



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 470 OF 2011

AHMED MOHAMED AHMED.....PLAINTIFF

-VERSUS-

AHMED MOHIDEED.....1ST DEFENDANT

KENYA UNITED STEEL COMPANY (2006) LIMITED...2ND DEFENDANT

JUDGEMENT

1. The plaintiff Ahmed Mohamed Ahmed brought this suit against the two defendants vide his plaint dated 24th August 2011 and later amended on 1st September 2011. He seeks for judgement against the defendants jointly and severally for:

- a) **A declaration that the Wakf created over the land known as Plot No. 884 (original 780/1) of Section VI M.N is null and void ab initio as it offends Rule against perpetuity for failing to provide for charity.**
- b) **An order to vest the land in the name of the deceased settler Asila bint Mwijabu.**
- c) **An order to nullify all the subsequent transactions over the subject land.**
- d) **Costs of the suit**
- e) **Any other and further relief this Honourable Court deems fit to grant.**

2. The plaintiff pleaded that the suit property plot No 884 (original No 780) of Section VI Mainland North was owned by Asila Binti Mwijabu – deceased. That by an instrument of Wakf, the deceased settler consecrated the land as a Wakf declaring income thereof after deduction of rates, taxes and all expenses shall from time to time be divided in equal shares amongst (1) Mohidin (2) Mohamed (3) Rashid (4) Rukiya binti Ahmed (5) Fatuma binti Ahmed as well as other children that may thereafter be born to Ahmed bin Sheikh Makame thereafter from generation to generation in equal shares. Ahmed Sheikh Makame who was the husband of the maker of the Wakf was appointed first trustee and subsequent trustees were provided to be the eldest male or female beneficiary for the time being entitled to share the income of the Wakf provided he/she is a suitable trustee under Shariah Law.

3. The plaintiff in paragraph 6 of the plaint listed the surviving beneficiaries of each of the persons named in the Wakf. He continued to plead that Mohidin Mohamed being the eldest beneficiary therefore registered as trustee of the Wakf leased the land vide a lease dated 14.1.1969 to Ram Piyasi & Kubra Mohamed Ali Chagpar for a term of 99 years on set terms.

4. That by diverse instruments, the lease was ultimately assigned to the 2nd defendant who now holds the lease for the remainder of the term. The plaintiff contends that the Wakf created over the land is bad, null and void in law for failing to provide for charity and offending the rule against perpetuity. This constitutes the basis of this suit.

5. The 1st defendant did not defend the suit. The 2nd defendant filed a statement of defence on 2nd November 2011. In her defence, the 2nd defendant pleaded that the suit is time barred by virtue of section 20 of the Limitation of Actions Act. The 2nd defendant also pleaded that the plaintiff has no locus standi to bring this suit as he is not the legal representative of Asila Binti Mwijabu – deceased. The 2nd defendant pleaded further that the absence of a charitable benefit cannot invalidate the Wakf. Further that the rule against perpetuities is inapplicable to the duly registered Wakf dated 19.8.1943.

6. The 2nd defendant pleaded further that between 1969 and 2011, the leased property has been charged to various financial institutions.

Therefore the financial institutions cannot be condemned unheard under the provisions of section 46 of the Registration of Titles Act (repealed). That the 2nd defendant's right to acquire property cannot be fettered by the plaintiff as the estate is bound by the terms of the lease awaiting its natural determination. The 2nd defendant also pleaded that this Court lacks jurisdiction to grant the reliefs sought. She urged the Court to dismiss the suit with costs.

7. After pleadings closed, parties adduced oral evidence in support of their case. The plaintiff stated in his evidence that Asila binti Mwijabu is his paternal grandmother who owned the suit plot. That the first trustee was the husband of Asila and upon his death, Mohidin took over. Mohidin is the father of the 1st defendant. The plaintiff produced the certificate of ownership as Pex 1 and the Wakf deed as Pex 2. That the deed provided for the mode of appointment of trustees hence Mohidin appointed himself as trustee via affidavit produced as Pex 3 and death certificate of Ahmed Sheikh Makame as Pex 4.

8. The witness continued that Mohidin leased the property to two women who later leased it to KUSCO. KUSCO later sold the remainder of the lease to the 2nd defendant. His complaint is that the Wakf does not benefit them. Secondly that the deed did not provide for charity. He asked the Court to dissolve the Wakf so that the property reverts back to the estate of Asila binti Mwijabu – deceased to enable them inherit it in accordance with the Islamic Law.

9. In cross – examination, the plaintiff said he brought the suit for himself and other family members. That he did not file any authority to bring the suit. That he knew the property was a Wakf in 1990 after the death of his father. The witness said he knows there is a factory built on the suit property. He was also aware that a bank gave some finance to KUSCO in 2000 and when he did searches, he noted other banks interests were also registered. That the administrator of Asila's estate is still the Public Trustee but the witness stated they have nothing to do with this property. The plaintiff said he is a beneficiary by virtue of the Wakf deed. Asked by Court, he said the 1st defendant is the one entitled to be next trustee as provided in the Wakf deed.

10. The 2nd defendant's witness testified on 26th April 2017. The witness for the defendant was Hussein Hilal who introduced himself as the group Human Resource and legal manager for ALAL group of companies. He adopted his statement filed in Court on 25.4.17 as his evidence in chief. In the statement, he said he relied on their documents filed in Court on 2nd November 2011. He added that the lease of 25.1.1969 was consented to by the Wakf Commissioners of Kenya in compliance with section 14 of Cap 109 (pages 13 – 15 of the documents). That this lease was transferred to them for the remainder of the term of the lease.

11. The witness stated further that by virtue of a transfer dated 9.5.2006, the suit property was transferred to S.R.M by Kenya Commercial Bank Ltd in exercise of the bank's statutory power of sale granted under a mortgage issued to the 2nd defendant. That the property is also charged to Standard Chartered Bank & Eastern & Southern African Trade & Development Bank therefore their interests should be protected. That the term of the lease will end on 1st January 2067 and until then, the estate of the late Asila Mwijabu shall be bound by the terms of the lease dated 14.1.1969. Mr Hussein also stated that the plaintiff not having been appointed the personal representative or trustee of the Wakf lacks locus to sue. He urged the Court to dismiss the suit with costs.

12. The parties thereafter filed written submissions which have raised the issues contained in the pleadings and evidence. I have read and considered the same and frame these three questions whose answers determine this suit:

(1) Whether the plaintiff has locus to bring this suit

(2) Whether the suit is time barred

(3) Whether the Wakf is null & void and therefore should be dissolved

13. A Wakf is defined under section 1 of the Wakf Commissioner's Act to mean ***“the religious, charitable or benevolent endowment or dedication of any property is accordance with Muslim law.”***

A trustee is defined to ***“include any person whether alone or jointly with another in control of any property the subject of a Wakf or in receipt of any rents or profits thereof.”***

The Wakf deed in question provided on how its trustees were to be appointed being ***“the eldest male or female beneficiary for the time being entitled to share in the income of the said Wakf provided always that he or she is a suitable person to be a mutawali or trustee under the Sharia law and if the eldest male or female beneficiary shall be unfit then the next eldest beneficiary shall be a mutawali.”***

14. From the above definition of what is a Wakf and the provisions within the Wakf deed on the appointment of a trustee, the plaintiff did not in my opinion need to obtain letters of administration of the estate of Asila binti Mwijabu or authority of the other beneficiaries to bring this suit. In my opinion and I so hold that the plaintiff needed only to demonstrate that he is a beneficiary and whether he is the eldest or next eldest. He sued the 1st defendant whom he said was the eldest beneficiary following the death of the 1st defendant's father Mohidin Mohamed who was the last trustee. The 1st defendant did not take up this responsibilities under the Wakf. From the list of beneficiaries in paragraph 6 of the plaint, the plaintiff appears to be the next eldest male beneficiary of the Wakf. The 1st defendant did not participate in these proceedings to controvert the lineage as set out by the plaintiff. For this I find that the plaintiff has locus to bring the suit by virtue of being a beneficiary and an elder beneficiary, the eldest having abdicated to take up his role.

15. The second issue taken by the 2nd defendant is that the suit is time barred. The 2nd defendant submitted that section 7 of the Limitation of Actions Act provides that an action to recover land cannot be brought after the end of twelve years from the date on which the right of action accrued. The Wakf deed is dated 19th August 1943 with the 1st trustee Ahmed bin Sheikh Makame appointed by the deed. Ahmed

passed on 9th December 1968 as per the affidavit sworn by the 2nd trustee Mohidin Mohamed. The plaintiff pleaded that Mohidin Mohamed was the trustee until he died. This is not disputed because it is Mohidin who signed the lease for which the 2nd defendant is a beneficiary.

16. The right of action to the plaintiff would therefore accrue when the term of the next in line of trusteeship terminated. It is not declared in the pleadings when the 2nd trustee – Mohidin died. Since the issue of limitation was brought up by the 2nd defendant, it was incumbent upon them to prove that indeed the suit was time barred by specifying when the time began running as against the plaintiff interest. It is a rule of evidence that he who alleges must prove. However assuming the time of death of Mohidin is known, the Wakf deed also dealt with the question of limitation. The donee of the land Asila binti Mwijabu stated the land was to benefit the persons named in the deed and the descendants of the said beneficiaries from generation to generation in equal shares. This means it benefits the descendants in perpetuity thereby a claim under this Wakf deed therefore cannot be said to be limited to a period of time.

17. The last issue is whether the Wakf deed is invalid & illegal for failing to provide for charity. Section 4 (1) of the Wakf's Commissioners Act explains what is a valid Wakf. That a Wakf is declared to be valid if:-

“(i) It is in every other respect made in accordance with

Muslim law and;

(ii) The ultimate benefit in the property the subject of the Wakf is expressly or in case in which the personal law of the maker of the Wakf so permits impliedly reserved for the poor or for any other purpose recognized by Muslim law as a religious pious or charitable purpose of a permanent character.

Provided that the absence of any reservation of the ultimate benefit in property the subject of a Wakf for the poor or any other purpose recognized by Muslim law as a religious pious or charitable purpose of a permanent character shall not invalidate the Wakf if the personal law of the maker of the Wakf does not require any such reservation.”

18. The 2nd defendant submitted that it was not proved that the personal law of the deceased maker of the Wakf in question required an express reservation stating the charitable purpose of the Wakf. It is implied that the 2nd defendant is conceding that indeed the Wakf deed did not provide for the poor or charitable purpose. The issue is whether there is proof of the personal law of the maker of the Wakf. At page 2 of the Wakf deed it is stated thus under the appointment of trustee, **“provided always that he/she is a suitable person to be a mutawali or trustee under the Shariah...”** This Court takes judicial notice that Sharia is a known Muslim law. Therefore the maker of the deed having specified that suitability of the trustees should be in accordance with the Sharia clearly disclosed her personal law.

19. The other issue is whether the registration of the Wakf deed under the Registration of Titles Act excluded the deed from complying with the requirements of section 4 of CAP 109. This issue was just dropped by the 2nd defendant without laying any basis I will not delve into what the 2nd defendant intended. The 2nd defendant further relied on the provisions of section 5 of CAP 109 that provides, **“the Act does not affect any right or interest that vested prior to its commencement.”** Unfortunately the lease which vested an interest upon the 2nd defendant was signed in January 1969 which was after the commencement of CAP 109 which Act came into operation in 1951. Hence the provisions of section 5 does not aid the 2nd defendant.

20. In conclusion I am satisfied that the plaintiff has shown that the Wakf deed as made did not comply with the provisions of section 4 (1) of CAP 109 and the proviso thereto does not apply as the maker's personal law is Sharia. Consequently the Wakf deed as drawn is null for noncompliance with the law and is thus invalid. The issue of charges registered on the title were transactions entered into between the 2nd defendant and the said financial institutions. Any remedy due to those institutions lie as against the 2nd defendant and therefore this suit cannot fail merely because these institutions were not joined in this suit. In the result I am satisfied that the plaintiff has proved his case within a balance of probabilities. Accordingly I enter judgement for the plaintiff as prayed in prayers (a) (b) (c) and (d) of the plaint.

Dated, signed & delivered at Mombasa this 31st day of October 2017

A. OMOLLO

JUDGE