



REPUBLIC OF KENYA



**Maalim v Shosi (Civil Appeal 99 of 2018) [2022] KECA 518 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KECA 518 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 99 OF 2018  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 6, 2022**

**BETWEEN**

**SALIM ABDALLA MAALIM ..... APPELLANT**

**AND**

**FAMAU MADI SHOSI ..... RESPONDENT**

*(Being an appeal against the whole of the judgment and order of the High Court at Mombasa delivered by Lady Justice Thande, J. on the 4th May, 2018 in Civil Appeal No. 11 of 2016)*

**JUDGMENT**

1. This is a second appeal to this Court from the judgment of the High Court sitting as a first appellate court in Mombasa from the judgment of the Principal Kadhi in Succession Cause No. 193 of 2015. That being the case this Court will confine itself to matters of law only as guided in *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No. 127 of 2007) where Onyango Otieno, J.A. put it succinctly in the following words:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

2. Where an appeal is confined to questions of law only, an appellate court has to accept the findings of fact made by the Courts below, and should not interfere with them unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion. This would be the same as holding the decision is bad in law. (See *Charles Kipkoeh Leting v Express (K) Ltd & another* [2018] eKLR).



3. The appellant Salim Abdalla Maalim filed a Succession Petition against the respondent Famau Madi Shosi, before the Kadhi's Court at Mombasa, being In the matter of the estate of Bakari Madi Shosi who died on 10th November, 2013. The facts of the case are that the deceased had no children but was survived by his brother, Famau Madi Shosi, and his widow Mwanashee Shaban; and that his sole property was a house without land, on Plot No. 82/1/MN in Frere Town in Kisauni, Mombasa.
4. The appellant's case was that he and his son Abdullah Salim were appointed trustees of the deceased estate vide a Wakf Deed dated 10th February 2004. In that wakf, the deceased instructed that his house without land on Plot No. 82/1/MN [hereinafter suit land] in Frere Town in Kisauni Mombasa be wakf to benefit madrassa Marajal Bahrrain situate at Kongowea, Mombasa, after his demise. In the Petition, the appellant was challenging the respondent's claim over a share of the suit property as heir of the deceased, despite it being a wakf. He sought three prayers; one, determination of the estate, the heirs and shares; two, the wakf be confirmed and respected for the said madrassa use; costs and any other relief the court may grant.
5. In the respondent's defence, he raised issue with the appellant's failure to enjoin the widow of the deceased in the suit as a co-respondent. He contended that as it did not meet the legality test, nor had any members of the family of the deceased witnessed its signing, the wakf was invalid; that the appellant and his son not being lawfully licensed and registered as Public Trustees, nor as Wakf Commissioner of Kenya could not serve as trustees over the wakf. He urged the court to dismiss the suit with costs, and to make any other relief the court may deem fit and just.
6. The main issues before the Kadhi Court were three;
  - i. Whether the wakf document constituted a valid wakf in accordance to Islamic Law and Statute;
  - ii. Whether the house without land on Plot No. 82/1/MN was properly designed as a wakf for the benefit of the madrasa Marajal Bahrain; and,
  - iii. Whether for the benefit of the heirs of the deceased Bakari Madi Chosi, the estate of the deceased should be subjected to succession.
7. The Principal Kadhi in his judgment found that the wakf met the legal requirements as regards veracity and authenticity but failed in its phrasing for being conditional upon the death of the donor. He found for reason of the condition set, the wakf reverts to being a will. He therefore ordered that the suit property was

“bequeathed for the benefit of the madrassatul Marajal Bahrain at Kongowea and therefore not available for inheritance to the heirs of the deceased in this matter”.
8. The respondent, being dissatisfied with the decision of the Principal Kadhi's Court, lodged an appeal to the High Court raising eight grounds of appeal, which we summarize as covering three broad areas, that is, the learned trial Kadhi erred:
  - i. For admitting the wakf as a legal document, yet it was produced after the death of the deceased against Islamic law;
  - ii. For accepting that the deceased bequeathed his entire property to wakf yet a deceased person was not allowed under Islamic Law to bequeath over 1/3 of his estate to one person or institution; and,
  - iii. For admitting that a deceased could bequeath a property after his death by way of a will unknown by his family before his death.



9. The learned Judge of the High Court sat with the Chief Kadhi as Assessor, as is the law. After considering the record of appeal and submissions of counsel to the parties, the Judge of the Superior Court identified the issue for determination on appeal as whether the Hon. Kadhi erred by confirming the wakf and finding that the suit property was not available for distribution amongst the legal heirs of the deceased. The learned judge found that in the judgment of the Principal Kadhi it was clear that he was of the view that the wakf was invalid for being conditional in that the deceased declared the suit property to be wakf after his death. The learned Judge found that being conditional the wakf offended the clearly set requirements of a valid Wakf.
10. The learned Judge, cited with approval the Supreme Court of India case in *Punjab Wakf Board Vs Shakur Masih* [1996] insc 1232(1 October 1996), which held that it is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency. The learned Judge found that since the deceased did not hand over the suit property on the date he declared it wakf in 2004, the wakf was invalid. The learned Judge further held that
 

“a Muslim is barred by Islamic Sharia from disposing by will more than 1/3 of his estate to third parties ... and any bequest exceeding 1/3 is invalid. In the present case, the Deceased was survived by his widow and his brother. As such the document if it was to be interpreted as a will could only bequeath 1/3 of the estate to the Madrassa.”
11. The learned Judge also considered the opinion of the Chief Kadhi to the effect that the appeal should be allowed, and set out part of that opinion in her judgment to wit:
 

“The learned Kadhi erred in his judgment to order the whole house subject of this case to be Wakf to madrasa, leaving the heirs without any benefits... In Islamic law of Wakf and Will, the beneficiaries have their word, either to object or to approve the same and in this case the heirs are objecting the Wakf to take place.”
12. In a judgement delivered on 4th May 2018, the High Court set aside findings of the Hon. trial Kadhi and held that the estate of the deceased be distributed to his heirs according to Islamic Sharia. Those findings necessitated the appellant’s second appeal to this Court against the High Court’s decision on 6 grounds as follows;
  - a. That, the learned Judge erred in a point of Muslim Law and law by holding that the wakf of Marajal Bahrain being conditional was invalid.
  - b. That, the learned Judge erred in a point of Muslim Law and law by holding that if a person wakfs a property, he should hand it over from the date of the declaration of the wakf and if he declares a property is a wakf after his death, the wakf is void on account of contingency.
  - c. That, the learned Judge erred in a point of Muslim Law by holding that a wakf is invalid if it does not cover the period from the date of declaration till the demise of the person who declares the same.
  - d. That, the learned Judge erred in a point of Muslim law by holding that a bequest by way of a will or wakf requires consent from the legal heirs.
  - e. That, the learned Judge erred in a point of law by failing to order a retrial to ascertain whether the wakf was more than 1/3 of the estate of the deceased before revoking the wakf of madrassatul Majajal Bahrain.



- f. That, the learned Chief Kadhi as an assessor erred in law and misguided the court by failing to opine on the substantive points of Muslim Law raised in the appeal.
13. This appeal was fixed for virtual hearing on the 15th February 2022 however, none of the counsels to the parties appeared despite being served with the notice of hearing. We noted that Messrs. A.A. Mazrui & Co advocates learned counsel for the appellant filed submissions and list and bundle of authorities on behalf of their client on 24th May 2019. There is also on record a notice of change of advocate for the appellant dated 5th August 2019, by Obura & Co. advocates filed after the date of the submissions by Mazrui advocate. Since Obura & Co. Advocates did not file any submissions, we shall consider those already on record.
14. Mr. Githuka learned counsel for the respondent did not file any submissions despite reminders to do so, the latest reminder being the email to his firm dated 9th February 2022. We noted that Mr. Githuka participated in a notice of motion application filed by the appellant’s advocate seeking extension of time to file and serve the record of appeal. In that application, whose ruling was delivered on 8th November 2018, Mr. Githuka was on record as having filed a notice of preliminary objection. It is for the reasons above that we decided to set down the appeal for judgment for determination based on the record before us, and the submissions, list and bundle of authorities as filed.
15. In the submissions by Mr. Mazrui learned counsel for the appellant, he urged that the first three grounds of appeal dealt with a single issue, which is the conditions for a valid wakf in Islamic law and statute. Counsel urged that Section 3 of the *Wakf Commissioners Act*, Chapter 109 [hereinafter the Act] provides that the said Act is the applicable law. That Section 4 of the Act highlights what constitutes valid wakfs, and urged that Section 4 (2) expressly provided that a wakf will never be declared invalid merely because it provides that it will not take effect until after the extinction of the family, children or descendants or kindred of the maker of the wakf. Counsel urged that neither the Hon. Kadhi nor the first appellate court considered the provisions of the Act on the conditions of a valid wakf, that they applied common law and personal jurisprudence thus turning a valid wakf into a will. Counsel submitted that for lack of local cases on the subject, we should consider comparative jurisprudence, and in that regard, cited the case of High Court of Judicature at Allahabad in *UP Sunni Central Board of Wakf v A.D.J. Court No. 3 Muzaffar Nagar & another* on 14 August 2015.
16. In order to answer the question whether the wakf by the deceased in this case meets the validity test, we must understand what a wakf is. We find guidance from the definition in section of the Act. Section 2 defines:
- “wakf” means the religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law;
- “wakf Ahli” means a wakf made for the benefit of an individual or family, or for the performance of rites or ceremonies recognised by Muslim law as being for the benefit of the soul of an individual (including the dedicator) or of the souls of the members of a family;
- “wakf Khairi” means a wakf, other than a wakf Ahli, made for any religious, charitable or benevolent public purpose recognised by Muslim law, including the provision and upkeep of cemeteries and burial grounds.”
17. Concerning validity of a wakf, Section 4 which provides:

“4. Validation of wakfs



1. Every wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say:
  - a. for the benefit, either wholly or partly, of the family, children, descendants or kindred of the maker or of any other person; or
  - b. if the maker of the wakf is in Ibathi or Hanafi Mohammedan, for his own maintenance and support during his lifetime, is declared to be a valid wakf 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 any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognised 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 recognised 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.

2. No wakf to which subsection (1) applies shall be invalid merely because the benefit in the property reserved by the wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf. [L.N. 142/1963, Act No. 19 of 1964, Sch.]
18. Section 4(1) (a) refers to both wakf Dhurry or Ahly as it benefits the family and descendants of the donor as stated in first part of subsection (a), and; wakf kheiry where it provides for benefit of

“or of any other person”, in the latter part of subsection (a). It is clear that the law recognizes that a wakf declared for the benefit of the family and descendants of the donor (wakf Dhurry or Ahly), or for any other person (wakf Kheiry) will be deemed to be valid only if it meets the requirements set under that section. These requirements as set under Section 4(1) (i) (ii) are conjunctive and twofold, one it must be made in accordance with Muslim law, and two the ultimate beneficiary must be expressly or impliedly reserved for the poor or for other purpose recognized by Muslim law as a religious, pious or charitable purpose of a permanent character.

19. We noted that the Opinion of the Chief Kadhi to the learned Judge addressed that issue and stated that under Muslim Law, in wakf one cannot exceed a third when one gives out property for non-heirs to benefit. He concluded by stating that the Hon. trial Kadhi erred in his judgment to order the whole house subject of this case to be a Wakf to a madrassa, leaving the heirs without any benefits. In the case of *Saifudean Mohamedali Noorbhai v Shebnaz Abdehusein Adamji* [2011] eKLR this Court opined:

“The limit on a Muslim’s testamentary freedom, up to one-third of one’s estate, is seen in Islam as a means to ensuring balance between a Muslim’s freedom in this regard and his responsibility to his or her heirs. Deriving sanction from a Prophetic tradition, it reflects indications in the noble scripture that a Muslim may not “so dispose of his property by will as to leave his heirs destitute”.

20. The deceased in this case disposed of his entire property to wakf leaving his heirs destitute. That rendered the wakf invalid for being contrary to Muslim Law. Since the requirements of a valid wakf are



conjunctive in nature, any breach of any one of the requirements is sufficient to invalidate the wakf. That being the case, the learned Judge of the High Court did not err in declaring the wakf invalid.

21. The other issue raised of whether the consent of the legal heirs is required is covered in the first three grounds of appeal and we need not go into it. The issue of determining whether the wakf covered the entire property of the deceased is superfluous as in its very wording it bequeathed the entire property to one beneficiary, not an heir of the deceased. There is nothing left more to enquire into, as clearly no one else was to benefit from the deceased estate except the madrassa.
22. We have come to the conclusion that the appeal has no merits. Accordingly, we affirm the judgment of the High Court and dismiss the appeal in its entirety. As ordered by the Superior Court, the proceedings are remitted back to the Kadhi Court to distribute the property of the deceased between the widow and brother of the deceased, who are the legal heirs, in accordance to Muslim Law. There will be no order as to costs.
23. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.**

**S. GATEMBU KAIRU (FCI Arb)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original Signed*

**DEPUTY REGISTRAR**

