REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 11 OF 2016

FAMAU MADI SHOSI.....APPELLANT

VERSUS

SALIM ABDALLA MAALIM.....RESPONDENT

JUDGEMENT

(An Appeal from the Judgement of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 14.4.16 in Mombasa Kadhi Succession Cause No. 193 of 2015)

1. Salim Abdalla Maalim, the Respondent herein filed Succession Petition No. 193 of 2015 against Famau Madi Shosi, the Appellant in respect of the estate of Bakari Madi Chosi (the deceased) who died on 10.11.11. According to the Petition, the deceased was survived by his widow Mwanashee Shaban and his brother Famau Madi Shosi, the Appellant herein. The deceased left a house without land on Plot No. 82/I/MN at Frere Town, Kisauni, Mombasa (the House). The Respondent claimed that the Deceased had a wakf in which he had appointed him and Abdillahi Salim, his son as trustees over the House which was to be used by Madrassa tul Bahrain after the demise of the Deceased. The Respondent sought a determination of the estate, the heirs and their shares. He also sought the confirmation of the wakf for madrassa use.

2. In the impugned judgment, the Hon. Principal Kadhi made the following determination:

> ***"Accordingly the property in this matter is ordered bequeathed for the benefit of the madrasatul Marajal Bahrain at Kongowea and is therefore not available for inheritance to the heirs of the deceased in this matter."***

3. The Appellant being aggrieved by the decision of the Hon. Principal Kadhi preferred the Appeal herein. The Grounds of Appeal are that the learned Kadhi erred in law and fact in that he:

1. Admitted the alleged will as a legal document yet produced after the demise of the deceased contrary to Islamic law.

2. Accepted that the deceased left behind the only property or entire estate to Wakf when he knew that a deceased person cannot bequeath more than 1/3 of his estate to one person or institution.

3. Admitted that a deceased person can bequeath a property after his death by way of a will not known before his death.

4. Failed to consider the Appellant's submissions.

5. Failed to submit the alleged Will to the Wakf Commission of Kenya.

6. Failed to call the deceased wife as a witness to estabklish the allegations.

7. Failed to recognize and accept the Memorandum of Understanding done by the deceased as the last legal document by the deceased.

8. Alleged in his judgment that the deceased has three houses.

4. The parties through their respective counsel filed written submissions which were highlighted before the Court and in the presence of the Hon. Chief Kadhi as assessor as required by Section 65(1)(c) of the Civil Procedure Act. It is the duty of this Court as a first appellate court

to reconsider the evidence, revaluate it and make its own conclusions. This duty was set out by the **Court of Appeal** in the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212* **wherein it was held** *inter alia***, that:-**

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".***

5. I have given due consideration to the record of appeal, as well as the submissions by counsel. The issue for determination is whether the Hon. Kadhi erred by confirming the wakf and finding that the House was not available for distribution amongst the legal heirs of the Deceased.

6. In the wakf deed dated 10.2.04, the Deceased stated in part:

> ***"1. I am the owner of a house without land situated at Frere Town Kisauni Mombasa on Plot No. 82/1MN.***
>
> ***2. That I therefore declare that the above mentioned house be Wakf to benefit Madrassa MARAJAL BAHRAIN situated at Kongowea, Mombasa after my death."***

7. The Hon. Kadhi set out in his judgment the following requirements of a valid wakf:

> ***1. The donor must have legal capacity***
>
> ***2. The property must be owned by the donor free of encumbrances or charges***
>
> ***3. It must be wakfed for charitable purposes***
>
> ***4. The beneficiary must be specified***
>
> ***5. Its transfer and ownership to the beneficiary [ies] must be immediate, not conditioned on time, death of the donor.***
>
> ***6. It shall not have any condition contrary to the objective of Wakfs under the law.***
>
> ***Wakf is different from wills. Wakf is detaining the property for and use of its proceeds to benefit charity. Once executed It ceases to belong to the donor. A condition to benefit, from a wakf by the donor as in this case, invalidates it."***

8. It would appear from the foregoing that the Hon Kadhi was of the view that the wakf herein being conditional was invalid. This finding is clearly based on the requirements of a valid wakf listed by the Hon. Kadhi. The wakf was conditional in that the Deceased declared the House to be Wakf to benefit Madrassa MARAJAL BAHRAIN situated at Kongowea, Mombasa after his death. This obviously offends the clearly set out requirements of a valid wakf. It is therefore curious that the Hon. Kadhi went on to state:

> ***"The document correctly captures the intention of the deceased. It fulfils the legal requirements as regards it veracity and authenticity, it only fails on the phrasing. A wakf should not, as in this case, be conditional upon the death of the donor. Does this invalidate the entire document and therefore makes the Wakf a nullity? A literal interpretation could lead to such a finding. However it is established under the science of Islamic Jurisprudence that 'the intention and meaning is takes precedence in consideration than the wording"***

9. An intention which clearly offends the legal requirements of a valid wakf cannot possibly be upheld. If a conditional wakf is invalid it remains invalid regardless of the intention of the maker of the wakf. The Supreme Court of India in Punjab Wakf Board Vs. Shakur Masih [1996] INSC 1232 (1 October 1996) held:

> ***"…in Mohammad Law, if a bequest is made by way of Will in future or subject to the contingency, the condition is void. In Section 191 of the Mulla's Principles of Mohamedan Law it is stated that it is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency. It would thus be clear that a disposition by way of Will given in future or subject to the contingency or conditional one is void under the Mohamedan Law…"***

10. My understanding of this holding of the Supreme Court of India and indeed of the Hon. Kadhi himself is that if a person wakfs a property, he should hand it over from the date of the declaration of the wakf. If he declares that a property is wakf after his death, that wakf is void on account of the contingency. The wakf is also invalid as it does not cover the period from the date of declaration till the demise of the person who declares the same. The record does not show that the Deceased surrendered the House to the beneficiary in 2004 when he executed the wakf deed. Indeed it would appear that he held on to the House for another 7 years until his demise in 2011. It follows therefore that the Deceased's declaration that *"the above mentioned house be Wakf to benefit Madrassa MARAJAL BAHRAIN situated at Kongowea, Mombasa after my death"* renders the wakf invalid.

11. The Hon Kadhi went on to state:

> ***"Further, the intentions of the deceased as much as possible must be respected provided they don't offend the law. In such case, where a wakf is conditional to the death of the maker, it reverts to being a will as it is in the meaning of a will despite the wording. It complies with all the limitations thereto. According to the property in this matter is ordered bequeathed for the benefit of the madrasatul Marajal Bahrain at Kongowea and is therefore not available for inheritance to the heirs of the deceased in this matter."***

12. The Hon. Kadhi found that because the wakf of the Deceased was conditional, the same "reverts to being a will as it is in the meaning of a will despite the wording". If the wakf deed did indeed revert to a will, the Hon. Kadhi ought to have considered whether the deed met the conditions of a will. It is trite law that a Muslim's testamentary freedom is limited to 1/3 of his estate. In the leading case of Saifudean Mohamedali Noorbhai v Shehnaz Abdehusein Adamji [2011] eKLR the Court of Appeal opined:

> ***"The limit on a Muslim's testamentary freedom, up to one-third of one's estate, is seen in Islam as a means to ensuring balance between a Muslim's freedom in this regard and responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not "so dispose of his property by will as to leave his heirs destitute". (Mulla, Ch, IX, Wills, p. 141).***

13. A Muslim is barred by Islamic Sharia from disposing by will more than 1/3 of his estate to third parties who are not heirs. This is to ensure a balance between giving his property to charity or to whoever he wishes and his obligation to his legal heirs. The heirs of a Muslim are assured of a minimum of 2/3 of his estate and any bequest exceeding 1/3 of a Muslim's estate to third parties is not valid. In the present case, the Deceased was survived by his widow and his brother. As such the document if it was to be interpreted as a will could only bequeath 1/3 of the estate to the Madrasa.

14. It is not clear from the record just how many houses are on the property. In the Plaint the Respondent averred that the Deceased's estate comprised of a *"House without land at Frere town kisauni Mombasa on plot no. 82/1/MN."* The Deceased in his wakf deed stated *"I am the owner of a house without land situated at Frere Town Kisauni Mombasa on Plot No. 82/1MN."* It is at the hearing that both the Respondent and the Appellant's witness stated that the houses are 3. It would appear that the Hon. Kadhi was persuaded that the Deceased had 3 houses and that the Deceased gave one house to his wife, one to his brother and one to the Madrasa as wakf. Even if this were the case, it was imperative that a valuation of the 3 houses be done prior to the Kadhi giving the House to the Madrassa thereby excluding the legal heirs therefrom. Further, whether the bequest to the Madrasa was by way of will or wakf, the legal heirs must give their consent which in this case they have not.

15. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed and stated in part:

> ***"The learned Kadhi erred in his judgement to order the whole house subject of this case to be a WAKF to a madrasa, leaving the heirs without any benefits… In Islamic law of Wakf and Will, the beneficiaries have their word, either to object or to approve the same and in this case the heirs are objecting the Wakf to take place"***

16. I concur with the opinion of the Hon. Chief Kadhi and my conclusion is that the Hon. Kadhi erred in finding that the House was validly bequeathed for the Madrasa and was not available for distribution to the legal heirs of the deceased. Accordingly, I find and hold that the Appeal has merit and the same is allowed. The judgment of the Hon. Kadhi of 14.4.16 is hereby set aside. The estate of the Deceased shall be distributed to the legal heirs of the Deceased according to Islamic Sharia. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 4th day of May 2018

_____

M. THANDE

JUDGE

In the presence of: -

…… for the Appellant

…… for the Respondent

…….…… Court Assistant