1954
Jan. 9

SUADA HUSSEIN BEHITCH v. ATTORNEY-GENERAL

[HALLINAN, C.J., AND ZEKIA, J.]

(January 9, 1954)

SUADA HUSSEIN BEHITCH,
WIFE OF MEHMED ARIF DJEMAL, *Appellant*,

v.

THE ATTORNEY-GENERAL,
(for the Delegates of Evcaf) *Respondent.*

(*Civil Appeal No.* 4045)

Vakf—Characteristics of Meshrutah Vakf—Deed of dedication missing —Evidence—Records of Evcaf Office, Turkey—Not public document.

Certain immovable property in Nicosia was dedicated as *vakf* in the early nineteenth century by one Abdulkerim; this *vakf* was in the category *Meshrutah* which is administered by a "*mutevelli*" who holds office by inheritance; the charitable object of the dedication was to "read the Koran at fixed times and for the education of children in Nicosia". The deed of dedication could not be found, but this category of *vakf* usually provided that the surplus income from the *vakf* after paying for the charitable object should be enjoyed by the "*mutevelli*" or manager of the property appointed by the dedicator, and probably one of his descendants. The appellant claimed the right to be a "*mutevelli*" of the property as a descendant of the dedicator.

The appellant *inter alia* relied on a copy of an original memorandum of search made in the records of the Evcaf Office in Turkey. The trial Court rejected this document and held that the appellant had failed to prove any deed of dedication or her descent from Abdulkerim.

Upon appeal,

Held: that the appellant had failed to prove that she was a descendant of the dedicator.

[per HALLINAN, C.J.]: The copy of the original memorandum of search was not admissible because (1) it was not established that the information had been extracted from a record which was a public document;

(2) a copy of a public document to be admissible must be properly authenticated and the copy tendered in evidence was not so authenticated.

[per ZEKIA, J.]: The non-production of the deed of dedication would not in itself be fatal to the case of the appellant, but she must establish her relationship to the dedicator and this she had failed to do. The copy of the original memorandum was inadmissible because it was not established that it contained an extract from a public document; had that document been a public document, then the copy tendered in evidence might have been admitted.

Appeal dismissed.

Appeal by plaintiff from the judgment of the District Court of Nicosia (Action No. 1419/50) in favour of defendant.

Stelios Pavlides, Q.C., with *K. Halil* for the appellant.

Fadil Korkut for the respondent.

Judgment was delivered by the Chief Justice:

A separate judgment was also delivered by ZEKIA, J.:

HALLINAN, C.J.: In this case the plaintiff-appellant asks for an order of the Court that she be appointed to the trusteeship and management of vakf property which was dedicated in the early part of the nineteenth century by one Abdulkerim. In order to establish her claim she had to prove that under the deed of dedication the office of Mutevelli or trustee should be performed by a descendant of the dedicator; and, secondly, that the appellant was a descendant of the dedicator.

It has been submitted for the appellant that the appellant having shown that this is Meshrutah Vakf and that, after the charitable uses of the vakf have been performed, there is a surplus revenue, it follows from the ancient practice in the management of Meshrutah Vakfs that a descendant of the dedicator should be the Mutevelli.

Since I have reached the conclusion that the appellant has failed to prove her descent from the dedicator, I do not consider it necessary to decide the question whether the office of Mutevelli should or should not be filled by a descendant of the dedicator.

As I understand this case, the evidence adduced by the appellant to establish her descent is as follows: First, her own evidence; secondly, her statement of a declaration as to pedigree made by her uncle Ahmet Inayet; thirdly, a document dated the 1st September, 1929, which purports to be a copy of an original memorandum of search made in the records of the Evcaf Office in Turkey, dated the 25th August, 1926; and lastly, a letter from the Delegates of Evcaf to the Colonial Secretary dated the 21st September, 1929.

It is convenient to deal first with the document of the 1st September, 1929. This, if admissible at all, must be an authenticated copy or extract from a public document. The rule which makes the contents of public documents evidence applies to public documents of foreign origin (*Sturla* v. *Freccia*, 50 Law Journal, Chancery, p. 86). But the question here is whether the memorandum of search is an extract from a public document. The extract states that:

> "Upon researching it has been ascertained that the Trusteeship of the vakf of Abdulkerimzade ..... was conferred upon Mustafa son of Osman".

There is no evidence as to what records in the Evcaf of Turkey were searched or relied on for this information.

In my view the appellant has failed to establish that the questioned document is an extract from a public document. Furthermore, I do not consider that the questioned document is properly authenticated so as to be admissible evidence of a public document. In general, where secondary evidence of documents is admissible there are no degrees; the secondary evidence of public documents is an exception to this rule, for the document is not lost, nor is it in the hands of a party who refuses to produce it. The secondary evidence of a public document must therefore be proved to be a properly authenticated copy (See Phipson on Evidence, 9th Edition, p. 566). The manner in which copies of public documents should be authenticated is laid down in section 14 of the Evidence Act, 1851, which provides that secondary evidence of public documents must be proved by an examined copy or extract, or purport to be signed and certified as a true copy or extract by the officer in whose custody the original is entrusted. In my view even if the memorandum of the search of the Evcaf of Turkey could be considered as an authenticated extract of a public document, the copy made of this extract on the 1st September, 1929 (the questioned document) is not a properly authenticated copy or extract of a public document and is therefore on this ground also inadmissible.

In their letter of the 21st September, 1929, to the Colonial Secretary the Delegates of Evcaf, who are the virtual respondents in this case, after referring to some documents (which probably included the memorandum of search of the Evcaf of Turkey) gave it as their opinion that:

> "In the absence of the deed of dedication the position of the applicant is very difficult, but if at any time the deed of dedication was produced together with the material now adduced the applicant would have a very strong claim to the whole vakf".

The applicant referred to is Ahmet Inayet, the uncle of the appellant. The letter recommended that an *ex gratia* amount of £5 a month be paid to Ahmet Inayet. It has been submitted for the appellants that this letter constitutes an admission of Ahmet Inayet's claim and therefore of the appellant's claim also. I am unable to accept this submission. The Delegates have rightly refused to recognise Inayet's claim unless the deed of dedication is produced. The memorandum of search merely shows that Mustafa the son of Osman was appointed the first mutevelli for performing the pious objects of the vakf, but it cannot be inferred from this that this Mustafa was a descendant of the dedicator. If the deed of dedication is produced this question might be cleared up. This, I think, is a fair statement of the position taken up by the Delegates in the letter of the 21st September, 1929, and in my view it does not amount to any admission by the Delegates of the claim of Inayet or of the appellant.

In considering the evidence of the plaintiff and more especially her evidence as to declarations concerning this pedigree made by her uncle Ahmet Inayet, the trial Court appears not to have distinguished the law applicable to the primary evidence given by the appellant and the hearsay evidence she gave as to what her uncle Ahmet Inayet had told her. The trial Court in its judgment states:

> "She (the plaintiff) failed because she was unable to prove her relation with Abdulkerim further than Hussein Vechi. In cases of pedigree it is already established that the declarant's relationship must be shown aliunde and there must be some other evidence except her own evidence".

The words "the declarant's relationship must be shown aliunde" are taken from Phipson on Evidence, 9th Edition, p. 322, where it is clear that the author is discussing declarations by deceased persons. The person whose relationship to the Abdulkerim family had to be established aliunde was not the appellant but the declarant, the deceased Ahmet Inayet. In other words, it must be independently established that the deceased person was a member of the family whose pedigree is in question before hearsay statements made by such deceased person can be admitted. The trial Court in applying the statement in Phipson, appears to have thought that "the declarant" was not the deceased Inayet, but the plaintiff herself. But even if the declaration of Inayet made through the plaintiff is admitted, little weight can be attached to the evidence of the appellant and her account of what her uncle Inayet had said. It must be remembered that any statement made by Inayet to the appellant would be made when he was trying to establish his claim to the mutevelliship of this vakf. I do not consider that the evidence of the appellant or any statement by her deceased uncle made to her is sufficient without other evidence to establish her claim to be a descendant of Abdulkerim.

Order of trial Court varied only by setting aside order as to costs. No order as to costs upon appeal.

ZEKIA, J.: Plaintiff-appellant by her statement of claim in effect sought (A)(*i*) a declaration that she, together with her absentee sister Zekiye Behitch, are entitled to be registered as owners of the properties known as Abdulkerim Zadeh vakf, which consist of five shops in Nicosia described in Exhibit 2; (*ii*) injunction restraining defendant-respondent from interfering with such properties, as well as rendering accounts of the rent collected; (B) in the alternative, appellant claims that if the immovable properties involved are vakf property, the trusteeship, *i.e.* the management and administration of the said properties be given to her on the ground that she is the grandchild of deceased Fatma Hanoum Hussein, a descendant of Abdul Kerim Effendi, the dedicator. An account on oath for rents collected by respondents as

well as damages for unlawful detention of the said properties, return of account books relating to such vakf, are the additional remedies sought under the alternative claim. Counsel of the appellant in the Court below in his opening referred only to the alternative claim and apparently did not intend to proceed for part A of the claim. At any rate during the proceedings before this Court it was made clear that appellant abandoned her first claim and confined her case to the alternative claim.

Before dealing with the grounds of appeal it would be helpful if I deal with the category of vakf to which these properties belong. From exhibit 9, serial No. 3, it appears that the vakf Abdul Kerim Zadeh belongs to the category of Mulhaka Meshrutah held and administered by a trustee (mutevelli) who holds office by inheritance and not by appointment. The object of dedication is given in exhibit 10 which reads: "Bequeathed for the reading out of the Koran at fixed times and for the education of children at Nicosia". The lines we have quoted appear in a list submitted by the Ministry of the Evcaf, Constantinople, in 1879 and as it has been stated in the same page, was found to be incomplete. As the deed of dedicaton has not been traced in this case, terms contained in the deed beyond what appears in exhibits 9 and 10, in the absence of any oral evidence touching the remaining terms, can only be inferred from the nature of the vakf and from custom prevailing in such vakfs. There was no evidence as to how the surplus of the revenue in this vakf was utilised. That there was a surplus is admitted by defendants-respondents. Evidence was also lacking as to any existing custom for the disposition of the surplus after the known provisions had been carried out and subsidized. A meshrutah vakf is one of which the surplus revenue goes for the benefit of the heirs. In other words it is a charge on a property for a certain religious purpose and it is administered by a trustee who is usually the owner or one of his descendants. In modern times it has been the practice to dedicate properties primarily for the benefit of descendants and ancillarily for certain pious objects. As the validity of the dedication depended greatly on making some provision for a pious object in such deed some provision of insignificant value was being made in the deeds of vakf made in modern times. The present vakf, however, has made substantial provision for the education of children and it is difficult to say that the object of the dedicator in this particular case was primarily to help his descendants. However, the trustee (beneficiary) was to have the surplus of the revenue and from the evidence in this case there was a surplus of a significant amount for the mutevelli. The fact that the vakf in question is of Meshrutah category administered by a mutevelli who holds office by virtue of inheritance, strongly suggests that the vakf in question made a provision for the surplus of the revenue in favour of the mutevelli who very likely was a descendant of the dedicator.

Now, therefore, it was a material point in this case to decide whether the appellant was one of the descendants of the vakf, the dedicator.

The trial Court found that the appellant failed to prove her alleged relationship with Abdul Kerim and that she also failed to prove any deed of dedication.

We now come to the grounds of appeal.

Ground (1): It is alleged that the trial Court misdirected itself by taking a wrong view of the law relating to the establishment of one's pedigree. In the judgment it appears: "In cases of pedigree it is already established that the declarant's relationship must be shown aliunde and there must be other evidence except her own evidence, and her own evidence does not carry her further than Vechi". As the record stands the Court either treated the claimant as declarant or confused claimant's evidence given in order to establish the fact that deceased declarant (uncle) made the alleged statement (for which no legal corroboration is required), with evidence required aliunde to establish the declarant's relationship to the ancestor, in this case the dedicator. Here Ahmed Inayet, uncle of the appellant, was the deceased declarant and it was competent for the plaintiff-claimant to give evidence as to what her deceased uncle stated and the Court could legally accept her evidence on this point without corroboration. But in pedigree cases it is essential that the statement of the declarant should be corroborated aliunde; in other words, the statement of deceased uncle Inayet that he was a descendant of dedicator Abdul Kerim had to be supported by some other evidence.

This misdirection, however, for reasons I propose to give later, is not sufficient either to set aside judgment or to remit this case for retrial.

Ground (2) is that the Court was wrong in law in rejecting a record from the Turkish Republic which was in the custody of the respondents. This Court, for the purpose of deciding whether or not the document in question was rightly rejected and acting under section 4, sub-section (5) of the Evidence Law (Cap. 15), inspected the document which is Blue 13. This document appears to be a copy of a certified memorandum of search issued from the office of Director General of Evcaf of the Turkish Republic dated 25th August, 1926, stating the result of a search made into the mutevelliship of the same vakf. This copy was as it appears in it prepared by an official of the respondent Evcaf and very likely the original was handed back to the said Ahmed Inayet. The Evcaf Office kept the copy in question in their file, and indeed reference is made to this document in the correspondence, relating to this vakf, between the Evcaf Office and the Colonial Secretary. It appears also that the presentation

of this certified memorandum together with the mukhtar's certificate and a copy of ilam (exhibit 1) by Ahmed Inayet to the Evcaf Office, prompted the Delegate of Evcaf to recommend to His Excellency for approval of a grant out of the revenue of this vakf, as an act of grace, the payment of a monthly salary of £5, then increased to £7, payable during his life time to the said Ahmed Inayet, uncle of the appellant.

The trial Court rejected this document on the ground that it was a copy of a copy. There is no doubt that the Court was wrong in rejecting the document on this ground because the missing original document was not a copy but a certified memorandum of search recording the result of a search carried out in the office of the Director General of Evcaf, Turkey, and as such an original document. The copy having been made by defendants' officer and kept in their file, after adequate explanation for the non-production of the original, it might have been accepted had the original document been admissible in evidence. Moreover a copy of a copy is admissible where copies are admissible, provided the first copy was compared with the original.

Now, was this certified memorandum admissible at all? The document does not disclose the source from which the facts contained therein have been collected. It does not purport to be an extract of any record or entry kept under Evcaf Laws and Regulations for the registration of Vakfieh (deed). Neither does it appear to be a copy of a document either public or judicial which could be admitted as documentary evidence. The rejected document as I said records the result of a search made, but whether that result was arrived at by examining admissible or inadmissible records or documents is by no means clear. Unless there is a statutory provision to admit certificates of this character, and to my knowledge none exists, such a document is inadmissible in any legal proceedings. Had this certified memorandum purported to be an extract of an Evcaf register kept under a provision of a law in connection with the registration of deeds of dedication made while the Island was under Ottoman Occupation or satisfied the requirements for its being admitted as a public or judicial document then its admissibility could not easily be questioned. But this is not the case. It has been argued whether it could not be accepted as a piece of a continuous record or as an ancient document. A simple reading of section 4 of Cap. 15 shows how untenable these suggestions are.

The Court was therefore right in my view in rejecting the document is question.

There still remains a significant point to be considered. It has also been pointed out that the Evcaf Office received this document and acted upon it. I think exhibit 4 supports

this contention. See paragraphs 2 and 5 of exhibit 4 (Letter addressed to the Colonial Secretary by the Delegates of Evcaf). Let us assume that respondents are legally bound by what they appear to have admitted in exhibit 4. Then it is relevant to examine as to what in fact they admitted. The effect and extent of their admission appears in para. 5 of exhibit 4 which reads:

> "In the absence of the deed of dedication the position of the applicant is very difficult; but if at any time the deed of dedication were produced together with the material now adduced the applicant would have a very strong claim to the whole vakf".

Are we to infer from this that if the deed of dedication was traced regardless of its contents the claimant would have had a perfect case to support his claim? I am sure this could not have been the purport of this paragraph. That there was a deed of dedication could not be disputed, because without such a deed it was very unlikely for this vakf to exist; strictly speaking a vakf could in old days be created without deed. But this was of rare occurrence. But if the deed was traced one would expect to find in it the name of the first mutevelli given and described as descendant (the case was very likely to be so but not necessarily because the dedicator might indicate a mutevelli other than his descendant) and this might naturally support or destroy the case of the claimant who alleges relationship to the dedicator. It could not reasonably be inferred from paragraph 5 of exhibit 4 that defendants admitted Ahmed Inayet, uncle of appellant, as being a descendant of the dedicator Abdul Kerim, and what was left for the legal recognition of his rights was the mere production of a deed. I think what they meant by the said paragraph was that claimant would have had a strong claim if the deed of dedication could be traced and it was found to contain name and description of the first mutevelli which was the same as the one given by deceased claimant in his genealogical table.

Ground (3): The allegation that the Court below was wrong in finding that Article 423 of the Evcaf Law had no application in the present case was also correct. Article 423 relates to a simple matter, namely, that a person who wants to prove his pedigree to a dedicator should either give the whole line of descent or be able to establish his relationship to a descendant of the dedicator who is already admitted or proved to be so. I think, however, that this misconstruction of the Article did not affect the result. Furthermore it is highly questionable whether this Article is operative any longer because it deals with rules of evidence and matters relating to such rules in Ottoman legislation have been superseded by English Rules of Evidence long ago.

Ground (4): Failure to prove deed of dedication would not in itself be fatal to the case of the appellant, because there is sufficient material and information about the details

of the said vakf, and a reasonable inference might be drawn that the said deed had a provision for the surplus in favour of a descendant; but as there is no sufficient evidence to establish the relationship of the appellant to the vakf, the dedicator, the line taken by the Court although incorrect did not prejudice the appellant.

It may further be added that Ahmed Inayet, the declarant, was himself interested in the vakf in question when he made his declaration or statements, and this fact also, if it did not render his statements, altogether unacceptable, detracts a lot from their weight. At the inception of the British occupation in 1880 the name of Shoukri Effendi is given as a mutevelli by inheritance to the vakf in question (see exhibit 9). Exhibit 9 is a tabular list contaning vital information concerning Mulhaka vakfs prepared after an official enquiry by a committee appointed by the Governor in 1880. It is significant that this name does not appear in the line of ancestry given by appellant. It has been argued that this Shoukri Effendi might be holding the office of mutevelli as "kaimakam" substitute as provided by Article 288 in Law of Evcaf by Omer Hilmi. If such was the case one would expect exhibit 9 to describe Shoukri as such and also to indicate him under the column headed "How does Trustee take" as holding office by appointment and not by inheritance as it had actually been recorded. A substitute (*locum tenens*) is appointed by Court when the office of mutevelli is vacant and the person entitled to the office is minor. He holds office only by appointment.

I agree, therefore, that the appeal should be dismissed without costs here and below.