**

**IN THE MATTER OF THE ESTATE OF SELF ABDALLA MOHAMMED (DECEASED)**

**IN THE MATTER OF: SAID KHAMISI MBILI**

**ESHA AHAMAD HAMISI.....PETITIONERS**

**IN THE MATTER OF:**

**WAKF KHADIJA BINTI SULEIMAN EL BUSAIDY.....INTERESTED**

**PARTY/APPLICANT**

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

**Ondabu & Co. Advocates for the Petitioners**

**Kilonzo & Aziz Advocate for the 1<sup>st</sup> Interested Party**

**Kadima & Co. Advocates for the 2<sup>nd</sup> Objector**

**JUDGMENT**

The Applicant herein filed a Chamber Summons dated 27<sup>th</sup> September, 2019 in which he sought the following orders;

**1. Spent**

**2. That this Honourable Court be pleased to make an order that the Grant of Letters of Administration Intestate issued on the 15<sup>th</sup> Day of February, 2018 to Said Khamisi and Esha Ahamad Hamisi and confirmed on 14<sup>th</sup> March, 2019 be revoked (or annulled) pending hearing interparties of this Application and/or until further orders are issued by this Honourable Court.**

**3. That this Honourable Court be pleased to make such orders as may appear to be fit and convenient to meet the ends of justice.**

**4. That the costs of this Application be provided for.**

In Opposition to the said Summons for Revocation of Grant, the Petitioners/Respondents filled grounds of Opposition and a Replying Affidavit sworn by one **Said Khamisi Mbilu** on the 16<sup>th</sup> October, 2019 and filed on the same date. The 1<sup>st</sup> Interested party subsequently filed an Affidavit in opposition of the Petitioner's grounds of opposition and Replying Affidavit on the 13<sup>th</sup> day of November, 2019.

In support of the revocation is an affidavit sworn by **Sultana Fadhil** dated 27.09.2019 in which grounds are stated as follows:

**1. That, evidently, plot No. 7, Group V, Kilifi was registered in the name of KHADIJA BINTI SULEIMAN EL-BUSAIDY on 23<sup>rd</sup> January, 1941 and has never been transferred to a 3<sup>rd</sup> party.**

**2. That he is a beneficiary of the Wakf of Khadija Binti Suleiman Bin Hemed El-Busaidy as I am the granddaughter of Rukiya Mohammed Bin Hemed El-Busaidy, the sister of Khadija Binti Suleiman Bin Hemed El-Busaidy, who is the donor of the**

WAKF(Trust) property comprising of PLOT NO. 7, Group V Kilifi which has also named beneficiaries and whom are not petitioners herein.

3. That I am aware that the position as regards Wakf Property is that the same is managed by a trustee as per the intentions of the donor of the Wakf for the benefit of the Beneficiaries as opposed to an Estate which is administered by an Executor or Administrator for distribution to the heirs.

4. That at the time of her death SHARIFFA MOHAMED BUSAIDY did not have any assets registered in her name to form part of an estate but was a beneficiary of a share of the Wakf of her late sister KHADIJA BINTI SULEIMAN EL-BUSAIDY.

5. That in High Court Civil Case No. 846 of 1995, the court appointed Zeyane Mohamed Omar and Fatma Mahmoud Fadhil Al-Bakry as the Trustees and the suit property herein.

6. That the petitioners herein have misled the court by claiming that ESHA AHAMAD HAMISI and SAID KHAMISI MBILU are the widow and son respectively to SEIF ABDALLA MOHAMED yet the deceased did not have any sons and he only had one daughter named WAFAA who is still alive.

7. That it is interesting that WAFAA, the said surviving daughter of ABDALLA SEIF MOHAMED has not been included in the succession matter and the petitioners have failed to mention her or seek her consent.

8. That SEIF ABDALLA MOHAMED was only a beneficiary of the WAKF (Trust) property who was only entitled to a share of the income during the lifetime as provided at Clause 3 of the Wakf Deed which state;

‘.....and the fifth part shall be distributed equally among the children and adopted child of my late brother Seif Bin Mohamed El-Busaidy, named Fatuma, Harith, Abdalla and Rukiya and upon the death of any of the said beneficiaries his or her share shall be divided equally among his or her sons and daughters and their issue per stripes.’

The Petitioners herein **Said Khamisi Mbilu** and **Esha Ahamad Hamisi** did file grounds of opposition and a Replying affidavit and deposed as follows:

1. That the Interested Party/Applicant is and has no legal capacity to act on its own in absence of the registered trustees.

2. That deponent of the supporting affidavit to the summons for revocation (Sultana Fadhil) is neither a heir nor a dependent of the Estate of Seif Abdalla Mohammed and has no interest in the Estate capable of supporting an Application for Revocation of the Grant.

3. There is no Wakf created over the property forming part of the Estate of Seif Abdalla Mohamed.

4. That grounds in support of the summons for revocation of the grant are frivolous and amount to an abuse of the process of the court as Sultana Fadhil who alleges to be the beneficiary of the Wakf and the deponent is support of the summons for revocation herein acted as an advocate for Abdalla Seif Mohamed in Probate Cause No. 196 of 1989 over the subject matter of the Estate of Shariffa Mohamed Busaidy which property has now descended to the Petitioners.

### **The objectors case**

The objector's case was based on the testimony of **Sultana Fadhil (PW1)** who adopted two affidavits one dated 27.9.2016 as the basis of his evidence. The second Affidavit is dated 13.10.2019 in response to the Petitioner's application. He further informed court that the late Abdalla Seif was his mother's first cousin who had one daughter called Wafaa. He stated that he did not see her name as a heir to the estate. She did not also give any consent to the application for making of the grant. He confirmed that the Abdalla Seif did not have a son called Said Hamisi who is one of the Petitioners. He further stated that Wakf property was included as an asset of the estate and that in the Wakf he is the only beneficiary of the Trust. He stated that the Wakf document No. 13 is of 3.11.1942 and Wafaa is the beneficiary of the Wakf and that the Wakf is administered by the Trustees and is not inheritable. **Mr. Kilonzo on behalf of the 1<sup>st</sup> Interested Party** submitted that the moment the late Khadija Binti Suleiman El-Busaidy donated her Mnarani Farm Plot No. 7 Group (V) Kilifi Creek (LT.45 Folio 475) as a Wakf property, the same ceased to become personal property and changed its legal status to the Wakf of Khadija Binti Suleiman El-Busaidy. **Mr. Kilonzo** also submitted that the evidence of the Land Registrar was clear that the said property had been consecrated as a Wakf property on the 3<sup>rd</sup> day of November, 1942 and that the said property could not therefore form part of the Estate of the late Abdalla Seif Mohamed who was a beneficiary of the Wakf as it is still registered as a Wakf.

**PW3 the Land Registrar Mombasa County** prepared a report dated 18.06.2020. He informed court that the Wakf in question was registered on 3.12.1942. The Wakf was meant to benefit Sharifa, Rukiya, Katathuma and Mwana Wa Shee, all daughters of Mohamed Hemed Busaidy. He confirmed that the second schedule of the properties are located in Kilifi and that both properties cannot be inherited. The Report produced in court clearly gave a Historical registration account of the Wakf property in question. His evidence based on the historical account of the property's registration was that on 23<sup>rd</sup> January, 1941, a conveyance dated 23<sup>rd</sup> January, 1941 to Khadija Binti Suleiman El-Busaidy was registered as LT. IV, Folio 458/14. His report further stated that on 3<sup>rd</sup> December, 1942, a Deed of Wakf dated 3<sup>rd</sup> November, 1942 by Khadija Binti Suleiman Bin Hemed El-Busaidy in consideration of her natural love and affection of her sisters, Shariffa, Rukiya, Kalathum and Mwana Wa Shei all daughter of Mohamed Bin Hemed El-Busaidy consecrating Plot No. 7 Group V, Kilifi among others to the wakf was registered as LT IV, Folio 459/15.

That on 28<sup>th</sup> May, 1946, and Indenture dated 20<sup>th</sup> May, 1946 between Khadija Binti Suleiman Bin Hemed El-Busaidy as Trustee of the settlement of Wakf made by her virtue of a Deed dated 3<sup>rd</sup> November, 1942 of one part and Gulamhussein Mohamed (Tenant) was registered as L.T. IV, Folio 459/16. PW1 further stated based on his Report that **SHARIFFA MOHAMED BUSAIDY** was one of the **TRUSTEES** of the Wakf of Khadija Binti Suleiman Bin Hemed El-Busaidy and **NOT** the sole proprietor of Plot No. 7 Group V, Kilifi and thus the Grant of Probate and Letters of Administration intestate mentioned above in respect of Shariffa Mohamed Busaidy and Seif Abdalla Mohamed respectively was erroneously registered against the title in respect of Plot No. 7 Group V, Kilifi and thus should be expunged from the records and gazette Notice No. 5340 of 21<sup>st</sup> June, 2019 countermanded. That a perusal of the records, the surviving remaining Trustee of the Wakf as per the record is **FATMA MAHMOUD FADHILI**.

**Mr. Kilonzo on behalf of the 1<sup>st</sup> Interested Party** proceeded to file written submissions on the 24<sup>th</sup> day of December, 2020 in support of its application for summons for revocation or annulment of grant dated 27.09.2019. It was **Mr. Kilonzo's submission** that the grant confirmed on 14.03.2019 was obtained fraudulently and through concealment or non-disclosure of material facts. That the Petitioners did not disclose that the subject property in the succession was a Wakf property and not personal property and therefore not capable of being inherited. **Mr. Kilonzo** relied on the authorities of **IN RE ESTATE OF JULIUS NDUBI JAVAN (DECEASED) 2018 eKLR**, **IN RE ESTATE OF LESINKO SOKORTE KIRAYIO (DECEASED) 2017 eKLR**, **IN RE ESTATE OF CCBH (DECEASED) 2017 eKLR** and that of **IN THE MATTER OF THE ESTATE OF ISHMAEL JUMA CHELANGA (DECEASED) 2002 eKLR** in support of his Submissions for revocation of the said grant.

#### The 2<sup>nd</sup> Interested Party's Case.

**Mr. Francis Kadima Osundwa** PW2 testified and adopted his affidavit sworn on 15<sup>th</sup> August, 2019. His affidavit was in support of the revocation of the Grant. He also relied on his list of documents of the 4<sup>th</sup> of February, 2020. He informed court that he knew the two Petitioners through Kituo Cha Sheria to offer probono services. He stated that he was instructed that Esha was the widow and Said was the son of the Deceased. **Mr. Kadima** told court that he was instructed to recover the land in question. **Mr. Kadima** informed court that he assigned the file to Mr. John Saisi an advocate of 25 years standing and that Succession Cause No. 1 of 2016 was the full work of his office. That there was no input from the counsels on record. **Mr. Kadima's** evidence was that on the date of confirmation of grant he never sent Mr. Saisi to represent his Law Firm. His testimony was that he could not have done that since he did not have a practicing certificate. That one Mr. Saisi did not inform him of his attendance. **Mr. Kadima** also informed court that he called for the copies of the proceedings and that the record does not indicate that the Petitioners were present and that the record was not clear. He told the court that he attended disciplinary proceedings and that they partially succeeded as he was allowed to be an inhouse advocate, he was not to appear in court nor sign any documents. That leave was granted by court allowing him to give evidence as an Interested Party and as an Officer of the Court. His testimony was to the effect that the person who appeared in court on 24<sup>th</sup> march, 2019 SAISI AFWOHOH MAKOKHA had no authority to appear on behalf of his Law Firm **KADIMA & COMPNAY ADVOCATES** as he had been struck off the Roll of Advocates on 3<sup>rd</sup> September, 2007.

**Mr. Kadima** at the conclusion of the matter filled his written submissions dated 31<sup>st</sup> December, 2020 in support of the application for revocation/annulment of the Grant. He Submitted that the Grant confirmed was defective in substance since the same was obtained fraudulently as he had not given permission to the said Advocate who was on record. He submitted that the Petitioner fraudulently obtained the Grant and therefore cannot give them any right to the Wakf Property of **KHADIJA BINTI SULEIMAN BUSAIDY**. **Mr. Kadima** in his Submissions relied on the Authorities of **MOTEX KNITWEAR LIMITED VS GOPITEX KNITWEAR MILS LIMITED NAIROBI HCCC NO.834 OF 2002** citing the case of **AUTAR SINGH BAHRA & ANOTHER VS. RAJU GOVINDJI HCCC No. 548 OF 1998** and that of **TRUST BANK LTD VS. PARAMOUNT UNIVERSAL BANK LTD & 2 OTHERS NAIROBI HCCC NO. 1243 OF 2001**.

**Mr. Kadima** also placed reliance on Section 76 of the Law of Succession Act which provides for revocation of a Grant.

#### The Petitioners'/Respondents' Case.

The Respondents sworn evidence challenged the objector's claim in rebuttal that they are widow and son of the Deceased who were dependants of the deceased at the time of his demise on the 2<sup>nd</sup> August, 1994. To the extent of asserting the correct position, **Mr. Ondabu for the Petitioners'/Respondents** averred that the only property known to them is a farm at Mnarani registered as **PLOT NO. 7 GROUP (V) KILIFI CREEK (L.T. 45 FOLIO 475)** measuring approximately 172 acres. That both Petitioners/Respondents averred that they all resided with Abdalla Seif Mohamed (deceased) on the premises prior to his death.

According to **Mr. Ondabu** and particularly in reference to the Application dated 18<sup>th</sup> October, 2019 where **FRANCIS KADIMA MULAMA OSUNDWA** sought to be enjoined as the 2<sup>nd</sup> Interested and the reasons advanced on the face of the Application being that the grant was obtained fraudulently by making a false statement or by concealment from court of some important material fact. **Mr. Ondabu's Submissions** in respect to the testimony of PW2 was that he sought to run away from his work and that his office was fully responsible for the work according to his testimony. He asserted that there is nothing in his testimony which describes any form of fraud or conspiracy on the said matter. According to **Mr. Ondabu**, Clause 6 of the Standards of Professional Practice and Ethical Conduct requires that there should be no conflict of interest. That the Application dated 18<sup>th</sup> October, 2019 chose to support the Applicants to revoke the Grant without discussing it with his clients. He avers that there is nothing on record in his testimony to suggest he made an effort to discuss with his clients the matters he has raised.

According to **Mr. Ondabu** for the Respondents, the Applicant has not proved the existence of a wakf that is recognized under the Wakf Act (Cap 109). The Respondents in rebuttal to the evidence and Affidavits filed by the Applicants relied on the Authority of **IN RE-ESTATE OF BAKARI MADI CHOSI (2016) eKLR** asserting that the evidence of PW1 was not water tight in convincing the court that there indeed existed a Wakf, the Respondents averred that they expected the evidence to assist the court in determining whether: -

#### *1) The donor had legal capacity to consecrate a Wakf*

2) *The Property must be owned by the donor free from encumbrances or charges*

3) *It is for charitable purposes.*

4) *The beneficiaries must be specified.*

5) *It's a transfer from the owner to the beneficiaries must be immediate not conditioned on time or death of the donor.*

6) *It must comply with the Law of Kenya.*

### **Analysis and Determination.**

I have carefully considered the application, the evidence tendered in court, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence, I take the following view of the matter. The issues for determination herein are:

**a) Whether or not the Applicant lacks locus standi to institute these proceedings.**

**b) Whether or not the Grant of Letters of Administration issued to the Petitioners should be revoked.**

**c) Whether or not Mnarani Farm Plot No. 7 Group (V) Kilifi Creek (L.T. 45 Folio 475 is part of the Estate of Seif Abdalla Mohamed (Deceased)**

The first point for determination is whether or not the Applicant herein lacks locus standi to bring this application as alleged by the Counsel for the Respondents in his submissions.

*Locus standi* is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

### **The law**

*Locus standi* of the Petitioners has remained alive issue throughout these proceedings and is accordingly one to be considered by the court. Following the death of the deceased his estate will either be administered by a valid will or grant of letters of Administration intestate. Section 11 of the Laws of Succession Act provides for the formulation of the making of a valid will as a necessary legal instrument in which the deceased conferred during his lifetime the estate to an executor. The burden of proof of existence of a valid will made by the testator is vested by the person who alleges to rely on that purported will. Similarly, the court also recognizes all wills made in consonant with the provisions in terms of Section 8 & 9 of the Act.

I must also indicate that the law also recognizes intestate succession which clearly deals with property of the deceased person vested in the administrator or legal representative to the estate. In this category the operation of the law focuses on descent or hereditary succession, whereby a man on the death of his ancestor acquires his estate by right of representation as his heir at law. The heir therefore becomes the person who inherits the property from the deceased. This is in accordance to Section 29 of the Law of Succession Act which defines dependants or heirs who may claim inheritance to the estate of the deceased and are conclusively designated.

Going by the broad interpretation any applicant desirous of an inheritance must bring himself or herself within this definition. Intestate succession as the law applies to estates of the deceased persons who left no written will or will disposing off their property, thereby requiring the court to issue Grants of Letters of Administration.

In this regard, courts must bear in mind that intestate proceedings deal with devolution of both real and personal property and is co-existence with the word succession. Generally speaking the making of the grant is for the next of kin or dependants of the deceased to succeed in inheriting the personal and real property. It has highly been observed that in a majority of intestate succession the controversy revolves around the meaning of legal heirs and next of kin. It is therefore necessary from the outset to define and recite in which class of dependants under Section 29 of the Act the Petitioners as to the nature and degree of dependency apply. It is therefore arguable that our statute provides the scheme touching on the order of distribution, amongst the spouse if the deceased was in a monogamous marriage or spouses in the event of a polygamous union, followed with a child or children if any such be or otherwise to the next kindred to the deceased in equal degree is the conceptual framework of succession. **[See provisions under section 35,36,37 38 & 40 of the Laws of Succession Act].**

The principle of lineal present in the first canon under Section 29 [a] of the Succession Act to that extent provides; the parentelic method of computing heirs to the intestate estate. In the instance case the inquiry involves as to who are the heirs of an intestate estate of the deceased on when his estate devolves. Once again the court has to make reference to the lineal descendants such as the wife, or wives or family wives, children or child whether maintained by the deceased immediately prior to his death. It goes further to include parents, step parents, grandparents, grandchildren etc.

I presume that whether under the law of succession or Islamic law in order to succeed to an estate for an inheritance the person claiming to the heir are to be related by blood to the ancestor leaving the estate. Within this context is the relationship of individuals by blood known as consanguinity by descent and affinity which is a connection formed by marriage. To buttress their argument as heirs to the estate of the deceased under Section 29 the Petitioners ought to have confronted the issue as expressly stated in Section 3 of the Laws of succession Act.

It is therefore arguable and legally so that our Act provides the model on the order of distribution amongst the dependants of the deceased. It is this definition on consanguinity and affinity which is a prelude to establish *locus standi*. In **B.V Narayana Reddy vs the estate of Kamataka** air [1995] KAN 99, 106 *locus standi* requires a right to be heard a person must have sufficiency of interest to sustain his standing to sue in a court of law. For a party to have *locus standi* in a matter he ought to show that his own interest particularly has been prejudiced. Order 1 rule 8 of the Civil Procedure Rules authorizes the bringing of a representative suit where there are persons having the same interest in the said suit or property. [*England Revenue Commissioner –vs- National Federation of self-employed and small business Ltd 1981 2WLR 2022. Campos and another –vs- De Souza 15 eKLR 87*]. Under the laws of succession or Islamic law essentially there is no conflict on who are the right beneficiaries to an estate of the deceased. All in all, the first hurdle was for the petitioners to satisfy the criteria, they have a right of inheritance and the deceased left free property as defined under section 3 of the laws of succession Act capable of being distributed to the heirs. It's the burden to be borne by the Petitioners to demonstrate that by approaching the probate court for grant of letters of Administration they were dependants of the deceased and there existed free property to devolve to any one of them or other beneficiaries for that matter. From the record the court acting on misrepresentation and non-disclosure of fundamental material went ahead to order for the making of the Grant in favour of the petitioners without ascertaining the legal tenured of the certificate of title allegedly which formed the subject matter of the succession. As canvassed by both the 1<sup>st</sup> and 2<sup>nd</sup> interested parties it is crystal clear that the land in question had been conveyed and transferred as a wakf therefore alienating it from distribution to individual heirs to the estate. It must be noted that this is a case under the wakf Act and not the provisions in the Succession Act for appointment of a legal representative to require of him/her to administer the estate of the deceased. A glimpse look at the administration of the wakf, the process starts with appointment of an executor or trustee by the donor to administer the immovable estate and to proceed to promote the activities as provided for in the wakf deed.

As a matter of fact, and evidence the interest being sought to be protected by the Petitioners had been ousted by the creator of the wakf in devolving the property to other members of the society. The purported legal representation set to be conferred to the petitioners under Section 83 of the laws of Succession Act in its character and scope was in violation of the principle of *locus standi*. It's not disputed that the subject matter of mitigation is no longer traceable directly or indirectly to the petitioners who filed the succession proceedings. In **INEC v Ogbadibo local government council**, [2014] lpelr-22640 [CA] 1 @24.25 where the court stated as follows;

***Locus standi*, traces its roots to latin language which means “place of standing”. In its expounded legal form, *locus standi* denotes the legal right or capacity of a person to institute an action in a court of law when his right is trampled upon by somebody or authority. Further in **Adesanya v President of Nigeria** [1981] 5 SC 1 @174. Ombaseki JSC observed that;**

***Locus standi* or standing to sue is an aspect of justiciability and as such the problem is surrounded by the same complexities and vagaries inherent unjusticiability. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court not on the issue he wishes to have adjudicated”**

Clearly in the instance case the petitioners are neither trustees nor executors of the wakf deed of the subject matter of the suit in the probate court. The legal right in the subject matter of the suit stopped when the donor on 3<sup>rd</sup> December 1942 by a deed of wakf of Khadija Binti Suleiman bin Hemed El-busaidy who vide a conveyance dated 23<sup>rd</sup> January, 1941 consecrated Plot No. 7 group V Kilifi as a wakf. In any respective view I think the court as correctly constituted had no jurisdiction nor judicial power to entertain the proceedings in the making of the Grant of representation for the benefit of the petitioners to the estate of the deceased. It is trite that for an individual to have a *locus standi* he must have an interest either vested or contingent in the subject matter before the court. A belief in a right however strongly felt the law generally prohibits a particular conduct to litigate on a subject matter which the presumed possessor of a right gives him/her no *locus standi*. By applying the case law in relation to the issues raised preceding to the grant of letter of Administration the court at the first instance failed to take into account of the nature and specific character of the subject matter interest underpinning the cause of action. Am of the considered view that the absence of recognition and its impact on the petitioner *locus standi* stood as a bar to institute any proceedings against the estate of the deceased. It's settled law that where proceedings are instituted and a party instituting the same as no *locus standi* the said proceedings are invalidated. I will adopt those words by lord Denning in the case of **McFov v U. A. C** [1961] 3 All E R 1169 that;

***“if an act is void then in law it is a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”***

As for me and my conclave of legal ideas of nothing useful to add to this great jurist of our times.

Under Section 76 of the Law of Succession Act, any party interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. Rule 17(1) of the Probate & Administration Rules provides that: -

***“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”***

The evidence on record suggest that the Applicant herein brought these proceedings on behalf of the late; Abdalla Seif (deceased) who is the mother's cousin. The Applicant's interest emanates from the fact that Plot No. 7, Group V, Kilifi was registered in the name of **Khadija Binti Suleiman El-Busaidy** on 23<sup>rd</sup> January, 1941 and has never been transferred to a 3<sup>rd</sup> party, thus the Applicant being a beneficiary of the Wakf of Khadija Binti Suleiman Bin Hemed El-Busaidy as she is the granddaughter of Rukiya Mohamed Bin Hemed El- Busaidy, the sister of Khadija Binti Suleiman Bin Hemed El-Busaidy , who is the donor of the wakf.

I have carefully considered the pleadings filed, the evidence on record and the relevant laws and Section 4 of the Wakf Commissioners Act, Cap 109 Laws of Kenya provides as follows:

**“4 (1) Every Wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say:**

**a) for the benefit, either wholly or partly, of the family, children, descendants or kindred of the maker or of any other person; or**

**b) .....**

**is declared to be a valid wakf if –**

**i. it is in every other respect made in accordance with Muslim Law; and**

**ii. the ultimate benefit in the property the subject of the Wakf is expressly, or in any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognized by Muslim law as a religious, pious or charitable purpose of a permanent character:**

**Provided that the absence of any reservation of the ultimate benefit in property the subject of a Wakf for the poor or any other purpose recognized by Muslim Law as a religious, pious or charitable purpose of a permanent character shall not invalidate the Wakf if the personal law of the maker of the Wakf does not require any such reservation.**

**(2). No Wakf to which subsection (1) applies shall be invalid merely because the benefit in the property reserved by the Wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of family, children, descendants or kindred of the maker of the Wakf.”**

It is clear from the provisions of Section 4 (1) (a) of the Wakf Commissioners Act that there existed a valid Wakf made wholly for the benefit of Shariffa, Rukiya, Kalathum and Mwana Wa Shei all daughters of Mohamed Bin Hemed El-Busiady and their children forever. The Wakf is to be managed by Trustees and is not inheritable and cannot therefore form part of the assets of the deceased to be distributed among the beneficiaries.

Relying on a book Muslim law by **Kashi Prasad Saksena 4th edition pg 538**. It is stated in that book as follows:

**“when any Wakf property is unlawfully alienated, any person interested in the objects of the wakf may institute a suit to set aside the unlawful alienations and for the enforcement of the provisions of the Wakf”.**

Another issue for determination in this matter is whether or not the wakf deed is legal and valid and whether or not the property is available for inheritance to the heirs of the deceased.

The Applicant produced a Wakf deed dated 3<sup>rd</sup> November, 1942 signed before two witnesses: Habib Abdulla and J. Christine and endorsed by the District Commissioner, Lamu. She (Khadija Binti Suleiman Bin Hemed El- Busaidy (proprietor) in consideration of her natural love and affection of her sisters, Shariffa, Rukiya, Kalathum and Mwana wa Sheli all daughters of Mohamed Bin Hemed El-Busaidy consecrating Plot No. 7 Group V, Kilifi among others to the Wakf was registered as LT 1V, Folio 459/15. On 28<sup>th</sup> day May, 1946, an Indenture dated 20<sup>th</sup> May, 1946 between Khadija Binti Suleiman Bin Hemed El-Busaidy as Trustee of the settlement of Wakf made by her virtue of a Deed dated 3<sup>rd</sup> November, 1942 of one part and Gulamhusein Mohamed (Tenant) was registered as **LT.IV, Folio 459/15 on 3<sup>rd</sup> December, 1942 as LT.IV, Folio 459/16.**

It is also important to note that 21<sup>st</sup> June, 1957 a Deed of Appointment of Trustees dated 21<sup>st</sup> June, 1957 appointing Ali Bin Mohamed Bin Hemed El-Busaidy, Shariffa and Kalathum daughters of Mohamed Bin Hemed El-Busaidy as Trustees.

PW1 during her testimony informed court that the Deceased Seif Abdalla Mohamed is her mother’s cousin who had only one daughter called Wafaa.

Wakf literally means confinement and prohibition. Under Islamic law it is the detention of specific properties in the ownership of wakf and the devoting of its profits or products in charity of poor or other good purposes. It is also defined as a form of gift in which the corpus is detained and the usufruct is set free. *Al Sharbiny al Khatib in al Mughny al Muhtaj* defines wakf as detaining of corpus and setting free its usufruct for use in an available and legally permissible purpose" *Al Mughny 2/372*. Wakf is *sadaqa* charity *fisabilillah* in the cause of and to please of Allah.

Ibn Qudamat reports consensus of Muslim jurists on permissibility of Wakf. It is based on Hadith narrated by Ibn Umar [R.A.] he said: Umar [R.A.] got a parcel of land in Khaibar and sought advice of the prophet [PBUH], the Prophet [PBUH] told him, "you may detain the corpus and give out its proceeds as alms [*sadaqa*] to the poor, the needy, relatives, travelers and guests." Reported by Bukhari and Muslim.

Jabir [R.A.] is reported saying, "I do not know of any one among the *Muhajirin* and *Ansar*, who had wealth and did not consecrate a wakf, **that forever was not to be sold, bought, gifted or inherited.** Omar, Abubakar, Hafsa, Safiyya, Al Zubeir [R.A.] are examples of the companions who consecrated Wakfs.

There are two types of wakf: Wakf Kheiry [for Charity] and Dhurry or Ahly [for descendants]. The Egyptian law of endowment No. 180 of 1952 and Syrian Law of 1949 abolished Wakf Ahly due to its complex problems. Ref 10/7607, Al Zuheily, Islamic Jurisprudence and its evidences. There is no dispute on legality and validity of Wakf *Dhurry* or *Ahly*. It is in fact encouraged in Islam. There is no consensus on

Wakf *ahly* or *Dhurry* but the preponderant opinion is that it is legal if it does not offend Islamic laws of inheritance.

In this case, the **Wakf** is **Ahly**, to benefit the children of the donor and their children from generation to generation. The Wakf cannot be dissolved as there are still other generations who have interest in the Wakf. The law allows for division [al Muhaya'at] of the Wakf if it is in the best interest of the Wakf. However, where it does not conflict with the law, the intention of the donor must be respected as much as possible taking consideration of his or her objectives to the Wakf.

Therefore, in the court's view, the instant Application is properly before this court.

On whether the Grant of Letters of Administration issued to the Respondents on 15.2.2018 and a certificate of Confirmation of Grants dated 14.3.2019 are valid instruments capable of being revoke, the Applicant resorted to section 76 of the Law of Succession Act which provides for revocation and annulment of grant and the same provides as follows:

#### **76. Revocation or annulment of grant**

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) that the grant has become useless and inoperative through subsequent circumstances.”***

The Applicant made reference of subsection (b) cited above and argued that the respondents were aware that the estate did comprise of another beneficiary at the time of filing the petition but they indicated that there were only two beneficiaries to the estate thereby they concealed material facts of not stating that the Deceased had one surviving daughter **WAFAA** whom the petitioners failed to mention or get her consent. Similarly, the Applicant strongly took the position that the proceedings leading to the issuance of the grant were defective in substance since the Respondents failed to disclose that the only asset in question is a Wakf property that cannot be inherited, that it is managed by trustees as per the intentions of the Donor of the Wakf. The Applicant submitted that the WAKF property being under a valid and subsisting WAKF could not be alienated.

This court having looked at the evidence on record and listened to the witnesses of the Applicants has no doubt that Plot No. 7, Group V, Kilifi was indeed registered in the name of KHADIJA BINTI SULEIMAN EL-BUSAIDY as a Wakf Property to be managed by trustees named in the wakf.

The above mentioned sections signifies that a petitioner for grant of Letters of Administration will be deemed *prima facie* to have obtained a fraudulently grant, with respect of the state if he or she fails to issue notice to any of the dependents or beneficiaries to the estate of the deceased, including obtaining their necessary consents as mandatory provided in the Succession Act. Equally the grant of Letters turns out to be defective if the evidence shows that it was issued in error, misrepresentation of facts, concealment or nondisclosure of material evidence relevant and admissible for the making of the grant of representation. In one of the Leading judgments of the court in this area of Law in **Matheka and Another V Matheka (2005) EA 251** it is clearly stated as follows:

***“A grant may be revoked either by application or by an interested party or on the courts own motion. Even when revocation is by the court upon its own of motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential. In point of Law or that the person named has failed to apply for Confirmation or to proceed diligently with the administration of the estate. The grant may also be revoked if it can be shown to the court that the person to which the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired”***

For the purposes of interpretation, the court considering the same set of facts in the matter of the **Estate of Yusuf Mohammed (Deceased) MSA High Court P& A Number 434 of 1995**, the applicants contended that the petitioners falsely alleged that the deceased was survived

*by three children only and that he did not consent to the issue of the grant of the petitioners. The court found that there were other survivors the deceased who were not disclosed in the petition and who were not notified of the same and proceeded to revoke the grant.*

The court considering the same set of facts in the matter of the **Estate of David Kamenthu alias David Maina Kinyanjui (Deceased) Nairobi High Court P& A Cause Number 1301 of 2002**, *the applicant successfully petitioned for revocation of grant of Letters of Administration with respect to the Estate of the deceased for the petitioner alleging that he was the only person who summoned the deceased. It was held: "that the grant was obtained fraudulently by the making of a false statement of material fact."*

### **The Decision**

The analysis above leads me to this. The Objectors/Interested parties have satisfied the criterion under section 76 of the Law of Succession Act on revocation and annulment of the Grant of letters of Administration issued to the Petitioners for the benefit of the estate of Seif Abdalla Mohamed. In the upshot, the said Application is granted with the following declarations; -

- 1. The grant of letters of administration issued and confirmed to the petitioners on 15<sup>th</sup> February, 2018 and 14<sup>th</sup> March, 2019 respectively is hereby annulled.**
- 2. The grant so issued on 14.3.2019, be recalled and surrendered to the Deputy Registrar High Court, Malindi forthwith.**
- 3. That a Declaration is hereby issued by this Honourable court that Mnarani Farm Plot No. 7 Group(V) Kilifi Creek (LT. 45 Folio 475) is a Wakf property that cannot be inherited.**
- 4. The issue of locus standi to sue by the Petitioners was a matter of substance and of law. Therefore, the failure by the Petitioners to pass that hurdle on standing rendered any proceedings a nullity before the Probate Court.**
- 5. The costs of this litigation be in the cause.**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 14TH DAY OF APRIL 2021.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Ondabu Advocate for the Petitioners

**NB:**

*In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [advocatesondabu@gmail.com, mwadzoyoadvocates@gmail.com, Maurice.kilonzo@yahoo.com, kadimawakili@yahoo.com]*