Privy Council Appeal No. 63 of 1960

Riziki Binti Abdulla and another – – – – – – *Appellants*

v.

Sharifa Binti Mohamed Bin Hemed and others – – – *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER, 1962

Present at the Hearing:
LORD EVERSHED.
LORD MORRIS OF BORTH-Y-GEST.
MR. L. M. D. DE SILVA.
[*Delivered by* LORD EVERSHED]

This is an appeal against a judgment of the Court of Appeal for Eastern Africa (Windham Justice of Appeal with whom Forbes Vice President and Gould Justice of Appeal agreed) delivered on the 10th December, 1959, dismissing an appeal against a judgment of the Supreme Court of Kenya delivered on the 28th October, 1958, declaring ineffective a written instrument dated the 3rd December, 1942, by which one Khadija Binti Sulaiman Bin Hemed El Busaid (hereinafter referred to as the maker) sought to create a wakf of certain property belonging to her in favour of two adopted daughters and certain other beneficiaries. The appellants are the two adopted daughters. They were defendants in the original suit. The respondents were the plaintiffs and are persons entitled to succeed to the maker's estate on an intestacy.

The maker made provision in the deed for defraying the expenses of maintaining and administering the property and appointed successive trustees (or mutawallis) of whom she was the first. She then proceeded to make the following provision in Clauses 3 and 6 which, as observed by the Court of Appeal, contain (subject to one reference later made) everything in the deed material to this case:—

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

Their Lordships are aware that recent decisions of the Indian and other Courts, including decisions of the Privy Council, have, by some learned in the principles of Mohammedan law, been regarded as failing in true appreciation of those principles. But, in Their Lordships' opinion, it cannot be in doubt that the legislation in Kenya and other countries, aimed at validating certain documents as effective wakfs, has been passed on the basis that these decisions have been accepted by the respective legislators as effective interpretations of the law: and such legislation must be construed accordingly. The problem having therefore become one of the application of local legislation, Their Lordships' function in the present case must be to construe, according to well-recognised principles, the Kenya Ordinance of 1951. In light, however, of what has been said, it is in Their Lordships' opinion both relevant and permissible to take note of the general form of the document of 1942 submitted to constitute a wakf. In general form and structure the document follows and follows precisely those of an ordinary English settlement. The terms of the final gift over in clause 6 are not forgotten. Nonetheless, the language chosen by the draftsman (and the maker) is characteristic of that which would, in an English instrument, be ordinarily appropriate and apt for the creation of successive interests to be enjoyed beneficially and absolutely—but with a final gift over for " charitable purposes " to take effect only upon (and at the date of) the failure of all the previous interests. Their Lordships take note (in addition to the language of the passages already quoted) of the words immediately preceding the operative part of the Deed: " in consideration of my natural love and affection for my adopted daughters . . . and the other beneficiaries hereinafter mentioned " and they add that it is plain from a reading of the document that the word " beneficiaries " is confined to the Donees specified in clause 3. Their Lordships accordingly confess to having been conscious of a certain feeling of unreality in being invited to treat a document so framed as being an expression of the principles (including the religious beliefs) which they understand to have underlain the ancient Mohammedan conception of the Wakf.

It is indeed, as their Lordships understand, common ground that, owing to the nature of the provisions it contains, the Deed would be invalid as a wakf unless covered by the Ordinance of 1951. As this position is accepted by both parties Their Lordships do not think it necessary to discuss it at great length but they feel that some of the considerations which lead to this result, shortly set out, would be useful for an understanding of the decision in this case.

In the creation of a wakf a substantial gift for charitable purposes, for instance a gift to the poor, is a material element. The Board took the view in 1894 in *Abdul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (L.R. 22 I.A. p. 76) amongst other things that " provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family " (by this was meant the succeeding generations of a family) was so remote as to be illusory and was not sufficient for the creation of a valid wakf.

In 1951 in the case of *Fatuma Binti Mohamed Bin Salim Bakhshuwen* v. *Mohamed Bin Salim Bakhshuwen* ([1952] A.C. 1) the Board was invited to re-examine and restate the relevant principles of Mohamedan law. The Board refused to do so, pointing out *inter alia*

> ". . . they have carefully considered not only the so-called leading case (*Abdul Fata's* case L.R. 22 I.A. 76), but numerous cases decided before and after that date in the Courts of India and the Privy Council. In particular they have examined what truly might be called the leading case in this branch of the law, *Bikani Mia* v. *Shuk Lel Poddar*, I.L.R. 20 C. 116, in which Ameer Ali J. in a long dissenting judgment brought all the resources of his great learning to bear in support of the validity of such a wakf as that now under consideration. There is no doubt that that judge and Mohamedan lawyers in general who thought with him were convinced that the judgment was wrong. But it appears to their Lordships that, whatever views might have been entertained in the eighteenth and earlier centuries, by the end of the nineteenth the trend of

judicial opinion was firmly set in favour of the view that such wakfs were invalid, and that the conclusions to which the High Court of Calcutta and this Board came were inevitable. And in many cases after Abdul Fata's case the same conclusion was reached. As Lord Robertson said in *Mujibunnissa* v. *Abdul Rahim*, L.R. 28 I.A. 15, 23: " It will be so (i.e. the wakf will be valid) " if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family '. If the result was not acceptable to Muslim sentiment, it was to the legislature that recourse must be had.".

The principles laid down in the cases mentioned were laid down after the most careful consideration of the points for and against them and for the reasons already given must be accepted subject of course to such modification as has been made by statute.

By the Wakf Commissioners Ordinance 1951 of Kenya, the principles laid down by the Courts were to some extent relaxed.

The relevant portions of the Ordinance are:

" 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*) if the maker of the wakf is an Ibathi or Hanafi Mohammedan, for his own maintenance and support during his lifetime,

is declared to be a valid wakf if—

(i) it is in every other respect made in accordance with Muslim law; and

(ii) the ultimate benefit in the property the subject of such wakf is expressly, or, in any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character:

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

(2) No wakf to which 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.".

Where a statute is enacted to permit provision in a wakf which would otherwise render it invalid the statute has, in Their Lordships' view, to be closely examined in order to ascertain the limits of the provision which may be made. A wakf which contains in addition provisions which would have invalidated it and which are not covered by the statute would continue to invalidate it.

The Supreme Court in the present case held that the wakf could not be said to be for " maintenance and support " within the meaning of section 4 (1) (*a*) of the Ordinance, and that therefore the Ordinance did not cover it.

The Court of Appeal upheld this view in dismissing the appeal. It also held that the appeal had to be dismissed upon another ground (discussed later) which was not considered by the Supreme Court.

Dealing with the first ground the Supreme Court and the Court of Appeal held that they were bound by a previous decision in the case of *Sheika binti Ali* v. *Halima binti Said* ([1958] E.A. L.R. 623). In that case there

was an absolute gift of income and it was held that the wakf was invalid. In the instant case also there is an absolute gift of income. It was argued by the appellants in both the Courts in Africa that (1) that case was distinguishable from the present case on the facts and (2) that it was reached *per incuriam*. A good deal of discussion took place upon the argument. Their Lordships do not think it necessary to consider all the points that arose upon this discussion because they are of opinion that as laid down by the Court of Appeal in *Sheika binti Ali's* case an absolute gift of income is something wider than, and different in kind from, a gift for maintenance and support. It may often be difficult to determine whether a particular use to which a gift is put to is one for " maintenance and support " and such cases will have to be decided as the question arises on the facts of each case. But in this case no such question arises. There are clearly many uses to which a gift may be put when it is an absolute gift which have nothing to do with " maintenance and support ". To take one instance, upon the widest interpretations of those words which could in the context be possible urged, Their Lordships are of the view that it could not be urged that they cover gambling. An absolute gift could undoubtedly be used for such a purpose. The very words " maintenance and support " need not necessarily be used in the deed but words indicative of such purpose as distinct from an unqualified right of user arising from an absolute gift are necessary. In the judgment of the Supreme Court in *Sheika binti Ali's* case Mayers, J. had said:

> " While I do not pause to enquire exactly what may or may not be included in the term ' maintenance and support ' I have no hesitation in expressing the opinion that that phrase in its natural sense is not co-extensive with such a phrase as ' for the use of the beneficiary in whatever manner he may think fit '.".

Their Lordships are of the view that that statement correctly reflects the true position.

It was urged before the Court of Appeal that it was permissible to lead extraneous evidence to prove that the purpose of the wakf was to maintain and support the appellants. The Court of Appeal quoting from another case stated the general principle applicable to be—

> ". . . 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 ".

This is evident from the section itself. There is nothing in the present case which would justify a departure from this principle.

It was urged in the Court of Appeal that *Sheika binti Ali's* case ought not to be followed *inter alia* because the " attention of the Court was not specifically directed to, nor did the Court specifically refer to " the significance of the words " either wholly or partly " which appear twice in the first five lines of section 4 (1) (above). Their Lordships have considered those words and do not see in them any reason to alter the view, expressed in *Sheika binti Ali's* case that section 4 (1) (*a*) is not satisfied where the disposition is an absolute gift. There was no provision in *Sheika binti Ali's* case nor is there in the instant case that the gift should be used wholly or partly for " maintenance and support ". On the absolute gift created it might have been so used. But that is not sufficient to satisfy section 4 (1) (*a*). It might equally have been used wholly for a purpose totally unconnected with maintenance and support such for instance as gambling.

One further point remains. Not only has the Indian Transfer of Property Act 1882 been made applicable to Kenya but by the Kenya Civil Procedure Ordinance, cap. 5, para. 44 (1) (2), it is expressly provided that a person's right to receive future maintenance is not liable to attachment in favour of that person's creditors. In other words it would seem, if Mr. Foot's argument were accepted, inevitably to follow that the rights to shares of income given by the document of 1942 would be immune from attachment or other process for the payment of that person's creditors. Their Lordships confess to the greatest difficulty in attributing such a result to the language

chosen by the maker of this instrument; and therefore find themselves unable to take the view that, whatever be the true scope of the formula " maintenance and support " in the relevant Ordinance, it can cover gifts framed as have been the benefactions in the present case.

There is however a second ground upon which the Court of Appeal held that the Plaintiffs claim should fail—namely because (as the Court of Appeal stated) " 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*).".

It sought to follow a decision of its own in a previous case namely *Amina binti Abdulla's* case. [1954] 21 E.A.C.A. 12). In the case mentioned the Court of Appeal found some difficulty in construing the words " of any person including the family, children, descendants or kindred of the maker ". The Vice-President (Sir Newnham Worley with whom the President Sir Barclay Nihill and Justice of Appeal Briggs agreed) said

> " The contention of the plaintiff/respondent (which was accepted by the trial court) was that while this expression was admittedly clearly wide enough to cover a Wakf for the benefit of a living stranger, yet taken in its context and with due regard to the other provisions in the section, it was not intended to and does not include the children and descendants of a stranger. For the defendants/appellants it was contended that the expression ' any person ' (which of course, includes the plural) could and should be construed independently of any following words and, being given its full force and meaning, would cover not only a living stranger, but also an unborn stranger and the unborn descendants of any such person from generation to generation.
>
> " I have come to the conclusion that the learned Judge in the Court below was right in rejecting this last argument and accepting the argument of the plaintiff/respondent, although I must confess that I have not found the problem quite so easy of solution as he did. It must, I think, be conceded that the *prima facie* meaning of ' any person ' is wide enough to include, as the appellants have contended, not only a living but also an unborn person, and it must also be conceded that the insertion of these words in paragraph (*a*) of sub-section (1) of section 4 was intentional for they did not appear in that clause as published in the original Bill which appeared in the Official Gazette of the 30th January, 1951; in that Bill clause (*a*) followed the Indian and Zanzibar equivalents and whatever the purpose behind the addition of the words ' any person ' I cannot regard the method of amending the clause as wholly satisfactory and explicit ".

Their Lordships are very much of the same view as that expressed in the last sentence quoted and would suggest that at some convenient time the legislature should make clear what was intended to be enacted.

Prima facie, no doubt, the words " any person " should be taken to mean what they say and so to comprehend any person whatever, whether living or not and whether or not connected in any way with the maker of the instrument. But if this be the meaning of the words " any person ", then it must follow that all the words which immediately follow, namely, " including the family, children, descendants or kindred of the maker " are wholly tautologous. Moreover the terms of subsection (2) of the section " 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 . . ." would, on this view, not at all fit with sub-section (1) and would indeed be capricious to the point of absurdity. Upon clear and well-established principles it is necessary to construe the relevant section as a whole—particularly to construe the language of sub-section (1) (*a*) in light of, and so as to make it, if possible, consistent with subsection (2). On this view it seems to Their Lordships plain that what was intended by sub-section (2) was to save from invalidity a Wakf which conformed with sub-section (1) but was (upon

existing authorities) open to the challenge that the final " charitable " gift, expressed to take effect on the failure of the dispositions comprehended in sub-section (1), was too remote.

One construction, which has undoubtedly much to commend it, is to treat the phrase " any person including . . ." as meaning " any person of the class comprehending . . .". Sub-section (1) or (2) would then perfectly fit. But the result would be that the insertion of the words " any person " would have no practical affect whatever. Their Lordships are reluctant so to construe the sub-section and not the less so since the Courts in Kenya have treated the formula as apt to cover any living person or persons though not belonging to the class of the maker's family, children, descendants or kindred. If this view is accepted, then the formula would and should be interpreted as meaning " any living person or persons and also members of the maker's family, children, descendants and kindred even though not living ". This view has the advantage of giving sense and meaning to the words " any person " and at the same time making, for practical purposes, sub-section (2) consonant with sub-section (1).

Their Lordships find themselves, however, unable to go any further with the appellants and to treat the phrase " any person " as comprehending any person or persons whatever whether living or not. The result is that (if the view above expressed is right) in the present case the deed of 1942 must fail in any case to fall within the terms of sub-section (1) of section 4 of the Ordinance, even if their Lordships were wrong in the view they have expressed of the meaning of the words " maintenance and support ".

There is however a still further difficulty in the appellants' way. Both section 4 (1) and section 4 (2) have to be satisfied by the instrument under consideration before it can be said to be saved by the Wakf Commissioners Ordinance 1951. For the purposes of this case it is, in Their Lordships' opinion, strictly unnecessary to arrive at a final conclusion whether section 4 (1) is satisfied and for the following reason. If section 4 (1) is not satisfied the appeal would fail. But assuming that section 4 (1) is satisfied the appeal would still fail because, in Their Lordships' view, section 4 (2) is in any case not satisfied. The reasons are set out in the following paragraphs. This means that whatever view is taken of section 4 (1) the appeal fails on a consideration of the provisions of section 4 (2).

The inclusion in the wakf deed of a large number of persons specified in it who had to become extinct before the charitable purpose of the wakf was achieved was one of the reasons why the wakf deed discussed in the *Bakhshuwen* case was held to be illusory and ineffective to create a wakf. The provision for the charitable purpose was held to be too remote. This view was relaxed to some extent by section 4 (2) which provided:

> " (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.".

It is conceded (rightly in Their Lordships' view) that but for the enactment just quoted a wakf deed which made the provision made permissible by the enactment would be invalid. Section 4 (2) makes it permissible to stipulate that the " charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf ".

Whatever be the true answer to the problem created by the formula " any person including . . ." in subsection (1) of the section it cannot be in doubt that the descendants of the makers' two adopted children (who are beneficiaries under clause 3 of the Deed and to the extinction of whom, among others, the " charitable " gift in clause 6 is made dependent) are outside the formula of sub-section (2).

Their Lordships are of the view that the Statute was laying down the outer limits of the permissible range. In Their Lordships' opinion an extension of this range by the addition of persons not covered by the section is not

permissible, and the inclusion of such persons in the range specified in the wakf deed would therefore render it invalid.

In the circumstances, it is unnecessary to consider whether the two adopted daughters might fall within the word " family ". But it was urged that even if the wakf deed be regarded as invalid for the purpose for which it was created parts of it should be given effect to; for instance the part which makes a gift to the appellants, the two adopted daughters. At the beginning of the wakf deed there occur the following words. " I 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* . . ." Then follow among other things the provisions earlier set out above. Their Lordships are of the view that in such circumstances the instrument must either be effective to create a wakf in its entirety or, if no such wakf was created, the instrument is totally void. It is not permissible to ignore the words just quoted and by reference to certain passages out of their context to hold that a simple gift or settlement was created. Equally to treat the Deed as operating as a valid wakf during the respective lives of the two adopted daughters would involve an interpretation of the instrument different in respects of the interests given to the adopted daughters from that of the language appropriate to the other beneficiaries. In the circumstances their Lordships have been unable to derive from the cases cited by Mr. Foot sufficient authority for such a partial validation. Their Lordships add also that it is in any case far from clear what the effect would be of such a partial validation upon the operation of the instrument after the death of the survivor of the adopted daughters. As a matter of the construction of the language there would appear to be no justification for " advancing " clause 6 of the Deed so as to allow it to take effect on the happening of that event.

For the reasons they have given Their Lordships think that the appeal must fail. Their Lordships make no reference to section 16 and 21 of the Ordinance discussed in the judgment appealed from as Counsel intimated that no point based upon them was being made before Their Lordships.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed. In all the circumstances of this case Their Lordships are of opinion that no order should be made as regards the costs of the present appeal.

(86797) Wt. 8004/82 90 1/63 Hw.

In the Privy Council

RIZIKI BINTI ABDULLA AND ANOTHER

v.

SHARIFA BINTI MOHAMED BIN HEMED AND OTHERS

DELIVERED BY
LORD EVERSHED

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