

UGANDA / JUDGMENT

Ganyuma v Mohamed (C.A. 27/1927.)

[1927] EACA 48 (1 January 1927)

[1927] EACA 48**COURT**

East African Court of Appeal

BEFOREGriffin C.J. (Uganda),, Guthrie-Smith, J. (Uganda),
Russell CJ**CASE / FILE NUMBER**

C.A. 27/1927.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR CHARLES GRIFFIN, C. J. (Uganda); SIR ALISON RUSSELL, C. J. (Tanganyika);
GUTHRIE-SMITH, J. (Uganda).

ALI GANYUMA (Appellant) (Original Respondent) ø.**ALI MOHAMED (Respondent) (Original Appellant). C. A. \$27/1927\$.**

Section 4 of the Mohammedan Marriage Divorce and Succession Ordinance, 1920—devolution of property of a member of the Wa-Digo tribe who was a Mohammedan.

Held: -That Mohammedan Law applies and the estate descends patrilineally.

\$C.\$ \$B.\$ Patel for appellant.

Agard for respondent.

SIR CHARLES GRIFFIN, C. J.-In this appeal the question for decision is whether the estate of a deceased member of the Wa-Digo tribe, who was a Mahommedan, descends in accordance with Mahommedan law or in accordance with the customary law of the Wa-Digo tribe. Descent according to Mahommedan law is. patrilineal; according to Wa-Digo customary law is matrilineal.

The suit was first heard and decided by a native tribunal which decided that the estate descended by Wa-Digo custom, that is, matrilineally. There was an appeal to a British Court the Second Class District Court at Kwale—and before that Court an attempt was made to prove that in the clan of the Wa-Digo tribe to which the deceased belonged the customary law of inheritance was patrilineal. The Court decided against this contention and basing its Judgment on a decision of

the High Court of Kenya (*Benjawa Jembe v. Priscilla Nyondo*-4 E. A. L. R., p. 160)—held that the inheritance was governed by tribal custom, that the estate descended matrilineally, and accordingly upheld the decision of the native tribunal. From this Judgment there was an appeal to the Supreme Court of Kenya (His Honour MR. JUSTICE STEPHENS). The Judgment is a short one It is as follows: $\rightarrow$

"This is an appeal from the District Commissioner of Kwale on the question whether the property of a native of the Wa-Digo tribe, who is a Mahommedan, should on his decease be distributed according to the rules of Mahommedan Law or according to the rules of Native Law and Custom. He referred to the case of *Benjawa Jembe v. Priscilla*

Nyondo (4 E. A. L. R. 160) in which it was held by BARTH, J. (now SIR JACOB BARTH), succession to a Native Christian's estate follows the law of the tribe to which such Christian Native belongs. BARTH, J., says: 'The law of succession' applied to this Protectorate is the Indian Succession Act, vide East African Order in Council, 1897, Article 11, but that law does not apply to natives, vide the Application to Natives of Indian Acts Ordinance, 1903. The fact that the deceased married a wife according to the rites of the Anglican Church does not, since the repeal of section 39 of the East Africa Marriage Ordinance, 1902, by section 9 of the Native Christian Marriage Ordinance, 1904, in my opinion, affect the succession to his property. Such succession must be regulated by native law or custom'. But it is because the Indian Succession Act does not apply to natives that the only law that can be applied is the law and custom of the deceased native's tribe. But where natives are Mahommedans the Mahommedan Law, in my opinion, applies to them.

I therefore allow the appeal with costs both here and in the Court below."

This statement of the law is, if one considers the stream of Indian and Privy Council decisions, not merely too wide; it is in direct conflict with those decisions. The Judgment, however, can be supported on the provisions of a special Kenya enactment. the Mahommedan Divorce and Succession Ordinance, enacted in 1920. Section 4 of that Ordinance is as follows:—

"Where any person contracts a marriage or, being a male, contracts marriages, in accordance with Mahommedan law, whether such marriage or marriages shall have been contracted either prior or subsequently to the commencement of this Ordinance, and such person dies after the commencement of this Ordinance, and where the issue of any such marriage or marriages dies after the commencement of this Ordinance, the law of succession applicable to the property both movable and immovable of any such person shall be in accordance with the principles of Mahommedan law, any provision of any Ordinance or rule of law to the contrary notwithstanding: Provided that where in any sect of Mahommedans to which the deceased belonged the law of succession differs from the ordinary law of succession in accordance with the ordinary principles of Mahommedan law then the law of succession applicable to such sect shall apply."

The effect of that section on the question of succession before this Court is, in my opinion, that Mahommedan law applies and the estate descends patrilineally. As the Wa-Digo are a tribe and not a sect, the proviso at the end of the section which

is limited to sects does not take cases of the succession to estates of Mahommedan members of the tribe out of the general provision contained in the section. It is curious to note that throughout the whole of the proceedings in the Lower Courts, no reference has been made to the Mahommedan Divorce and Succession Ordinance, which governs the case.

The appeal is dismissed, costs here and in the Courts below to be borne by the estate.

SIR ALISON RUSSELL, C. J.—I agree.

GUTHRIE-SMITH, J.—I agree.

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