



REPUBLIC OF KENYA



**KENYA LAW**  
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**Al Aufy v Al Aufy (Family Appeal E041 of 2024)  
[2025] KEHC 16278 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E041 OF 2024  
G MUTAI, J  
NOVEMBER 3, 2025**

**BETWEEN**

**MOHAMED SAID ZAHRAN AL AUFY ..... APPELLANT**

**AND**

**FADHILA ZAHRAN AL AUFY ..... RESPONDENT**

**JUDGMENT**

1. In a decision delivered on 30<sup>th</sup> May 2024, the Hon Omar Swaleh, made the following orders: -
  1. The petitioner, being the second-generation beneficiary, is the only one entitled as trustee of the Waqf and beneficiary and is hereby appointed as such;
  2. The applicant of the interested party, being the 3rd generation, has no right of action, which would only be acquired upon the demise of the last person in the second generation;
  3. The applicant or interested party be and is hereby removed and a statement from being a party herein; and
  4. This being a family matter, each party shall bear his/her own costs.
2. The above-referenced decision arose out of an application by the appellant (the interested party in the court below) to be appointed as a co-trustee with the respondent (the petitioner in the Court below). The appellant is the great-grandson of the waqif of the Waqf, while the Respondent is the granddaughter, and thus a second-generation beneficiary.
3. In his analysis, the learned identified two issues, to wit, whether the two parties are eligible to be appointed as trustees of the Waqf; and whether the petitioners and their children deserve to exclusively benefit from the Waqf to the exclusion of the other beneficiaries.



4. On the first issue, the learned Kadhi concluded that the use of the word “shall” in the Waqf deed meant that the waqif intended that the Waqf benefits his three named children as the first generation and that the subsequent generations would only benefit so long as no member of the previous generation was alive. He concluded that since the appellant was of the 3<sup>rd</sup> generation, while the respondent was of the 2<sup>nd</sup> generation, the appellant wouldn’t be appointed as a trustee nor benefit from the Waqf.
5. On the second issue, the learned Kadhi concluded that only the respondent was of the second generation. Thus, she was entitled to benefit exclusively from the Waqf, while her children were not.
6. Being aggrieved by the said decision, the appellant filed the instant appeal. The appeal raises 8 grounds. These are that: -
  1. That the learned Kadhi erred both in fact and in law by holding that the respondent is the only entitled beneficiary and trustee of the waqf, thereby depriving the appellant and other beneficiaries of the Estate of Mohamed Bin Omar Al-Aufi of their rightful inheritance;
  2. That the learned Kadhi erred both in fact and in law by holding that the appellant has no right of being a trustee for the sole reason of being a 3<sup>rd</sup> generation beneficiary, which is a clear violation of the Waqf Deed;
  3. That the learned Kadhi erred both in fact and in law by failing to adhere to the terms of the Waqf Deed, which state that “any one of the beneficiaries who may be found fit for the purpose” may be appointed as a Trustee;
  4. That the learned Kadhi erred both in fact and in law by appointing the respondent as the trustee of the Waqf despite it being clear that the Respondent has no capacity to secure and manage the Waqf properties;
  5. That the learned Kadhi erred both in fact and in law by failing to declare the Waqf Deed invalid for contravening Islamic Sharia Law and Section 4 of the Waqf Act by reason of the Waqif’s action to place all of his properties under the waqf and thereby depriving successive generations of the right to inherit;
  6. That the learned Kadhi erred both in fact and in law by failing to hold that the Waqf is no longer viable and uneconomic due to the extensive number of beneficiaries;
  7. That the learned Kadhi erred both in fact and in law by proceeding to determine the suit in finality without giving the appellant an opportunity to be heard and give evidence in Court; and
  8. That the learned Kadhi erred both in fact and in law by disinheriting all of the beneficiaries of the estate of Mohamed Bin Omar Al-Aufi in favour of the Respondent, thereby leaving them poor and destitute.
7. Vide the instant appeal, the appellant seeks: -
  1. That the appeal herein be allowed in its entirety;
  2. Costs of the appeal; and
  3. Such further relief as the honourable Court may deem fit to grant.
8. This Court admitted the appeal on 6<sup>th</sup> November 2024. The Court gave directions on how the appeal would be canvassed. The parties were given timelines for filing their submissions. This Court heard the appeal on 24<sup>th</sup> April 2025. The Court sat with Hon Salim Juma Mwaito, Principal Kadhi, and



- Wendo Shaban Wendo, Senior Resident Kadhi, as the assessors. Mr. Ibrahim submitted on behalf of the appellant, while Mr. Mitei, learned counsel, made submissions for the Respondent. I shall set out their submissions below.
9. Mr. Ibrahim, learned counsel for the appellant, submitted that the learned Kadhi erred as he should have declared the Waqf deed unlawful, unworkable, and uneconomic for having too many beneficiaries.
  10. He identified issues coming for determination as being
    - i. Who deserves to be appointed as a trustee of the Waqf;
    - ii. Whether the trustee should benefit exclusively from the Waqf;
    - iii. Whether the respondent can manage the Waqf;
    - iv. Whether the Waqf is invalid for contradicting the Islamic Sharia; and
    - v. Whether the Waqf should be dissolved for being uneconomic.
  11. It was urged, in respect of the first issue, that being the eldest male descendant of the waqif, the appellant qualified to be appointed as a trustee. On the second issue, Mr Ibrahim submitted that the waqif did not want his descendants to be destitute. For that reason, all his descendants were entitled to benefit from the Waqf.
  12. The appellant's counsel submitted that the respondent had no capacity to manage the Waqf. In support of the said contention, it was urged that only 4 out of 13 Waqf properties had parcel files. Additionally, one of the Waqf properties had been compulsorily acquired, yet no compensation had been paid. Counsel submitted that under Islamic law, a waqif could only place 1/3 of his property in a Waqf. In this case, the waqif transferred all his properties to the Waqf. That meant that the Waqf was invalid.
  13. Mr. Ibrahim submitted that the Waqf had become uneconomic and should be dissolved as it was too fragmented and wasn't bringing in sufficient returns to benefit all the descendants of the waqif.
  14. Mr. Mitei, learned counsel for the respondent, urged that the respondent went to the Kadhi's Court in 2019 seeking to be appointed as a trustee, as there was no trustee at that point. The appellant objected on the ground that, as the eldest male heir, he was entitled to be appointed as trustee.
  15. Mr. Mitie identified three issues as coming up for determination: -
    - i. Who should be appointed a trustee;
    - ii. Whether the respondent can manage the Waqf; and
    - iii. Whether the Waqf should be declared invalid.
  16. On the first question, it was urged that only the members of the eldest surviving generation could benefit from the Waqf. In Mr Mitei's view, the use of the word "shall" denoted a mandatory direction. Regarding the ability of the respondent to manage the waqf, it was urged that nothing had been provided showing that the respondent was incompetent.
  17. Counsel submitted that the issue of dissolution of the Waqf was a new issue which this Court should disregard.
  18. I have perused the record of appeal, evidence contained therein, as well as the submissions and authorities filed by the parties in support of their respective cases.



19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand.
20. In the case of *Mbogo and Another v Shah* [1968] EA 93, the Court stated:-
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
21. The duty of the first appellate Court was settled long ago by *Clement De Lestang, VP, Duffus and Law JJA*, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where their lordships held as follows:-
- “ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
22. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves.
23. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows: -
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
24. From the memorandum of appeal, responses thereto, and submission, the issues for determination in this matter are as follows: -
- i. Whether the respondent is the only entitled beneficiary and trustee of the waqf;
  - ii. Whether the 3rd generation beneficiary can also be a trustee and beneficiary;
  - iii. Whether the Waqf deed as drafted contravenes the Shariah law?
25. On the 1<sup>st</sup> issue, on whether the respondent is the only one entitled to benefit as a trustee of the waqf of the late Mohamed Bin Omar Bin Aish El A-Aufi.

Section 2 of the Waqf Act, Cap 109, reads as follows:

“Waqf” means a religious, charitable, or benevolent endowment or dedication of any property in accordance with Islamic law, and “awqaf” means more than one waqf.”



Under Islamic law, a Waqf is managed by Al-Mutawalli (the manager of the endowment), and he/she should possess several key qualities, which include trustworthiness, competence, and commitment to fulfill the waqf purposes. In a complex situation, Al-Mutawalli should seek legal advice from the relevant authorities to ensure compliance with Sharia Law.

26. According to Sharia, there is a consensus of Muslim Jurists on the permissibility of Waqf. It is based on the Hadith narrated by Ibn Umar (R.A) where he said: Umar (R.A) got a parcel of land in Khaibar and sought advice of the Prophet (P.B.U.H) told him, " you may detain corpus and give out its proceeds as alms(Sadaqat), to the poor, the needy, relatives, travelers and guests( Bukhari and Muslims).
27. There are several types of Waqf, but the most common ones are Waqf Kheyri (for charity) and Waqf Ahly (for descendants).
28. What is before this court is purely Waqf Ahly, which is meant for the descendants of the late Mohamed Bin Omar Bin Aish El-Aufi. There is no dispute on the legality and validity of such waqfs; in fact, it is encouraged in Islam, and most waqfs done by the companions are of this kind. The preponderant opinion of most jurists is that Waqf Ahly is legal if it does not offend Islamic Law.
29. As per the attached waqf deed, the late Mohamed Bin Omar Bin Aish Al-Aufi registered the Waqf deed by indicating as follows: -

“I do hereby declare that I consecrate the said property to be waqf forever for the benefit of the following, that is to say, for my three children, namely Seif, Zahran and Ali and their survivors of them during their lifetime and after death of my last surviving child for my grandchildren and survivors of them during their lifetime and thereafter in the same way for their children and children’s children from generation to generation male or female according to their shares under the Sharia...”

30. Section 4 of the Waqf Act provides that: -
  - (1) A waqf shall be valid where—
    - (a) It is made in accordance with Islamic law;
    - (b) The waaqif has attained eighteen years;
    - (c) The waaqif is of sound mind; and
    - (d) it is made for religious purposes for the poor and vulnerable within the Muslim community.
  - (2) A waqf shall not be invalid merely because the benefit of the waqf that shall be reserved for the poor or any other purpose shall not take effect until after the extinction of the family of the waaqif.
31. Quran 4:7 Allah says: "that both men and women are entitled to a share of the inheritance left by their parents and relatives, whether it is a small or large amount, and that this is a divinely ordained share"
32. The deceased was survived by three children, namely: -
  1. Seif Bin Mohamed Bin Omar Bin Aish Al-Aufi (deceased, no offspring);
  2. Zahran Bin Mohamed Bin Omar Bin Aish Al-Aufi (survived by 13 children as indicated below:
    1. Said Zahran Al Aufy (deceased);



2. Nunu Zahran Al Aufy(deceased)
  3. Omar Zahran Al Aufy(deceased)
  4. Rashid Zahran Al Aufy(deceased)
  5. Fatma Zahran Al Aufy(deceased)
  6. Azzan Zahran Al Aufy(deceased)
  7. Alye Zahran Al Aufy (deceased)
  8. Suleiman Zahran Al Aufy (deceased)
  9. Abdulaziz Zahran Al Aufy(deceased)
  10. Sharifa Zahran Al Aufy(deceased)
  11. Mohamed Zahran Al Aufy (deceased)
  12. Ahmed Zahran Al Aufy(deceased)
  13. Fadhila Zahran Al Aufy (Alive)
33. Ali Bin Mohamed Bin Omar Bin Aish Al-Aufi (deceased was survived by)
1. Wadha Ali Mohamed (Alive)
  2. Maimuna Ali Mohamed(deceased)
34. The waaqif wished the Waqf to benefit his children and children of the children and male or female generations according to their shares under the sharia. The appellant is the son of the late Said Zahran while the respondent is the daughter of the late Zahran, they all fall under either children or children of the children of the late Mohamed Bin Omar Bin Aish Al-Aufi and each and every one of them has his or her share according to sharia law, as per the wish of the Al Mutawalli when he was drafting the Waqf deed, therefore the respondent is not the only beneficiary as it stand of the Waqf of the late Mohamed Bin Omar Bin Aish Al-Aufi.
35. On the 2<sup>nd</sup> issue, whether the 3<sup>rd</sup> generation beneficiary can be a trustee with the 2<sup>nd</sup> generation beneficiaries, the late Mohamed Bin Omar Bin Aish Al-Aufy indicated in the Waqf Deed as follows: -
- “..AND THAT as long as any beneficiary of each generation shall remain alive, the succeeding generation shall not be entitled to any benefit of the Waqf...
- "And I therefore appoint myself to be the first mutawalli or trustee of the said wakf property and after my death my wife Aliya Binti Hamadi Bin Salim Eljafriya shall be the next Mutawalli Or Trustee and after her death the wakf shall be administered by the eldest beneficiary for the time being entitled to the usufruct or any one of the beneficiaries who may be found fit for the purpose..
36. A trustee is defined under section 2 of the Waqf Act to mean "include any person, whether alone or jointly with another, administering any waqf property."



Likewise, Andra Pradesh High Court in A.S Abdul Khader Wakf for Deeni V. Saber Miah (2003) (6 ALD 625) it was held as follows:

“The position of a Mutawalli is just akin to a trustee. It is no doubt true that a Mutawalli cannot act adversely to the interests of the Waqf. A Mutawalli is expected to administer and manage the properties of the waqf, keeping in view the wishes of the founder, and the Mutawalli is expected to protect the interests of the beneficiaries as well.

37. The intention of the donor of the Waqf, in my view, is for his descendants to fully benefit from the properties in perpetuity, and the intention of the waaqif must be respected and since he mentioned the shares of each one according to sharia, in other words he totally submitted to the will of Allah by allowing the Quran to carry out the distribution as indicated hereunder:-

Quran 4:7 Allah says: "that both men and women are entitled to a share of the inheritance left by their parents and relatives, whether it is a small or large amount, and that this is a divinely ordained share."

38. The issue of 1<sup>st</sup>, 2<sup>nd</sup>, or 3<sup>rd</sup> generation is neither here nor there, as the Holy Quran has clearly stipulated that each of the beneficiaries has his or her share. In my opinion, the 2<sup>nd</sup> and 3<sup>rd</sup> generations are all beneficiaries, and no one should block the others.

39. On the 3<sup>rd</sup> issue, whether the waqf deed as drafted contravenes the Shariah law or is in line with the Shariah law?

40. Wakf that offends the Quran and Sunnah with regards to inheritance and equity between the children and beneficiaries is void to the extent of the inconsistency. For example, consecrating waqf to the 2<sup>nd</sup> generation and excluding the 3<sup>rd</sup> generation, or the children of the deceased 2<sup>nd</sup>-generation beneficiaries. In Islamic Law, correcting a waqf (endowment) is possible, but it depends on the specific circumstances and whether the correction aligns with Sharia principles. Generally, amendments can be made to address errors, clarify ambiguities, or adapt to changing needs, provided they do not contradict the original intent of the waqf or violate Islamic law. A condition in the Waqf Deed, that is contrary to Islamic law, like some beneficiaries to benefit to the exclusion of the others in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> generations, is not binding. The Kadhi has the power and the discretion to give directions on the waqf towards the realization of its objectives.

41. The intention of the waaqif, in my view, is for his descendants to fully benefit from the property. In some instances, the institution of the family waqf (waqf ahli) has come under scrutiny. Free will gives the maker the freedom to make his/her wishes as he/she please, without any checks and balances, which has led to instances where legal heirs have been deprived of their rightful shares solely because they are from the 2<sup>nd</sup> or 3<sup>rd</sup> generation.

42. It should be understood that inheritance is the primary and original entry of living persons into the possessions of a dead person's property. However, it seems there has been a strong desire from some corners of the Muslim Community to have control over the allocation of their property after their demise. Categorizing the beneficiary into generations is an outright departure from the teachings of Quran 4:11.

“Allah commands you as regard your children's (inheritance) to the male, portion equal to that of 2 females”



43. In the above Quran verse, Allah (S.W.T) has categorically stated that inheritance matters are His limits; no heir should miss out. He is exalted, says in the Quran 4:13, 14:-

“These are the limits (set by Allah) and whoever obeys Allah and His Messenger (P.B.U.H) will be admitted to the Gardens under which river flows (in paradise), to abide therein, and that will be the great success. And whoever disobeys Allah and his messenger and transgresses His Limits. He will cast him into fire, to abide therein, and he shall have a disgraceful torment.”

44 This is a terrifying verse in which those who either follow God's Sharia of inheritance or violate the legal bounds categorically laid down by Allah in his book are warned of unending punishment. It is not desirable for someone to have property and lock out some of his/her beneficiaries, whether knowingly or unknowingly. The prophet (P.B.U.H) said: -

“Whoever stipulates a condition that is not in the Book of Allah, it is not valid, even if he stipulates a hundred times. ”Narrated by al Bukhari (2155) and Muslim(1504)

It is incumbent upon the institution of waqf to either come up with necessary procedures, including vetting of the wishes of the makers of Waqf Ahli upon drafting the waqf deed before appending their signatures and correcting any errors, as stated by Vogel, the Islamic Foundation of the Islamic Legal System on religious belief means that, the law is perfect but humans are not”.

45. The Wakf deed, as it can be seen, the intentions of the waqif(owner) cannot be reasonably carried into effect, and it offends the Islamic Law of Inheritance as well as the Rule against perpetuity for failing to provide the shares when the 1st generation dies, who replaces him/her, and vice versa.

46. The upshot of the foregoing is that the appeal has merit. The same is allowed in its entirety. The decision of the court below is set aside.

47. This being a family matter, each party shall bear his or her own costs of the appeal.

48. It is so ordered.

**DATED AND SIGNED AT MOMBASA, THIS 3<sup>RD</sup> DAY OF OCTOBER 2025. DELIVERED THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Ibrahim, for the Appellant;

Mr Mitei, holding brief for Mr Yunis Ali, for the Respondent; and

Arthur - Court Assistant.

