



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ENVIRONMENT AND LAND CASE NO. 294 OF 2012**

**FATUMA YUSUF AROI.....PLAINTIFF**

**VERSUS**

**JUMA LAIL**

**IBRAHIM AMRA**

**HUSSEIN OMAR**

**GHALIB SHARIF**

**BASHIR AHMED WARIFA**

**MOHAMED BAKARI.....DEFENDANTS**

**J U D G M E N T**

1. By a plaint dated and filed on 17<sup>th</sup> December 2012 the Plaintiff instituted this suit against the Defendants in her capacity as the administratrix of the estate of the late Yusuf Avumai Aroi. The deceased was the owner of all those four pieces of unadjudicated plots excised from plot no. 539/III/MN situate in Mtwapa. The Defendants are residents of Mtwapa with no ownership stake in the suit property. That the deceased had constructed a Mosque and Madrassa on the property which was run by the Plaintiff and her committee.

2. It is pleaded further that on 8<sup>th</sup> December 2012, the Plaintiff and her committee resolved to close the Madrassa from 9<sup>th</sup> December 2012 to January 5<sup>th</sup> January 2013. The Defendants however tore the closure notices from the doors of the madrassa, broke the locks and forcefully re-opened them. They then held elections on 12<sup>th</sup> December 2012; declared themselves the owners and managers of the suit premises and used violent means to bar the plaintiff and her committee from the property. The Plaintiff therefore seeks the following reliefs:

**(i) A declaration that the defendants do not have any right whatsoever over the Madrassa and Mosque existing on Plot No. 539/III/MN.**

**(ii) A permanent injunction restraining the defendants personally or through their employees, servants and/or agents from interfering with the management or running of the mosque and madrassa existing on Plot No. 539/III/MN.**

3. The Defendants jointly filed a statement of defence on 20<sup>th</sup> June 2017 denying the Plaintiff's ownership claim to the suit premises. They averred that the deceased, Yusuf Aroi donated the subject plot as a wakf to Muslims residing in the area and that the Mosque was constructed thereon by the Muslims for their benefit. The defendants also denied declaring themselves as owners and managers of the properties. They stated that the Plaintiff wanted to appoint a new committee and forcefully take over the running of the madrassa under the mistaken belief that it belongs to her father.

4. The hearing of the case took place on various dates from 28<sup>th</sup> March 2019 with three witnesses giving evidence for each side. The Plaintiff testified as **PW1** adopting her witness statement dated 17<sup>th</sup> December 2012 as her evidence in chief. PW 1 stated that she is the administrator of the estate of Yusuf Aroi and produced a copy of the grant of limited letters of administration. She narrated that before the death of her father, he was the owner of the suit plot. That he had built on the plot and had a sale agreement as well as building plans prepared in his name. It is her evidence that the 2<sup>nd</sup> Defendant is deceased while some of the defendants are teachers at the mosque and were being paid for their services. **PW1** continued that after her father's death, the defendants removed the committee he had put in place vide a mini-election. That the defendants had earlier forged a letter by the deceased alleging the suit property was donated as wakf. On the wakf, the late Yusuf

sued them before the kadhi denouncing the document and the defendants apologized.

5. On cross-examination, **PW1** stated that the deceased died intestate. That people used to use the madrassa during the deceased's lifetime. She was born in 1987 and although she did not run the madrassa at the time but was aware of the happenings. **PW1** gave evidence that she issued the closure notice due to a misunderstanding. That after her father's death, she became the in-charge by virtue of the premises being family properties to which they were rightful heirs in accordance with Islamic law. She was adamant that her father did not give the property to the public before his death and that the 1<sup>st</sup> Defendant is employed by the madrassa while the 4<sup>th</sup> Defendant was a resident of Mtwapa but not a member of the committee which is made up of family members & a few outsiders. She denied that their intention was to acquire the school for private use and had sought the court's redress to enable them to manage the property and to receive revenue.

6. Abdulhalim Said Mohamed testified as **PW2**. He adopted his statement dated 4<sup>th</sup> June 2019. **PW2** stated that during the lifetime of Yusuf Aroi, he built a mosque, madrassa and women's prayer room on his land using his own resources and only sought help to complete them. That he used to manage the properties with the help of a committee. **PW2** was in charge of finance and maintenance and produced a payroll record for payment of teachers as proof. He continued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were teachers, the 3<sup>rd</sup> Defendant was a parent to a child at the institution and the 4<sup>th</sup> and 5<sup>th</sup> Defendants were worshippers at the mosque. That the 6<sup>th</sup> Defendant had been invited to be a legitimate committee member before he changed tune. The said Defendants formed their own committees.

7. **PW2** narrated that the issues began on 5<sup>th</sup> December 2012 when they asked the caretaker to briefly close the school. The same were reported to the police and Chief Kadhi who advised them to seek court intervention. He continued that sometime in 2003, two teachers claimed the late Yusuf had given the property as a wakf which he denied at the Chief Kadhi's. They were made to resign but are now before court attempting to use the forged document to grab the suit properties.

8. On cross-examination, **PW2** was categorical that the parents of the children only paid school fees. They did not contribute to the building of the madrassa. That they registered Al Sunna Welfare Organization sometime in the year 2000 so as to start a nursery school. The committee had a membership of six people. He stated further that in 2001, the public and committee decided to expand the mosque. **PW2** admitted that the forgery was not reported to the police.

9. Ali Hussein Athman testified as **PW3**. He adopted his statement filed on 31<sup>st</sup> May 2018 as his evidence. He was a teacher and Imam at the madrassa and mosque. **PW3's** evidence mirrored that of PW2. He appeared before the Kadhi when the wakf allegedly signed by the deceased was contested. They were referred to the chief and his name is indicated in the chief's letter. PW 3 stated that the wakf was invalid having been disowned by its alleged author during his lifetime.

10. The Defence case commenced with the testimony of Mohamed Bakari as **DW1**. He gave evidence that the Plaintiff is his granddaughter and adopted his statement of 13<sup>th</sup> June 2018. **DW1** asserted that the late Yusuf Aroi gave the land to wakf of the muslims of Mtwapa. It was therefore no longer his property or that of the Plaintiff. He stated that the wakf was a genuine document regardless of the fact that it had been challenged before the Kadhi during the deceased's lifetime. He produced a letter by Yusuf to the District Education Officer dated 25<sup>th</sup> April 2000 as proof of the same. **DW1** concluded by stating that donations are used to pay the teachers of madrassa.

11. On cross-examination **DW1** stated that he was only a worshipper at the mosque before issues arose and was elected as an official after Yusuf's demise. That Abdulhalim (PW 2) and Yusuf ran the mosque before. He admitted that the suit land belonged to Yusuf who built the foundation of the mosque as well as the walls but did not put up the roof. He did not have proof of contributions made for the building of the mosque. According to DW1 there were trustees appointed to administer the wakf. That himself and his fellow committee members were elected by the parents of the children attending the madrassa. It was not their intention to throw out the plaintiffs.

12. Juma Hamesa Lail and Ghalib Sharif testified as **DW2** and **DW3** respectively. Their evidence was largely in consonance with DW1's testimony. **DW2** stated that he is a teacher at the madrassa while **DW3** is the chairman of the committee having been appointed in 2013. They both averred that the suit properties had been given as a wakf and were no longer owned by Yusuf or the Plaintiff. The only point of divergence in **DW2's** testimony was that there were no trustees appointed for the wakf. **DW2** added that the deceased had not appointed anyone as administrator.

13. **DW3** on the other hand gave evidence that he knew that the suit properties had been given as a wakf which was sufficient once spoken orally. There was no requirement that it must be in writing. He denied that the Plaintiff had been restrained from accessing the mosque but contended that she had no ownership rights over it. **DW3** however admitted that a wakf is to be operated by trustees. That after Yusuf's death, the people under him were responsible to do so. He continued that Abdulhalim used to pay the teachers but that in itself did not make him a trustee. **DW3** had been elected chairman by parents of the madrassa. He also admitted that they indeed removed the closure notice and formed a new committee to run the madrassa.

14. Parties filed their final submissions for consideration by the Court. The Plaintiff's submissions was filed on 8<sup>th</sup> July 2019 while the Defendants' were filed on 27<sup>th</sup> August 2019. I have considered the same as well as the applicable law; the parties' pleadings and evidence rendered. The following questions are raised for determination:

- (i) Whether or not the suit property was given as a wakf by the deceased OR
- (ii) Whether the suit properties form part of the deceased's estate
- (iii) Whether or not the Plaintiff is entitled to the reliefs sought in the plaint.

15. The contested issue between the parties herein is whether there was a valid wakf whereby the deceased donated the suit property to the

Muslims resident in Mtwapa. The defendants relied on a wakf deed dated 20<sup>th</sup> May 1996 as their defence to the claim. The Plaintiff on the other hand gave evidence challenging the validity of the wakf on the basis that it was denounced by the deceased during his lifetime in 2003 when it was brought to his attention. Counsel for the Plaintiff submitted that the wakf document did not specify the exact area to be donated by the deceased and that it spoke of setting aside a portion of the suit land for construction of a mosque and madrasa which were already complete and in use by 1996.

16. The principles and essentials of wakf were explained by the Court in *Fatuma Mohamed Salim Shirazy v Fatma Ahmed Abdulla [2020] eKLR* as follows:

#### *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 Asgdar Ali, {1932} 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 Waqf*

*(c) Soundness of mind*

*(d) Majority*

*Waqf also has an element of inalienability 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 nor 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 Waqf.”*

17. In the instant case, the plaintiff’s evidence is that the wakf deed dated 20<sup>th</sup> May 1996 was successfully contested and denounced by the deceased and the denunciation was reduced to writing at the Chief Kadhi’s chambers on 31<sup>st</sup> March 2003. The testimony of PW1, PW2 and PW3 on the same is corroborated by DW1’s evidence that the document was indeed contested during the deceased’s lifetime. DW1 and DW3 also admitted that the deceased did not appoint any trustees to act as the managers of the wakf which is itself standard practice.

18. The property was also not registered as such in accordance with section 10 of the Wakf Commissioners Act Chapter 109 Laws of Kenya. Further, the Plaintiff only seeks orders restraining the Defendants from interfering with their running and management of the madrasa and mosque which function was undertaken by her deceased father before his demise. There is no intention to acquire the school for private means as alleged.

19. It is not in dispute that the suit property was owned by the deceased Yusuf Aroi. The property automatically passes on to his estate unless there is proof that the wakf was valid. The plaintiff has presented evidence contained in her supplementary list of documents summons from the Chief Kadhi and an agreement executed between the deceased & Ustadh Mohamed Omar & Ustadh Ali Hussein. In the agreement said to have been reached before the Chief and the elders, Ustadh Omar & Ustadh Ali stated that they had no claim effective 7.5.2003 from Yusuf Aroi in respect to the wakf dated 20/5/1996.

20. Additionally, the wakf document presented by the defendants described the land donated as comprised of 6200 sq. Under paragraph (iii) the done stated that *“from the first day of construction I have designated the said portion as wakf land.”* The plaintiff submitted that by the date of the wakf, the mosque and madrasa were already in use thus there is nothing linking the disputed developments to the wakf. The defendants referred this court to a letter dated 25<sup>th</sup> April 2000 done by the deceased to the district education office. Unfortunately, the said letter was not attached to the list. Consequently, there is inference drawn by this court doubting the competency of the wakf as one would wonder whether it was practical to donate land to build a new mosque next to an existing one.

21. The defence witnesses particularly DW3 stated that he was elected by the parents of the children attending the madrassa to be their chairman. He did not justify from where he derived his authority to run/manage the properties in dispute. To me his designation strictly was the parents' representative and nothing more. Further, DW1 said he was a worshipper while DW2 was a teacher meaning that they equally had no designated role to bring a claim on the existence of a wakf or otherwise. According to the Law of Succession Act, they are equated to intermedllers of the estate of a deceased. The plaintiff did present evidence of limited grant of letters of administration issued in Succession cause no 320 of 2012. She is therefore the only person authorized in law to deal with the assets & liabilities of the late Yusuf Aroi.

22. Both parties submitted extensively on the permanent injunctive orders sought. The Plaintiff has proved that she is the one legally allowed to deal with the assets/liabilities of the deceased thus she has proved her case on a balance of probabilities. Moreover, if the orders sought are not granted, it amounts to assisting the defendants intermeddle in the deceased estate which may likely expose the beneficiaries of the deceased's estate to lose their entitlements of the property due to them.

23. The upshot of the foregoing is that I am satisfied that there is merit in the plaintiff's claim hence I enter judgment in her favour as prayed in the Plaint. Parties shall each bear their own costs of the suit.

**Dated and signed at Busia this 15<sup>th</sup> day of July 2020.**

**A. OMOLLO**

**JUDGE**

**Judgment delivered electronically by email this 16<sup>th</sup> Day of July, 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**