

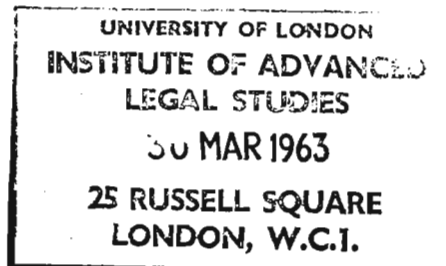
ON APPEAL FROM
THE COURT OF APPEAL FOR EASTERN AFRICA
AT MOMBASA

B E T W E E N:

1. RIZIKI BINPI ABDULLA and
 2. FAIZA BINTI ABDULLA
- (Defendants) Appellants

- and -

1. SHARIFA BINTI MOHAMED BIN HEMED
 2. KULTHUMI BINTI MOHAMED BIN HEMED
 3. RUKIYA BINTI MOHAMED BIN HEMED
 4. MWANA SHEH BINTI MOHAMED BIN HEMED
 5. SAID BIN SULEMAN BIN HEMED
 6. ALI BIN SULEMAN BIN HEMED
 7. GHUFERA BINTI SULEMAN BIN HEMED
 8. KHULTHUMI BINTI SULEMAN BIN HEMED
- (Plaintiffs) Respondents



68287

CASE FOR THE APPELLANTS

- 20 1. This is an appeal from a Judgment and Order of the Court of Appeal for Eastern Africa at Mombasa, dated the 10th December, 1959, dismissing an appeal from a decree of the Supreme Court of Kenya at Mombasa District Registry, dated the 1st December, 1958, whereby a wakf registered at the Coast District Land Titles Registry on the 3rd December, 1942, was declared null and void. Under the terms of the said wakf the Appellants were, subject to certain prior interests, entitled to receive the
- 30 balance of the income arising from the wakf properties.

By the decisions of the Courts below the said properties were declared to belong to, and form part of, the Settlor's intestate estate which the Respondents claim as "sharers" and "residuaries" under Muslim law.

Record

pp.69, 94.

Record

By the Wakf Commissioners Ordinance, 1951, (hereinafter referred to as "the 1951 Ordinance") "'wakf' means the religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law."

2. The main question for determination on this appeal is whether or not the said wakf is within the provisions of Section 4 (1) (2) of the 1951 Ordinance which validate a wakf made, inter alia, for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker, if in every other respect it is made in accordance with Muslim law and the ultimate benefit in the property settled is reserved for religious or charitable purposes of a permanent character - and even though such ultimate benefit is not to take effect until after the extinction of the family, children, etc. of the maker of the wakf. 10

3. Relevant sections of the 1951 Ordinance are included in an Annexure hereto. 20

4. The facts were thus stated in the Judgment of Windham J.A. in the Court immediately below:-

p.69, 11.21-44.

Ex.4, p.101.

"The Settlor," (i.e. the maker of the wakf - one Khadija binti Suleman) "and also all the parties to the suit, were Mohammedans of the Shafi sub-sect of the Sunni sect. By a written instrument, dated 3rd November, 1942, and registered on 3rd December, 1942, the Settlor declared, or purported to declare, a wakf of certain immovable property owned by her in Mombasa. She appointed herself as the first trustee (or mutawalli) of the wakf, and after her death her cousin the 1st Defendant" (not a party to the appeal in the Court below or to this appeal) "and thereafter such person as he or the beneficiaries should appoint." After reciting that she was making the wakf "in consideration of my natural love and affection for my adopted daughters Riziki binti Abdulla and Faiza binti Abdulla" (the present Appellants) "and the other beneficiaries hereinafter mentioned," and after declaring the wakf appointing the successive trustees as aforesaid, and providing that from the monthly income they should first defray all expenses of maintaining 30 40

and administering the property and then pay one-tenth of the balance into a reserve fund, she made beneficial provisions of which Clauses 3 and 6 of the wakf deed contain everything material to this case, both in the Court below and before us on appeal."

5. The learned Judge (Windham J.A.) then set out the said Clauses 3 and 6 as follows:-

p.70

Ex.4, p.103.

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"3. The free balance of the income of the wakf property shall be divided each month between my said adopted daughters in equal shares and upon the death of one or other of my said adopted daughters, her share shall be divided equally among her sons and daughters and their issue per stirpes, brothers taking the same share as sisters, and failing issue of either of my adopted daughters, the half share of the income that would have gone to such issue shall be divided (First) equally among my sisters Sharifa, Kalathumi, Rukiya and Mwana Wa Shei each of whom and, failing her, her issue shall take one part (Second) the surviving adopted child or her issue per stirpes who shall take one part and (Third) the children of my late brother Seif bin Mohamed El-Busaid including his adopted child, and, failing any of such children, their issue shall take per stirpes who shall take one part equally among them.

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x x x x x x x x

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"6. If the beneficiaries so appointed shall die out or fail, the income of the wakf shall be devoted to assisting poor Mohamedans, promoting the Mohamedan faith, educating Mohamedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the Prophet would approve."

Ex.4, p.103.

6. The learned Judge (Windham J.A.) continued his narrative as follows:-

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"The Settlor died on the 11th April, 1952, and the 1st Defendant proceeded to administer the wakf in accordance with its provisions until, on the 10th February, 1958, the plaint was lodged, claiming a declaration that the

p.70, 11.30-40.

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wakf was void ab initio on a number of grounds and asking for an account of the income that had been paid out under it. At the trial learned Counsel for the Respondents abandoned any claim to accounts of income received and distributed before 31st July, 1957, none having been distributed since that date.

p.70, 1.41 to
p.71, 1.7.

"Before considering the question of the validity of the wakf I would here record, as undisputed facts, that the Settlor's adopted daughters, the 1st and 2nd Appellants, were adopted and brought up by her from infancy, that they were not related to her by blood or marriage, that they were respectively 12 and 5 years old in 1942 when the wakf was made, that they married at the ages of 13 and 19 respectively and that they both have issue living. It is also conceded that no legal form or ceremony of adoption was gone through in their case, and that in any event adoption, as such, is not recognised by Mohamedan law and confers no rights of inheritance under that law."

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p.1.

7. Instituting proceedings in the Supreme Court of Kenya at Mombasa District Registry against, inter alia, the present Appellants (hereinafter also referred to as "Defendant No. 2" and "Defendant No. 3") the present Respondents (hereinafter also called "the Plaintiffs"), in their Complaint, dated the 10th February, 1958, prayed, inter alia, for a declaration that the said wakf (see paragraph 5 hereof) was null and void ab initio because:-

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p.4; 1.37 to
p.5, 1.1.

(i) the Settlor, after making the wakf and until her death in 1952, had continued in possession of the properties concerned receiving the income thereof. The wakf "was therefore a mere camouflage to create a chain of several life estates taking effect after her death and thus a disposition offending against the rule against perpetuity, the ultimate gift to charity therein being merely illusory,"

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p.5, 11.5-6,
16-19.

(ii) the beneficiaries, Defendants Nos. 2 and 3, were not related to the Settlor and were not "Muslims" within the definition in Section 2 of the 1951 Ordinance. The wakf was therefore not within the validating provisions of the Ordinance.

(iii) Even if the 1951 Ordinance is applicable, the said wakf contravenes Section 4 thereof because -

Record
p.5, 1.24 to
p.6, 1.11

(a) "it is not made for the maintenance or support of any person, or of the family, children, descendants or kindred of the Settlor";

10 (b) the Settlor's provision for her "adopted daughters" and their sons and daughters and their issue is contrary to Muslim law which does not recognise adoption;

20 (c) the benefit reserved for the poor, etc., "is postponed to take effect in the first instance, after the extinction of the Second and Third Defendants, their sons and daughters and the issue of their sons and daughters; and even thereafter, to some extent, after the extinction of an 'adopted' child of the Settlor's brother and the issue of his said 'adopted' child"; and

p.5, 1.44 to
p.6, 1.7.

(d) the ultimate gift to charity does not purport to be for a religious, pious or charitable purpose of a permanent character."

p.6, 11.8-11.

8. The Plaintiffs, in their said Plaint, prayed, inter alia, that -

30 (1) the said wakf be declared null and void ab initio and the properties wakfed thereby be declared to belong to, or form part of, the intestate estate of the Settlor;

p.6, 1.28 to
p.7, 1.8.

(2) "the fourth Defendant (Registrar of Titles) be directed to cancel and delete all entries relating to the said properties which had been made in the Register, etc.; and

(3) directions be given for the rendering to the Plaintiffs of accounts of income received by the Defendants Nos. 1 (the mutawalli or trustee) 2 and 3 from the properties concerned.

40 As has been indicated, in addition to Defendants Nos. 2 and 3 (the present Appellants) the

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other persons made parties to the action as Defendants were the mutawalli or trustee (Defendant No.1) and the Registrar of Land Titles Coast Registry (Defendant No. 4) - neither of whom filed defences to the action.

pp.7-9.

9. By her Written Statement of Defence, dated April, 1958, Defendant No.2 said, inter alia, that: she was the adopted daughter of the Settlor who throughout her life had stood in loco parentis towards her; the Settlor's possession of the wakf

p.8, 11.3-7.

properties had only been that of a trustee; the Settlor had used the income of the said properties for the "maintenance and support" of herself (Defendant No.2) and Defendant No.3; she was a Muslim within the definition of that word in Section 2 of the 1951 Ordinance; she was a member of the Settlor's family; and that the wakf was valid and was made "in all respects in accordance with the provisions of the said Ordinance and of the Mohammedan law".

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p.8, 11.13-15.

p.8, 11.16-19.

p.8, 11.32-34.

p.8, 11.39-40.

p.8, 11.44-46.

pp.9-11.

10. A Written Statement of Defence, dated the 25th April, 1958, similar in its contents to that filed by the Defendant No.2, was filed by Defendant No.3.

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pp.11-12.

11. By their Reply, dated the 2nd May, 1958, the Plaintiffs joined issue on the allegations that the Defendants Nos. 2 and 3 were, or could validly be, the adopted daughters of the Settlor.

The issue of adoption does not now arise.

12. Issues framed in the action, on the 22nd September, 1958 were as follows:-

pp.15-16.

"1. Did the Settlor subsequent to the creation of the wakf receive and use the income of the properties the subject of the wakf for her own use and benefit and/or continue in physical occupation of any part of the said properties?

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"2. If the answer is in the affirmative, does anyone of the above facts invalidate the wakf?

"3. (a) Are the 2nd and 3rd Defendants in any way related to the Settlor?

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(b) Are they Muslims in accordance with the

definition of the Wakf Commissioners Ordinance?

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- (c) Are they members of the family or kindred of the Settlor on any of the grounds alleged in paragraph 3(b) of the Defence?
- (d) In the event of the answers to (a) and (b) and (c) being in the negative, does the Wakf Commissioners Ordinance apply to the wakf?

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"4. If the Wakf Commissioners Ordinance does not apply to the wakf, is the wakf valid?

"5. Does the wakf contravene Section 4 of the Ordinance and is it therefore invalid in that -

(a) it is not made for the maintenance and support of any person including the family, children, descendants and kindred of the Settlor?;

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(b) Muslim law does not recognise adoption?;

(c) the ultimate benefit to charity is postponed to the extinction not only of the 2nd and 3rd Defendants but of their sons and daughters and their issue and thereafter to the extinction of an adopted child of the Settlor's brother and its issue?;

(d) the ultimate gift to charity is not of a permanent character or is void for uncertainty?

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"6. Are the Plaintiffs the heirs at law of the Settlor?

"7. In the event of the wakf being held invalid are Defendants 2 and 3 liable to account for and pay what they have received from the wakf properties and if so from what date?"

13. Evidence in support of the Plaintiff's case was given by Plaintiff No.2, Kalathumi, a sister of the Settlor.

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- Record
p.20, 11.10-20. The witness said that the Settlor had been
p.20, 11.23-25. married three times and that she had died without
p.20, 11.29-30. issue; the Defendants Nos. 2 and 3 were not her
p.20, 1.38 to children and that their fathers were not known; the
p.21, 1.4. Settlor had said that the Defendant No. 2 was the
child of an Indian woman; and that she (the witness)
had collected Defendant No.3 from a maternity home
and brought her to the Settlor when she was only 3
or 4 days old, her mother not wanting her as she was
an illegitimate child. 10
- In cross-examination, the witness said:-
- p.21, 11.26-30 "I signed the wakf deed as a consenting party to
her act. It was her intention to wakif these
properties to these two girls. She dispossessed
herself of the properties. She signed the deed.
At the same time she made another wakf deed in
respect of other properties in favour of myself
and my three sisters. I signed this deed too
.....
- p.22, 11.5-11. "She did not consult me about the wakfs. 20
I knew what they were about. I could not go
against her order which was to make provision
for the two girls. She wanted my consent. I
gave it. She did not need my consent as
regards the other properties. I would have
inherited in any case
- p.22, 11.16-19. "They" (Defendants Nos. 2 and 3) "were
completely dependent on her and her husband,
and after his death on her alone. They re-
mained with her until she died. She clothed, 30
fed, educated them."
- pp.24-25. 14. Also in support of the Plaintiffs' case, one
Ghaniya binti Rashid Mandriya gave evidence as to
the circumstances in which the Defendants Nos. 2 and
3 had come under the Settlor's care. She said,
p.25, 11.15-18. further, that the Settlor had treated both as if they
were her own children, had looked after their welfare,
educated them, and had arranged the marriage of the
Defendant No. 2.
- pp.25-30. 15. Defendant No. 1 (the mutawalli or trustee of 40
p.26, 1.1. the wakf), who had not filed any defence, gave evi-
dence as a Plaintiffs' witness. He said that he
p.26, 11.3,4,9. was a brother of Plaintiffs Nos. 1 to 4 and a cousin
p.27, 11.9-10. of the Settlor; and that he was also a trustee

under a second wakf which the Settlor had made in favour of Plaintiffs Nos. 1 to 4.

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In cross-examination, the witness said:-

"I signed the wakf deed and agreed to accept my appointment as trustee. I undertook to carry out her wishes. I am not opposing the setting aside of the wakf or supporting it. I am a disinterested party

p.29, 11.9-27.

10 "I thought then that she was making an invalid wakf. I told her so long ago. I advised her that her own sisters and brothers are poor, and you are depriving them in favour of these two children. I did not advise that the wakf was invalid.

20 "I agree Khadija" (the Settlor) "supported and maintained these children and that they were solely dependent on her for their support after Rashid's" (the Settlor's third and last husband) "death. She treated them as though they were her own children."

16. Defendant No. 2, giving evidence in support of her own case, said:-

pp.33-34.

"I have in my lifetime resided with Khadija..... She was the only person whom I knew and understood as my mother. She maintained me - brought me up.

p.33, 11.14-25.

30 "I was first married when I was about 13 years old. Khadija paid for my wedding and expenses I was married a second time after Khadija's death.

"Khadija had paid for all my expenses, food, clothes, medical fees, school She bought jewellery for me

"Mother told me she had made the wakf so that I would be provided for during my life."

p.33, 11.30-32.

In cross-examination, she said:-

"I now have learnt that I was not born of Khadija. I learnt this after her death."

p.34, 11.9-10.

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17. Defendant No. 3, giving evidence in support of her own case, said:-

p.34, 11.25-32.

"I am a Mohammedan. I have always been one. I am now 21 years old. I regarded Khadija.....as my mother. She always looked after me - I lived with her until 1952 when she died. She paid all food, clothing, school and everything. I was solely dependent upon her.

"I married in 1956 after she died."

18. The full report of the Judgment of the learned Trial Judge (Edmonds J.), delivered on the 28th October, 1958, in favour of the Plaintiffs, is as follows:- 10

p.37, 11.19-27.

"E.A.C.A. in C/A 69/1958 Sheikha binti Ali bin Khamis and Another v Halima biniti Said bin Nasib has confirmed the judgment of Mayers J. which decided Issue 5(a) in the present suit in favour of the Plaintiffs - that issue being the same in the former case. Judgment in the instant case must therefore be in conformity with the decision of E.A.C.A. and the Plaintiffs in this case must succeed." 20

It would seem, therefore, that the learned Trial Judge, following the decision in the earlier case he mentioned, came to the conclusion that the wakf in the present case was invalid solely because it was not made for the maintenance and support of any person including the family, children, descendants and kindred of the Settlor within the meaning of those words in Sections 4(1)(a) of the 1951 Ordinance. 30

The Order of the Trial Court, also dated the 28th October, 1958, was as follows:-

p.38, 11.23-24.

"There will be judgment for the Plaintiffs as prayed in paragraphs (1) and (2) of the Plaint."

The rest of the Order was concerned with accounts in respect of income received by the Defendant No. 1 (the mutawalli or trustee) and with costs.

pp.39-40.

19. A decree in accordance with the Judgment and Order of the Trial Court (the Supreme Court of Kenya at Mombasa District Registry) was issued on the 1st December, 1958, and against the said decree the 40

Defendants Nos. 2 and 3 appealed to the Court of Appeal for East Africa at Mombasa upon the various grounds set out in their Memorandum of Appeal which, dated the 3rd January, 1959, is printed on pp.41 to 44 of the Record.

Additional and re-framed grounds of appeal, concerned mainly with the jurisdiction of the Wakf Commissioners under the 1951 Ordinance, filed on the 11th September, 1959, are printed on pp. 48 and 49 of the Record.

20. By their Judgment, dated the 10th December, 1959, the learned Judges of the East African Court of Appeal at Mombasa, dismissed the appeal.

pp.69-94.

Delivering the main Judgment of the Appellate Court, Windham J. (with whom Forbes V.P. and Gould J.A. agreed), after narrating the facts as set out in paragraphs 4 to 6 hereof, referred to the grounds upon which the validity of the wakf had been attacked and said that the ground which was concerned with the Settlor's use of the income for herself and that which alleged that the ultimate gift to charity was not of a permanent character or was void for uncertainty had not been strongly pressed.

p.72, 11.9-37.

p.72, 11.36-37.

The learned Judge said that the Court below, following the decision of the East African Court of Appeal in Sheikha binti Ali and Another v Halima binti Said C.A. 69 of 1958, had decided against the validity of the wakf solely on the ground embodied in Issue 5(a) (see paragraph 12 hereof). He referred in detail to the said earlier case in which, in the circumstances of that case, the Court had accepted the argument that successive life interests in the wakf deed had contravened the rule against perpetuities and were not trusts for the "maintenance and support" of the persons concerned but amounted to absolute gifts of income to them from time to time. Expressing approval of the Judgment of the Court below, the learned Judge said: "the Court below, in the instant case, was right in holding itself bound by the.....judgment of this Court in Sheikha binti Ali's case and.....we too ought to follow it unless it can be shown either (a) that it is distinguishable on facts or (b) that it was reached per incuriam both of which contentions have been advanced on the Appellants' behalf."

p.72, 1.42 to
p.73, 1.10.

p.73, 1.19 to
p.75, 1.44

p.74, 11.35-46.

p.76, 11.1-9.

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21. Continuing, the learned Appellate Court Judge (Windham J.) said that in Sheikha binti Ali's case the Court had conceded that -
- p.76, 11.10-16. "although a wakf in order to come within the provisions of Section 4(1)(a) must have as its purpose the 'maintenance and support' of individual beneficiaries, those words need not be used, and the purpose might appear by implication."
- p.76, 11.28-46. But, in his view, the actual words of disposition in the instant case could only be construed as an absolute gift of income allowing of no implication that the disposition was, either wholly or partially, for the "maintenance and support" of the beneficiaries concerned. He thought that the words "divided between" or "divided among" were quite as free from restriction regarding user as were the words "paid to" which, in the wakf in Sheikha binti Ali's case, had been construed as absolute gifts of income. 10
- p.76, 1.47 to p.77, 1.7. 22. For reasons that he gave the learned Appellate Court Judge (Windham J.) rejected the argument advanced on behalf of the Appellants that "the Court ought to have regard to extraneous circumstances in order to show that the purpose of the wakf was to maintain and support the Appellants; in particular the facts that the Appellants were adopted by the Settlor in infancy, their paternity being unknown, and that they were brought up by the Settlor." He said:- 20
- p.78, 11.29-37. "I would hold that extraneous evidence to show that the Settlor intended her dispositions to be limited to the maintenance and support of the Appellants or the succeeding beneficiaries is inadmissible and that there is nothing on the face of the deed itself to indicate that such was her intention. I accordingly find nothing to distinguish the present case from Sheikha binti Ali's case on the facts." 30
- p.78, 1.38 to p.81, 1.7. 23. The learned Appellate Court Judge (Windham J.) rejected also the submission that the decision in Sheikha binti Ali's case was not really binding inasmuch as in that case the Court's attention had not been specifically directed to, nor did the Court specifically refer to, the significance of the words 40

Recordp.81, 1.34 to
p.82, 1.20.

"either wholly or partially" which appear twice in the first five lines of Section 4(1) of the 1951 Ordinance. He accepted the argument, advanced on behalf of the Plaintiffs-Respondents, that even if the Defendants Nos. 2 and 3 are within the words "any person" in said Section 4(1)(a) for whose benefit a wakf could be made, those words would not include their issue or descendants, for these would be the descendants of a stranger and as such would, in accordance with the decision in Amina binti Abdulla and Another v Sheha binti Salim (1953) 21 E.A.C.A.12, be excluded. It was the view of the learned Judge that even although the Appellants were, or regarded themselves as being, the Settlor's adopted daughters and had throughout resided with her, they could not be regarded as members of the "family" of the Settlor within the meaning of that word in Section 4(1)(a).

p.85, 11.1-7.

24. Summarising his findings, the learned Appellate Court Judge (Windham J.) said:-

"In my view the wakf fails to come within the saving provisions of Section 4 for two independent reasons: first, because the wakf income has not been shown to have been left, either expressly or by implication, for the "maintenance and support" of the beneficiaries, following the decision of this Court in Sheikha binti Ali's case (supra); secondly, because the dispositions following those for the Appellants themselves for life are not in favour of 'any person including the family, children, descendants or kindred of the maker' for the purpose of Section 4(1)(a) following the decision of this Court in Amina binti Abdulla's case (supra)".

p.85, 11.9-21.

Further, the learned Judge said that if the wakf did not fall within Section 4 then, in accordance with Amina binti Abdulla's case, its validity would have to be determined by the law in force immediately prior to the 1951 Ordinance and, according to that law, the ultimate gift to charity was so remote as to be illusory which would invalidate the wakf ab initio.

p.85, 11.29-48.

25. The learned Appellate Court Judge (Windham J.) next referred to, and, for reasons that he gave, rejected, the Appellants' argument in the alternative "that even if the disposition to the Appellants'

p.86, 1.7 to
p.91, 1.44

Record

issue is bad, the gift of the wakf income to the Appellants themselves for their respective lives is, taken by itself, a good disposition by reason of its falling within Section 4(1)(a) of the Ordinance of 1951; that the income should therefore be paid to them until their respective deaths; and that the residue should then be paid, not to the heirs of the Settlers (the Plaintiffs-Respondents) but to the Wakf Commissioners, to be administered by them for charitable purposes as provided in the Wakf Commissioners Ordinance, 1951." Sections 16 and 21 of the Ordinance upon which part of the said agreement was founded are included in the Annexure hereto.

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pp.94-95.

26. An Order in accordance with the Judgment of the Court of Appeal for Eastern Africa was drawn up on the 10th December, 1959, and against the said Judgment and Order this appeal to Her Majesty in Council is now preferred, an Order granting Final Leave to Appeal having been made by the said Court of Appeal on the 2nd September, 1960.

pp.95-96.

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The Appellants respectfully submit that the appeal should be allowed, with costs throughout, for the following among other

R E A S O N S

1. BECAUSE the said wakf was clearly within the provisions of Section 4(1)(2) of the 1951 Ordinance and was therefore valid.
2. BECAUSE the wakf which was made for the "maintenance and support" of the Appellants is a valid wakf even if the words "maintenance and support" do not appear in the wakf deed.
3. BECAUSE on the evidence before the Trial Court and in the light of the surrounding circumstances the words of gift in the wakf deed can be reasonably interpreted as being words which were intended to, and did in fact, provide for the maintenance and support of the Appellants.
4. BECAUSE the words "shall be divided....between" or "shall be divided equally among" in the said wakf cannot reasonably be said to exclude the possibility that the income to which they relate was thereby given to the Appellants for their "maintenance and support".

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5. BECAUSE even if the said words be construed as being words which import an absolute gift such interpretation does not necessarily negative the possibility that the absolute gift was made for the "maintnance and support" of the Appellants.
6. BECAUSE the words "any person" in the said Section 4(a) include not only the Appellants but also their issue and descendants.
7. BECAUSE even admitting (without conceding) that the wakf is invalid insofar as its dispositions in favour of the Appellants' issue and descendants are concerned (which, it is submitted, it would be premature to decide before the first death of either of the Appellants) it is valid insofar as it is for the Appellants' own maintenance and support and to that extent at least should be made effective.
8. BECAUSE if the decisions in Sheikha binti Ali and Another v Halima binti Said C.A. 69 of 1958 and Amini binti Abdulla and Another v Sheha binti Salim (1953) 21 E.A.C.A. 12 are contrary to the reasoning of the Appellants' case they must be considered to have been wrongly decided.
9. BECAUSE the decisions of the Courts below are wrong and ought to be set aside.

DINGLE FOOT.

R.K. HANDOO.

A N N E X U R E

THE WAKF COMMISSIONERS ORDINANCE, 1951

An ordinance to make better provision for the appointment of wakf commissioners, to prescribe their powers and duties and to amend the law relating to wakf property.

2. In this Ordinance, unless the context otherwise requires -

"Muslim" means an Arab, a member of the Twelve Tribes, a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa, of the Muslim faith;

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x x x x x x x x

"Wakf" means the religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law;

3. Every wakf made by or for the benefit of any Muslim shall be administered in accordance with the provisions of this Ordinance:

Provided that any person professing Islam who is not a Muslim within the meaning of section 2 of this Ordinance may appoint the Wakf Commissioners to be the trustee of any property the subject of a wakf made by such person and in every such case the Wakf Commissioners shall act as trustee thereof and the property shall be administered in accordance with this Ordinance.

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4. (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:-

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- (a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or
- (b) if the maker of the wakf is an 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 such 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 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.

(2) No wakf to which sub-section (1) of this section applies shall be invalid merely because the benefits in the property reserved by such 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.

16. (1) Subject to the provisions of sub-section (2) of this section all property the subject of any wakf which is under the control of the Wakf Commissioners shall be administered by the Wakf Commissioners in accordance with the intentions of the maker of the wakf if such intentions are lawful according to Muslim law and are capable of being carried into effect, and whether such intentions are ascertainable by reference to tradition or by reference to any other evidence lawfully obtainable.

(2) In any case where in the opinion of the Wakf Commissioners the intentions of the maker of a wakf are unlawful or unascertainable or are incapable of being carried out or where any surplus revenue remains after fulfilling the intentions of

the maker of the wakf the Wakf Commissioners shall, in the case of a wakf Khairi, apply the property the subject of the wakf or any surplus property or revenue therefrom, as the case may be, for such benevolent or charitable purposes on behalf of Muslims as appear to the Wakf Commissioners proper, and in the case of wakf Ahli, shall apply such property or surplus property or revenue as aforesaid in such manner as the Wakf Commissioners think fit for the benefit of the beneficiaries of the wakf.

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21. (1) If, in respect of any wakf -

(a) the intentions of the maker -

(i) are unlawful or unascertainable, or

(ii) are incapable of being carried into effect,
or

(iii) cannot reasonably be carried into effect, or

(b) the beneficiaries are unascertainable; or

(c) any surplus revenue remains after making the payments required by section 20 of this Ordinance and after carrying into effect the intentions of the maker of the wakf,

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the Wakf Commissioners shall pay into the Surplus Fund created under section 18 of this Ordinance the proceeds of sale of any such property the subject of a wakf as is mentioned in paragraphs (a) and (b) of this section and any such surplus revenue as is mentioned in paragraph (c) of this sub-section.

(2) The Wakf Commissioners shall have power to place on deposit in any bank or to invest in and upon such investments and securities as are allowed by law for the investment of trust funds any moneys standing to the credit of the Surplus Fund and income derived therefrom shall be paid to the credit of the General Administration Fund.

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No. 63 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF
APPEAL FOR EASTERN AFRICA

B E T W E E N :

RIZIKI BINTI ABDULLA
and Another
(Defendants) Appellants

- and -

SHARIFA BINTI MOHAMED BIN
HEMED and Others
(Plaintiffs) Respondents

CASE FOR THE APPELLANTS

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.