



**In re Estate of Bakari Madi Chosi (Deceased) (Succession Cause
193 of 2015) [2016] KEKC 34 (KLR) (14 April 2016) (Judgment)**

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Neutral citation: [2016] KEKC 34 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
SUCCESSION CAUSE 193 OF 2015**

AH ATHMAN, PK

APRIL 14, 2016

IN THE MATTER OF THE ESTATE OF BAKARI MADI CHOSI (DECEASED)

BETWEEN

SALIM ABDALLA MAALIM PETITIONER

AND

FAMAU MADI SHOSI RESPONDENT

JUDGMENT

1. The petitioner seeks prayers for confirmation and respect of the Wakf consecrated by the deceased herein. He claims the deceased left a house without land at Frere town - Mombasa on Plot No. 82/I/MN which he consecrated as wakf for Madrasatul Bahrain and appointed the petitioner as the Trustee and after him, his son one Abdillahi Salim. He claims the respondent however claims a share in the property despite it being a wakf.
2. The respondent deny the authenticity of the wakf deed which in any way contravenes the legal requirements of Wakf. He states none of the relatives of the deceased witnessed the signing alleged Wakf deed. He further stated that the petition lacks key documents such as death certificate. He also was not willing to submit to the jurisdiction of this court.
3. The respondent gave power of attorney to his daughter, Umi Famau Madi dated November 9, 2015 and registered with the District land Registry on 1 November 1, 2015.
4. Although in his pleadings the respondent did not submit to the jurisdiction of this court, at trial he abandoned the same and submitted to the court's jurisdiction.
5. The issues for determination in this matter are 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.



6. The plaintiff produced a Wakf deed dated 15th 2004 signed before two witnesses: Ali Said Ali and Abdu Ahmed and endorsed by the Hon. Sheikh Twalib B. Mohamed, the Kadhi Mombasa [as he then was]. He declared that he is the owner of the house without land at Frere town on plot No. 82/I/MN and has wakfed the property to benefit Madrasa Marajal Bahrain at Kongowea, after his death.' He appointed Ustadh Salim Abdalla Maalim to be the Trustee and after him Abdillah Salim. Abdul Ahmed Mohamed PW1 testified confirming witnessing the signing of the document. The petitioner submitted that the deceased had one wife and no child and had three houses, that he gave one house to his wife, one to his brother and one to the Madrasa as wakf.
7. The respondent's attorney admitted the deceased left three houses and was not survived by children but with one wife and brother. She questions the validity and legality of the wakf as it provides the property to be wakf. '.. after my death' and did not involve any of the deceased relatives.
8. 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.
9. 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, travellers and guests." Reported by Bukhari and Muslim.
10. The prophet [PBUH] said. "[registration] of a person's deeds ends upon his death, except three types of deeds, continuing alms [sadaqa jariya], profitable knowledge and a good child praying for him."
11. 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.
12. 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.
13. There is no dispute on legality and validity of Wakf kheiry. It is in fact encouraged in Islam and most Wakfs done by the Companions is of this kind. 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. For it to be valid, it must meet some requirements. These are:
 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.



14. 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. On the other hand, a will consecrates to specific individuals / entities up to one third of one's estate after one's death. The donor can benefit from the property during his lifetime.
15. *Minhaj et Talibin, a manual of Islamic law according to the school of Shafii* by Nawawi [1914] as translated by E.C. Howard it is stated at page 260 - 261 that:

"testamentary disposition may not exceed a third of the estate; and those made in contravention of this precept of the law, may be reduced to the portion which may be disposed of, upon the application of the legitimate heir. If he declares his approval of the disposition, it is effective, whatever it amounts may be; but according to one jurist it is then considered as mere donation upon the part of the heir, and the legacy itself remains void for as much as exceeds the third."

Musyoka in his Law of Succession states:

"will making is allowed and even encouraged under Islamic law. However, the testamentary capacity of a Muslim is subjected to two limitations namely he can only bequeath one-third of his property by will and even then, he cannot give any part of the one-third to the heirs as stated in *the estate of late Suleiman Kusundwa* [1995] EA 247 (Sir Ralph Windham J) NB,

16. According to Sir Clement de Leistang in *Mohamed Thabet Ali Maktari v Mohamed Rageh Mohamed Saleh Maktari & others* [1996] EA 35 Under Islamic law a will may be made either orally or in writing. It does not have a particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing it need not be signed and if signed it need not be attested.
17. 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' [?????? ?????????? ?? ?????????]
18. 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. 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.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA ON 14TH APRIL 2016.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of:

Petitioner

Attorney for respondent

