

10.6.61  
Kenya  
37/62  
IN THE PRIVY COUNCIL

No. 63 of 1960

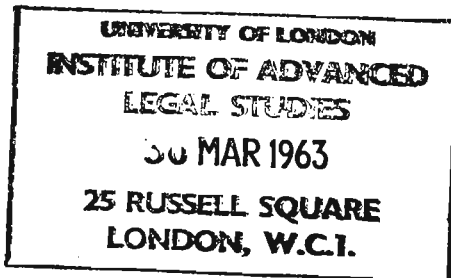
ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

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

versus

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 and
8. KHULTHUMI BINTI SULEMAN BIN HEMED  
(Plaintiffs) Respondents



---

RECORD OF PROCEEDINGS

---

68286

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

Solicitors for the Appellants.

KNAPP-FISHERS AND BLAKE & REDDEN,  
31 Great Peter Street,  
London, S.W.1.

Solicitors for the Respondents.

i.

IN THE PRIVY COUNCIL

No. 63 of 1960

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

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

versus

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 and
8. KHULTHUMI BINTI SULEMAN BIN HEMED  
(Plaintiffs) Respondents

---

RECORD OF PROCEEDINGS

---

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE SUPREME COURT OF KENYA</u>		
1	Plaint	10th February 1958	1
2	Defence of Defendant No. 2	April 1958	7
3	Defence of Defendant No. 3	25th April 1958	9
4	Reply to Defence of Defendant No. 2	2nd May 1958	11
5	Reply to Defence of Defendant No. 3	2nd May 1958	12
6	Notice to produce documents	15th September 1958	13
7	Court Notes	18th June and 22nd September 1958	14

INDEX OF REFERENCE (contd.)

No.	Description of Document	Date	Page
<u>IN THE SUPREME COURT OF KENYA</u>			
<u>(contd.)</u>			
<u>Plaintiffs' Evidence</u>			
8	Amar Chand Bector	22nd September 1958	19
9	Kalathumi	22nd September 1958	19
10	Ghaniya Binti Rashid Mandriya	23rd September 1958	24
11	Ali Bin Mohamed	23rd September 1958	25
12	Kalathumi (recalled)	23rd September 1958	30
13	Court Notes	23rd September 1958	30
<u>Defendants' Evidence</u>			
14	Riziki Binti Abdulla	23rd September 1958	33
15	Faiza Binti Abdulla	23rd September 1958	34
16	Addresses of Counsel	23rd and 24th September 1958	35
17	Order	28th October 1958	37
18	Decree	28th October 1958 1st December 1958	38 39
<u>IN THE COURT OF APPEAL FOR</u>			
<u>EASTERN AFRICA</u>			
19	Memorandum of Appeal	3rd January 1959	41
20	Affidavit of Plaintiffs' Counsel	4th May 1959	44
21	Court Notes	8th May 1959	46
22	Notice of Additional and reframed Grounds of Appeal	11th September 1959	48
23	Respondents' (Plaintiffs') Notice	1st October 1959	49
24	President's Notes of Argument	3rd and 4th November 1959	51
25	Judgment	10th December 1959	69
26	Order	10th December 1959	94
27	Order granting Final Leave to Appeal to the Privy Council	2nd September 1960	95

INDEX OF REFERENCE (contd.)E X H I B I T S

Exhibit Mark	Description of Document	Date	Page
1	Power of Attorney, Khadiya binti Suleman to Ali Mohamed	27th July 1940	97
2	Power of Attorney, Khadiya binti Suleman to Ali Mohamed	19th December 1940	99
3	Family Tree	-	101
4	Deed of Wakf	3rd November 1942	101
"A"	Deed of Wakf	3rd November 1942	106

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
<u>IN THE SUPREME COURT OF KENYA</u>	
Annexure "A" to the Plaint (Copy of Exhibit 4)	3rd November 1942
Notice of appointment of Advocates on behalf of Defendant No. 2	(Undated)
Notice of appointment of Advocates on behalf of Defendant No. 3	(Undated)
Notice of Appeal	7th November 1958
Notice of Address for Service	19th November 1958
<u>IN THE COURT OF APPEAL FOR EASTERN AFRICA</u>	
Notes of Argument of Gould J.A.	8th May, 3rd and 4th November 1959
Notes of Argument of Windham J.A.	8th May, 3rd and 4th November 1959
Order granting Conditional Leave to Appeal to the Privy Council	2nd June 1960

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

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

versus

10

- 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 and
- 8. KHULTHUMI BINTI SULEMAN BIN HEMED  
(Plaintiffs) Respondents

RECORD OF PROCEEDINGS

No. 1  
P L A I N T

In the Supreme  
Court

20

IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY.  
Civil Suit No. 81 of 1958

No. 1  
Plaint,  
10th February  
1958

30

- 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, and )
- 8. Kulthumi binti Suleman bin Hemed )

Plaintiffs

versus

- 1. Ali bin Mohamed bin Hemed as )
- Trustee or Mutawali of the Wakf )
- made by Khadija binti Suleman bin )
- Hemed (deceased) )
- 2. Riziki binti Abdulla )
- 3. Faiza binti Abdulla, and )
- 4. Registrar of Titles, Coast Registry )

Defendants

P L A I N T

40

The Plaintiffs state:-

- 1. The Plaintiffs are all Shafi Mohammedan El

In the Supreme  
Court

—  
No. 1

Plaint,

10th February  
1958 -  
continued.

Busaid Arabs, of whom the first two reside at Mombasa, the third resides at Lamu and the fourth, fifth, sixth, seventh and eighth all reside at Zanzibar. The address for service for the purposes of this suit of all the Plaintiffs is, however, the office of Mr. Narshidas M. Budhdeo, Advocate, Albert Building, Treasury Square, Fort Jesus Road, Mombasa.

2. The first Defendant is a Shafi Mohammedan El Busaid Arab residing at Kibokoni, Mombasa, and he is sued as the Trustee or Mutawali of the Wakf made by one Khadija binti Suleman bin Hemed a Shafi Mohammedan El Busaid Arab lady (now deceased) who will be hereinafter referred to as "the Settlor". 10

3. The second and third Defendants are ladies professing Shafi Mohammedan faith. The second Defendant Riziki binti Abdulla resides in a flat on the top of the shop of "Colonial Supply Store" situate on Kobokoni Road, Mombasa; and the third Defendant Faiza binti Abdulla resides in a house in the Shamba of Salim bin Iddi Baluchi on Mgongo Road at Changamwe on the Mainland North of Mombasa. 20

4. The fourth Defendant is made a formal party to this suit in his official capacity merely with the intent that he gives effect to the directions (if any) which may be given by this Honourable Court in this suit for any amendment, variation, deletion or rectification of entries in the Register of Land Titles kept by him for the Coast District under the Registration of Titles Ordinance (Chapter 160 of the 1948 revised edition of the Laws of Kenya). The incumbent from time to time of the office of the fourth Defendant normally resides and performs the duties of his office at Mombasa. 30

5. By an instrument in writing registered as No. C.R. 3710/7 and No.C.R.1320/7 on the 3rd of December 1942 at the Coast District Land Titles Registry at Mombasa, the Settlor, during her lifetime, made and declared "a Wakf" of her following two properties, viz., 40

- (1) All that piece or parcel of land containing 0.067 of an acre or thereabouts situate at the corner of Crawford Street and Kibokoni Road on the Island of Mombasa, known as plot

or sub-division No.164/R of Section V, Mombasa, more particularly described and delineated on the Plan No.18333 annexed to the Certificate of Ownership No.4905 issued by the Recorder of Titles on 3-9-1923 and registered in the Registry of Land Titles at Mombasa as No. C.R.3710/1, together with the buildings and improvements thereon; and

In the Supreme  
Court

          
No, 1

Plaint,

10th February  
1958 -  
continued.

- 10 (2) All that piece or parcel of land containing  
5.75 acres or thereabouts situate on the  
Malindi Road at Kisauni on the Mainland  
North of Mombasa, known as plot or sub-  
division No.50 of Section II, more parti-  
cularly described and delineated on the  
Plan No.13997 annexed to the Certificate of  
Ownership No.2517 issued by the Recorder of  
Titles on 20-10-1921 and registered in the  
Registry of Land Titles at Mombasa as No.  
20 C.R.1320/1, together with the buildings and  
improvements thereon.

A copy of the said instrument of Wakf (hereinafter referred to as "the said Wakf") is hereto annexed and marked "A".

- 30 6. By the said Wakf, the Settlor appointed herself to be the first Trustee or Mutawali of the said Wakf and after her death her cousin, the first Defendant herein, and after him such person as he (the First Defendant) should appoint, whom failing such person as the beneficiaries who are capaces should appoint. The Settlor died on the 11th day of April 1952 and since her death the first Defendant is administering the said Wakf.

- 40 7. By the said Wakf the Settlor directed the Trustee to retain in his own hands, out of the monthly income of the Wakf properties, after paying taxes, rates, repairs, debts and all other proper outgoings and expenses of maintaining the said properties and administering the Wakf, one tenth part of the residue or balance of the income then remaining as a reserve fund to meet expenditure of a capital or exceptional nature and to develop and improve the said properties in the best interest of the "trust", and to divide the free balance of the income of the wakf properties each month between the second and the third Defendants (whom the Settlor described in the said Wakf as

In the Supreme  
Court

No. 1

Plaint,

10th February  
1958 -  
continued.

her "adopted daughters") in equal shares, and upon the death of one or other of them to divide her share equally among her sons and daughters and their issue per stirpes, brothers taking the same shares as sisters; and failing issue of either of them to divide the half share of the income which would have gone to such issue (First) equally among the Settlor's sisters Sharifa, Kalathumi, Rukiya and Mwana Wa Sheh (the first four Plaintiffs) 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 the Settlor's deceased brother Seif bin Mohamed El Busaid including his adopted child, and failing any of such children, their issue per stirpes who shall take one part among themselves.

10

8. The Settlor, after directing further in the said Wakf that in all cases the issue of a beneficiary shall upon his or her decease take the share that would have gone to their parent, that brothers and sisters shall share equally and that the share of a beneficiary dying without issue shall accrue to his surviving brothers and sisters, further provided by the said Wakf that if the beneficiaries appointed by her should die out of fail the income of the Wakf should 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.

20

9. The Plaintiffs say that the said Wakf made by the Settlor (the deceased Khadija binti Suleman bin Hemed El Busaid) is null and void ab initio on the following among other grounds:-

30

(i) In spite of her purported dedication to "Wakf" of her above-mentioned properties in December 1942, the Settlor continued in possession thereof and received and enjoyed for her own absolute use and benefit all the income of the said properties and was in physical occupation of some part thereof up to the time of her death in April 1952. The said Wakf was, therefore, a mere camouflage to create a chain of several life estates taking effect after her death and thus a disposition by her of her said properties offending against the rule against perpetuity, the ultimate gift to

40



charity therein being mere illusory.

In the Supreme  
Court

No. 1

Plaint,

10th February

1958 -

continued.

(ii) The second and third Defendants, for whose benefit (and for the benefit of whose sons and daughters and their issue) the said Wakf is primarily made, were not and are not in any way related to the Settlor. To the best of the Plaintiff's information and belief, the second Defendant Riziki binti Abdulla was born of an Indian mother by a man to whom she was not married and whose identity was not known to the Settlor or to the Plaintiffs nor is it yet known to the Plaintiffs; and the third Defendant Faiza binti Abdulla was born of a Seychellois mother by a man to whom she was not married and whose identity was not known to the Settlor or the Plaintiffs nor is it yet known to the Plaintiffs. The said Defendants are not, therefore, "Muslims", as defined by Section 2 of the Wakf Commissioners Ordinance (No.30) of 1951, although the Settlor calls them her "adopted daughters" in the said Wakf, as the Muslim law does not at all recognize adoption; and the said Wakf Commissioners Ordinance does not, therefore, apply to or govern the said Wakf.

(iii) Assuming, without admitting, that the said Wakf Commissioners Ordinance does apply to the said Wakf, it is still void ab initio, because it contravenes Section 4 of the said Ordinance as follows:-

- (a) it is not made for the maintenance or support of any person, or of the family, children, descendants or kindred of the maker, that is Settlor;
- (b) in so far as the Settlor makes provision therein for her "adopted daughters" and their sons and daughters and their issue, it is contrary to Muslim law, as Muslim law does not recognise any adoption;
- (c) the benefit reserved by it in the Wakfed properties for the poor and for the religious, pious or charitable purposes therein set out is postponed to take effect not on the extinction of the family, children, descendants and kindred of the maker or settlor only, but it is postponed to take effect, in the first instance, after the extinction of the

In the Supreme  
Court

No. 1

Plaint,

10th February  
1958 -

continued.

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 Seif bin Mohamed El Busaid and the issue of his said "adopted" child;

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

10

(iv) The ultimate gift to charity is void for uncertainty or vagueness of its objects.

10. The said disposition of her said two properties by the Settlor by way of Wakf being void in law ab initio, the said two properties form part of her intestate estate; and the Plaintiffs who are her heirs at law are entitled to inherit the same. The present value of the said two properties together is Shs.180000/-.

20

11. The Plaintiffs have requested the first, second and third Defendants to agree to the cancellation of the said Wakf as being void in law ab initio and to surrender the said Wakf for that purpose, and to give possession of the Wakfed properties to the Plaintiffs but the said Defendants have all failed and neglected to do so.

The Plaintiffs, therefore, pray that

- (1) the said Wakf registered at the Coast District Land Titles Registry as No.C.R. 3710/7 and No.C.R.1320/7 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;
- (2) the fourth Defendant be directed to cancel and delete all entries made in the Register of Land Titles and on the Certificates of Titles relating to the said properties concerning the said Wakf or in pursuance thereof;
- (3) the first, second and third Defendants do all render a full and true account of all the rents and profits or other income respectively

30

40

received by or paid to them from the properties the subject-matter of the Wakf and pay to the Plaintiffs the amounts respectively received by or paid to them for or in respect of the said rents, profits and income; and all necessary directions be given and investigations ordered for account thereof being taken for that purpose;

In the Supreme  
Court

No. 1

Plaint,

10th February  
1958 -  
continued.

- 10 (4) the Plaintiffs be awarded the costs of this suit and the same be ordered to be paid to them in such manner as this Honourable Court thinks just;
- (5) that the first, second and third Defendants do pay the Plaintiffs interest at 6% per annum on the amounts which may be found respectively payable by them, from the date of the judgment till payment; and
- 20 (6) such other or further relief may be granted to the Plaintiffs as the nature of the case requires or this Honourable Court deems fit to grant.

Mombasa, dated the 10th day of February, 1958.

(Signed) Narshidas M. Budhdeo

ADVOCATE FOR THE PLAINTIFFS.

Filed by:  
Narshidas M. Budhdeo  
Advocate for the Plaintiffs.

No. 2

DEFENCE OF DEFENDANT NO. 2

30 IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY

Civil Case No.81 of 1958

(Title as in No. 1)

WRITTEN STATEMENT OF DEFENCE  
OF DEFENDANT NUMBER TWO.

No. 2

Defence of  
Defendant  
No. 2,

April 1958

I, RIZIKI BINTI ABDULLA the Second Defendant above-named state as follows:-

In the Supreme  
Court

No. 2

Defence of  
Defendant  
No. 2,

April 1958

- continued.

1. Paragraphs 1, 2, 3, 4, 5, 6 and 8 of the  
Plaint are admitted.

2. Paragraph 7 of the Plaintiff is admitted. The  
Second Defendant further states that the Second  
Defendant is adopted daughter of the settlor who  
throughout her life stood in loco parentis to the  
said Second Defendant.

3. As to paragraph 9 of the Plaintiff the Second  
Defendant denies that the Wakf is null and void  
ab initio and in particular

10

(a) denies that the Settlor received or enjoyed  
the income of the said properties for her  
absolute use or benefit and state that the  
Settlor was in possession of the properties  
only by reason of the fact that she was the  
trustee of the Wakf and that the income was  
used for the maintenance and support of  
the Second and Third Defendants who resided  
with the Settlor during the latter's life-  
time. In any event, assuming without  
admitting the allegations contained in sub-  
paragraph (i) of paragraph 9 of the Plaintiff,  
the Second Defendant states that such con-  
duct only amounts to breach of trust and  
does not invalidate the Wakf.

20

(b) denies each and every allegation contained  
in sub-paragraph (ii) of paragraph 9 of the  
Plaint and in particular denies the allega-  
tion of illegitimacy contained therein. In  
any event, the Second Defendant maintains  
that she has since her birth professed the  
Mohammedan religion and that she is a Muslim  
within the definition given in the Wakf  
Commissioners Ordinance 1951. She further  
states that she is the adopted child of the  
Settlor, that she has been brought up suppor-  
ted and maintained by the Settlor who through-  
out her life stood in loco parentis to the  
Second Defendant and as such she is a member  
of the Settlor's family and/or is one of  
Kindred of the Settlor.

30

40

(c) denies each and every allegation contained in  
sub-paragraph (iii) of paragraph 9 of the  
Plaint and states that the Wakf has been made  
in all respects in accordance with the pro-  
visions of the said Ordinance and of the  
Mohammedan Law.

4. As to paragraph 10 of the Plaintiff, the Second Defendant denies that the Wakf is bad in law and that the properties disposed thereby it form part of the estate of the Settlor. The Second Defendant does not admit that the Plaintiffs are the heirs of the Settlor.

In the Supreme Court

No. 2

Defence of Defendant No. 2,

April 1958

- continued.

10 5. In reply to paragraph 11 of the Plaintiff the Second Defendant admits having received the request for the cancellation of the Wakf but states that until this Honourable Court annuls the Wakf she is not bound to give her consent.

WHEREFORE the Second Defendant prays that the Plaintiffs Suit be dismissed with costs.

Dated at Mombasa this day of April, 1958.

Sgd. Riziki binti Abdulla  
SECOND DEFENDANT.

20 Drawn by :-  
SATCHU & SATCHU,  
ADVOCATES,  
MOMBASA.

No. 3

DEFENCE OF DEFENDANT NO. 3

IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY

Civil Case No. 81 of 1958

(Title as in No. 1)

WRITTEN STATEMENT OF DEFENCE  
OF DEFENDANT NUMBER THREE

No. 3

Defence of Defendant No. 3,

25th April 1958

30 I, FAIZA BINTI ABDULLA the third Defendant above-named state as follows:-

1. Paragraphs 1, 2, 3, 4, 5, 6 and 8 of the Plaintiff are admitted.

2. Paragraph 7 of the Plaintiff is admitted. The

In the Supreme  
Court

          
No. 3

Defence of  
Defendant  
No. 3,

25th April  
1958 -

continued.

third Defendant further states that the third defendant is adopted daughter of the Settlor who throughout her life stood in loco parentis to the said third Defendant.

3. As to paragraph 9 of the Plaint the third Defendant denies that the Wakf is null and void ab initio and in particular

- (a) denies that the Settlor received or enjoyed the income of the said properties for her absolute use or benefit and states that the Settlor was in possession of the properties only by reason of the fact that she was the trustee of the wakf and that the income was used for the maintenance and support of the Second and Third Defendants who resided with the Settlor during the latter's lifetime. In any event, assuming without admitting the allegations contained in sub paragraph (i) of paragraph 9 of the Plaint, the third Defendant states that such conduct only amounts to breach of trust and does not invalidate the wakf. 10
- (b) Denies each and every allegation contained in sub-paragraph (ii) of paragraph 9 of the Plaint and in particular denies the allegation of illegitimacy contained therein. In any event, the third Defendant maintains that she has since her birth professed the Mohammedan religion and that she is a Muslim within the definition given in the Wakf Commissioners Ordinance 1951. She further states that she is the adopted child of the Settlor, that she has been brought up supported and maintained by the Settlor who throughout her life stood in loco parentis to the Third Defendant and as such she is a member of the Settlor's family and/or is one of the kindred of the Settlor. 30
- (c) denies each and every allegation contained in sub-paragraph (iii) of paragraph 9 of the Plaint and states that the Wakf has been made in all respects in accordance with the provisions of the said Ordinance and the Mohammedan Law. 40

4. As to paragraph 10 of the Plaint, the Third Defendant denies that the wakf is bad in law and

that the properties disposed thereby it form part of the estate of the Settlor. The Third Defendant does not admit that the Plaintiffs are the heirs of the Settlor.

In the Supreme Court

No. 3

Defence of Defendant No. 3,

25th April 1958 - continued.

5. In reply to paragraph 11 of the Plaint the Third Defendant admits having received the request for the cancellation of the Wakf but states that until this Honourable Court annuls the Wakf she is not bound to give her consent.

10 WHEREFORE the Third Defendant prays that the Plaintiffs Suit be dismissed with costs.

Dated at Mombasa this 25th day of April, 1958.

Sgd. Faiza Abdulla

THIRD DEFENDANT

Drawn by:-  
Messrs. Bryson & Todd,  
Advocates,  
Mombasa.

20

No. 4

REPLY TO DEFENCE OF DEFENDANT NO. 2

IN HER MAJESTY'S SUPREME COURT OF KENYA,  
AT MOMBASA DISTRICT REGISTRY

Civil Suit No. 81 of 1958.

(Title as in No. 1)

REPLY TO THE DEFENCE OF  
THE SECOND DEFENDANT

30

1. The Plaintiffs join issue on the allegations contained in paragraph 2 of the defence, viz., that the second Defendant is an "adopted daughter" of the settlor, and that the settlor "stood in loco parentis" to her (the second Defendant). The Plaintiffs deny that the settlor did adopt the second Defendant as her child or that any adoption was or could have been validly made by the settlor.

No. 4

Reply to Defence of Defendant No. 2,

2nd May 1958

In the Supreme Court

No. 4

Reply to Defence of Defendant No. 2,

2nd May 1958

- continued.

2. The Plaintiffs join issue on the denials, allegations and contentions contained in paragraphs 3 and 4 of the defence, in so far as such denials, allegations and contentions are contrary to or at variance with the Plaintiffs' allegations and contentions contained in the Plaintiff.

Mombasa, dated the 2nd day of May, 1958.

Sgd. Narshidas M. Budhdeo.

ADVOCATE FOR THE PLAINTIFFS.

To, Messrs. Satchu & Satchu, Advocates for the 2nd Defendant, Mombasa.

10

Filed by:-

Narshidas M. Budhdeo, Advocate for the Plaintiffs.

No. 5

Reply to Defence of Defendant No. 3,

2nd May 1958

No. 5

REPLY TO DEFENCE OF DEFENDANT NO. 3

IN HER MAJESTY'S SUPREME COURT OF KENYA,  
AT MOMBASA DISTRICT REGISTRY

20

Civil Suit No. 81 of 1958.

(Title as in No. 1)

REPLY TO THE DEFENCE OF THE THIRD DEFENDANT  
FAIZA BINTI ABDULLA

1. The Plaintiffs join issue on the allegations contained in paragraph 2 of the defence, viz., that the third Defendant is an "adopted daughter" of the settlor, and that the settlor "stood in loco parentis" to her (the third Defendant). The Plaintiffs deny that the settlor did adopt the third Defendant as her child or that any adoption was or could have been validly made by the settlor.

30

2. The Plaintiffs join issue on the denials, allegations and contentions contained in paragraphs



3 and 4 of the defence, in so far as such denials, allegations and contentions are contrary to or at variance with the Plaintiffs' allegations and contentions contained in the plaint.

In the Supreme Court

No. 5

Mombasa, dated the 2nd day of May, 1958.

Sgd. Narshidas M. Budhdeo  
ADVOCATE FOR THE PLAINTIFFS.

Reply to  
Defence of  
Defendant  
No. 3,

2nd May 1958  
- continued.

Filed by:-  
Narshidas M. Budhdeo,  
Advocate for the Plaintiffs.

10

To,  
Faiza binti Abdulla, the 3rd Defendant,  
on the top of Colonial Supply Store, Kibokoni,  
Mombasa.

No. 6

NOTICE TO PRODUCE DOCUMENTS

IN HER MAJESTY'S SUPREME COURT OF KENYA,  
AT MOMBASA DISTRICT REGISTRY

Civil Suit No.81 of 1958

(Title as in No. 1)

No. 6

Notice to  
produce docu-  
ments,

15th September  
1958

20

TAKE NOTICE that you are hereby required to produce and show to the Court at the hearing of this suit all books, papers, letters copies of letters, and other writings or documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in dispute in this suit and especially the following:-

1. Copy of the letter No.S&K/389/57 dated 31-7-1957 (from Mr. Narshidas M. Budhdeo, Advocate, to Mr. Ali bin Mohamed bin Hemed El-Busaidi) served on Faiza binti Abdulla.
2. Letter No.K/40/58 dated 4-2-1958 from Mr. Narshidas M. Budhdeo, Advocate, to Riziki binti Abdulla, and Faiza binti Abdulla.

30

In the Supreme Court

No. 6

Notice to produce documents,

15th September 1958 - continued.

3. This Notice to produce.

Mombasa, dated the 15th day of September, 1958.

Sgd. Narshidas M. Budhdeo,

ADVOCATE FOR THE PLAINTIFFS.

To, Messrs. Bryson & Todd, Advocates for the Defendant No.3, Mombasa.

No. 7

Court Notes, 18th June 1958

No. 7

COURT NOTES

10

IN HER MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA DISTRICT REGISTRY

Civil Case No.81 of 1958

(Title as in No. 1)

18.6.58

Mr. N.M. Budhdeo for the plaintiffs. No appearance for defendant No.1 who having entered an appearance failed to file his defence within 15 days from the date of appearance.

20

Mr. A.J. Kanji for Defendant No.2. Clerk to M/s. Bryson & Todd for Defendant No.3.

No appearance for defendant No.4 who has failed to enter appearance within the time prescribed in the summons.

By consent of the advocates for the plaintiffs, the defendants Nos. 2 & 3, this case is listed for hearing on 22.9.58 at 9.15 a.m.

S.F. Nunes,

30

Ag. Deputy Registrar.

22.9.58.

N.M. Budhdeo for plaintiffs.  
 No appearance for 1st Defdt. and 4th Defdt.  
 A.J. Kanji for 2nd Defdt.  
 Bryson for 3rd Defdt.

In the Supreme  
 Court

No. 7

Court Notes,  
 22nd September  
 1958

Issues agreed and framed as under:

- 10 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.
2. If the answer is in the affirmative, does any-one of the above facts invalidate the Wakf.
3. (a) Are the 2nd and 3rd Defdts. in any way related to the settlor?  
 (b) Are they Muslims in accordance with the definition of the Wakf Commissioners Ordinance?  
 20 (c) Are they members of the family or kindred of the Settlor on any of the grounds alleged in para. 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?
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  
 30 (a) it is not made for the maintenance and support of any person including the family children descendants and kindred of the Settlor,  
 (b) Muslim Law does not recognise adoption  
 (c) The ultimate benefit to charity is postponed to the extinction not only of the 2nd & 3rd defdts. but of their sons and daughters and their issue and thereafter to the extinction of an adopted child of the Settlor's  
 40 brother and its issue?  
 (d) the ultimate gift to charity is not of a permanent character or is void for uncertainty?

In the Supreme  
Court

No. 7

Court Notes,

22nd September  
1958 -  
continued.

6. Are the plaintiffs the heirs at law of the Settlor?
7. In the event of the Wakf being held invalid, are Defdts. 2 & 3 liable to account for and pay what they have received from the Wakf properties and if so from what date?

Budhdeo:

Plaintiffs in 2 groups.

Plaintiffs 1 to 4 are by the same father.

Plaintiffs 5 - 8 are by another father.

10

Mother of all 8 plaintiffs and 1st defdt. married first Suleman bin Hemed and then Mahmud bin Hemed. Latter the father of plaintiffs 1 to 4 and the 1st defdt. 5 to 8 live in Zanzibar.

Settlor the uterine sister of the first four. Law is that if more than one such sister they take between themselves one-third of property left by the mother - the remainder goes to the residuaries.

1st Group called sharers - 2nd Group called Residuaries.

20

Latter take in proportion of 2 to a male, and 1 to a female.

Mulla's Mohamedan Law 14th Ed. p.58 - Table.

Settlor died without having any child - was the daughter of Suleman and therefore sister of 5, 6, 7, 8 through their father. Khadija - settlor - was uterine sister of 1st part.

Uterine brothers and sisters are sharers - the first 4 plaintiffs - the second part are residuaries.

30

Mulla p.66.

Uterine brothers and sisters are those born of same mother but different father - and consanguine are those born of same father but by different mother.

Defence do not state there are any other heirs - merely standing by the Wakf Deed.

1st Issue: Matter of evidence.

Issue 5(b) Mahmud Allahdad v. M. Ismail I.L.R. (1888) 10 Allahabad 289 (also reported in Digest of Indian Cases 1887/8/9 Col.640)

40

Allahabad Report - 339/41

Ghasiti & Nanhi v. Umrao

(1893) 20 Indian Appeals 193 at 199.

Adoption not known to Mohamedan Law.

Muhamad Umar v. M. Niazuddin (1911) 39 Indian Appeals 19 at 25 No right of inheritance to a person purported to be adopted.

Mami v. Kallandar Ammal (1926) 54 I.A. 23 at 31.

No legal adoption among Mohammedans.

10 Abdul Halim Khan v. Saadatali Khan (1932) 59 I.A. 202 at 204

No adoption pleaded by defendants under any statute or by any custom.

Mir Zaman v. Nur Alam (1936) All I.R. Peshawar 108 Maduali

(b) Minhaj et Talibin does not speak at all of Adoption. It is unknown to the Shafies. Mulla 293 para.347.

3rd edition Tyabji's Muhammedan Law p.266/7.

20 If any contention that adoption not recognised and consequently the adopted child does not become a member of the adoptive father, then Wakf Commissioners Ordinance does not apply to such beneficiaries as claim by adoption.

Issue 3.

21 E.A.C.A.12 Amina Abdulla v. Sheha Salim 13.

Wakf unless it complies with the Ordinance is not valid.

Section 2 - Definition of Muslim.

30 Defence do not state that the defendants come within definition. Section 3 - "Any Muslim". This Wakf not for the benefit of a Muslim.

If Ordinance does not apply, then it had to be decided if Wakf valid under general Muhammedan Law - Not valid if it offends against perpetuity.

Section 4 Ordinance.

4(a) Those were the words which had to be interpreted in the Amina Abdullah case. That case decided that Wakf for descendants of strangers is not valid.

40

In the Supreme Court

No. 7

Court Notes,

22nd September 1958 - continued.

In the Supreme  
Court

No. 7

Court Notes,

22nd September  
1958 -  
continued.

Present Wakf made for benefit of the 2 defendants and their descendants - they are strangers - even if the words "any person" in section 4 could be said to include the two defendants. Their children would not be included in words "any person".

12 p.m. Luncheon interval.

2 p.m. As before.

Section 4 - 'any person' - words don't appear in Indian Legislation or in Zanzibar Amin Abdullah case p.14/15. "any person" includes a living stranger, but not the descendants. 10

Instate case the same - if my contention regarding adoption is correct.

1942 I.L.R. Bombay 441. Ismail Haji Arat v. Umar Abdulla Sec.4(ii) & (2) "Any person" - omitted in (2) Issue 1.

Personal Law of Shafi do not allow a settlor to reserve any benefit for himself.

Minhaj 230. 20

We allege settlor had the benefit of the property during her lifetime. These are Shafi - 4(1) (b) does not therefore apply.

Issue 5(a) - Words "maintenance and support" do not appear in this Wakf Deed.

Mayers J. in C.C.9/1957 Halima binti Said: This decision the subject to appeal to E.A.C.A.

Issue 5(d) - Clause 6 of the Deed "of which the prophet would approve". That is too vague. 30

"impoverished mosques" - no permanency - also vague.

Calls:

PLAINTIFF'S EVIDENCE

No. 8

AMAR CHAND BECTOR

XD: Budhdeo: ARAM CHAND BECTOR Sworn.

Agent of Public Trustee in Mombasa. I have papers relating to distribution of estate of late Khadija binti Suleman bin Hemed. When dealing with distribution of Mohamedan estates we make enquiries as to who are the heirs. From record of this estate, which we administered, I have a copy of the distribution a/c. I informed the Public Trustee in Nairobi as to who the heirs were.

I reported the heirs as eight - those shown as the 8 plaintiffs. I did not report that either 2nd or 3rd defendants were heirs. They were not described as heirs. They did not claim as heirs.

XXd: Bryson: Information as to who were the heirs was given to me by the 1st defendant.

In the Supreme Court

Plaintiffs' Evidence

No. 8

Amar Chand Bector,  
Examination

Cross-Examination

No. 9

KALATHUMI

Xd: Budhdeo: KALATHUMI Muslim Sworn.  
binti Mohamed bin Hemed.

I knew deceased Khadija. She was my sister - we had same mother, not the same father. None of the plaintiffs are of same father and mother. Khadija was the daughter of Suleman; I the daughter of Mohamed. Our mother was FATUMA. She first married Suleman. They had the one child Khadija. Suleman had other children by another wife, not Fatuma - they were 5, 6, 7 & 8 plaintiffs. 8th plaintiff also known for short as Shumi.

Suleman(s death ended his marriage with Fatuma. Fatuma was then married by Mohamed. They had 4 daughters and 2 sons. The sons dead.

1st Defendant a son of Mahumed but not of Fatuma.

No. 9

Kalathumi,  
Examination

10

20

30

In the Supreme Court

Plaintiffs' Evidence

No. 9

Kalathumi,

Examination - continued.

Fatuma was the mother of the first 4 plaintiffs. Mohamed was the father.

We 4 sisters claim to be heirs of Khadija because we were all born of same mother. I admit plaintiffs 5 to 8 are heirs also because they were Khadija's brothers & sisters with the same father Suleman.

Khadija had a nickname Mwana bin Suleman.

Khadija first married Said Ali bin Hamud of Zanzibar - the son of the Sultan of Zanzibar. Marriage ended by divorce - he divorced her.

10

She married again at LAMU. She had no children by HAMUD.

She married SWALEH bin ABDULLAH at Lamu. She had a son by him. Died during her lifetime. Their marriage ended by divorce - he divorced her.

She married again in Mombasa - SHEIK RASHID BIN SOOD.

Marriage ended by death of the Sheik. She survived him.

20

Marriage had lasted about 30 years. No children of the marriage. 2nd & 3rd defdts. not daughters of Khadija's by Sheik Rashid. 2nd defdt. is called Riziki binti Abdulla because her father is not known. Similarly, with 3rd defdt. I know of other illegitimate children who have been given surname of Abdullah. I first saw Riziki when she was 2 1/2 years old - saw her at Lamu. She was with Khadija. I spoke to Khadija about Riziki. She told me that Riziki was a child of an Indian. She did not say it was her child. She said she was given the child by KULSUM KARMALI. I knew this Indian woman. She was a Khoja Ismaili. Khadija said that this woman told her that the child's mother had given her up because the child had no father.

30

I know 3rd Defdt. She was not Khadija's daughter. She was the daughter of a Seychellois woman. I collected the child from Mrs. TEJPAR, who was a midwife and had a maternity home.

40



I took delivery of Feiza there. Khadija asked me to do this. Feiza was then 3 or 4 days old. The mother did not want the child as it was illegitimate. I suckled the child - she was also given other milk. I had a child of my own at that time - about 7 months old.

I suckled Feiza about 4 months.

When I picked up Feiza from Mrs. Tejpar, SHIDI was with me.

10 I have heard that Mrs. Tejpar no longer in Mombasa. Last saw her about 1 year ago. She stopped her maternity home about 6/7 years ago.

I know the 2 Wakf properties. Khadija inherited them from Sheik Rashid. She died 6 years ago. The Sheik died about 16 or 17 years - approx.

Before I saw Riziki at Lamu I had heard that Khadija had obtained her from an Indian.

Kulsum Karmali and Mrs. Tejpar were friends of Khadija. Mrs. Tejpar was Khoja Ismaili.

20 I saw Feiza's mother at the maternity home - she looked like a European - a Seychellois.

Such children are known as "watoto wa Kuleya" (Interpreter says Kulya means to bring up, nurse or to adopt).

XXd: Bryson:

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 3 sisters. I signed this deed too.

Budhdeo: I object to evidence of this deed. Not mentioned in pleading. I am taken by surprise.

Bryson: I am leading evidence to establish what the intention of the Settlor was - see para.3(a) - last 4 lines.

Court: I will allow the evidence.

In the Supreme  
Court

Plaintiffs'  
Evidence

No. 9

Kalathumi,

Examination  
- continued.

Cross-  
Examination

In the Supreme  
Court  
-----  
Plaintiffs'  
Evidence  
-----  
No. 9  
Kalathumi,  
Cross-  
Examination  
- continued.

XXn continues: I see my signature to the document (put in as Exh. A for identification). This document was signed on the same date as the Wakf the subject of this action. Khadija discussed these matters with me. She did not consult me about the Wakfs. I knew what they were about. I could not go against her order which was to make provision for the 2 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.

10

2nd defdt. was taken in by Khadija during lifetime of her husband Rashid bin Sood - so was 3rd Defdt. They lived in the same house as Khadija and Rashid, were maintained as children, not as members of her family. They were completely dependent on her and her husband, and after his death on her alone. They remained with her until she died. She clothed, fed, educated them.

Until they were married they were solely dependent on Khadija. She treated them in the same way as she would have done her own children. They called her mother. She called them not her daughters, but the children.

20

Don't know who mother of Raziki was. Khadija told me she was an Indian. I don't know who the father was. Khadija would have told me if she had known.

Faiza's birth not registered. I didn't do so myself and I know Khadija didn't. Not sure if Mrs. Tejpar did.

30

Faiza was handed to me because Khadija wanted to adopt her. She told me to go and get the child for her.

Khadija had a brother SEIF BIN MOHAMED. He died before Khadija. He has an adopted child - still alive - a girl. She was the daughter of Seif's wife, by another man not her husband before her marriage. The child may have been Seif's, but it wasn't born during marriage.

40

When Khadija signed the Wakfs she was living in Cathedral Road, Mombasa. Her husband not then alive. She moved later from that house to Marie Louise Road.

The house in Cathedral Road was rented.

Wakf made 3/11/42. She shifted from Cathedral Road about a year later.

No XXn: Kanji.

In the Supreme Court

Plaintiffs' Evidence

No. 9

Kalathumi,

Cross-Examination - continued.

Re-Examination

Re-Xd: The house in Marie Louise Road to which she moved was one of the Wakf properties - that is one of the properties which produces rent. The other property is a shamba. She lived in that house to her death. She did not pay rent for that house.

10

Building on the property is a 2 storied, with shops below.

Residence upstairs occupied by Khadija & 2nd & 3rd Defendants. None upstairs let.

Khadija used to spend the rent from the shops - on food, clothing, everything.

I visited Khadija every day.

Feiza was not married during lifetime of Khadija. Raziki was married 3 times during Khadija's lifetime.

20

When Seif married, his wife, the latter did bring her child to live with them. She had nowhere else to leave her.

Khadija received income from the chamba of the Wakf. I don't know what the income was.

Hearing adjourned to 9.15 tomorrow.

E. A. J. Edmonds, J.

---

In the Supreme Court

23/9/58. As before.

Budhdeo calls:

Plaintiffs' Evidence

No.10

No.10

GHANIYA BINTI RASHID MANDRIYA

Ghaniya binti Rashid Mandriya,

2 P.W. Xd: Budhdeo: GHANIYA BINTI RASHID MANDRIYA tribe. Muslim. Sworn.

Examination

Am known by name of Shidi.

Knew Khadija. Knew her about 60 years ago. If she were alive today she would be about 70 years old. We were about the same age. First knew her at Zanzibar. We became friends. I could stay with her whenever I liked. 10

I know about Riziki (2nd Defdt.). Khadija told me she was going to get a child. She was not pregnant. She had had a child at Lamu before she married RASHID. She gave birth to no child after her marriage to Rashid.

I was not with Khadija when Riziki was brought to her. I saw the child 3 days after the child had been delivered to her. Khadija told me she had got the child at MAZERAS, that it was the child of an Indian. Shesaid KULSUM KARMALI had told her she had a child for Khadija. She told me that SHRIMANJI and SUKARI and SALIMA had fetched the child from Mazeras. She said the mother of the child was ashamed of bearing an illegitimate child and gave her up. The child was 15 days old when I saw it. I have known Riziki ever since. She was sick when she arrived. I called a doctor in. Khadija also reared FAIZA (3rd Defdt.). Khadija got her about 11 or 12 years after Riziki. I did not take delivery of Faiza. I and Kalathumi (last witness) fetched her. 20 30

I was in Khadija's house - she was absent - when a boy came to the house to fetch Khadija. I told him Khadija was in hospital. I told her she was wanted by a midwife BATCHI. Khadija told me to go to her as she was busy. I went to the midwife - she told me her husband's name was Tejpar. I asked her why she wanted Khadija. She said she wanted Khadija to take home a child whose mother didn't want to suckle. I asked the mother why, 40

and she said she didn't want her. I went and told Khadija. She told me to go to Mr. Budhdeo to get him to make out a paper for the signature of the mother - a Seychellcis woman. He said there was no need of a paper. I told Khadija. Next day at 10 a.m. I and last witness took round a car and fetched the child. We took her to Khadija's home. Rashid was then alive. I have known this child Faiza ever since.

In the Supreme Court

Plaintiffs' Evidence

No.10

Ghaniya binti Rashid Mandriya,

Examination - continued.

10 Both Raziki and Fazia addressed me as "Mama Mashidi". Those are they now in Court.

XXd: Kanji: When Raziki was brought to Khadija, she was fed by the bottle. Faiza was suckled by last witness - for about 6 or 7 months.

Cross-Examination

Raziki and Fazia both called Khadija Mama. She treated them as though they were her own children. She looked after their welfare educated them. She arranged Raziki's marriage.

20 Khadija never discussed her financial affairs with me.

Khadija called her Raziki because she was blessed by God with a child whom she had not born.

I heard that Khadija created a Wakf in favour of Raziki & Fazia. I did not discuss it with Khadija. I heard Khadija say she wanted to create a Wakf.

XXd: Bryson: FAIZA was 5 or 6 days old when first brought to the house. Last witness was then a grown woman - she had already a child.

30 Re-Xd: When the children Raziki and Faiza were with Khadija, there was another Khadija binti Juma staying with them. The children called her Mama also. Binti Juma was living with Binti Suleman until they grew up. She is now dead.

Re-Examination

No.11

ALI BIN MOHAMED

Xd: Budhdeo: ALI BIN MOHAMED - 1st Defdt. Muslim Sworn.

No.11

Ali Bin Mohamed, Examination

In the Supreme  
Court

Plaintiffs'  
Evidence

No.11

Ali Bin Mohamed,

Examination  
- continued.

I have not filed defence. Summoned to give evidence.

I am a brother of the first four plaintiffs and a cousin of the other four. I have the same father as first 4 plaintiffs but a different mother.

I have worked in Mombasa Municipality for last 23 years.

Suleman & Mohamed bin Hemed were brothers.

Khadija (settlor) my cousin.

Since her death I have been administering the Wakf in this suit. I knew Khadija well - we were brought up together. 10

Fatuma, Khadija's mother, married my father after Suleman died. I know Riziki and Faiza.

Khadija had no child by Rashid. Their marriage lasted 30 - 35 years until Rashid died in 1940.

The Wakf in this case was created after the death of Sheik Rashid. Sheik Rashid had had a child by a former union - a boy. When he died the boy and Khadija were left as his heirs. Neither Raziki or Faiza claimed as heirs of Rashid. 20

Khadija entrusted me to obtain her share of Rashid's estate - she gave me a Power of Attorney (produced - Ex.1). Mr. Budheo prepared the Power of Attorney.

Khadija was living in Rashid's house in Kibokoni, Mombasa.

Khadija got from inheritance, the house and shamba wakfid to these 2 girls (2nd & 3rd Defdt.). Two other houses at Mombasa, one shamba at Kilifi, and a shamba at Changamwe. 30

I managed her affairs and collected her income during her life-time after her husband's death. I was appointed by a Power of Attorney. This is it (Ex.2) dated 19/12/40. I was managing properties generally. I paid the income to Khadija. I think she was using it.

After the Wakf in this case was created, I continued managing the properties and collecting the rent. She was living in the house described in the Wakf. She paid no rent to the Wakf for that

house. If any expenses or rates due on properties I paid them. She had no income except from the properties she inherited.

Khadija wakfed the rest of her inherited properties under another Wakf except the shamba at Changamwe which produced 300/- a year.

During her lifetime I kept no accounts. Did so only after her death.

10 I am a Trustee under the second Wakf in favour of the first four plaintiffs. I collected the income in respect of properties in both Wakfs, even after Wakfs made.

I handed over net income to her.

Khadija died in 1952 - about 10 years after Wakfs created.

Know clause in first Wakf (present one) reserving 10% of income for repairs. I handed full income to her - as far as I know she did not put aside anything.

20 After her death, I received no sum representing sum collected towards the 10% reservation. The other Wakf provided for 20%. During Khadija's lifetime Raziki married. She remained with Khadija - later she went to her husband's house for few months and then returned to Khadija's house. Khadija remained in the house.

I am now administering the suit Wakf. In the other one I have resigned and 1st & 2nd plaintiffs are managing it.

30 The net income of the 2nd Wakf was about 500/- a month - the beneficiaries 1 - 4 plaintiffs each got 100/- and a further 100/- was divided among the children of the late Seif bin Mohamed including one adopted child. The words "toto Wakulcya" mean "the maintenance and bringing up of a child not born of the parents."

40 Khadija several times told me of the origin of the girls, 2nd & 3rd Defdts. 2nd Defdt. Raziki was brought from Mariakani, born of a Khoja Ismaili. Faiza was child of Seychellois girl in Mrs. Tejpar's maternity home. Khadija did not mention the

In the Supreme  
Court

Plaintiffs'  
Evidence

No.11

Ali Bin Mohamed,  
Examination  
- continued.

In the Supreme  
Court

Plaintiffs'  
Evidence

No.11

Ali Bin Mohamed,  
Examination  
- continued.

father of the girls.

The name Abdulla is not the name of the fathers of the girls. Fathers not known. Abdulla is common name among Arabs for children with no known father.

I knew Khadija binti Juma. She stayed with Khadija binti Suleman an Arab lady. She was related to Sheik Rashid - a niece. She also had two 'adopted' children, reared in the way Raziki and Faiza were. One was called DALILA BINTI Abdulla. The other a son - forget his name but he was bin Abdulla. The two children were not I think related. Their real fathers unknown. 10

Binti Juma made a Wakf in favour of Dalila. I understand it has been set aside by this Court.

Khadija made no Wakf in favour of plaintiffs 5, 6, 7 & 8.

I am still managing the Wakf to the 2 girls, defendants 2 & 3.

Since July '57 I have made no distribution because of this case. The net income paid to the two girls under this Wakf was approximately between 600/- & 800/- each per month. It varied. 20

My father brought up Khadija because he was her uncle and step-father. He is now dead.

He died long before Khadija died. She lived with us as one of the family. She did not become an heir to my father - she could not according to Mohammedan Law.

Cross-  
Examination

XXd: Khanji: Khadija was not paying rent for the house she occupied. I wouldn't know if she paid herself the rent. She never said so. I saw no account reflecting this after her death. 30

I filed no income tax returns in respect of the income. Made a mistake. Have now asked accounting to do so.

Rental from the shops below where she lived was about 140/- a month. Rent of flat before Khadija occupied it was 115/- a month. Cost to maintain one person then was very cheap - Cost of maintaining 40



one child then was about 25/- to 30/- a month - living then very cheap.

Khadija during her lifetime bought a property. She made it the subject of the 2nd Wakf.

At the time of making the Wakfs, Khadija spoke to me about them. She said she wanted to make a Wakf for the 2 girls & her sisters.

XXd: Bryson:

10 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. Don't think it was my duty to oppose this action.

When Khadija made this Wakf, I can't say what intention she had. The deed was read to me in Mr. Christie's office.

I thought then she was making an invalid Wakf. I told her so long ago.

20 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.

I agree Khadija supported and maintained these children and they were solely dependent on her for their support after Rashid's death. She treated them as though they were her own children.

30 Khadija and the 2 girls moved into the Kibokoni flat above the shops about a year after Wakf made. She made certain improvements, by pulling down a staircase and making room for another shop. Costs just over 2000/-. I presume this was met from the rent from the shops.

40 Re-Xd: Before the execution of the first Wakf Deed, Khadija asked me to become Trustee. At first I declined because I spoke to the Chief Kathi and asked him to draft me a Wakf Deed and I mentioned that Khadija wanted me as Trustee. He warned me that if I was the Trustee what would happen to the income - was I to keep it or would Khadija spend the money during her lifetime. I

In the Supreme Court

Plaintiffs' Evidence

No.11

Ali Bin Mohamed,

Cross- Examination  
- continued.

Re-Examination

In the Supreme  
Court

Plaintiffs'  
Evidence

No.11

Ali Bin Mohamed,  
Re-Examination  
- continued.

said Yes to the latter. Then he warned me to be very careful about it. As trustee during her life you will be responsible for all the income and after her death the beneficiaries might ask you to account for the income. He advised that she should be trustee during her life, and myself after her death.

Budhdeo: That is my case.

Produce family tree - Exh. 3.

Bryson: Ask leave to recall 1 P.W.

10

Budhdeo: No real objection.

No.12

Kalathumi  
(Recalled),  
Examination

No.12

KALATHUMI (Recalled)

1 P.W. recalled and reminded of her oath.

XXd: Bryson: I suckled Faiza for 3 to 4 months - 2 or 3 times a day. I was thin. 29 or 30 years old.

No Re-Xn.

No.13

Court Notes,  
23rd September  
1958

No.13

COURT NOTES

20

Khanji: I will deal only with the following issues:  
Nos. 1 & 2. Once a Wakf made, and if the intention of the Settlor was to create Wakf, subsequent acts contrary to provision of Wakf does not invalidate the Wakf. Mere breach of Trust, for which beneficiaries have an action. 1947 A.I.R. Lahore 117 Mohomed Afzal v. Din Mohamed. sub-para. (b).

Case went to Privy Council 1948 A.I.R.168 para. (e). Here, settlor intended to make and made a valid Wakf. Her subsequent conduct a breach of Trust - no invalidation.

30

Not necessary for a formal change of possession.

Mulla p.170 para.186(2)

In this case, settlor was the first Trustee.

3(b) Whether beneficiaries are Muslims or not?

Notwithstanding whether 2nd & 3rd defdts. are Muslims within the definition in Ordinance, the Ordinance still applies. Section 3 - Submit that if Wakf made by a Muslim, then Ordinance met. Not necessary that beneficiaries should also be Muslim. "or" must be read "disjunctively".

In the Supreme  
Court

No.13

Court Notes,  
23rd September  
1958 -  
continued.

10 Section 4 refers to Wakfs made "BY" any Muslim - doesn't refer to Wakfs "for the benefit of".

Issue 5(a) - this is sub judice before E.A.C.A.

12 midday - Luncheon recess.

At 2 p.m. As before.

Kanji:

Issue 5(d) - void for uncertainty because gift to charity not of permanent character - Not gift to charity of which prophet approved - too vague.

Saxena - Muslim Law 3rd Ed. 519.

20 Objects of Wakf.

Prophet has laid down in the Koran the religious objects of which he approves.

But, not necessary to name any particular charitable object if document amply clear that Wakf for religious and charitable purposes.

Mulla 166 para. 179. See Commentary - (q)  
para.6 of Wakf.

"poor Mohamedans" - see Ordinance Sec.4(i)(ii)

30 All objects in para.6 do come within scope of charity & religion.

Mulla p.164.

Not excluded by Mulla.

Issue 7. Friend agrees that this issue be left open until Court decides other issues.

Bryson: Other issues common to one matter. Plaintiffs contend that as this comes within Privy Council's decision as to validity, this Wakf would be invalid unless brought within ambit of section 4

In the Supreme  
Court

No.13

Court Notes,  
23rd September  
1958 -  
continued.

of Ordinance. Section 4.

This Wakf made by a Muslim - for 2 beneficiaries in first instance - 2nd & 3rd Defendants.

We comply with section 4(1)(a).

E.A.C.A. approved gift to a stranger - but not to children of strangers.

Then section 4(1)(1) & (11)

Section (2)

E.A.C.A. held that subsection did not include family of stranger. 10

Exhibit (1) the girls are members of family of Settlor and E.A.C.A. decision does not apply to them.

- (2) With regard to 3rd Defendant, particularly she is a member of the family of the maker by virtue of fosterage.

Budhdeo: Fosterage not raised in pleadings.

Bryson: We had no knowledge of this evidence and would not have had - we can therefore rely on this. 20

We can only plead what is within our knowledge.

This is relevant to main issue - whether defendants members of the family.

- (3) Even if it is held Defendants not members of family, the Wakf still valid in so far as this gift to persons with gift over to descendants then to charity. That part to the descendants children can be excised - submit this point never argued before E.A.C.A.

On (1) Tyabji 590 (3rd ED) Note 11. 30

Saxena Muslim Law 3rd Ed. p.455

\* Mubarak Ali v. Hamed Ali 1935 A.I.R.Lahore 414 "kindred" not included in Indian Act.

Ismail Haji v. Umar Abdulla 1942 I.L.R. Bombay 441 at 445

On (2) Distinct case of Faiza

Minhaj 378, 379 -

Relationship through foster mother to latter's sisters & brothers. Through P.W.1 to Khadija, 3rd Defdt. relative by fosterage of the maker of the Wakf - thus a member of the family. 40

On (3) Question whether gift over to children of stranger may be excised.

Saxena 451.

M Afzal's case - 1947 A.I.R. Lahore 117 at 134 para.58 p.135, 136, 137.

This point not discussed when case went before Privy Council.

\*Mubarak Ali's case at p.414 foot of p.415.

In the Supreme Court

No.13

Court Notes,

23rd September 1958 - continued.

10

DEFENDANTS' EVIDENCE

Kanji calls: No.14

RIZIKI BINTI ABDULLA

Xd: Kanji: RIZIKI BINTI ABDULLA, Muslim Sworn.

I have in my lifetime resided with Khadija. She was my mother. I have called her mother ever since I can remember. She was the only person whom I knew and understood as my mother. She maintained me - brought me up.

20

I was first married when I was about 13 years old. Khadija paid for my wedding and expenses - don't know how much.

I was married a second time after Khadija's death.

Khadija had paid for all my expenses, food, clothes, medical fees, school (Arab and Convent School). She bought jewellery for me - don't know value of it.

I remember she made a Wakf for my benefit in 1942. I signed it. (This is it - Put in by consent as Exh.4).

30

I identify my signature. Mother told me she had made the Wakf so that I would be provided for during my life.

In 1942 I was living in Cathedral Street, near the church. We rented the house. We later moved to Kibokoni and lived in a flat above shops.

Defendants' Evidence

No.14

Riziki binti Abdulla,

Examination

In the Supreme  
Court

Defendants'  
Evidence

No.14

Riziki binti  
Abdulla,

Cross-  
Examination

XXd: Budhdeo: I am about 23 years old.

I left convent in 1942 - then got married. First marriage was to Mohamed Ali. Next marriage was to Ismail Salim.

I know SHAH of Nairobi. When I knew him Khadija was alive. I had a child by my first husband.

I have married Ismail according to Islam rites - 6 years ago.

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

10

When I went to school I went under the name of HAURAN RASHID. I have been called Raziki binti Abdulla since childhood.

When Rashid was alive I was called Raziki or HAURAN RASHID. I was about 22 when Khadija died.

At time of signing Wakf I did not know Khadija was not my mother. When we signed she didn't tell us all that was in the document.

Re-Examination

Re-Xd: I have always lived with Khadija even when I was married. My husband used to give me money.

20

No.15

Faiza binti  
Abdulla,

Examination

Bryson calls:

No.15

FAIZA BINTI ABDULLA

3rd Defendant Xd: Bryson: FAIZA BINTI ABDULLA, Muslim Sworn.

I am a Mohammedan - I have always been one. I am now 21 years old. I regarded Khadija binti Sulemani 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. No one else provided for me before her death. I was solely dependent upon her.

30

I married in 1956 after she died.

XXd: Budhdeo: No questions.

CLOSE OF CASE FOR DEFENCE.

No.16

ADDRESSES OF COUNSELIn the Supreme  
CourtNo.16Addresses of  
Counsel,23rd September  
1958Kanji: 1st Issue.

Intention of settlor at time of making Wakf is important.

The Deed - para.8.

The declaration - the evidence of P.Ws 1 & 2 - shows intention to make Deed. It was given publicity and formality of proper legal document. Proof that settlor had every intention of making Wakf.

Khadija only moved into house subject of Wakf a year or 2 after making Wakf.

The execution of 2nd Wakf in favour of the plaintiffs - on same date and at same time.

Khadija's occupation of house not of such conduct as to put in question the original intention of the settlor.

The income from the Wakf. The 2 girls were being maintained wholly by Khadija - she received all the income from the properties and used it for their benefit - all or a large proportion.

Bryson: Little to add - We concede that legal adoption is unknown in Mohammedan Law. Adoption does not give any right to inheritance.

This does not affect my argument that as dependants the girls were members of the family.

(Khanji) C.C.426 of 1957 - Delila

Budhdeo: Take exception to framing any further issue.

I asked for the addition to issue 3(c) - so as to shut out any other plea which would take me by surprise.

Para.3(b) Defence.

On question of Fosterage it is dealt with only for purpose of prohibiting marriage.

Mulla 237.

Minhaj 379.

No facts alleged as to relationship by fosterage. I am entirely taken by surprise.

In the Supreme Court

No.16

Addresses of Counsel,

23rd September 1958 - continued.

Nothing to show that Kulthmin was living with Khadija.

No case cited to support this contention.

I say Court cannot go outside Issue 3(b)

Quinn v. Letham 1901 A.C.

Interpretation.

None of the Indian cases quoted by friends are in point.

None of cases referred to 'strangers' - they were relatives.

Fayzee Outline of Mohammedan Law 262. Meaning of Family.

Defdts. 2 & 3 can only be regarded as utter strangers.

The Amina binti Abdulla case 21 E.A.C.A.12.

C.C.426/1957 SAID Bin Abdulla v. Delila.

In any event you cannot go behind the intention of the settlor and excise any portion of her intent - Indian decisions are not binding on this Court.

Hearing adjourned to 9.15 a.m. tomorrow.

24th September 1958

24/9/58

E.A.J. Edmonds, J.

Kanji. Refers to Minhaj - 240 Foundlings. Wakfs in favour of foundling.

Budhdeo: That may have been old Arabian Law - but since Bakushman's case matter changed.

1901 A.C. Quin 495 at 506 - Logic had no application.

On Fosterage: Minhaj 291.

Only a subject to be treated in relation to marriage and prohibited degrees. p.378, 381.

sec. h.(6) p.117.

Submit that since Bakushmin's case every Wakf that postpones bequest to charity indefinitely is to be regarded as invalid. It is for the defendants to show that the Wakf comes within the protection of the Ordinance under Sec.3 & 4. Interpretation of Sec.3. Means any Wakf made by and/or for the benefit of any Muslim.

If Ordinance does not apply Wakf charity invalid under Bakshumen's case.

10

20

30

40



Conduct of the settlor - she continued to act in respect of income as she had done before. Did not set apart 10% of net income.

In the Supreme  
Court

If her conduct shows that she intended to benefit herself during her lifetime then invalid as Section 4(1)(b) does not apply.

No.16

The case of Mohamed Afzal - question of excisement.

Addresses of  
Counsel,

Mulls 171 - Intention

24th September  
1958 -  
continued.

172 - Shafi Law.

183 - Note 1.

Dalila's Wakfe C.C.426/1957.

ORDER: Cur Adv. Vult. I will hear submissions as to accounts and costs after judgment on the initial issues.

E.A.J. Edmonds, J.

28/10/58. Budhdeo for plaintiffs.  
Bryson for Defdt. 3.  
Kanji for Defdt. 2.

28th October  
1958

Court: E.A.C.A. in C/A 69/1958. Sheikh binti Ali bin Khamis & Anr. v. Halima Binti 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.

Budhdeo: Issue 7 - No income distributed since 31/7/1957.

We are not claiming accounts of income received & distributed prior to that date.

Ask that 1st defdt. should be ordered to render accounts for income and expenditure subsequent to 31/7/57, and also in respect of any income in his hands at that date, and not distributed; and that net amount due be paid to the plaintiffs.

Bryson: We accept that.

Kanji:

Budhdeo: Costs - Ask first that Court makes a finding in the affirmative as regards the 6th issue.

In the Supreme Court

No.16

Addresses of Counsel,

28th October 1958 - continued.

Costs - Don't think 2nd & 3rd Defdts. can be said to be at fault.

Suggest costs of 2nd & 3rd defdts. who did not have conflicting interests and therefore there should be one set of costs, should be paid out of the income of the Wakf.

I do not press prayer 5 of the plaint.

Bryson: As to costs - true that interests identical - there was a variation on question of birth and adoption - Foster mother. Think the 2nd & 3rd defdts. should have been represented separately, and on Solicitor & Client basis, as approved by E.A.C.A.

10

Registrar would have a discretion as regards instruction fee. Matter for him.

Budhdeo: No conflicting interest. Pleadings exactly the same.

20

No.17

Order,

28th October 1958

No.17

O R D E R

ORDER: There will be judgment for the plaintiffs as prayed in paragraphs (1) & (2) of the Plaint. As regards para. (3) the 1st defdt. is ordered to render accounts for income received and expenditure made subsequent to 31/7/57, and also in respect of any income he may have had in his hands and undistributed at that date, and that the 1st defdt. do pay the net amount due under such accounts to the plaintiffs after the payment of all costs awarded in this action. 30

The costs of the parties, that is to say, the plaintiffs and the 2nd and 3rd defdts. will be paid out of the income of the "Wakf" properties; the 2nd & 3rd Defdts. to have one set of costs. All costs to be taxed as between solicitor and client.

E.A.J. Edmonds, J.

No.18

D E C R E E

IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY

Civil Suit No. 81 of 1958

(Title as in No. 1)

In the Supreme  
Court

No.18

Decree,

1st December  
1958CLAIM

- 10 (1) That the Wakf registered at the Coast District Land Titles Registry as No. C.R.3710/7 and No. C.R.1320/7 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;
- (2) that the fourth Defendant be directed to cancel and delete all entries made in the Register of Land Titles and on the Certificate of Titles relating to the said properties concerning the said Wakf or in pursuance thereof;
- 20 (3) that the first, second and third Defendants do all render a full and true account of all the rents and profits or other income respectively received by or paid to them from the properties the subject-matter of the Wakf and pay to the Plaintiffs the amounts respectively received by or paid to them for on in respect of the said rents, profits and income; and all necessary directions be given and investigations ordered for account thereof being taken for that purpose;
- 30 (4) that the Plaintiffs be awarded the costs of this suit and the same be ordered to be paid to them in such manner as this Honourable Court thinks just;
- (5) that the first, second and third Defendants do pay the Plaintiffs interest at 6% per annum on the amount which may be found respectively payable by them, from the date of the judgment till payment; and

In the Supreme  
Court  
            
No.18

(6) that such other or further relief may be granted to the Plaintiffs as the nature of the case requires or this Honourable Court deems fit to grant.

Decree,  
1st December  
1958 -  
continued.

This suit coming on the 28th day of October 1958 for final disposal before the Honourable Mr. Justice E.A.J. Edmonds in the presence of Mr. Narshidas M. Budhdeo, Advocate for the Plaintiffs; Mr. A.J. Kanji, Advocate for the second Defendant, Mr. John Edward Leslie Bryson, Advocate for the third Defendant and in the absence of the first and the fourth Defendants who were both duly served with the summons in this suit IT IS ORDERED THAT

10

(1) The Wakf registered at the Coast District Land Titles Registry as No.C.R.3710/7 and No.C.R.1320/7 be and is hereby declared null and void ab initio and that the properties wakfed thereby be and are hereby declared to belong to and form part of the intestate estate of the Settlor;

20

(2) The fourth Defendant do cancel and delete all entries made in the Register of Land Titles and on the Certificates of Title relating to the said properties concerning the said Wakf or in pursuance thereof;

(3) The first Defendant do render accounts for income received and expenditure made subsequent to the 31st July 1957 and also in respect of any income he might have had in his hands and undistributed at that date, and that the said first Defendant do pay to the Plaintiffs the net amount due under such accounts after payment thereof of all costs awarded in this suit; and

30

(4) The Plaintiffs do have their costs of this suit out of the income of the wakf properties and the second and third Defendants do have one set of costs of the suit between them out of the income of the wakf properties and all costs be taxed as between Solicitor and Client.

GIVEN under my hand and the Seal of the Court at Mombasa this 28th day of October, 1958.

40

ISSUED on this 1st day of December, 1958.

Roger J. Quin.

AG. DEPUTY REGISTRAR,  
H.M. SUPREME COURT OF KENYA  
MOMBASA DISTRICT REGISTRY.

No. 19

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL NO. 5 OF 1959

- 1. RIZIKI BINTI ABDULLA
- 2. FAIZA BINTI ABDULLA .. .. APPELLANTS

versus

- 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 RESPONDENTS

(Being an appeal from the judgment and decree of the Supreme Court of Kenya at Mombasa (the Honourable Mr. Justice J. Edmonds) dated 28th October, 1958)

in  
CIVIL CASE NO. 81 OF 1958

between

- 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

and

- 1. Ali Mohamed bin Hemed as Trustee or Mutawali of the Wakf made by Khadija binti Suleman bin Hemed deceased
- 2. Riziki binti Abdulla
- 3. Faiza binti Abdulla and
- 4. Registrar of Titles, Coast Registry Defendants

MEMORANDUM OF APPEAL

The Learned Judge in the said Civil Case No. 81 of 1958 having followed the Judgment of Her Majesty's Court of Appeal for Eastern Africa in

In the Court of  
Appeal

No. 19

Memorandum of  
Appeal,

3rd January  
1959

10

20

30

40

In the Court of  
Appeal

No. 19

Memorandum of  
Appeal,

3rd January  
1959 -  
continued.

Civil Appeal No.69 of 1958 (Sheikha binti Ali bin Khamis and another versus Halima binti Said bin Nasib and others), Riziki binti Abdulla and Faiza binti Abdulla the Appellants above named, who allege and maintain that the said Judgment in Civil Appeal No. 69 of 1958 was wrong in law, appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision in the above mentioned Civil Case No.81 of 1958 on the following grounds, namely:-

10

1. The learned Judge ought to have held that the Wakf in question complied with the words "maintenance and support" in Section 4(1)(a) of the Wakf Commissioners Ordinance 1951 (Number 30 of 1951);

2. The learned Judge failed to appreciate that the words "maintenance and support" in Section 4(1)(a) of the Wakf Commissioners Ordinance 1951 (Number 30 of 1951) refer to the "purpose" of the Wakf and not to the "income" thereof, so that the absence in the Wakf Deed of any restriction upon the use of the income or the specific allocation thereof towards "maintenance and support" was immaterial, and no such restriction or allocation was necessary under Mohammedan Law;

20

3. The learned Judge ought to have held that the Wakf in question complied with Section 4(1)(a) of the Wakf Commissioners Ordinance 1951 (Number 30 of 1951) having regard to the fact that under Mohammedan Law the basic purpose of all such Wakfs is "maintenance and support" viz. to provide for the beneficiaries and to prevent them from falling into indigence and want, so that such purpose was implied in the Wakf in question;

30

4. If and in so far as the Wakf Deed was silent as to the use to which the income could be put and consequently ambiguous or capable of various constructions as to such use, the learned Judge ought to have referred a construction which would have validated the Wakf Deed and effectuated its purpose, by inferring that the income was impliedly devoted towards "maintenance and support" of the beneficiaries, and the learned Judge ought to have rejected the contrary construction adopted by him which was inconsistent with such purpose and which invalidated the Deed;

40

5. The learned Judge ought to have held that the effect of the Wakf in question was in essence to give the income towards "maintenance and support" having regard to the plain and ordinary meaning of the expression "maintenance and support";

In the Court of  
Appeal

No. 19

Memorandum of  
Appeal,

3rd January

1959 -

continued.

10 6. The learned Judge should not have introduced principles of English Law into a Mohammedan dedication which ought to have been construed in accordance with Mohammedan Law and ought to have appreciated that it was permissible in Mohammedan Law for the income of the Wakf to be allocated to a series of beneficiaries who may enjoy the same without any question of "maintenance and support" in any restricted or artificial sense which it was sought to impose upon these words and of which the Mohammedan Law is ignorant;

20 7. There was no material or essential difference between Mohammedan Law and English Law as the affect of income given for "benefit or use" or for "maintenance and support" under both the systems is the same and the learned Judge erred in drawing distinction between the two systems of law on this point;

30 8. The learned Judge failed to appreciate that such Wakfs as drafted in East Africa and in instances cited by Mohammedan jurists do not conform to the exact words of Section 4(1)(a) of the Wakf Commissioners Ordinance 1951 and that the effect of construing the said section as he did, was to frustrate the purpose for which the said section was enacted and to reduce the law to a "dead letter"; and the learned Judge misdirected himself in not interpreting the said section consistently with the spirit and intention of the said section so as to validate such Waks and so as to "advance the remedy and suppress the mischief";

WHEREFORE the Appellants pray:-

- 40 (a) that this Appeal be allowed with costs in this Court and in the Court of the first instance;
- (b) the said decision of the Supreme Court of Kenya be set aside.

In the Court of  
Appeal

No. 19

Memorandum of  
Appeal,

3rd January  
1959 -  
continued.

DATED at Mombasa this 3rd day of January 1959

BRYSON & TODD,

(Sgd) J.H.S. TODD,

Partner.

Advocates for the Appellants.

To: The Honourable the Judges of Her  
Majesty's Court of Appeal for Eastern Africa.

Narshidas N. Budhdeo, Esq.,  
Advocate,  
Mombasa.

10

No. 20

Affidavit of  
Plaintiffs'  
Counsel,  
4th May 1959

No. 20

AFFIDAVIT OF PLAINTIFFS' COUNSEL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL No.5 of 1959

(Title as in No.19)

A F F I D A V I T

I, Narshidas s/o Motichand Budhdeo, of Mombasa,  
solemnly affirm and say:-

1. I am an advocate of Her Majesty's Supreme  
Court of Kenya, residing and ordinarily practising  
at Mombasa, and, as such, entitled to appear and  
practise before this Honourable Court.

20

2. In the original suit No.81 of 1958 in the  
Superior Court the seven agreed issues appearing  
at pp.23-24 of the record of this appeal were  
framed.

3. After the conclusion of the hearing of the  
original suit, the Superior Court, on the 24th of  
September, 1958 reserved its decision. At that  
time Civil Appeal No.69 of 1958 filed in this  
Honourable Court by Sheikha binti Ali bin Khamis  
and another versus Halima binti Said bin Nasib was  
pending before this Honourable Court.

30



4. I am informed by Mr. R.K. Mitra, the Appellants' advocate in the said Civil Appeal No.69 of 1958 that the decision of this Honourable Court in the said appeal was pronounced on or about the 8th day of October, 1958, and the written judgment or reasons for the said decision were delivered on the 24th day of October, 1958. Thereupon the Superior Court listed the original suit for further argument, if any, on the 28th October, 1958, on the issue No.5(a).

In the Court of  
Appeal

No. 20

Affidavit of  
Plaintiffs'  
Counsel,

4th May 1959

- continued.

5. Mr. Bryson, who appeared as advocate for the second Appellant herein (the third Defendant in the original suit) at first verbally applied to the Superior Court to let its decision stand over till the decision of an appeal to Her Majesty's Privy Council, which, he stated, was, according to his information from Mr. Mitra, being contemplated from the said decision of this Honourable Court in the said Civil Appeal No. 69 of 1958; and Mr. A.J. Kanji who appeared as advocate for the first appellant herein (the second Defendant in the original suit) also made a similar request. I opposed such indefinite postponement of its decision by the Superior Court, and the Superior Court refused to let its decision stand over indefinitely on the ground put forward by Mr. Bryson, and invited appellants' advocates if they had anything to say against it following the judgment of this Honourable Court in the said Civil Appeal No.69 of 1958 and giving its decision on Issue No.5(a) in accordance with the said decision. Mr. Bryson and Mr. A.J. Kanji thereupon conceded that, in that case the suit before the Superior Court on issue No.5(a) was on all fours with the case before this Honourable Court in Civil Appeal No.69 of 1958, and that the decision in the said appeal was, therefore, binding on the Superior Court.

6. The Superior Court thereupon gave judgment for the Plaintiffs deciding the suit on Issue No. 5(a) alone, considering it unnecessary, in the circumstances, to decide the other issues framed in the suit.

7. It appears to me that even if the present appeal be decided against the Appellants, the subject-matter in dispute is of the value entitling the Appellants to obtain leave to prefer an appeal to Her Majesty's Privy Council, as of right. Moreover several of the other issues not decided by

In the Court of  
Appeal

No. 20

Affidavit of  
Plaintiffs'  
Counsel,

4th May 1959

- continued.

the Superior Court involve important questions of law. I have, therefore, had conversation with both Mr. Bryson and Mr. A.J. Kanji and they both agree with me that it would be in the interest and save costs of all the parties concerned in this appeal if the Superior Court was asked to give its decision on all the issues framed in the original suit and this appeal would be thereafter heard by this Honourable Court after giving liberty to the Appellants to file fresh or additional grounds of appeal and to the Respondents to so act as they may be then advised.

10

Solemnly affirmed by the )  
above-named Narshidas s/o )  
Motichand Budhdeo, at )  
Mombasa, this 4th day of ) Narshidas M. Budhdeo.  
May 1959 in the presence )  
of )

B.T. Parkar,

COMMISSIONER FOR OATHS

20

Filed by:

Narshidas M. Budhdeo,  
Advocate for the Respondents.

No. 21  
Court Notes,  
8th May 1959

No.21

COURT NOTES

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL No.5 of 1959

(Title as in No.19)

8/5/59 Budhdeo for Applicants.  
A.J. Kanji for Respondents

30

Budhdeo: I did not intend that this application should come before your lordship, but before one of the visiting Justices of the Court of Appeal.

Court: I really do not think I can deal with this application, as I am affected by it.

ORDER: Hearing adjourned and to be placed before

another Judge of the Court of Appeal.

E.A.J. Edmonds, J.

Civil Appeal 5/59.

8/5/59. Coram: Forbes, V-P.  
2.30 p.m. Gould, J.A.  
Windham, J.A.

In the Court of  
Appeal

No. 21

Court Notes,  
8th May 1959  
- continued.

Budhdeo for Applicants/ Respondents.  
Bryson for Respondents/Appellants.

Budhdeo:

10 This is really a joint application. Agreed  
that whatever result costs should be costs in  
appeal.  
Application agreed.  
Affidavit - Para.7.  
Seven issues at pp.23 & 26.  
6th & 7th practically abandoned.  
Other issues contained sub-issues.  
Altogether 4 sub-issues.  
20 Question decided in another appeal same as issue  
5(a).  
Other appeal decided on that issue.  
Para.5 of Affidavit.  
Suit was decided on issue 5(a).  
Leave to appeal to Privy Council can be obtained  
as matter of right.  
Assuming the Court follows its own decision, then  
leave as a matter of right will be granted.  
Privy Council may decide case 2 or 3 years hence.  
30 If Privy Council reverses decision matter will have  
to be referred back to Supreme Court on other  
issues. Judge who heard case may not be available.  
Witnesses may be dead. Expenses of new hearing.  
Important questions arise on issues.  
Issues should be decided by Judge who heard case  
and framed issues.  
(V.P. What power to send back)  
Rule 74(4) of E.A.C.A. Rules - very wide.  
If I seek to support case on remaining issues Court  
will not hear me.  
40 But Respondent entitled to rely on any ground.  
Submit R.74(4) wide enough to enable order sought  
to be made.  
Evidence on issues heard, case fully argued, only  
remains for Judge to give his finding on issues.  
Refer Order in Council, s.16 - Power, etc. of

In the Court of  
Appeal  
 No. 21  
 Court Notes,  
 8th May 1959  
 - continued.

Court from which appeal brought.  
 S.97 of Civil Procedure Code - Inherent powers.  
 Submit just and expedient case should come before  
 Court after decision on all the issues.  
 Makes for speedier litigation and for finality.

Bryson: Support application - also on costs.

Order:

We are of opinion that we have no power to  
 make the order sought, and the application must  
 accordingly be refused.  
 By consent, costs of the application to be costs  
 in the appeal.

10

A.G. Forbes,  
 Vice-President.  
 8/5/59.

No. 22  
 Notice of  
 Additional and  
 Reframed  
 Grounds of  
 Appeal,  
 11th September  
 1959

No.22

NOTICE OF ADDITIONAL AND REFRAMED  
 GROUNDS OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
 AT MOMBASA

20

CIVIL APPEAL No.5 of 1959  
 (Title as in No.19)

NOTICE OF ADDITIONAL AND REFRAMED GROUNDS  
 OF APPEAL TO BE READ AS SUPPLEMENTAL TO  
 THE ORIGINAL GROUNDS OF APPEAL

TAKE NOTICE that the Appellants will ask for  
 the leave of the Court to put forward the following  
 additional and reframed grounds, at the hearing of  
 the Appeal:-

1. That the Supreme Court has no jurisdiction to 30  
 entertain the Suit as the Wakf Commissioners  
 Ordinance 1951 has taken from the Supreme  
 Court and given to the Wakf Commissioners  
 jurisdiction to declare whether or not a  
 Wakf is lawful.
2. That if the Supreme Court had any jurisdiction,  
 it was only for a limited purpose under the

Wakf Commissioners Ordinance, to declare whether a Wakf is valid or not and not to declare a Wakf void ab initio since Section 21 of the said Ordinance precludes the Wakf property to revert to the dedicator or his heirs.

In the Court of  
Appeal

No. 22

Notice of  
Additional and  
Reframed  
Grounds of  
Appeal,

11th September  
1959 -  
continued.

- 3. That the Wakf Commissioners are the only competent parties in any suit to move the Court for a declaration as to the validity of a Wakf.

10

DATED at Mombasa this 7th day of September, 1959.

John L. Bryson.

BRYSON & TODD,  
ADVOCATES FOR THE APPELLANTS.

- 1. To The Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa;
- 2. To Narshidas M. Budhdeo, Esquire, Advocate, Mombasa.

The Address for Service of the Appellants is care of Messrs. Bryson & Todd, Advocates, Mombasa.

20

FILED this 11th day of September, 1959.

Roger J. Quin,  
Ag. Deputy Registrar,  
H.M. Court of Appeal for Eastern Africa,  
Mombasa.

Filed by:  
Bryson & Todd,  
Advocates,  
Mombasa.

30

No.23

RESPONDENTS' (PLAINTIFFS') NOTICE

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL No.5 of 1959

(Title as in No.19)

RESPONDENTS' NOTICE

TAKE NOTICE that at the hearing of this Appeal

No. 23

Respondents'  
(Plaintiffs')  
Notice,

1st October  
1959

In the Court of  
Appeal

No. 23

Respondents:  
(Plaintiffs:)  
Notice,

1st October  
1959 -  
continued.

the Respondents will refer to and rely on paragraphs 5 and 6 of the affidavit of their advocate Narshidas M. Budhdeo, sworn the 4th day of May 1959 and filed herein, and will also contend that the decision of the Superior Court should be affirmed on grounds other than those relied on by that Court, namely:-

1. Subsequent to the creation of the Wakf, the settlor, a Shafi Mohamedan, received and used till her death the income of the wakfed properties for her own use and benefit and also continued in physical occupation till her death of some part thereof; so that the Wakf was a mere camouflage to create several successive life estates taking affect after her death and thus a disposition by her of her said properties offending against the rule against perpetuity, the ultimate gift to charity therein being merely illusory; 10
2. No Appellant was in any way related to or a member of the family or a kindred of the settlor, and the Wakf Commissioners Ordinance (No.30 of 1951) did not, therefore validate the wakf; 20
3. The Wakf contravenes section 4 of the said Wakf Commissioners Ordinance in the following respects as well:-
  - (a) the settlor makes provision therein for the appellants as her "adopted daughters" and it is, therefore, contrary to Muslim law, as Muslim law does not recognise "adoption" as a means of conferring or establishing parent-hood; 30
  - (b) the ultimate benefit to charity is postponed to the extinction not only of the appellants but of their sons and daughters and their issue and even thereafter to the extinction of an adopted child of the settlor's brother and its issue; and
  - (c) the ultimate gift to charity is not of a permanent character or is void for uncertainty.

Dated at Mombasa this first day of October, 1959. 40

Narshidas M. Budhdeo,  
ADVOCATE FOR THE RESPONDENTS.

To The Honourable Judges of Her Majesty's Court  
of Appeal for Eastern Africa; and

To Messrs. Bryson & Todd, Appellants' Advocates,  
Mombasa.

Filed the 1st day of October, 1959, at Mombasa.

Roger J. Quin,  
Ag. Deputy Registrar,  
H.M. Court of Appeal for Eastern  
Africa, Mombasa.

In the Court of  
Appeal

No. 23

Respondents'  
(Plaintiffs')  
Notice,

1st October  
1959 -  
continued.

10

No.24

PRESIDENT'S NOTES OF ARGUMENT

3.11.59. Coram: Forbes, Ag.P.  
Gould, Ag. V-P.  
Windham, J.A.

No. 24

President's  
Notes of  
Argument,  
3rd November  
1959

Nazareth, Q.C., A.J. Kanji with him, for Appellants.  
Budhdeo, K.M. Pandya with him, for Respondents.

Nazareth: Appeal from Supreme Court decision that  
a Wakf was null and void ab initio and granting  
relief to Plaintiffs. Civil Appeal 69/58:

20 Decision of this Court. Judge without deciding  
other issues held that on basis of that decision  
Plaintiffs must succeed.

P.43 of record: Decision: No considered judgment.  
Issue 5(a) is at p.24 of record.

Wakf is at pp.10 - 13 of Record. Corrections not  
questioned.

Judge without considering the evidence has appar-  
ently decided Wakf is not made for maintenance and  
support of any person including family, etc.

30 No attempt made to apply concretely the judgment  
in Civil Appeal 69/58 to facts in present case.  
No express decision that Wakf was for maintenance  
and support partly or wholly within s.4 of Wakf  
Commissioners Ordinance.

Must go into judgment in Civil Appeal 69/58 to  
see whether Plaintiffs must necessarily succeed  
on basis of that decision and whether orders can  
be supported.

Wakf made in December, 1942.

40 2 Plots made Wakf. p.30 last line.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Wakf for benefit of two "adopted" daughters and other beneficiaries. Settlor the first trustee. 10% of income reserved for development of property.

Cl.3. Limitation: 1st adopted daughters and issue. 2nd sisters, etc.

Cl.6. Specified charitable purposes and other charitable purposes.

Cl.8. All relations made express parties.

Another Wakf (P.56) for benefit of sisters of settlor.

Value of property (p.13): 22,000/- odd.

Income would be at 8% would be less than 150/- per month.

Trustee has given evidence of higher figures.

In 1942 Appellant Rasiki was 12 years of age.

Entirely dependent on settlor.

No evidence that she had any other means of maintenance.

Faiza even younger: even more in need of support.

Settlor under obligation to provide for support.

Certainly moral, perhaps also legal.

Submit Wakf in light of surrounding circumstances was family arrangement for maintenance and support of two appellants.

It also contains clear gift to charity.

Refer Wakf Commissioners Ordinance 1951

= Do not suggest that Privy Council decisions cannot be applied or are irrelevant. But they have to be applied in light of Wakf Commissioners Ordinance. Heavy impact of Ordinance. Submit most decisions will be found not particularly relevant.

= Will submit that a Wakf which would otherwise be invalid is saved by s.4(1)(a) if in fact it is constituted even partly for the maintenance of any living person or any member of settlor's family.

= Will submit adopted daughter is a member of settlor's family for the purposes of s.4(1)(a) even though no legal adoption in Islamic Law. Gift to living person is good gift though gift over void.

= Person maintained and supported by settlor even though not adopted in member of settlors.

= If surrounding circumstances support inference the Wakf is in fact made for maintenance and support of living person or member of family, no legal requirement that should be express provision stating that Wakf is made for maintenance and support.

10

20

30

40

50



= Under Ordinance, if there is a religious charitable or endowment of any property by way of Wakf, then property can never revert to settlor or his heirs.  
Property will fall to be administered in accordance with provisions of Ordinance. Very different from position in India.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Budhdeo: Leave not obtained. Points not argued below.

10 Nazareth: Regret oversight. Apply for leave. Notice served. Make application now.

Budhdeo: No explanation in affidavit. Different points taken. Grounds should have been taken below.

20 Nazareth: Application of 7th September. Not taking ground 1. Argument will be based on Ground 2. Ground 3 enters into picture. Enters so much into relief to be given on admitted facts. (Ag.-P. Are Wakf Commissioners interested parties) Interest to extent they may take an advantage. But not necessary parties. Would not be told to administer.

ORDER: Leave given to argue points of law raised by appellant. Points mentioned by Mr. Budhdeo may affect costs, but in our view should not preclude argument on the law applicable.

Nazareth: (cont:)

Not going to submit that Wakf Commissioners Ordinance has restored Mohammedan Law of Arabia in full force.

30 Bakhshuven Case (1949) 16 E.A.C.A.11

On appeal (1952) A.C.1.

Submit decision in 69/58 does not go far enough to entail judgment for plaintiff.

No case here where considered what happens if Wakf is defective. Does not fall to be administered under Ordinance. On assumption Wakf not valid, is it saved by Ordinance.

c.f. position here and in India.

Important differences:

40 (1) Ordinance lays down law for administration of defective Wakfs.

Mulla Mohammedan Law, 14th ed. p.185/6. Indian Law set out.

Indian Validating Act, 1913: Only 5 sections.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Kenya Ordinance - contains 27 sections.

Our s.4 comprehends all that is contained in  
Indian Act i.e. ss.3 & 4.

Other important differences:

Repetition of words "wholly or partly" twice  
in our Ordinance as against Indian Act.

Other points: show net of validity cost much  
wider; intent to restore to greater extent than  
India the pure Mohamedan law of Wakfs.

ss.4(2) In India held that Wakf propined to lives  
of large number of people, charitable gift illu-  
sory. Decisions displaced by this section.

Here under Ordinance if shown Wakf is wholly or  
partly for following purposes it is within ambit  
of section. Submit full effect must be given to  
words "wholly or partly".

In present case will submit decision is per incur-  
iam as differences between Kenya Ordinance and  
Indian Act were not examined or appreciated.

Will also distinguish case from 69/58 on fact.

Refer Kenya Ordinance (30/51).

Mulla p.16 - Art. 173.

Important that property does not vest in trustee  
as it does in English Law.

Muhammed Ruston Ali v. Mustag (1920) 47 I.A.224

Vidya Varuthi v. Bulusami (1921) 48 I.A.302 at  
p.312

In Mahomedan conception property is transferred to  
God.

Trustee merely manages property. This can lead to  
very different approach and results if effect of  
Wakf is transfer of ownership to God. Could affect  
legislation if intent was generally to restore  
Mahomedan law.

If this so, there is no question of reversion to  
settlor of dedicated property.

Ordinance: S.2: Definitions of Wakfs.

S.3: Proviso important. Other Muslim  
can get his property administered  
under Ordinance by appointing  
Commissioners as trustees.

S.4: Object was to validate certain  
wakfs previously held to be  
invalid.

Law as given in earlier decisions  
of Courts had run counter to in-  
tentions of Muslims.

Was enacted to correct this.

So stated in Amina binti Abdulla  
etc. (1954) 21 E.A.C.A.12 at  
p.13.

10

20

30

40

50

Intention of Ordinance was to cure dissatisfaction. Should be given effect to so far as can be in words of Ordinance.

S.4(1)(ii): Postponement does not matter

S.5: Saves rights accrued

SS.6 to 9: Constitution

S.10: Register of Wakf property.

S.11: Enables Wakf Commissioners to take over any property.

Should be noted in relation to S.3.

Once Wakf Commissioners take over, Wakf must be administered in accordance with Ordinance although some of objects may be invalid.

So far as S.11 is concerned in case of a private Wakf - can only be handed over to Wakf Commissioners as in para.(b)

S.12:

S.13:

SS.16, 17 & 21: To be considered together.

Will submit that read with Ordinance as a whole, that if there is a religious etc. endowment of property, then notwithstanding defects which render Wakf invalid in whole or in part the property is in implied ownership of God to be administered in accordance with Ordinance and cannot revert to settlor and his heirs. Here, if invalid in whole or part, would have to be administered by Wakf Commissioners.

S.16: "Under control of Wakf Commissioners" governs section.

S.17:

S.21: Same contingencies provided for  
(b) beneficiaries unascertainable; something not referred to in SS.16 & 17.

Difference between sections is that in S.21 is not said in so many words that property is under control of Commissioners. Submit either Wakf Commissioners can compel person in whom property is vested to sell or can themselves sell.

Differences between way property must be dealt with under SS.16 & 17 and under S.21.

"Benefit of beneficiaries" on one hand.

"pay into surplus fund" on other.

Omission of "Beneficiaries unascertainable".

Reason clear: rests on difference above.

Otherwise provisions are parallel.

There is no specific provision for Commissioners to take and sell property but it is implied in S.21.

S.7(1)

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November

1959 -

continued.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Interpretation & General Clauses Ordinance, S.44.  
Ord.38/56.

Powers are implied to enable Commissioners to carry out duty. As much sense as can be should be extracted from sections: But same idea runs through both; property is not to revert to settlor.

Indian Cases: Not relevant as Indian Act contains no similar provision. In absence of such provision the English doctrine of resulting trusts was brought in. 10

But submit that cannot apply in view of provisions of Kenya Ordinance. Charitable intention that property is not to go back to settlor.

Surplus Fund: SS.18 & 20. Corresponds to bait-il-mal.

Fitzgerald's Mahomedan Law 1st Ed. (1931) p.210.

In India no bait-il-mal.

Wakf Commissioners v. Public Trustee Civ.App.80/58  
at p.5 of cyclostyle. 20

Therefore surplus fund exists into which ineffective Wakf can be paid; therefore effect can be given to Mohammedan notion of gift to God.

Instrument (p.10) makes it clear Wakf is made Cl.6 also makes dedication clear.

Effect of Ordinance is to restore view of West J. & Furrar J. vide Mulla, p.184, note (2)

This Wakf is a good Wakf as a matter of pure Mahomedan law.

Also a Wakf within definition in Ordinance. Here a dedication of property in accordance with Mahomedan law. 30

Submit result follows that property is in implied ownership of God and cannot revert to settlor.

If Wakf invalid to any extent, must be administered by Commissioners in accordance with Ordinance.

If Wakf held bad, will submit that at any rate appellants and children of appellants should get benefit.

= Q. Whether Wakf invalidated under Civ.App.69/58 decision. 40

Wakf created for benefit of adopted daughters who at time were living with Settlor.

Gift over to children of adopted daughters; then descendants; then sisters etc. of settlor.

Submit this was a family settlement within meaning of S.4(1)(a).

"Family" in S.4(1)(a): Stroud 3rd Ed. p.1066-8 - Definitions 1, 2 & 8. "family" a vague word.

Mulla p.183, Note 1.

"family" includes an adopted son. 50

Ismail Narji Arat v. Umar Abdulla (1942) Bom.441  
at p.443

Words "wholly or partly" in S.4(1) should be given effect to. Undoubtedly dispositions were for benefit of family of settlor.

Case 69/58: Counsel attempted to argue further than I am arguing. Purpose can appear by implication. Para.2 of judgment.

Accepted that purpose might appear by implication. Submit if all surrounding circumstances show intent was to maintain and support, then wakf is for maintenance and support.

Submit anything that is intended partly for maintenance and support should be saved.

Thing can be factually so though not said in so many words to be so.

e.g. consideration can be proved though not stated in contract.

Hailsham Vol.7 pp.343-4.

Submit Court in Civil Appeal 69/58 did not consider differences between our Ordinance and Indian Act.

Adjourned to 2.30 p.m. - A.S.F.

2.30 p.m. Bench & Bar as before.

Nazareth continues:

Different effects of ss.16 & 17 and s.21. Possible reason for difference. Many Wakfs. Administrative work might become very heavy and cast heavy burden on Commissioners. So short cut may have been provided in cases where Wakf property not in control of Commissioners.

S.4: Wakf "wholly or partly" for any of following purposes.

S.4(1)(a) cast in the widest terms.

Submit was intended to validate to greatest possible extent the family settlements.

Every part of sub-section (1) should be given full weight. Court should not consider itself bound unless previous dicta of court was necessary for the decision.

Stress "wholly and partly" occurring twice and other differences from Indian Act - 4 differences. Submit Wakf here was for benefit of two members of Settlor's family.

It therefore comes within para.(a) and is saved if it comes within (i) and (ii).

Submit this Wakf does satisfy requirements of s.4(1)(a)

Submit decision should be set aside to that extent. Matters in (i) and (ii) not gone into.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Submit Court should effectuate aim of legislature.  
Rule of perpetuities - submit does not apply.

Submit remoteness and illusory gifts. Clear  
legislature intended to exclude them. Therefore  
Indian decisions unreliable.

Previous decisions of Court. Extent of invalida-  
tion has never been considered before. If con-  
ceded, that not now binding.

= If Wakf is validated, then as far as gifts to  
appellants and their children are concerned, these 10  
are valid as trusts.

Persons who were living; no breach of rule against  
perpetuities. Second gift also depended on a life  
in being.

Question is as to children's children. There if  
this fails as a Wakf, they would not take.

Void interest. Therefore children would take  
estate as a trust.

Refer S.2 of Indian Transfer of Property Act.

Never referred to in decisions of this Court 20  
dealing with Wakfs.

Second Chapter SS.5 - 53A

In particular, S.14; English rule of perpetuities  
approximate. Illustrations.

Cheshire 5th Ed. p.473

Mohameddan Real Property.

Interests of daughters are vested interests. There-  
fore entitled to take.

Children will take a life estate.

But grandchildren may not take and life interests 30  
given to them cannot take effect if perpetuities  
rule takes effect.

Hayes v. Hayes 37 E. & E. Digest, p.95 Case 307

Bhose v. Burgh do. p.118 Case 494

Courtier v. Oram 52 E.R. 793

Submit if this instrument is not good as a Wakf  
it is good as a trust.

Appellants at least get their life interests.

Ismail Haji Arat v. Umar Abdalla (1942) Bom.441  
at p.449, 451. 40

In that case the Wakf was not wholly invalidated.  
Wakf can be valid in part as regards earlier  
interests.

Saadat Kamel Hanum vs. Attorney-General of Palestine  
(1939) A.I.R. (P.C.) 188

Submit if Wakf invalid it should be given effect to  
as a trust.

Submit

(a) Wakf was a good wakf within S.4(1)(a) of Ordi-  
nance. Therefore all dispositions to be given 50  
effect to.

- (b) If not good under S.4, then gifts to appellants and their issue is good.
- (c) If Wakf not good and (b) not accepted, then property does not revert but must be administered by Commissioners in the Ordinance. Submit appeal should be allowed.

Budhdeo:

Arguments amount to saying Court has erred all along.

10 It has been laid down by Court in more cases than one, that prima facie all Wakfs are void as offending against perpetuities. Gifts to charity are illusory.

Court could not have been ignorant of rule against perpetuities in all cases.

Abdul Fata case: 22 Ind. Appeals 76.

Considered amending legislation.

Mulla (14th Ed) p.179

20 Provision for settlor's family held invalid.

Wakf there set aside as offending against the law of perpetuities.

13 E.A.C.A. 32: Said bin Muhammed v. Wakf Commissioners.

Wakf held illusory and consequently void and of no effect. Refers to Abdul Fata case

16 E.A.C.A.11 Bakhshuwen's case.

After that the 1951 Ordinance was passed.

Then came the case Amina binti Abdulla v. Sheha binti Salim (1954) 21 E.A.C.A.12.

30 That case turned on s.4(1) of Ordinance.

Submit never was corpus of property made to vest at any time.

Rule against perpetuities is to effect that legal interest should vest in possession within life or lives in being at time of creation of disposition and 21 years after that.

If at time of creation there is a possibility that corpus of estate may not vest until after period of perpetuity, then whole disposition is void ab initio.

40 In re Thompson T V T. (1906) 2 Ch. 199 at p.202

Re Whightwich's Will Trusts (1950) 1 A.E.R.689 at p.692

Gift fails ab initio

Even if Wakf Commissioners entitled to get property from me, what is there left to administer.

Gift is void ab initio.

Here corpus never vested in anyone.

50 It is never intended to vest in possession or enjoyment. It is only income that is to be used from generation to generation.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -

continued.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

3rd November  
1959 -  
continued.

Corpus not to vest till expiration of time allowed by perpetuity rules.

Wakf deed only disposes of income of trust property.

Even at last when gift to poor persons takes effect, it is only a gift of income.

Clearly offends against perpetuity rule.

Judgment in Amina binti Abdulla.

As in this case appellants were not related to maker of Wakf.

Adoption gives no right to child in Mohamedan law.

In this case appellants are not within definition of Muslims - Evidence to that effect.

If Appellant fails to bring Wakf within 4 corners of S.4, appeal must fail.

Wakf had been declared void ab initio and this was confirmed on the appeal.

Original judgment in Amina binti Abdulla (read).

Submit S.4 does not do away in its entirety with decisions regarding Wakfs which are "family" Wakfs.

Only validated those falling within the validating provisions of that section.

i.e. If orbit of beneficiaries is larger in any way than what is stated to be lawful orbit under

S.4, then Wakf is void ab initio because maker transgresses limits laid down.

Not valid for purpose of conferring benefit even on named beneficiaries who are alive.

Adjourned to 9 a.m. on 4/11/59.

A. G. Forbes,  
3.11.59.

4th November  
1959

4.11.59. Bench & Bar as before.

Budhdeo continues:

Refer E.A.C.A. (1957) 688

Bin Hassan v. Bin Hassan

Shows unless and until Wakf is brought within section 4, the principle of Bakhshuwen's case applies. Also at p.633 id et seq.

On that followed Civil Appeal 69/58.

Decision in present case based on that decision.

Judgment in this case was reserved so that decision in 69/58 would be known.

When after decision in 69/58 was known, issue 5(a) was put before us - p.43 of Record.

My affidavit stated what happened then.

Counsel asked if case was to be distinguished.

Bryson for Appellants said case was on all fours with Civ. App. 69/58.

10

20

30

40



Judge invited counsel to distinguish this case if they could from Civ. App. 69/58.

Wished to get decision of Judge on other points as well.

Thereafter gave notice that I would rely on what was stated in paras. 5 & 6 of that affidavit. Bryson agreed affidavit correct before I signed it. Contents of those paragraphs have not been challenged up to now.

10 I am submitting that the reason for additional grounds of appeal recent - due to industry and ingenuity of Mr. Mahmoud - raising new grounds of law.

Refer to decision of Judge before whom Mr. Mahmoud took these points in September this year. Case not yet reported.

Case is Civ. Case 476/58.

Mahmoud Abdulla Mfaume & 2 Ors. v. Salim Ismail & Anor.

20 Sections 16, 17 and 21 were presented as a preliminary point.

(Ruling in that case read).

Long title of Wakf Commissioner's Ordinance:

Ordinance replaces earlier Ordinance. Title does not cover validating of Wakfs.

Craies Statute Law 5th Ed. p.183.

Act may deal with subjects not expressed in title.

30 In Kenya validating provisions included in Ordinance providing for Wakf Commissioners - Special validating Act and decree in India and Zanzibar.

Appellant argued Court had no jurisdiction to make orders made. Submit untenable.

Retrospective effect of Ordinance: Wakf created in 1942. Ordinance enacted in 1951. If Wakf Commissioners given power to declare Wakf unlawful by SS. 16, 17 and 21, it could not apply to Wakfs created before 1951. That would take away authority of previously appointed trustees to manage wakf entrusted to their care - such power only be given by express words.

40 S.4 clearly expressed to have retrospective effect. No similar provision in SS. 16, 17, 21.

Order in Council - powers vested in Supreme Court.

Rely on Ruling of Edmonds J. in Civ. Case 476/58.

Submit reasoning is correct.

Submit (1) ss.16, 17 & 21 do not apply to present Wakf as it was made in 1942.

(2) SS.16, 17 & 21 are mere administrative provisions.

50 SS.16 & 17 incompatible with 21 and therefore to be treated as particular provisions.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

4th November  
1959 -  
continued.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

4th November  
1959 -  
continued.

(3) SS.16, 17 & 21 apply only to Wakfs of properties under control of Wakf Commissioners and not to private Wakfs unless and until they get control of private Wakf by moving under S.12. Proviso to S.3 - shows how Wakf Commissioners may get control.

S.12: Quasi-judicial function. Requires formal order to be made.

No similar provision in SS.16, 17 & 21.

Order under S.12 could be questioned in a Court of Law. 10

S.11: Shows how Commissioners may take over administration of Wakf.

Here private trustee in existence up to suit.

(Ag.V.P.: S.13. Does "properly administered" mean in accordance with Ordinance or properly administered generally?)

Means properly administered in accordance with instrument - S.16(1)

S.7(2): Wakf Commissioners may be challenged in Court. 20

Refer Mohiuddin Ahmed v. Safia Khatun I.L.R.(194) 2 Cal.464 at p.473.

Group can be only as wide and no wider than that allowed by S.4.

Submit that here group is more extended. Income to be divided not only between two appellants, but also between their descendants. Appellants are strangers in Muslim law.

Civil Suit 426/1957 Said bin Abdalla Shikely v. Delila 30

Short adjournment.

On resumption Bench and Bar as before.

Budhdeo continues:

Adoption:

Mulla p.293: Para.347

Adoption confers no status on adopted child.

No claim here that there was a statutory adoption under Adoption Ordinance. Nor any attempt to prove custom conferring a right of adoption in Shafi Sect. "Family" 40

Submit no authority for that.

In commentary cited adopted child was sister's son - fell within description of relative.

Fraid Tyabji (3rd Ed) p.266 Sect.255: 2 cases cited. Not a child and therefore not a member of the family.

Mulla p.183. Son was already a dependant relation. In certain provinces of India adoption is legalised.

Ghasiti & Nanhi v. Umrao (1893) 20 I.A.193 at p.199  
 = Submission that from value of property it must  
 be presumed it is for "maintenance and support".  
 Refer para.10 of Plaint: No denial of this value  
 in defence:

Para.4 of Defence. 180,000/-.

Issues agreed p.23.

Use of proceeds by maker.

She died in 1952. Made herself first trustee.

Occupied property up to her death. Kept no account  
 of her use of Wakf income during her lifetime.

Contended in Plaint that Wakf had on that ground.

Issue 1.

S.4(1) does not allow maker to make it for his own  
 benefit unless maker belongs to sects set out in  
 that section. Here maker a Shafi: But treated  
 property as her own during her life.

Issue 3(a): Maker herself states daughters adopted.  
 Cannot be said to be related to maker.

Issue 3(b): Not relevant now.

Issue 3(c): Submit simply because they lived to-  
 gether does not make them members of  
 family.

Issue 4: If not within S.4, then not valid.

Issue 5(c): Another ground on which Wakf invalid.

Issue 7: I withdraw that prayer on account of  
 difficulty of following income.

First 4 plaintiffs are sharers ) according to

Next 4 plaintiffs are residuaries) Muslim Law.

First 4 Plaintiffs signed: But Zanzibar heirs  
 entitled to 2/3rds, and they did not sign.

Not seriously that Plaintiffs were all heirs  
 entitled to inherit.

P.25 of Record: Cases I cited.

Gift to charity too remote.

Evidence: P.27.

Appellants never proved as heirs of maker.

P.33: Evidence of trustee.

P.35: Value of income 600/- 800/- each per month

Respondents' Notice:

Paras. 1. Ask Wakf to be declared invalid on this  
 ground as well as others.

Last ground: Submit "such benefit as prophet  
 would approve" are too vague.

S.4: Words "wholly or partly"

Was not stated in argument what effect should  
 be given to them.

Submit "wholly or partly" relate to disposition  
 of instrument.

Again in (a) again may be wholly or partly for  
 those purposes.

In the Court of  
Appeal

No. 24

President's  
 Notes of  
 Argument,

4th November  
 1959 -  
 continued.

10

20

30

40

50

In the Court of  
Appeal  
 No. 24  
 President's  
 Notes of  
 Argument,  
 4th November  
 1959 -  
 continued.

May be wholly or partly for charitable purposes.  
 In any case section has been before Court before  
 and fact those words not mentioned before does not  
 make it necessary to depart from that decision  
Stare decisis rule (1955) 2 Q.B.D. 370 at p.405.  
 Submit no grounds for holding previous decisions  
 were per incuriam.  
 Submit those decisions are binding.  
 Civ. C.9/1957. (Judgment read).  
 Submit amount of Wakf is not material.  
 Principle should apply whatever the value.

10

Adjourned to 2.30 p.m. A.G.F.

2.30 p.m. Bench & Bar as before.

Budhdeo continues:

Mulla: Para.173.

Submit views of Mohameddan Jurists not the criterion  
 in deciding whether Wakf is valid or not.  
 But see para.189 of Mulla: A testamentary Wakf can  
 be revoked.

Not consistent.

20

But if statute prescribes that in only certain  
 cases is Wakf valid, then must come within those  
 cases.

= Submission that deed should be given effect to  
 as a trust.

Jarman on Wills, 8th Ed. Vol.1: p.292

Perpetuity cannot be created by means of a  
 trust.

= Judgment in Civ. App. 69/58.

There held that in form there was an absolute  
 gift of income. Court therefore not prepared  
 to hold it was for maintenance and support.

30

In view of my notice on behalf of Respondents  
 Court should proceed under rule 174 and draw in-  
 ferences of fact where necessary - Almost all are  
 uncontroverted. Plaintiff's case is uncontradicted  
 as to birth of girls, as to use by maker, as to  
 amount of income, and as to expense of maintaining  
 child. Quantum of income not relevant. It form  
 it is an absolute gift.

40

All evidence has been given. Court can draw in-  
 ferences of fact. No difficulty here. No finding  
 by lower Court.

Would be inequitable to refer back for findings of  
 fact.

Paquin Ltd. v. Beauclerk (1906) A.C. 148

Here submit Respondents entitled to judgment apart  
 from Court being bound by Civ. App. 69/58.

S.4(1) does not allow that kind of Wakf to be made

- (a) Children of adopted daughters are strangers,  
 (b) Gift to brother's adopted child and its descendants: No evidence it was living with maker.  
 (c) Mere camouflage by maker: she continued to use income herself: Her subsequent acts show an intention to continue to use income during her life. On face of Wakf I cannot challenge on this ground, but rely on inference to be drawn from maker's subsequent acts. She made no difference from beginning.

Costs: If appeal is dismissed, respondents should get costs from appellants.  
 If appeal succeeds only on points taken with leave of Court, the respondent should get costs both of appeal and in Court below. Points should have been taken below.

Nazareth (in reply)

Inferences of fact: far from being case that questions such as use of income by maker, costs of maintenance, etc. are unchallenged.

Trustee was cross-examined. Evidence was challenged.

Court can make findings of fact if sufficient evidence.

But if Court takes view of law I support, appellants should succeed on facts.

Not on record that it was conceded that case is on all fours with 69/58.

Court should not go outside record.

Do not concede that; Court should consider both.

Stare Decisis: Am not asking Court to depart from principle. Must have been a decision on particular point. My submissions do not involve departure from previous decisions.

App.69/58: Maintenance by implication.

Rely on implication both from instrument and from surrounding facts.

Submit can rely on surrounding facts.

Abdul Fata Mahomed, 22 I.A.

Not set aside on ground of perpetuity.

Wakf is for charity, but can cut out if for family, etc.

If unduly delayed, held to be illusory.

Accept that Wakf must be within S.4. If not within S.4 agree that as a Wakf it is not valid.

If it is invalid as Wakf then gifts which infringe perpetuity rule bad.

Submit no decision of this Court had been cited which is relevant.

In the Court of  
Appeal

No. 24

President's  
 Notes of  
 Argument,

4th November  
 1959 -  
 continued.

10

20

30

40

50

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

4th November  
1959 -  
continued.

Question of "partly" never gone into at all.

= 13 E.A.C.A.32

In Bakhshuwen's case (16 E.A.C.A.11) only question was whether Wakfs were null and void.

Vesting of curpus: no case referred to that disposition as a whole is void.

Not correct that corpus must vest in possession.

Halsbury 2nd Ed. Vol. 26 p.303-4; p.317

Interests given in this case were equitable interests. p.638; p.350.

Cheshire: p.473; 481.

Re Whightwick:

Only particular disposition held void.

Legal estate vests in trustee.

= Adoption: Not relying on adoption as such.

Say that adoption made appellants members of family and so within S.4.

Case of Amina binti Abdalla: It was there common ground that only S.4 could save Wakf and decision was confined to that question.

Have accepted that must come within S.4 to be valid as a Wakf.

But it may be good as a trust though not good as a Wakf.

"Orbit of section 4".

May be invalid as Wakf. But have limits of S.4 been transgressed? Dispute is on subsection (1). Net cast very wide. Words "wholly or partly". Sub-section is satisfied if it is partly for following purposes.

Further word used is "any".

If partly for maintenance of any of family, it satisfies subsection (1).

Partly for support: beneficiary may have other sources of income. Also if only part is required for maintenance it is good gift.

Here gift good even if only part of income required for maintenance and support.

These persons had no other income. They depended on Waki for maintenance and support. Wakfs saved here to greater extent than in India. In pure Islamic law "given for benefit" = "given for maintenance."

Say under S.4(1)(a) Wakf valid as a Wakf gift is to anyone of class specified though gifts may also be to others outside class.

Abdulla bin Said bin Hassan case.

There there was no gift to charity. Therefore bad. Does not help here. Here no question of charitable purpose having to be implied.

10

20

30

40

50

Cannot use oral evidence to vary Wakf, but can to explain it.

Case 69/58; maintenance & support can be established by implication.

If Wakf is defective it falls to be administered under Ordinance.

But once established intentions are unlawful, then Ordinance comes into play and it must be administered in accordance with Ordinance.

10 Retrospective effect: ss.16, 17 and 21.

But see ss. 3, 5, 27.

No distinction drawn between future and past wakfs.

S.4 does not affect position.

Other sections show intent to bring all wakfs under Ordinance.

S.5: Limited saving of rights.

Ss.16, 17 & 21 declare law as to how Wakf is to be dealt with.

20 S.27: No distinction between old and new Wakfs.

S.21: Commissioners not required to administer, but, by implication, to sell out property and pay into surplus fund.

S.C. Case: Argument was on jurisdiction. Submit afford no useful guidance here.

SS.16,17 & 21: Submission that they do not apply to private Wakfs.

Submit cannot be supported: S.21 - "any Wakf" - not restricted.

30 Stroud: 2nd Ed. Definition of "any". p.92.

Particular regard must be paid to S.3.

Never intended that different systems of law should apply. Therefore intention that property should never revert to settlor once dedicated to religious purposes.

2 Cal.464: Nothing to prevent gifts taking effect.

Said bin Abdulla: Distinguishable.

= Adoption: Have referred to case that person - Ismail Haji Arat & Ors. vs. Umar Abdulla & Anor.

40 (1942)(Bom) p.441 - residing with and maintained by settlor is "family".

Ghasiti & Nanhi v. Ummrao: Nothing to do with meaning of "family".

Objects of Wakf: outside S.4 - Refer Mohamed Afzal v. Din Mahomed 34 A.I.R. (1947) Lahore p.117

Subsequent conduct can be looked at. But breach does not show trust not created.

Here maker may have been using income for herself but also using it for support.

50 Not at that time living in property - only moved there later.

In the Court of  
Appeal

No. 24

President's  
Notes of  
Argument,

4th November

1959 -

continued.

In the Court of  
Appeal  
No. 24  
President's  
Notes of  
Argument,  
4th November  
1959 -  
continued.

Charitable purposes: no uncertainty here.  
Authority for saying invalid dispositions may be excised.

Saksena on Muhomedan Law 3rd Ed. p.451

Evidence: Trustee merely says he thought she used income for herself. P.34 of record. Income 600/- in 1957.

Income must have been much less in 1942: Rents then strictly controlled. Since decontrolled.

P.35: bottom.

Will speaks only from death; therefore not relevant to argument that Wakf irrevocable.

Costs: Refer Amina binti Abdulla (1954) E.A.C.A.15  
Submit appellants if unsuccessful have been acting reasonably.

Submit entitled to come to Court especially in view of attitude of trustees. Ask for Solicitor & client costs if lose.

Ask:

- (1) Wakf be declared valid;
- (2) If any disposition is invalid it may be excised and gift to charity hastened;
- (3) Appellants and children of appellants take under this instrument on ground that limitation on their interest is void.
- (4) If not entitled to any instrument, then property must be dealt with by Wakf Commissioners under Ordinance and does not revert to heirs of maker.
- (5) Costs.

10

20

30

Budhdeo: Grounds in reply different from those taken on appeal.

C.A.V.

A.G. Forbes,

Ag: President.

4/11/59.





No.25

J U D G M E N T

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL No.5 of 1959

(Title as in No.19)

JUDGMENT OF WINDHAM, J. A.

10 This is an appeal against a judgment and  
decree of the Supreme Court of Kenya, at Mombasa,  
dated 28th October, 1958, declaring a wakf to be  
null and void ab initio and the wakfed properties  
to form part of the intestate estate of the maker  
of the wakf (settlor). The two appellants, who  
were the 2nd and 3rd defendants in the court below,  
were beneficiaries under the wakf and were de facto  
the adopted daughters of the settlor. The eight  
respondents, who were the plaintiffs below were  
blood-relatives of the settlor entitled, as  
20 "sharers" and "residuaries" to succeed to her  
estate upon her intestacy.

30 The settlor, 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 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 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  
40 expenses of maintaining 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. Clauses 3 and 6

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959

In the Court of  
Appeal  
No. 25  
Judgment,  
10th December  
1959 -  
continued.

read as follows:

"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 Sheh 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 per stirpes who shall take one part equally among them."

10

20

.....

"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."

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

30

40

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 Mohammedan law and confers no rights of inheritance under that law.

In the Court of  
Appeal

                      
No. 25

Judgment,

10th December  
1959 -  
continued.

10 It will be convenient at this point to set out the provisions of section 4 of the Wakf Commissioners Ordinance, 1951. The section reads as follows:

"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 -

(a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or

20 (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

30 (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 recognised by Muslim law as a religious, pious or charitable purpose of a permanent character:

40 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.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

(2) No wakf to which sub-section (1) of this section applies shall be invalid merely because the benefit 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."

The main grounds, upon any one of which the respondents contended in the Court below that the wakf was invalid - grounds which were substantially embodied in framed issues, were - (1) That the settlor, during her lifetime used the income from the wakf properties for her own benefit, or, in the phrase familiar in Mohammedan law, that she had "eaten out of the wakf"; (2) that the income was not given for the "maintenance and support of any person including the family, children, descendants or kindred of the maker", within the meaning of section 4(1)(a) of the Wakf Commissioners Ordinance, 1951, and that accordingly, the wakf, which but for the saving provisions of that section would be bad, was not saved by the section; (3) that even if the income of the wakf was impliedly given for the "maintenance and support" of any of the above categories of persons, those categories, while they would include the appellants under the head of "any person", would not cover the appellants' children and the latter's issue, who are among the subsequent beneficiaries under the wakf, and that accordingly the wakf was bad in respect of at least some of its dispositions and must therefore be declared null and void ab initio; (4) that the ultimate gift over to charity "is not of a permanent character or is void for uncertainty". The grounds which I have numbered (1) and (4) were not strongly pressed.

The learned trial Judge, after hearing some evidence, and much argument and reference to Mohammedan law and to judgments of the courts of India, of this Court and of the Privy Council, decided against the validity of the wakf on the issue which I have numbered as (2), and which in the framed issues was issue No.5(a); he accordingly found it unnecessary to decide on the other grounds upon which the wakf was argued to be invalid. In so deciding, the learned trial judge, in a brief judgment, followed a recent decision of this court on the same point upon what he considered to be indistinguishable facts, namely

10 Sheikha binti Ali and another v. Halima binti Said and others, C.A.69 of 1958 (not yet reported), holding that that case - "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." The learned Judge proceeded to enter judgment as prayed in paragraphs (1) and (2) of the prayer in the plaint, namely, that the wakf should be declared null and void ab initio, that the wakfed properties should be declared to "belong to or form part of the intestate estate of the settlor", and that entries in the Register of Land Titles and on all certificates of title relating to the wakf should be cancelled and deleted.

In the Court of  
Appeal

No. 25

Judgment,

10th December

1959 -

continued.

20 Sheikha binti Ali's case concerned a wakf of a number of properties made in 1946 by a Mohammedan of the Shafi sub-sect in which he directed that "the income" of the wakfed properties should be "utilised in the manner hereinafter set out", and there followed a direction that the income of one of those properties should be "paid to Sheikha and Fatuma, daughters of Ali bin Khamis during their lifetime only." After further directions for the payment of income of other of the wakfed properties towards specified religious purposes there followed  
30 a direction that the income from one of the properties should "solely be paid to my sister Mwana Kavaii binti Mwidau during her lifetime and after her death to her two daughters Sheikha binti Ali and Fatuma binti Ali during their lifetime only". Then came a direction that the income from yet another of the properties should be "paid to" his wife for life, and that thereafter it should "go to" his nephew for life and after his death, to his children and grandchildren, and so on from  
40 generation to generation, and, failing all descendants of the settlor, that the benefit of the wakf should go to his "poor relatives" and thereafter to the "poor and beggar Mohammedans of Mombasa".

At the trial of Sheikha binti Ali's case at first instance, the Supreme Court of Kenya, in Mombasa, in Civil case No.9 of 1957, declared that the above wakf was void ab initio, on the ground that, apart from the saving provisions of section 4 of the Wakf Commissioners Ordinance, 1951 it would

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

be bad by reason of the remoteness of the ultimate gift to charity, following the decision of this Court in Fatima binti Salim Badhshuwen and another v. Mohamed bin Salim Bakhshuwen (1949) 16 E.A.C.A. 11 upheld by the Privy Council eo nomine, in (1952) A.C.1, which I shall hereinafter refer to as Bakhshuwen's case. It is to be observed that section 4(2) of the Ordinance, which provides in effect that a wakf shall not be held to be void merely because it postpones indefinitely the religious or charitable gift over, applies only to wakfs to which section 4(1) applied. The Supreme Court went on to hold that the wakf did not fall within section 4(1) and was not saved by it, because paragraph (a) of section 4(1) requires that, to be saved, the purpose of the wakf must be for the "maintenance and support" of the person or categories of persons therein mentioned, whereas the wakf in that case merely provided that the income should be "paid to" or should "go to" the beneficiaries named, without any indication that it should be used only, or even partly, for their maintenance and support. This court, in Sheikha binti Ali's case, C.A.69 of 1958, upheld the decision of the Supreme Court. In the judgment of Briggs, V-P, the point at issue was stated thus:

"This was an appeal from a judgment and decree of the Supreme Court of Kenya declaring certain wakfs of land in Mombasa to have been void ab initio and granting consequential relief. The facts are set out in detail in the judgment appealed from, and it is not necessary to repeat them. Many issues were raised in the suit, but the learned trial Judge based his decision on one point only, that the successive life-interests created by the wakf deed in favour of various individuals living and unborn offended against the perpetuities rule, and were not saved by the provisions of section 4(1)(a) of the Wakf Commissioners Ordinance (No.30 of 1951), since they were not trusts merely for the 'maintenance and support' of those individuals, but were absolute gifts to them of the income of the fund from time to time. It was conceded by the appellants that, if the learned Judge was right on this point, his decision as a whole must stand. Accordingly we heard argument first on this point and, being of opinion that

10

20

30

40

50

it was rightly decided, found it unnecessary to consider any of the other issues raised on the appeal. There was a cross-appeal, to which reference will be made later.

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

10 It was submitted for the appellant that, 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. This may be conceded; but in the present case the gifts are in form absolute gifts of income, with no indication in the wording of the deed as to the object of the gifts or as to any restriction on disposal of the income. The appellant's counsel conceded that, if it was apparent from the wording that the money was intended to be applied to purposes not within the true meaning of "maintenance and support", for example, to gambling, and intended wakf might be bad; but he argued that, where income was given simpliciter to persons within the scope of section 4(1)(a), it was, or should be deemed to be, given for their 'maintenance and support' and the trusts should therefore be valid."

20

30 After considering the arguments advanced, the judgment approved the "general proposition that an absolute gift of income is something wider than, and different in kind from, a gift for maintenance and support", and it concluded in the following words:-

40 "For these reasons and for the further reasons given on this point by the learned trial Judge, we were of opinion that the life-interests given by the wakf deed were not within the permitted purpose of maintenance and support of the wakif's family, that the wakf was consequently not validated by the provisions of section 4 of the Ordinance and that it was rightly held void as being in breach of the rule against perpetuities.

Subject to consideration of a submission advanced for the appellants and based on sections 16 and 21 of the Wakf Commissioners Ordinance, 1951, with

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

which I will deal later, I am of opinion that the court below, in the instant case, was right in holding itself bound by the above judgment of this court in Sheikha binti Ali's case, and that 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.

As regards the first contention, this Court, 10  
in Sheikha binti Ali's case, conceded that "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". It is submitted that such purpose though it was held not to be implied in that case, does appear by implication in the instant case. The judgment in that case, however, continues - "but in the present case the 20  
gifts are in form absolute gifts of income, with no indication in the wording of the deed as to the object of the gifts or as to any restriction on disposal of the income". Confining ourselves for the moment to the actual words of the dispositions in the wakf deed which was the subject of that case and those in the wakf deed in the instant case, respectively, I can find no material difference between the two, whereby a gift for "maintenance and support" might be held to be implied in the 30  
latter though not in the former. In the instant case the direction is that the "free balance of the income of the wakf property shall be divided each month" between the two appellants equally, and that on the death of either, her share shall be "divided" equally among her sons and daughters and their issue, while failing them, later beneficiaries shall "take" specified shares. There is no suggestion that such income must be devoted solely, or even partly, to the maintenance and 40  
support of the beneficiary concerned. The words "divided between" or "divided among" are quite as free from restriction regarding user as were the words "paid to", which were the words used in the wakf that was the subject of Sheikha binti Ali's case.

It is argued, however, that, at least so far as the two appellants themselves are concerned, the court below ought to have had, and that this



10 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. From these and other circumstances it is argued that the gift to them of the income of the wakfed property for life must manifestly have been for the purpose of maintaining and supporting them. The first point for decision is to what extent, if at all, evidence of such circumstances is admissible to interpret, or supplement, the terms of the wakf. It was observed in Zainuddin Hussain v. Muhammad Abdur Rahim, AIR (1953) Cal: 102, in a passage at page 105 cited in Saxena's Muslim Law, 3rd ed. (1954) at page 118, that -

20 "The essential principle is that the intentions of waqif have to be gathered primarily from the terms of the deed itself, though attendant circumstances may be looked into if the intention is not apparent or clear from such terms, and subsequent circumstances may also be considered if they throw light on such intention". In order to admit evidence of such attendant circumstances, however, the ambiguity with regard to the settlor's intention must be one which lies in the terms of the wakf deed itself. In the present case there is, to my

30 mind, no such ambiguity or lack of clarity as to intention in the provisions of the wakf that the income shall be "divided" each month between the appellants and their issue. Such a direction, assuming it for the moment to be contained in a valid and enforceable deed, would have to be carried out in favour of a beneficiary who was already wealthy and in no need of complete or even partial maintenance and support, just as much as in the case of one who was indigent; and there is nothing in the wakf deed to suggest that the

40 settlor's intention was other than that expressed on the face of it, namely that the income should be paid monthly to the appellants for the rest of their lives, for them to spend it as they liked. In fact, although this can have no bearing on the settlor's intentions in 1942 when she made the wakf, one of the appellants married, and thereby presumably became independent of any need of maintenance or support otherwise than by her husband, within a year of the making of the wakf, and the

50 other some thirteen years later. But that is beside the point. The position as I conceive it,

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

regarding the admission of extraneous evidence to show that the settlor intended something different from the absolute gift of income which she made in the wakf deed, is in conformity with the provisions of section 91 of the Indian Evidence Act concerning the exclusion of oral by documentary evidence. As was said in Shaikh Muhammed Ibrahim v. Bibi Miriam 8 I.L.R. (1928) Pat.484, at page 489, in a passage quoted in Monir's Law of Evidence, 3rd ed: at page 649, - "It is true that a valid wakf can be created without writing; but when the terms of a disposition of property have been reduced to the form of a document, under section 91 of the Evidence Act no evidence can be given in proof of the terms of such disposition except the document itself or secondary evidence thereof". 10

Finally, there was no suggestion in the judgment of this court in Sheikha binti Ali's case that extraneous evidence would have been admissible to show that the settlor in that case, by his direction that the income should be "paid to" the beneficiaries concerned, intended that it should be devoted to their maintenance and support. On the contrary, the learned Vice-President in his judgment was careful to say that there was no indication "in the wording of the deed" to show by implication that the settlor's object was their maintenance and support. 20

For these reasons 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 in the face of the wakf 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

I turn to the alternative ground on which it is urged for the appellants that Sheikha binti Ali's case ought not to be followed, namely that it was decided by this Court per incuriam. The suggestion that it was so decided is based on the submission that, while this Court certainly had the terms of section 4 of the Wakf Commissioners Ordinance before it, the judgment indeed being based on the meaning of the words "maintenance and support" in section 4(1)(a), the attention of the court was not specifically directed to, nor did the court in its judgment specifically refer to, the present and 40

significance of the words "either wholly or partly", which appear twice in the first five lines of section 4(1). It is submitted that had this Court considered those words it would, or at least might, have decided differently. If such a contention were to prevail, few appellate judgments would survive the plea of per incuriam. A court must be presumed to have duly considered the effect of each word or phrase in a section which it is construing, without making specific reference to such word or phrase in its judgment, and without the necessity of such word or phrase having been specifically referred to in argument. The expression "per incuriam," when applied to judicial decisions, is one which has a defined and limited scope, as was recently pointed out by this court in Kiriri Cotton Co. v. R.K. Dewani (1958) E.A.239 where at page 246 the following passage from the judgment of Sir Raymond Evershed, M.R. in Morelle Ltd. v. Wakeling (1955) 1 All E.R. 708, at page 718, was quoted:-

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence."

Having in mind the above observations, there is nothing in the judgment of this court in Sheikha binti Ali's case, or in the arguments which were or were not there advanced to the court, which in my view brings it even remotely within the ambit of a judgment delivered per incuriam. I would accordingly hold that the stare decisis rule applies, and that the learned judge of the Supreme Court in the instant case was right in holding himself bound to follow that decision.

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

In the Court of  
Appeal  
No. 25  
Judgment,  
10th December  
1959 -  
continued.

Since the submission that that judgment was delivered per incuriam, however, was bound up with the meaning and effect of the words "either wholly or partly" which appear twice in the first five lines of section 4(1) of the Wakf Commissioners Ordinance, 1951, I think this would be a convenient point at which to consider the respective meanings of those phrases in the two places where they occur. The first few lines of section 4 read as follows:-

10

"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 -

(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) . . . . . "

As a matter of pure construction I would interpret the two phrases "either wholly or partly" as follows. Where the phrase first occurs, I would interpret it to mean that if a wakf was made partly for a purpose falling within paragraph (a) or (b), and partly for a purpose not falling within either of those paragraphs, then the whole wakf would be saved; but it would only be saved if both that part which fell within paragraph (a) or (b) and also that part which fell outside them, satisfied the remainder of section 4(1), namely the conditions following words "is declared to be a valid wakf if -." Where the words "either wholly or partly" next occur, namely within paragraph (a), I would interpret them to mean, what in my view they grammatically must mean, having regard to their position in the sentence, the same as if paragraph (a) had read - "for the entire or partial maintenance of any person including the family, children, descendants or kindred of the maker." In short, a gift of income would satisfy paragraph (a) if the whole of it was to be applied towards the maintenance and support of the beneficiary, whether or not it was enough to maintain and support him without being supplemented from some other source. If only a portion of the gift of income was to be applied towards the maintenance and support of the beneficiary the gift would still fall within paragraph (a), but this would be by virtue of the words

20

30

40

"either wholly or partly" where those words first occur in the section, as the gift would then be partly for the purpose set out in paragraph (a).

Applying section 4(1), as so interpreted, to the instant case, I am unable to find anything in the terms of the wakf deed which would bring it within paragraph (a).

Subject to what I shall have to say later regarding sections 16 and 21 of the Wakf Commissioners Ordinance, 1951, I would therefore hold that the learned judge of the Supreme Court rightly held the wakf to be void ab initio, following this Court's decision in Sheikha binti Ali's case where a similar order was made. But before passing to those sections I will deal with an alternative ground on which the respondents have urged that the wakf should be declared void, a ground which the court below did not find it necessary to consider. This contention touches that part of the wakf deed which provides for the wakf income to be paid, after the deaths of the appellants, to their respective "sons and daughters and their issue per stirpes". It may be observed that the expression "issue", in the absence of any indication to show that it is confined to "children", means, according to the trite rule of interpretation of dispositions inter vivos or by will, lineal descendants from generation to generation and not merely children: see Leigh v. Norbury (1807) 33 E.R. 321, and the many decisions on the point considered in Jarman on Wills, 8th ed: vol. 3, at pages 1581 et seq. Now the appellants, it is conceded, were not relatives of the settlor, either by blood or by marriage. True, the gift of income to them for life was not invalidated by that fact, because each of them was a "person" for the purpose of the words "any person" in paragraph (a) of section 4(1) of the Wakf Commissioners Ordinance, 1951. But it was held by this Court in Amina binti Abdulla and another v. Sheha binti Salim (1953) 21 E.A.C.A.12, in considering the validity of a wakf of a Shafi Mohammedan of a nature very similar to that in the present case, that the words "any person" in the phrase "of any person including the family, children, descendants or kindred of the maker" in section 4(1)(a), cover a stranger (i.e. one who is not related to the settlor) but do not cover the children or descendants of that stranger. The income from the wakf

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

in that case was to be distributed to two strangers for life, and thereafter the share of income of each was to be distributed to their "respective children and children's children from generation to generation". There was the usual ultimate gift over to charity. It was held (a) that the whole wakf would, prior to 1951, have been bad because of the remoteness of the charitable gift over, by reason of the decision of this Court in 1949, upheld in the Privy Council, in Bakhshuwen's case (supra); (b) that if the wakf had fallen within section 4(1)(a) of the Wakf Commissioners Ordinance, 1951, then the defect of remoteness would have been cured by section 4(2) of that ordinance, which applied to wakfs falling within section 4(1); (c) that the wakf did not fall within section 4(1) by reason of the gift of income, after the death of the two "strangers", to their children and descendants, because "any person" in section 4(1)(a) does not include the descendants of a stranger; (d) that therefore, and notwithstanding that the gifts for life to the two strangers themselves did fall within section 4(1)(a), the whole wakf was bad ab initio by reason of the decision in Bakhshuwen's case, which decision still applied to wakfs not saved by section 4 of the Wakf Commissioners Ordinance, 1951; (e) that accordingly the order of the court below that the Wakf was bad ab initio, and its consequential order that the wakfed property should be delivered up to the personal representative of the deceased settlor's husband, must be upheld. It is to be noted that in Bakhshuwen's case, as in both Amina binti Abdulla's and the instant case, the settlor was of the Shafi sub-sect.

Amina binti Abdulla's case was thus almost on all fours with the present case, with regard to the essential facts and the essential terms of the wakf deed. Appreciating this, Mr. Nazareth for the appellants has sought to argue that, while the descendants of the two appellants cannot be brought within section 4(1)(a) if the appellants be considered under the category of "any person", that is to say as strangers, their descendants would be brought within it, as indeed they would, if the appellants be considered as members of the settlor's "family" for the purpose of paragraph (a). It is accordingly argued that, as adopted daughters of the settlor who were brought up by her as if they had been her own true daughters, the appellants must be considered as members of her family,

according to the ordinary and popular meaning of that word. It is not seriously contested by the respondents that the word "family" can in certain contexts and circumstances be used in a wide sense so as to include an adopted child treated as one of the family - even a child (as in the case of the appellants) who has not been legally adopted; certainly it had been held to include an illegitimate child: Humble v. Bowman (1877) 47 L.J.Ch.62. But the question is whether the word can be so construed in a section of an Ordinance dealing with Mohammedan wakfs. I think that in this context it must be construed to mean what it would mean to a Mohammedan, in connection with the disposition of his property. And in that context it must be noted that the Mohammedan law does not recognise even legal adoption as a mode of filiation or as conferring any right of inheritance: see Saxena's Muslim Law 3rd ed: (1954) at pages 304-6, and Muhammad Umar Khan and another v. Muhammed Niaz-ud-din Khan (1911) 39 I.A. 19. See also Mulla's Principles of Mohammedan Law, 14th ed; (1955) at page 293. It is true that it has been laid down by the Courts in India that the word "family" in section 3 of the Mussalman Wakf Validating Act of that country, which corresponds to section 4 of the Wakf Commissioners Ordinance, 1951, is intended to be used in its broad and popular sense, and has been construed to cover collateral relations by blood or marriage if they have in fact been living in the settlor's house and maintained by him: see Saxena (op: cit:) at pages 455-6, and Mulla (Op: cit:) at page 183. The position is expounded clearly and at length in the judgment of Ismail Haji v. Umar Abdulla, A.I.R. (1942) Bom: 155, at pages 155-6. But in none of these cases has an adopted child who is not at the same time a blood-relation been held to qualify as a member of the settlor's "family" for the purpose of the section; still less the descendants of such an adopted child. The only case to which I have been referred, or of which I am aware, in which an adopted child has been held to be a member of the settlor's "family" for the purpose of the validating section is Mubarik Ali v. Ahmed Ali, A.I.R. (1933) Lah: 414. In that case the child was the settlor's nephew and the question for decision was whether such a blood-relation, although not a direct descendant of settlor, could be held to be a member of his family by reason of his having been adopted by the settlor and residing

In the Court of  
Appeal

No. 25

Judgment,

10th December

1959 -

continued.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

with and being dependent on him. It was held that he could. But the fact of his being a blood-relation was essential to the decision, and there was no suggestion that the mere fact of adoption and dependence would have qualified him if he had been no relation of the settlor's at all. The judgment in Ismail Haji v. Umar Abdulla (supra) sums up the decisions regarding the scope of the word "family" in the following words:-

"The result of the decisions thus appears to be that the word 'family' as used in Act 6 of 1913 would include (1) all those persons residing in the same house as the settlor and dependant upon him for maintenance and (2) all those connected with the settlor through a common progenitor or by ties of common lineage." 10

In so far as that summary may seem to lay down that a person residing with and dependent on the settlor is a member of the latter's "family" although not related to him by blood or marriage, it goes, in my view, beyond the decided authorities. But in any case that summary would not include the unborn children and issue of such a person, since they would not be residing with or dependent upon the settlor; and such are the persons with whom we are at present concerned in the instant case. The appellants themselves, as I have already said, would in any event qualify by virtue of the words "any person" which appear in section 4(1)(a) of the local Ordinance, though not in the corresponding Indian provision. Indeed, a later passage from the judgment in Ismail Haji v. Umar Abdulla seems to make it clear that an adopted child, not being related by blood, could not be included in the word "family" in section 3 of the Indian Act of 1913; for at page 157 the following passage occurs in the judgment:- 20 30

"The Act only permits Mussalmans to create wakfs for the benefit of the members of their family, their children and their descendants, and in order to come within the purview of the Act, every person benefited by the wakf, however, remote in time from the settlor himself, must be in a position to trace his descent from a progenitor common to himself and the settlor." 40



I would therefore hold that the disposition in favour of the children of the appellants and those children's issue prevents the wakf from falling within the saving provision of section 4(1)(a), notwithstanding that the appellants are the adopted daughters of the settlor and resided with her at the time of the creation of the wakf.

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

10 Accordingly, 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),

20 following the decision of this Court in Amina binti Abdulla's case (supra). Unless, therefore, I am wrong not only in one but in both these conclusions, the wakf, following the decision in each of those judgments, fails to bring itself within the protective mantle of section 4 of the Wakf Commissioners Ordinance, 1951, and is bad ab initio. It is bad ab initio because, as clearly laid down in Amina binti Abdulla's case, which was quoted and followed on the point in Sheikha binti Ali's case,

30 if a wakf does not fall within section 4, then its validity will depend on the law in force immediately before the enactment of that Ordinance, namely the Muslim law as modified by judicial decision, including the decision in the Bakhshuwen case (supra). And the wakf in the instant case must be void ab initio on the same ground on which the wakf was declared void in Bakhshuwen's case, following Said bin Muhamed bin Kassim el-Riyami and others v. The Wakf Commissioners, Zanzibar

40 (1946) 13 E.A.C.A.32, namely on the ground that, by reason of the disposition of income to the children and remoter issue of the first beneficiaries, from generation to generation, before the ultimate gift over to the charitable beneficiaries, the chances of those charitable beneficiaries benefiting are so remote that the necessary charitable intent is illusory and the wakf is accordingly no true wakf. The limitations in the instant case to the appellants' "sons and

In the Court of  
Appeal

No. 25

Judgment,

10th December  
1959 -  
continued.

daughters and their issue per stirpes" effect, as we have seen, a disposition of the income to their lineal descendants from generation to generation until they become extinct; and they are thus of exactly the same nature as were those in Bakhshuwen's case.

It has been argued by Mr. Nazareth for the appellants, in the alternative, that even if the disposition to the appellants' 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 be therefore paid to them until their respective deaths; and that the residue should then be paid, not to the heirs of the settlor (the plaintiff-respondents) but to the Wakf Commissioners, to be administered by them for charitable purposes as provided in the Wakf Commissioners Ordinance, 1951. This raises more than one question.

10

20

First, it is suggested that there is no decision of this Court on the question what is to happen if a wakf is only partially defective - whether the wakfed property reverts to the settlor or his heirs, or whether it falls to be administered by the Wakf Commissioners under the Ordinance. But that is not so, although it is true that the suggestion that the Wakf Commissioners should administer it does not seem to have been advanced to this Court until now. Whether or not the wakf in the present case can be called only partially defective, and I do not concede that it can, the decision in Amina binti Abdulla's case was concerned with just such a wakf, there being in that case, as in this, nothing illegal in the first disposition of income to the two appellants for life, taken by itself. And in that case, as we have seen, the decision of the court was that the wakf was void ab initio and that the corpus and income should be paid over to the personal representative of the deceased settlor's husband, without the income being paid to the appellants for the remainder of their respective lives. On the principle of stare decisis alone, I would hold that a similar order should be made in the present case, as was in fact made by the court below. But, quite apart from previous authority, it seems to me that such an order is correct. Both in Amina

30

40

10 binti Abdulla's case and in Sheikha binti Ali's  
 case the wakf was declared void ab initio on the  
 ground that, since it was not protected by section  
 4(2) of the Ordinance of 1951, the decision in  
Bakhshuwen's case applied to it, whereunder the  
 ostensible intention of the settlor ultimately to  
 devote the income to a religious or charitable  
 purpose was shown to be an illusory one, a camou-  
 flage for family aggrandizement, by reason of the  
 dispositions from generation to generation which  
 preceded it. Since a genuine intention (not an  
 illusory one) to benefit religion or charity, put  
 into operation by effective provisions to that end,  
 is a necessary pre-requisite to every wakf under  
 what may be called non-statutory Anglo-Muslim law,  
 it follows, as I see it, that an instrument which  
 does not disclose or give effect to such an inten-  
 tion is no wakf at all, and must be deemed to be  
 void ab initio, leaving no foundation to support  
 20 what might otherwise have been a good disposition,  
 namely a gift of income for life to a named bene-  
 ficiary. It is argued that, since the decision  
 in Bakhshuwen's case was in effect a decision that  
 the English rule against perpetuities must be  
 applied to wakfs, any vested interest conferred by  
 the instrument before the dispositions offending  
 against that rule must remain unaffected; and it  
 is suggested that the disposition in favour of the  
 appellants for life is such a vested interest.  
 30 The exposition of the rule against perpetuities in  
 Cheshire's Modern Real Property, 7th ed: at pages  
 273-4 is relied on, and such decisions as Hayes v.  
Hayes (1828) 38 E.R.822, whereunder vested life  
 interests to persons in being, preceding the of-  
 fending dispositions, have been allowed to stand.  
 The answer to this contention is, I think, three-  
 fold. First, according to the basic principle  
 underlying wakfs, which is recognised by the  
 Mohammedan law, there is no question of any bene-  
 40 ficiary acquiring a vested interest in the wakfed  
 property at all. The only vesting of anything  
 is the implied vesting of the corpus of the wakf  
 in the Almighty, the mutawalli or trustee being no  
 more than the manager of the wakf; vide Mulla  
 (op: cit:) at page 161. Secondly, as was pointed  
 out by the Privy Council in Saadat Kamel Hanum v.  
Attorney-General, Palestine, A.I.R. (1939) P.C.185,  
 at page 189, the rule against perpetuities does  
 not apply to wakfs. Limitations in favour of  
 50 beneficiaries from generation to generation make a  
 wakf bad, not by reason of any infringement of the

In the Court of  
 Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

rule against perpetuities as such, but because the indefinite postponement of the religious or charitable gift over, effected by such limitations, makes the religious or charitable intent illusory or, in other words, shows that there was in reality no such intent at all. Thirdly, such a contention would run counter to what was ordered by the Privy Council in Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry (1894) 22 I.A.76, and followed in Bakhshuwen's case, namely that where the purported wakf was illusory, by reason of the remoteness of the charitable gift over, there should be no further payment of income to the first beneficiaries, to whom the income had been directed to be paid for life, but that the corpus should immediately revert to the settlors or to their successors in title. In Bakhshuwen's case, their Lordships of the Privy Council accepted that it was Mohamedan law which determined the rights of the parties, stating in their judgment at page 14:- 10 20

"Their Lordships do not doubt that the judge was correct in saying that the rights of the parties are governed by Mohamedan law..."

I turn lastly to a submission advanced for the appellants which appears to have been raised before this court for the first time, though it was recently raised before, and considered by, the Supreme Court in Mombasa in Mohamed Abdalla Mfaume and others v. Salim Ismail and another, Civil Case No.476 of 1958. Briefly the submission, which has been argued as an additional ground of appeal is that by reason of the terms of section 21 of the Wakf Commissioners Ordinance, 1951, neither the Supreme Court nor this Court has jurisdiction to declare a wakf to be void ab initio or to order the wakf property to revert to the settlor or his heirs, but that the court's jurisdiction is limited to declaring whether or not the wakf is valid. Although this contention is based on section 21, the provisions of that section and of section 16 of the same Ordinance are at once so parallel and so seemingly irreconcilable that it will be convenient to set them both out. They read as follows:- 30 40

"16. (1) Subject to the provisions of subsection (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.

In the Court of  
Appeal  
No. 25  
Judgment,  
10th December  
1959 -  
continued.

10

(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."

20

.....

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

(a) the intentions of the maker -

30

- (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,

40

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

In the Court of  
Appeal

No. 25

Judgment,

10th December,  
1959 -  
continued.

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." 10

Of these two sections it is clear that section 16 can have no application to the present case, because (a) the wakf is not "under the control of the Wakf Commissioners", as required by sub-section (1), but is being administered by the first defendant as a private muatwalli; (b) it cannot be said that "in the opinion of the Wakf Commissioners" the intentions of the maker of the wakf are unlawful, as provided in subsection (2), since the Commissioners have expressed no opinion on that point and are not parties to the suit. Mr. Nazareth did argue that by virtue of section 3(1) of the Wakf Commissioners Ordinance, 1951, (which provides that every wakf made by or for the benefit of any Muslim shall be administered in accordance with the provisions of the Ordinance) read with the Ordinance as a whole (which deals almost exclusively with administration of wakfs by the Wakf Commissioners) it should be held that all property the subject of any wakf must be "under the control" of the Wakf Commissioners. With respect I am quite unable to accept this argument. It is contrary to the natural meaning of the words in section 16, and section 13 (which enables the Wakf Commissioners to call upon trustees of wakfs to produce evidence of proper administration of their trusts) clearly contemplates wakfs where the wakf property is not "under the control" of the Wakf Commissioners, the Wakf Commissioners merely having a supervisory capacity to ensure proper administration. But it is submitted that section 21, which is expressed to be applicable to "any wakf", applies since "the intentions of the maker" of the wakf are "unlawful" within the meaning of sub-section (1)(a)(i) of that section, and that accordingly, the Supreme Court (or this Court) having declared them to be unlawful, the Court has 20 30 40

10 exhausted its jurisdiction in the matter, and that  
 the consequences of such declaration follow auto-  
 matically from what is laid down or implied in the  
 remainder of the section, namely that the Wakf  
 Commissioners shall take over the administration  
 of the wakf from the mutawalli, shall sell the  
 property, and shall pay its proceeds into the  
 Surplus Fund created under section 18 of the  
 Ordinance. That fund, as was recently held by  
 20 this Court in The Wakf Commissioner for the Colony  
 and Protectorate of Kenya v. The Public Trustee  
 for the Colony and Protectorate of Kenya, Civil  
 Appeal No.80 of 1958 (not yet reported), is not a  
 re-creation of the Bait-ul-Mal, which was the  
 ancient administrative machinery for the distri-  
 bution of property for the benefit of Islam, but  
 it does set up new machinery for carrying out sub-  
 stantially the same objects, namely, in the words  
 of section 18(2), "such benevolent or charitable  
 purposes for the benefit of Muslims as the Wakf  
 Commissioners may consider proper."

30 Since the wakf in the present case, for rea-  
 sons which I have given, manifestly does not fall  
 within the scope of section 16, I do not propose  
 to deal with the question, which becomes irrele-  
 vant, of how to reconcile that section with sec-  
 tion 21, in cases where a wakf is "under the con-  
 trol of" the Wakf Commissioners, and where it would  
 thus appear at first sight to fall both within  
 section 16(2) and also within section 21(1), whose  
 provisions regarding the disposal of the wakf  
 property are in direct conflict. The question  
 before this court is whether section 21(1) is  
 applicable to the wakf in the present case, with  
 the result that the corpus of the wakfed property  
 would not revert to the heirs of the settlor but  
 would be sold by the Wakf Commissioners and the  
 proceeds paid into the Surplus Fund.

40 On the principle of stare decisis alone,  
 having in view the decisions of this Court in  
Amina binti Abdulla and Sheikha binti Ali, I would  
 hold that the corpus of the wakf must revert to  
 the settlor's heirs. But since in neither of  
 those cases was section 21 adverted to, either by  
 counsel or in the judgments of this Court, I think  
 it proper to consider whether section 21 is appli-  
 cable to a case such as the present, where, on the  
 authority of Bakhshuwen's case, the religious and  
 charitable objects of the settlor have been held

In the Court of  
 Appeal

No. 25

Judgment,

10th December,  
 1959 -  
 continued.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

to be illusory. In the first place, I can find nothing in section 21, or elsewhere in the Ordinance, which deprives the Supreme Court, or this Court, of jurisdiction to make such a finding or to hold in consequence that the wakf is void ab initio. Very clear language is required in a statute to deprive a court of jurisdiction hitherto vested in it, and the Wakf Commissioner's Ordinance contains no such language. That being so, the position is that the settlor has been held never to have had any genuine intention to benefit the religious or charitable purposes of Islam; and the wakf has accordingly been held no wakf at all. It seems to me that the words "any wakf" at the beginning of section 21 would not cover a disposition that has been declared to be no wakf. Nor would such a conclusion render the provisions of section 21(1) a dead letter when applied to a wakf in which "the intentions of the maker are unlawful." For a wakf might contain a disposition of a kind unlawful under Mohammedan law, or even unlawful under the general law of the land but not under Mohammedan law, without being no true wakf at all; as for instance if it disposed of the income for the maintenance and support of a stranger for life, and after his death to that stranger's (as yet unborn) children for life, and after the death of the survivor of those children, to specified religious purposes. In such a wakf the second disposition would be bad, but the religious object would not be indefinitely postponed and therefore not illusory. It may be that such a wakf would fall within section 21, though I do not venture to decide the point, since there are other difficulties in the interpretation of the section which may fall to be decided on another occasion. But, whatever section 21 does cover, I would hold that it does not cover an instrument which has been declared to be void ab initio for lack of any genuine religious or charitable object, and thus to be no wakf at all. The section would seem to be designed to ensure, rather, that where a genuine intention to benefit religion or charity has been shown by the settlor, put into effect by dedicating property to the Almighty by a wakf deed, that intention shall not be defeated by any difficulty or even illegality not going to the root of the dedication, but shall be given effect to, cy pres, by ensuring that the proceeds of the property shall be paid into a fund to be similarly devoted to "benevolent and charitable purposes for the benefit of Muslims."

10

20

30

40

50



I would for these reasons dismiss the appeal and uphold the order of the Court below. With regard to costs, and bearing in mind this court's ruling on the point in Amina binti Abdulla's case at page 15, I would order that the costs of all parties below, taxed as between solicitor and client, be paid out of the wakfed property, and that the respondents have their costs of this appeal, taxed on the same footing, paid out of the same property.

In the Court of  
Appeal  
 No. 25  
 Judgment,  
 10th December  
 1959 -  
 continued.

Dated at Mombasa this 10th day of December 1959.

R. WINDHAM,  
 JUSTICE OF APPEAL.

Judgment pronounced in the presence of Mr. A.J. Kanji, Advocate for the appellants and Mr. N.M. Budhdeo, Advocate, for the respondents on 10th day of December, 1959.

R. J. QUIN,  
 AG. DEPUTY REGISTRAR.

JUDGMENT OF FORBES, V.P.

I agree with the reasoning and conclusions of the learned Justice of Appeal and have nothing to add. The appeal is dismissed and an order for costs will be made in the terms proposed by the learned Justice of Appeal.

A. G. FORBES,  
 VICE PRESIDENT.

Judgment pronounced in the presence of Mr. A.J. Kanji, Advocate for the Appellants and Mr. N.M. Budhdeo, Advocate for the Respondents on 10th day of December, 1959.

R. J. QUIN,  
 AG. DEPUTY REGISTRAR.

In the Court of  
Appeal

No. 25

Judgment,  
10th December  
1959 -  
continued.

JUDGMENT OF GOULD J.A.

I also agree.

T.J. GOULD,  
JUSTICE OF APPEAL.

Judgment pronounced in the presence of  
Mr. A.J. Kanji, Advocate for the Appel-  
lants and Mr. N.M. Budhdeo, Advocate  
for the Respondents on 10th day of  
December, 1959.

R.J. QUIN,  
AG. DEPUTY REGISTRAR.

10

No. 26

Order,  
10th December  
1959

No.26

O R D E R

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL NO. 5 OF 1959.

(Title as in No.19)

IN COURT the 10th day of December 1959.

Before the Honourable the Vice-President, Mr.  
Justice Forbes  
the Honourable Mr. Justice Gould, a Justice  
of Appeal  
and the Honourable Mr. Justice Windham, a  
Justice of Appeal.

20

O R D E R

On this Appeal and the Respondents' Notice of  
Cross Appeal coming on for hearing on the 3rd and  
4th days of November 1959 AND UPON HEARING J.M.  
Nazareth, Esquire, of Her Majesty's Counsel and  
A.J. Kanji, Esquire, of Counsel for the Appellants  
and Narshidas M. Budhdeo, Esquire and K.M. Pandya,  
Esquire, of Counsel for the Respondents IT WAS  
ORDERED that this appeal do stand for judgment and  
upon the same coming for judgment this day IT IS  
ORDERED THAT (1) the Appeal be and is hereby dis-  
missed, (2) the Decree of the Supreme Court of

30

Kenya at Mombasa District Registry in the original Civil Suit No.81 of 1958 be and is hereby affirmed, (3) the costs of all parties below, taxed as between solicitor and client, be paid out of the wakfed property, and that the respondents have their costs of this appeal, taxed on the same footing, paid out of the same property.

In the Court of Appeal

No. 26

Order,

10th December 1959 -

continued.

GIVEN under my hand and the Seal of the Court this 10th day of December, 1959.

N.D. DESAI  
ACTING REGISTRAR.

Issued this 8th day of January, 1960.

SEAL.

No. 27

ORDER GRANTING FINAL LEAVE TO APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPLICATION NO. 2 OF 1960 (P.C.)

(In the matter of an Intended Appeal to Her Majesty in Council)

B E T W E E N

- 1. RIZIKI BINTI ABDULLA and
- 2. FAIZA BINTI ABDULLA .. .. APPLICANTS

versus

- 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 RESPONDENTS

(Intended Appeal from the final judgment and order of Her Majesty's Court of Appeal for Eastern Africa dated the 10th day of December 1959 in Civil Appeal Number 5 of 1959.)

B E T W E E N

No. 27

Order granting Final Leave to Appeal,

2nd September 1960

10

20

30

In the Court of  
Appeal

No. 27

Order granting  
Final Leave to  
Appeal,

2nd September  
1960 -  
continued.

1. RIZIKI BINTI ABDULLA  
2. FAZA BINTI ABDULLA .. .. APPELLANTS

versus

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 RESPONDENTS

10

IN COURT this 2nd day of September 1960.

Before the Honourable Mr. Justice E.A.J. Edmonds.

O R D E R

UPON the application presented to this Court on the 4th day of August, 1960, by Counsel for the above-named Applicants for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of JOHN EDWARD LESLIE BRYSON sworn on the 3rd day of August, 1960 in support thereof and the exhibit therein referred to and marked "JELBI" AND UPON HEARING Counsel for the Applicants and for the Respondents THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH FURTHER ORDER that the costs of this application be costs in the Privy Council appeal.

20

DATED at Mombasa this 2nd day of September 1960.

30

C.H. GRANT,

AG. DEPUTY REGISTRAR.

ISSUED this 13th day of September, 1960.



E X H I B I T SExhibits

1

EXHIBIT 1POWER OF ATTORNEY, KHADIYA BINTI SULEMAN  
TO ALI MOHAMEDPower of  
Attorney,  
Khadiya binti  
Suleman to  
Ali Mohamed,27th July  
1940

10 TO ALL to whom these presents shall come I  
Khadija binti Suleman of Mombasa in the Protecto-  
rate of Kenya send greeting: WHEREAS my husband  
Sheikh Rashid bin Sood late of Mombasa aforesaid  
died on the 19th day of June 1940 intestate leaving  
property in the Colony and Protectorate of Kenya  
and elsewhere AND WHEREAS by the law of intestate  
succession applicable to him and his estate I am  
one of his heirs and as such claim to be entitled  
to receive a share of and also administer his estate  
NOW KNOW YE that I the said Khadija binti Suleman  
hereby appoint Ali Mohamed El-Busaid of Mombasa  
aforesaid (hereinafter called the Attorney) my true  
and lawful attorney for me and in my name to do and  
execute all the following acts deeds and things or  
20 any of them that is to say:-

1. To apply for and obtain from the proper Court  
or other authority having jurisdiction in the  
premises a grant of letters of administration of  
the said deceased's estate and effects, and there-  
after to do all such acts and things as may be  
necessary for the realization and administration  
of the said estate and effects.

30 2. To oppose any application for letters of  
administration, and to lodge a caveat or do such  
other acts and things as may be necessary for the  
purpose.

40 3. To agree to myself acting or being appointed  
as a joint administrator or co-administrator with  
any one else whose claim to a grant of letters of  
administration of the said estate and effects may  
be upheld by such Court or authority as aforesaid,  
and to take all such steps as may be necessary or  
expedient to achieve the said object, whether by  
opposing any application for the grant as aforesaid  
or otherwise as my said attorney may think fit or  
be advised.

4. In the event of myself not being appointed  
administrator of the said deceased's estate and

Exhibits

1

Power of Attorney, Khadija binti Suleman to Ali Mohamed, 27th July 1940 - continued.

effects, to demand sue for and receive by way of transfer, conveyance, payment or otherwise as he may think fit or be advised from the administrator or from any other person to whom it may belong to distribute the same all such distributive share of the said deceased's estate and effects as I am or may be entitled to by law, and upon receipt or payment of the same to give a good receipt or discharge for the same, or upon refusal or neglect by such administrator to hand over or pay such share to commence and prosecute all actions and proceedings and use all other expedients for obtaining the same.

10

5. To settle all accounts relating to the said deceased's estate and effects and refer to arbitration or compromise any dispute concerning the same.

6. To enter into such obligation undertake such liabilities and execute such deeds as may be legally required for any of the above purposes.

7. Generally to do all acts and things which my attorney may find necessary or desirable to do in relation to the premises aforesaid.

20

AND I the said Khadija binti Suleman hereby agree at all times to ratify and confirm whatsoever my said attorney shall do or cause to be done in the premises by virtue of these presents.

IN WITNESS WHEREOF I have hereunto set my hand and seal at Mombasa aforesaid this twenty-seventh day of July One thousand nine hundred and forty.

Signed sealed and delivered) by the said Khadija binti Suleman in the presence of:- } (i.e. Khadija binti Suleman)

30

Narshidas M. Budhdeo  
Advocate, Mombasa.

Ali Adam,  
Clerk to N.M. Budhdeo.



EXHIBIT 2

POWER OF ATTORNEY, KHADIJA BINTI SULEMAN  
TO ALI MOHAMED

Exhibits

2

Power of  
Attorney,

Khadija binti  
Suleman to  
Ali Mohamed,

19th December  
1940

GENERAL POWER OF ATTORNEY

KNOW ALL MEN TO WHOM IT MAY CONCERN: THAT I,  
the Undersigned, Khadija binti Suleman bin Hemed  
El-Busaidiyah of Mombasa do hereby ordain, nominate  
and appoint Ali bin Mohamed bin Hemed El-Busaid of  
Mombasa to be my true and lawful attorney and  
Agent, with full power and authority, for me and  
in my name, and for my account and benefit, to ask,  
demand, sue for and recover, of and from all person  
or persons whomsoever, all such sum or sums of  
money which now are, or shall, or may at any time  
hereafter become due, owing, payable, or belonging  
to me, upon and by virtue of any notes, bonds,  
bills, book debts, deeds, shares, stock, or other  
securities whatsoever; also for me and in my name,  
to settle and adjust accounts as he shall think  
fit and proper and if necessary, to compound for  
the same and accept a part for the whole; also to  
submit any matters in dispute to arbitration and  
to sign, seal and execute the necessary acts for  
that purpose; also to let and hire out houses, to  
receive rents and grant receipts for the same, and  
in default of payment or delivery to use and take  
all lawful ways and means for the recovery thereof  
by attachment, ejectment, or otherwise; also if  
necessary, for me and in my name, to commence,  
prosecute, defend, any action or actions, suit of  
suits, at law or equity in any of the Courts of  
Kenya and Zanzibar and the same at pleasure to  
relinquish; also to draw, accept, or endorse,  
bills of exchange, promissory notes, or cheques,  
in satisfaction, or on account of any debt or  
claim due or payable to or by me: and further to  
buy and sell moveable or immoveable property; to  
make sign, give, and receive in due and customary  
form, all acts or deeds of transfer of such move-  
able or immoveable property; also to appear at  
the office of the Collector of Transfer Dues; or  
any Justice of the Peace, and then and there, in  
my stead to take and subscribe the necessary  
declaration as to the truth of the purchase amount;  
further for me and on my behalf, to take or give  
money on mortgage of immoveable property and to  
appear before the Registrar of Deeds, Registrar of

10

20

30

40

Exhibits

2

Power of  
Attorney,  
Khadija binti  
Suleman to  
Ali Mohamed,  
19th December  
1940 -  
continued.

Claims, and make, pass, give, or receive all such mortgage bonds, deed of hypothecation or other securities, as may be requisite or necessary, under obligation of my person and property of every description, or the person and property of any debtor passing such mortgage bonds, deed of hypothecation or other securities, and also, in my name, to enter into securities of what nature or kind soever; also, for me and in my name, to apply for and obtain shares in any Joint Stock or other Company or Companies, and to sell or exchange the same, and if necessary, for me and in my name to sign all and every deed of settlement of trust deed of any Company or Companies and further to attend personally or by proxy at any meeting or meetings of Shareholders in Company or Companies, in which I shall or may be interested, and to vote for me thereat; also to transfer all shares now held or hereafter acquired by me, and for that purpose to execute the usual and customary documents; and generally, for me and in my name to choose DOMICILIUM CITANDI ET EXECUTANDI: to manage and transact all my affairs in Kenya and Zanzibar and execute such deeds or instruments as may be necessary, or most to my advantage, and to use all lawful ways and means thereto, as fully and effectually to all intents and purposes as I might or could do if personally present and acting herein; hereby granting to my said Attorney and Agent full power and authority to substitute or appoint one or more Attorney or Attorneys under him and the same at pleasure to displace or remove, and appoint another or others; hereby ratifying, allowing, confirming, and promising at all times to ratify, allow and confirm all and whatsoever my said Attorney, his substitute or substitutes shall lawfully do, or cause to be done, in or about the premises by virtue of those presents 10 20 30

In witness thereof I have hereunto set my hand this 19th day of December in the year of Our Lord One Thousand Nine hundred and forty. 40

AS WITNESSES

sd (?)

Attested under Sec. 57 R.T.O. (Cap 142)

- - Hawkins.

Registrar of Titles, Mombasa.



LAND TITLES REGISTRY - COLONY OF KENYA  
 COAST DISTRICT, MOMBASA - REGISTERED No.C.R.P./A 590  
 Presented 20.3.1944  
 Time 9.30 a.m.

sd ?? Hawkins  
 REGISTRAR OF TITLES.

Exhibits

2

Power of Attorney,  
 Khadija binti Suleman to Ali Mohamed,  
 19th December 1940 - continued.

10

Certifying	Shs. 2/-
Attestation	Shs. 2/-
Stamp Duty	Shs. 10/-
Registration Fees	Shs. 10/-
	<u>Shs. 24/-</u>

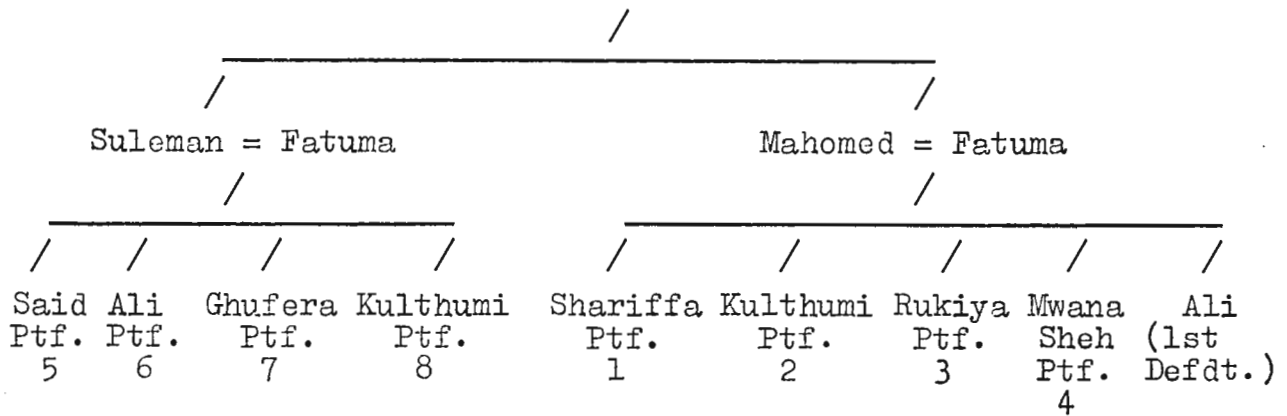
EXHIBIT 3

3

FAMILY TREE

Family Tree.

H E M E D



20

EXHIBIT 4

4

DEED OF WAKF

Deed of Wakf,  
 3rd November 1942

Kenya Revenue Five Pounds	Kenya Revenue Five Pounds	Kenya Revenue One Pound	Kenya Revenue Ten Shillings
---------------------------	---------------------------	-------------------------	-----------------------------

I, KHADIJA BINTI SULEMAN BIN HEMED EL-BUSAIN of Mombasa in the Protectorate of Kenya, widow, BEING REGISTERED AS THE PROPRIETOR OF (First) ALL

Exhibits

4

Deed of Wakf,  
3rd November  
1942 -  
continued.

THAT piece of land containing decimal point nought six seven nought (.0670) of an acre or thereabouts and situated at Crawford Street, Kibokoni in the Township and Island of Mombasa being the land surveyed and known as Subdivision Number One Hundred and Sixty Four of Section Number V of Portion Number 1 of Meridional District South B.37/D.II.a and more particularly described in a Certificate of Ownership Number 4905 dated the Third day of September One Thousand Nine Hundred and Twenty Three registered as No.C.R.3710/1 in the Registry of Titles at Mombasa and granted by the Acting Recorder of Titles to Rashid bin Soud El-Shikili and delineated on the Plan Number 18333 annexed to the said Certificate and (Second) ALL THAT piece of land containing Five decimal point seven five acres or thereabouts and situated on the Malindi Road, North-East of Port Tudor in the District of Mombasa being the land surveyed and known as Subdivision Number Fifty of Section Number II, Mainland North of Meridional District South B.37/D.II.a and more particularly described in a Certificate of Ownership Number 2517 dated the Twentieth day of October One Thousand Nine Hundred and Twenty One, registered as No.C.R.1320/1 in the Registry of Titles at Mombasa and granted by the Recorder of Titles in favour of Tala binti Ahmed bin Salim and delineated on the Plan Number 13997 annexed to the said Certificate; in consideration of my natural love and affection for my adopted daughters RIZIKI BINTI ABDULLA and FAIZA BINTI ABDULLA and the other beneficiaries hereinafter mentioned DO HEREBY DECLARE THAT I HAVE MADE WAKF of the said lands and the buildings and improvements thereon for the ends, uses and purposes and subject to the conditions, provisions, reservations and stipulations hereinafter set out, videlicet:-

10

20

30

1. I appoint myself to be the first Trustee or Mutwali of the Wakf and after me my cousin Ali bin Mohamed bin Hemed El-Busaid and after him such person as he shall appoint, whom failing, such person as the beneficiaries who are capaces shall appoint.

40

2. I direct the Trustee out of the monthly income of the said property after paying taxes, rates, repairs, debts and all other proper outgoings and expenses of maintaining the said property and administering the Wakf to retain in his own hands

one tenth part of the residue or balance of the income remaining and to keep this as a reserve fund to meet expenditure of a capital or exceptional nature and to develop and improve the said property in the best interest of the trust.

Exhibits

4

Deed of Wakf,  
3rd November  
1942 -  
continued.

10 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 Shariffa, 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 per stirpes who shall take one part equally among them.

20 4. I direct that in all cases the issue of a beneficiary shall upon his or her decease take the share that would have gone to their parent; that brothers and sisters shall share equally; and that the share of a beneficiary dying without issue shall accrue to his surviving brothers and sisters.

30 5. I declare that in no case shall anyone who has adjured or is not of the Mohamedan Faith share in the income of this Wakf and that the share which would have accrued to such person shall go to his or her issue or otherwise as though he or she were dead.

40 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.

7. The Trustees or Mutwalis under this Wakf shall have the widest powers to carry out the purposes of this endowment, and without prejudice to the

Exhibits

4

Deed of Wakf,  
3rd November  
1942 -  
continued.

foregoing generality, they shall have power to purchase lands and houses and add to and increase the property of the Wakf, to let and lease the same for such terms as they may think fit at reasonable rents payable regularly at terms not exceeding one year, to execute such repairs and alterations and do what may be necessary or they shall think fit for the maintenance or improvement of the property and subject to the purposes and conditions of the Wakf and the terms hereof to deal with the property as fully and freely as though they were the owners thereof.

10

8. And I declare that I have made known this Wakf and all the provisions and conditions thereof as hereinbefore expressed to the Trustee and beneficiaries herein named and that the said Ali bin Mohamed El-Busaid, Riziki binti Abdulla, Shariffa binti Mohamed, Kalathumi binti Mohamed, Rukiya binti Mohamed and Mwana Wa Shei binti Mohamed have all accepted and agreed to the Wakf, that the learned Kathi of Mombasa Sheikh Naamun bin Suleman has accepted and agreed to the Wakf on behalf of the said Faiza binti Abdulla and Rukiya binti Abdulla, the adopted child of my late brother, who are minors, and that the said Ali bin Mohamed El-Busaid has accepted and agreed to this Wakf on behalf of the minor children of the late Seif bin Mohamed El-Busaid.

20

IN WITNESS WHEREOF, I have hereunto set my hand this Third day of November One Thousand Nine Hundred and Forty Two.

30

SIGNED by the said KHADIJA  
BINTI SULEMAN BIN HEMED  
EL-BUSAID in the presence of:-)

sd (?)

sd. J. Christie  
Advocate, Mombasa.

Habib Abdulla,  
Law Clerk, Mombasa.

I accept.  
sd. Rukia bt.  
Mohamed.

40

We accept.

(?) sd (?)

(?) A.B. Mohamed.

Riziki binti Abdulla  
(?)

(?) (?) (?)

District Commis-  
sioner, LAMU  
18.11.42

The value of the properties set out in the foregoing document is as follows:

Plot No.164 of Section V Mombasa Shs.17360/-  
Plot No.50 of Section V Mainland North Shs.5000/-

.....  
i.e. Khadija binti Suleman.

LAND TITLES REGISTRY COLONY OF KENYA  
COAST DISTRICT MOMBASA - REGISTERED No.C.R.3710/7  
& 1320/7

Presented 3/12/1942

Time 8.25 a.m.

- - Hawkins,  
REGISTRAR OF TITLES.

Exhibits

4

Deed of Wakf,  
3rd November  
1942 -  
continued.

Duplicate	Shs.	4/-
Stamp Duty	Shs.	230/-
Registration fee	Shs.	26/-
		<hr/>
	Shs.	260/-
		<hr/>

10

Dated the 3rd day of November 1942

W A K F  
OF

Khadija binti Suleman bin Hemed  
El-Busaid

affecting

Plot No.164 of Section V Kibokoni  
Mombasa and Plot No.50 of Section  
II Mainland North.

Christie & Bryson,  
Advocates,  
Mombasa.

Exhibits

"A"

Deed of Wakf,  
3rd November  
1942

EXHIBIT "A"

DEED OF WAKF

Kenya	Kenya	Kenya	Kenya	Kenya	Kenya
Revenue	Revenue	Revenue	Revenue	Revenue	Revenue
Five	Five	Five	Five	One	Ten
Pounds	Pounds	Pounds	Pounds	Pound	Shillings

I, KHADIJA BINTI SULEMAN BIN HEMED EL-BUSAID of Mombasa in the Protectorate of Kenya, Widow, BEING REGISTERED AS THE PROPRIETOR OF the two Plots or pieces of land and premises in the Municipality and Island of Mombasa described in the First Schedule annexed hereto and BEING SEISED IN FEE SIMPLE FREE FROM ENCUMBRANCES AND BENEFICIAL OWNER of the hereditaments at Kilifi in the Kenya Protectorate described in the Second Schedule annexed hereto in consideration of my natural love and affection for my sisters, Shariffa, Rukiya, Kalathumi and Mwana wa Shei, all daughters of Mohamed bin Hemed El-Busaid and the other beneficiaries hereinafter mentioned DO HEREBY DECLARE THAT I HAVE MADE WAKF of the said lands and the buildings and improvements thereon for the ends, uses and purposes and subject to the conditions, provisions reservations and stipulations hereinafter set out, videlicet:-

10

20

1. I appoint myself to be the first Trustee or Mutwali of the Wakf and after me my cousin Ali bin Mohamed bin Hemed El-Busaid and after him such person as he shall appoint, whom failing, such person as the beneficiaries who are capaces shall appoint.

30

2. I direct the Trustee out of the monthly income of the said property after paying taxes, rates, repairs, debts and all other proper outgoings and expenses of maintaining the said property and administering the Wakf to pay the said Ali bin Mohamed bin Hemed the sum of Fifty Shillings per month during his lifetime and after his death to pay the sum of Fifty Shillings per month to such person, if any, as the said Ali bin Mohamed in a writing under his hand shall have appointed to receive this money during the lifetime of the person so appointed and I direct the Trustee to retain in his own hands one-fifth part of the residue or balance of the income remaining and to keep this as a reserve fund to meet expenditure of a capital

40

or exceptional nature and to develop and improve the said property in the best interest of the trust.

Exhibits

"A"

Deed of Wakf,  
3rd November  
1942 -  
continued.

10 3. The free balance of the income of the Wakf property shall be divided each month into five equal parts of which one part shall be paid to each of my four sisters Shariffa, Rukiya, Kalathumi and Mwana wa Shei, the daughters of Mohamed bin Hemed El-Busaid, and the fifth part shall be distributed equally among the children and adopted child of my late brother Seif bin Mohamed El-Busaid, namely Fatima, Harith, Abdulla and Rukiya and upon the death of any one of the said beneficiaries his or her share shall be divided equally among his or her sons and daughters and their issue per stirpes, and upon the failure of the issue of any one of my said sisters her share shall be divided equally among the surviving branches of beneficiaries, namely my surviving sisters, the issue of sisters 20 who shall have died and the said children of my late brother, Seif, and their respective issue, and upon the failure of the issue of any one of the children of my late brother Seif the share of such child shall go to the surviving children and the issue of children then dead in equal shares per stirpes.

30 4. I direct that in all cases the issue of a beneficiary shall upon his or her decease take the share that would have gone to their parent; that brothers and sisters shall share equally; and that the share of a beneficiary dying without issue shall accrue to his surviving brothers and sisters.

5. I declare that in no case shall anyone who has adjured or is not of the Mohamedan Faith share in the income of this Wakf and that the share which would have accrued to such person shall go to his or her issue or otherwise as though he or she were dead.

40 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.

7. The Trustees or Mutwalis under this Wakf shall

Exhibits

"A"

Deed of Wakf,  
3rd November  
1942 -  
continued.

have the widest powers to carry out the purposes of this endowment and, without prejudice to the foregoing generality, they shall have power to purchase lands and houses and add to and increase the property of the Wakf, to let and lease the same for such terms as they may think fit at reasonable rents payable regularly at terms not exceeding one year, to execute such repairs and alterations and do what may be necessary or they shall think fit for the maintenance or improvement of the property and subject to the purposes and conditions of the Wakf and the terms hereof to deal with the property as fully and freely as though they were the owners thereof.

10

8. And I declare that I have made known this Wakf and all the provisions and conditions thereof as hereinbefore expressed to the Trustee and beneficiaries herein named and that the said Ali bin Mohamed El-Busaid, Shariffa, Rukiya, Kalathumi and Mwana wa Shei have all accepted and agreed to the Wakf, that the learned Kathi of Mombasa Sheikh Maamun bin Suleman has accepted and agreed to the Wakf on behalf of the said Rukiya binti Abdulla the adopted child of my late brother, who is a minor, and that the said Ali bin Mohamed El-Busaid has accepted and agreed to this Wakf on behalf of Fatuma, Harith and Abdulla the minor children of the late Seif bin Mohamed El-Busaid.

20

FIRST SCHEDULE

1. ALL THAT piece or parcel of land situate on the North side of Rogers Road in the town and island of Mombasa containing point nought seven eight six of an acre or thereabouts being the land surveyed and known as Subdivision Number One Hundred and Eighty Seven of Section Number V of Portion Number 1 of Meridional District South B.37/D.II.a referred to and more particularly described in a Certificate of Ownership Number 4903 dated the Third day of September One Thousand Nine Hundred and Twenty Three registered as No.C.R.3708/1 in the Coast Registry of Titles at Mombasa and granted by the Acting-Recorder of Titles in favour of the late Rashid bin Sood and delineated on the Plan Number 17452 annexed to the said Certificate with the buildings and improvements thereon and parts and pertinents thereof.

30

40



2. ALL THAT piece or parcel of land situate on the North side of Crauford Street in the town and island of Mombasa containing point nought three five of an acre or thereabouts being the land surveyed and known as Subdivision Number Two Hundred and Sixty One of Section Number V of Portion Number 1 of Meridional District South B.37/D.II.a referred to and more particularly described in a Certificate of Ownership Number 5016 dated the Fifth day of September One Thousand Nine Hundred and Twenty Three, registered as No.C.R.3821/I in the Coast Registry of Titles at Mombasa and granted by the Acting Recorder of Titles in favour of Saida binti Hussein and delineated on the Plan Number 17487 annexed to the said Certificate with the buildings and improvements thereon and parts and pertinents thereof.

Exhibits

"A"

Deed of Wakf,  
3rd November  
1942 -  
continued.

SECOND SCHEDULE

1. ALL THAT piece or parcel of land situate South of Kilifi Creek in the District of Kilifi and Protectorate of Kenya containing One Hundred and Seventy Two decimal point eight nought acres or thereabouts being the land surveyed and known as Subdivision Number Seven of Group V referred to and more particularly described in a Certificate of Ownership (Number 179) dated the Twenty Eighth day of May One Thousand Nine Hundred and Twelve, registered on Folio 457 of Volume 4 of the Malindi Register and granted by the Recorder of Titles in favour of Byramji Rustomji Khajuri and delineated on the Plan Number 2637 annexed to the said Certificate subject to caveat on Folio 458/12 of Volume L.T.IV
2. ALL THAT piece or parcel of land situate South of Kilifi Creek in the District of Kilifi and Protectorate of Kenya containing nought decimal point five eight acres or thereabouts being the land surveyed and known as Subdivision Number Sixteen of Group V referred to and more particularly described in a Certificate of Ownership (Number 191) dated the Twenty Ninth day of July One Thousand Nine hundred and Twelve, registered on Folio 289 of Volume 5 of the Malindi Register and granted by the Recorder of Titles in favour of Byramji Rustomji Khajuri and delineated on the Plan Number 2745 annexed to the said Certificate.

Exhibits

"A"

Deed of Wakf,  
3rd November  
1942 -  
continued.

3. ALL THAT piece or parcel of land situate South of Kilifi Creek in the District of Kilifi and Protectorate of Kenya containing nought decimal point one three nine acres or thereabouts being the land surveyed and known as Subdivision Number Eighteen of Group V referred to and more particularly described in a Certificate of Ownership (Number 186) dated the Seventh day of June One Thousand Nine Hundred and Twelve, registered on Folio 49 of Volume 5 of the Malindi Register and granted by the Recorder of Titles in favour of Isajee Tayabjee Bohora and delineated on the Plan Number 3097 annexed to the said Certificate.

10

IN WITNESS WHEREOF I have hereunto set my hand this Third day of November One Thousand Nine Hundred and Forty Two.

SIGNED by the said KHADIJA )  
BINTI SULEMAN BIN HEMED EL- ) (sd)  
BUSAIID in the presence of:- )

20

J. Christie,  
Advocate,  
Mombasa.

Habib Abdulla,  
Law Clerk,  
Mombasa.

We accept.

Maamin (sd)  
Ali Mohamed sd. A.B. Mohamed.  
Shariffa (sd)  
Kalathumi (sd)  
Mwana Shei. (sd)

30

I accept.  
(sd)  
Riikia bt. Mohamed.

Signed before me.  
(sd)  
District Commissioner,  
LAMU  
18.11.42.

40

The value of the properties set out in the Schedules of the foregoing document is as follows:

Plot No.187 of Section V Mombasa Shs.19895/-  
 Plot No.261 of Section V Mombasa Shs.13000/-  
 Plots Nos. 7, 8 and 16 of  
 Section V, Kilifi Shs.10000/-

Exhibits

"A"

Deed of Wakf,  
 3rd November  
 1942 -  
 continued.

sd.

i.e. Khadija binti Suleman.

LAND TITLES REGISTRY - COLONY OF KENYA

10 COAST DISTRICT MOMBASA - REGISTERED No.C.R.3708/4  
 & 3821/8

Presented 3/12/1942

Time 8.26 a.m. - - Hawkins

REGISTRAR OF TITLES

COLONY & PROTECTORATE OF KENYA  
 MOMBASA REGISTRY

Registered at 8.26 a.m. 3.12.1942

Day Book No.	Volume	Folio	File
-----------------	--------	-------	------

1432	L.J.IV	459/15	162
------	--------	--------	-----

- " -	L.J.V	291/13	189
-------	-------	--------	-----

Duplicate Shs. 4/-	- " -	L.J.V	51/12	169
-----------------------	-------	-------	-------	-----

Stamp Duty  
 Shs.430/-

Registration  
 Fee Shs. 26/-

Shs.460/-

- - Hawkins  
 Registrar