



REPUBLIC OF KENYA



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**Ali Mohamed Ali Darani & Aliya Zahran v Khadija Shaffi, Kulthum Shaffi, Shaffa Shaffi & Fadhila Zahran (Miscellaneous Application 51 of 2015) [2015] KEKC 40 (KLR) (30 April 2015) (Judgment)**

*Ali Mohamed Ali Darani & another v Khadija Shaffi & 3 others [2015] eKLR*

Neutral citation: [2015] KEKC 40 (KLR)

**REPUBLIC OF KENYA**

**IN THE KADHIS COURT AT MOMBASA**

**MISCELLANEOUS APPLICATION 51 OF 2015**

**AH ATHMAN, PK**

**APRIL 30, 2015**

**IN THE MATTER OF THE WAQF OD KIBIBI BINTI MOHAMMED EL MAMBASIYA**

**AND**

**IN THE MATTER OF PLOT NO. 310 / MN AND HOUSE AT KIBOKONI**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE  
DIVISION OF WAQF PLOTS TO THE DONEES'S**

**DESCENDANTS**

**BETWEEN**

**ALI MOHAMED ALI DARANI ..... 1<sup>ST</sup> PETITIONER**

**ALIYA ZAHRAN ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KHADIJA SHAFFI ..... 1<sup>ST</sup> RESPONDENT**

**KULTHUM SHAFFI ..... 2<sup>ND</sup> RESPONDENT**

**SHAFFA SHAFFI ..... 3<sup>RD</sup> RESPONDENT**

**FADHILA ZAHRAN ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Pleadings

1. The applicants filed the originating summons dated March 14, 2014 for orders that the court be pleased to divide the actual properties forming the Waqf of Kibibi binti Mohammed El Mambasiya created on June 13, 1905. It is based on the grounds that the applicants are beneficiaries of the Wakf in this matter which has become non beneficial thus collective / joint management and development impossible, thus a source of division and endless dispute within the family members. It is supported by the sworn affidavit of Ali Mohamed Ali Darani and Aliya Zahrani dated March 14, 2014.
2. Khadija Shaffi, the 1st respondent, opposes the application through her replying affidavit dated April 15, 2014 but prays the court direct that the Wakf be run by professionals at the cost of the Wakf. She deponed that the donor's intention was to sustain the Trust for the benefit of her family from generation to generation and to divide the Wakf would be tantamount to be going against her wish. She averred that the Wakf can be profitable if properly managed especially if new younger trustees are included in its management. She denies existence of any disputes by the beneficiaries of the Wakf, currently; the dispute that existed between Alya and Fadhila Zahran against Swafiya Suleiman in 1976 was resolved in the latter's favour. The respondent deponed the applicant has not been properly managing the account.
3. In reply, the 1st applicant, filed a further affidavit on August 12, 2014. He reiterated that the application is for the actual division of the Waqf properties as per the Waqf deed and ownership of Kibibi binti Mohammed El Mambasiya and not inheritance or succession of the Wakf. He deponed the donor transferred ownership of the properties to her three daughters in her lifetime and therefore they [donees] were and still are the legal and registered owners in equal one third share of the properties and the wakf cannot revert to the donor. Upon division, the descendants of each donee will develop, maintain and administer the Wakf independently from generation to generation as per the wakf deed. He denies the application, if granted, will go against the intentions of the donor.
4. I directed the matter to proceed as petition [applicants to be petitioners] and take *viva voce* evidence to give opportunity for cross examination.
5. The petitioners were represented by Ms. Darani while the respondents were represented by Mr. Hamza.

### The Wakf

6. The Wakf of the late Kibibi binti Mohamed bin Sheikh El Mambasiya dated June 13, 1905 provided inter alia:

Kibibi binti Mohamed bin Sheikh El Mambasiya has consecrated her house No. 154 situate at Kibokoni and farm her at Chagamwe in favour of her children with Aziz bin Juma and those who may be born after them and to the children of their children however low may be in succession from generation to generation to gain and benefit in all ways.. and it is not subject to sell, gift, mortgage and whosoever alter or change after knowing this, is between him and the Almighty and she has appointed Rashid bin Mwijabu as Trustee of the income of this Wakf and to distribute the same among them in equal shares..



7. The certified copy of translation of the Arabic Deed was registered with the Registrar of documents, Mombasa Registry as No 346 of 1905.
8. The certificate of ownership for Plot No. 310/VI/ Changamwe - Miritini is registered in the names: Mwana Mishi, Mwana Ana and Mwana Aisha daughters of Aziz as Wakf to them and their children for ever in the terms of Wakf deed registered as No. 436 of 1905.

### **The Family**

9. The late Kibibi bint Mohamed El Mambasiya was survived by only her three daughters: Mwana Ana, Mwana Mishi and Mwana Aisha. They are all deceased. Mwana Ana had no children. Mwana Aisha had only one child, Mohamed [deceased] who had only one child, Ali Mohamed. Mwana Mishi had three children: Rukia, Sofia and khadija, they are all deceased. Rukia had no child, Sofia and Khadija each had seven children, some of whom are now deceased. Surviving are the third and fourth generation; the families of Mwana Mishi and Mwana Aisha.

### **Issues**

10. The issues for determination in this matter are whether or not it is permissible and legal to divide a Wakf, and if so whether there are sufficient grounds to divide the Wakf of the late Kibibi bint Mohamed El Mambasiya.

### **Submissions**

11. Ms. Darani for the applicants submitted the application seeks to orders to divide the properties of the Wakf among the donees of the Wakf and for the respective descendants to independently administer, benefit and develop the Wakf. She submitted the farm was sub divided into [27] plots, but only three plots fetch rent and only one at market rates, while [6] plots have cases pending in court resulting in legal fees eating on the income of the Wakf. She contends the Wakf currently fetches KES 1,440,000 per year in rent. She states, the Wakf is wasting and family disputes and legal issues makes benefiting fully from the Wakf impossible hence the application to enable each family to independently administer the Wakf. She reiterated the purpose of the application is not to open the wakf for inheritance.
12. Mr. Hamza for the respondents submitted the donor created the wakf and not a gift, intended to benefit her descendants. He submitted the Wakf fetches considerable income per annum which could improve if better managed and that opening the wakf would be contrary to the wishes of the donor.

### **Analysis**

13. It is clear from the pleadings and the submissions that the Wakf properties fetches considerable income although it could fetch more if properly managed. It is clear that the income is from a minority of the properties, most of which have legal issues with tenants and / or squatters. The family is also not focused and united in solution of the problems facing the Wakf. It is also clear the properties are Wakf and not Hibba [gift], for although the farm is registered in the names of the three primary beneficiaries, the three daughters of Kibibi bint Mohamed, they are so registered as Wakf and in the terms of the Wakf. What is Wakf and can it be dissolved, opened or divided?
14. 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.

15. 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.
16. 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."
17. 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.
18. Other scholars hold contrary view. Ibn Qudamat reports that Shuraih was of the opinion that Wakf is not permissible in Islam. Muhammad bin Abdulwahab in his 'twelfth letter' opines, Wakf to relatives is an innovation in Islam and therefore not permissible.
19. Wakf is intended to be perpetual and last forever, however Islamic law envisages conditions under which wakf may be terminated.
20. Imam Shafi is of the view that distribution of wakf [in finality issuing each beneficiary his / her share of the wakf property] is not permissible because it offends the condition set up by the donor, but beneficiaries may only allocate parts of the wakf among themselves to benefit from the said parts for a specified period [not absolute ownership]. Other jurists are of the view that wakf may be distributed among different types of beneficiaries, but if there is only one type they concur with Shafii school on its non permissibility. Hanafi, Maliki, hanbali and some Shafi school are of the view that sale of a wakf is permissible if it is obsolete and can no longer be of benefit to beneficiaries provided the proceeds shall be used to purchase another property to replace it.
21. Ref; Encyclopaedia of Islamic jurisprudence, Ministry of Endowment - Kuwait Vol. 44 pg. 135 - 194.
22. The difference between Wakf and Hiba is that in the former the ownership of the Waqif is completely ended and the prevents the property from being inherited or disposed of in any way, the beneficiaries are only to benefit from proceeds of the Wakf In the latter case the ownership of the property is transferred to the 'mawhoob' beneficiary who is entitled to transact in it as he or she pleases.
23. 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.
24. 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.
25. Wakf that offends Qur'an and Sunnah with regards to inheritance and equity between children is void to the extent of the inconsistency. For example consecrating as Wakf to some only of one's children, to daughters only or the entire properties of one's estate without leaving his children with anything to inherit would be offending the laws of inheritance and equity in Islam and therefore void to the extent of the inconsistency. This is probably why in Egypt and Syria, Wakf Ahly was abolished. The general purpose of Wakf was to consecrate part of one's properties for service to humanity, to cater for places of worship, education, feeding the poor and needy e.t.c.



26. In this case, the Wakf is Ahly, to benefit the children of the donor and their children from generation to generation. No beneficiary was excluded from benefiting from the Wakf properties. The shares were fair to all, the primary heirs all having been daughters. 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. A condition in the Wakf, that is contrary to Islamic law is not binding, even when a verse of the Qur'an is invoked to stop changing anything from the Wakf deed. The Kadhi has powers and discretion to give directions on the Wakf towards realization of these objectives.

### **Finding**

27. The intention of the donor in this Wakf, in my view, is for her descendants to fully benefit from the properties in perpetuity. After considering the challenges the wakf faces, the relationship of the beneficiaries, the income accruing from the properties, I find and hold that although the Wakf generates income, it is minimal and the full potential of the Wakf is not realised and the family, descendants of Mwana Mishi and Mwana Aisha do not work as a team, there is little respect and cooperation between them. This may lead to further wasting of the Wakf properties. Division of the Wakf into two, one to the descendants of Mwana Mishi and another to the descendants of Mwana Aisha, in my view, will not offend the intention of the creator of the Wakf, as each family will continue to manage and benefit from it albeit separately. I shall grant division of the Wakf, however this cannot be granted at the moment. The portions of the farm with dispute and / or settled by squatters has to be settled before division can commence so as not to prejudice any of the two families. I direct this be done within one calendar year, only then can we take proposals on the division of the Wakf.

28. When it shall be divided, and in the event there is no descendant surviving from any of the two families, their portion of the Wakf shall revert to the descendants of the surviving family, essentially reverting to the original Wakf.

29 Orders accordingly.

**DATED AND DELIVERED AT MOMBASA ON 30<sup>TH</sup> APRIL, 2015.**

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of:**

Mr. Yusuf Abdulrahman, Court Clerk

Ms. Darani for petitioner

Mr. Hamza for respondent

