



**In re Estate of Sheikh Bin Muhaji (Deceased) (Succession Cause  
219A of 2011) [2015] KEKC 17 (KLR) (10 December 2015) (Judgment)**

*In re Estate of Sheikh Bin Muhaji (Deceased) [2015] eKLR*

Neutral citation: [2015] KEKC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
SUCCESSION CAUSE 219A OF 2011  
AH ATHMAN, PK  
DECEMBER 10, 2015**

**IN THE MATTER OF THE ESTATE OF SHEIKH BIN MUHAJI ..... DECEASED**

**BETWEEN**

**MOHAMED HASSAN ABDULAZIZ ..... 1<sup>ST</sup> PETITIONER  
SAADA HASSAN ABDULAZIZ ..... 2<sup>ND</sup> PETITIONER  
AMINA HASSAN ABDULAZIZ ..... 3<sup>RD</sup> PETITIONER  
ABDULKADIR HASSAN ABDULAZIZ ..... 4<sup>TH</sup> PETITIONER**

**AND**

**MOHAMED HISHAM ..... 1<sup>ST</sup> RESPONDENT  
MANSUR MOHAMED [TRUSTEE] ..... 2<sup>ND</sup> RESPONDENT  
3. AHMED MOHAMED ABDULKARIM [TRUSTEE] ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner through his petition dated 3.10.2011 amended on 27.3.2012, claims the respondents are benefiting from the wakf [House known as Birikau / Old Town and Plot No. 799 section III(Block XLV / 44] consecrated by the deceased in this matter although they are not beneficiaries of the Wakf. He prays for orders that the respondents be stopped from any activity or transaction on the wakf property and the rightful beneficiaries be compensated for the loss of benefits of the wakf.
2. The respondents deny the claims. They state that the alleged wakf was revoked on 2.11.1961 and that the petitioners are not beneficiaries of the estate or the alleged wakf. They stated that the 1st and 2nd respondents are administrators of the estate of Mohamed Haji Abdulkarim who purchased a portion



- of the property Plot No. MSA/ Block 44/XLV from the estate of Sheikh bin Muhaji Al Bajuny. They claim the petitioners are trespassers on the property.
3. Sheikh Bin Muhaji Al Bajuny left a property on Plot No. 799/ III [0.62 acres]. He consecrated it as Wakf as follows:
    1. 3/4 Mohamed Sheikh Muhaji his son and his children
    2. 1/4 Durri bint Abdalla Omar El Basty, his wife and her children
    3. If the donee died without children, it be shared by his niece Nana bint Omar Ahmed El Ausy
    4. Masjid Al Juma - Mlango wa Papa , if no beneficiaries above exist
    5. Wakf not be sold, mortgaged gifted or inherited.
  4. Sheikh Bin Muhaji died in 1942 according to the Chief Old Town - Mombasa.
  5. The title entries shows the Wakf was cancelled by the Registrar through decree dated 25.8.1960 [S.C.C. 95 of 1960] declaring the Wakf void *ab initio*.
  6. The title was transferred to Mohamed bin Muhaji, his only son on 8.7.1961 who thereafter sold parts of the property to Mwanamwinyi wa Issa [3/5] on 18.6.1962; Nyanya binti Tawakal [2/5] on 8.7.1962.
  7. Mwanamwinyi wa Issa consecrated her portion as wakf and appointed Mohamed Haji Abdulkarim and later his eldest son as Trustees on 4.6.1976. The 1st and 2nd respondents grandsons of Mohamed Haji Abdulkarim are executors of his will.
  8. The issues for determination in this case are:
    1. Whether or not the wakf was wakf was legally opened
    2. Whether or not the petitioners are beneficiaries of the wakf.
    3. Whether or not the respondents should be restrained from making any transaction in the property.
    4. Whether or not the petitioners should be compensated from loss of benefit.
  9. The petitioner in his evidence in chief stated he is a grandson of Sheikh Muhaji and that Nana bint Omar is his mother, who died in 1980s, that the wakf was not opened and the petitioners are the heirs. Nothing was filed to support the family tree. Under cross examination he admitted Abdulaziz Mohamed Ali [his relative] used to pay ground rent to one Mansour Mohamed for tenancy on the property.
  10. The respondents evidence is that Mohamed Haji Abdulkarim, their grandfather was the owner of the title 3/5 share in MSA/ Block XLV/44, that he left a will appointing them executors of his will, that they got letters of administration in his estate in 2002. They made application for transmission of the estate to themselves. They then transferred the same to Sharifa SAid Abu and Khamis Ali. They contend the wakf had been cancelled but admitted under cross examination, they did not know how their grandfather acquired the property.
  11. Mr. Hashim Got Sat, the land Registrar - Mombasa [RW1] gave evidence and submitted records on the property. His evidence is that the Plot originally was registered as Plot No. 799/III/MI measuring 0.062 acres. It was registered in the name of Sheikh Bin Muhaji Al Bajuny on 25.8.1923 who consecrated it as Wakf. on 2.11.1961 the Wakf was expunged from the record as a result of a court order issued by



the Supreme Court of Kenya in civil case No 95 of 1960 Mohamed bin Sheikh Muhaji Vs Nana bint Omar bin Ahmed al Ausy. He read the order as follows

12. It is ordered:
  1. That the Wakf created by Muhaji Ali and registered at the cost land Registry at Mombasa of Plot No. 799/III/MI be and the same hereby is declared null ab initio
  2. That the registrar of titles be and hereby directed to expunge the wakf entries made against the relevant titles.
  3. Costs to the plaintiff be paid.
13. Upon independence the title was then converted under the Registered Land [RLA] Act Cap 300 to MSA/ Block XLV/ 44 freehold. The first registered owners were Mwanamwinyi Issa [3/5] Maryam bint Abdalla [2/5] share. On 27.7.1976 the property was in the name of Maryam Abdalla [2/5] and Mohamed Haji Abdulkarim [3/5]. Maryam bint Abdalla sold her [2/5] share to Hamisi Ali. On 25.4.2012 Mohamed Hashim and Mansour Ahmed Abdulkarim being personal representatives of Mohamed Haji Abdulkarim sold his [3/5] share to Said Abu and Maryam O. Shariff, Hamisi Ali still holds [2/5] share.
14. The two registration numbers Plot 799/III/ MI and MSA/ Block XLV/ 44 refer to one and the same property. one is under the *1908 Ordinance* and the other under RLA, Cap 300.
15. 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.
16. Wakf is intended to be perpetual and last forever, however Islamic law envisages conditions under which wakf may be terminated.
17. In this case Sheikh bin Muhaji consecrated his property to his son 3/5 and wife 1/4. If he died without children he said Nana bint Omar should benefit from the wakf. Mohamed bin Sheikh Bin Muhaji, the donee's son and Nana bint Omar went to the supreme Court of Kenya over this Wakf in 1961. H.M. Supreme court,[ Mr. justice E.A.J. Edmonds] declared the wakf void ab initio.
18. This is a decision of a competent and superior court, the Highest court in the country at the time. The original decree was produced, certified copy retained. It was signed by the Acting Deputy registrar of H.M. Supreme court on 25th August 1960. It cannot be said to be illegal. Islamic law envisages wakf to be opened. The Wakf was therefore legally opened. The petitioners have not with finality established their lineage to either Sheikh bin Muhaji or Nana bint Omar as alleged. In any case the original beneficiaries were heard by a competent court and third parties cannot be questioned on the legality of transactions that took place as a result of the Supreme Court decision. Further, this being a subordinate court, it has no jurisdiction to vary, set aside or sit on appeal of a Supreme court decision.
19. Having found the Wakf legally opened and all transactions legal, the petitioners have no interest on the property. The petition be and is hereby dismissed with costs.
20. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA ON 10TH DECEMBER 2015**



**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of:

Mr. Yusuf K. Abdulrahman, Court assistant

Mr. Oddiaga for the petitioners

Mr. Omwenga for the respondents

