JUDGES INTERPRETATION IN THE INHERITANCE CASE No.783/Pdt.G/2014/PA.Gs. ABOUT DOUBLE CERTIFICATE OF LAND PROPERTY IN *MASLAHAH MURSALAH* PERSPECTIVE

Thesis

By:

Achmad Hadi Prawiro Negoro

NIM 12210015

AL-AHWAL AL-SYAKHSHIYYAH DEPARTMENT

SHARIA FACULTY

MAULANA MALIK IBRAHIM

STATE ISLAMIC UNIVERSITY MALANG

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STATEMENT OF THE AUNTENTICITY

In the name of Allah (swt),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

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Malang, 26th of April 2017

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The supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Thesis Board of Examiners.

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MOTTO

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَى وَيَنْهَى عَنِ

الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُون

Indeed, Allah orders justice and good coduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.

ACKNOWLEDGMENT

*Alhamd li Allâhi Rabb al-'Âlamîn, lâ Hawl walâ Quwwat illâ bi Allâh al-'Âliyy al-'Âdhîm,*with all of His grace, mercy and guidance the thesis entitled **Judges Interpretation In The Inheritance Case No.783/Pdt.G/2014/Pa.Gs. About Double Certificate Of Land Property *Maslahah Mursalah* Perspective** can be done very well. *Wasshâlâtu was salâm 'ala Rasulillah*, for his teachings that taught us to live in the world, led our way from the darkness to the light in this life. May we are become one of those who will has his *syafaat* in the Judgment day.

With all of the support, effort, help, guidance, briefing, and discussion of various parties in the process of writing this thesis, the writer with his great humility expressed his thanks infinitely to:

1. Prof. Dr. H. Mudjia Rahardjo, M.Si, as the Rector of State Islamic University of Maulana Malik Ibrahim Malang.
2. Dr. H. Roibin, M.H.I, the Dean of Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang, an also as lecturer guardian for guiding the writer in any academic processes while studying in Sharia Faculty. Many thanks are expressed for everything he has provided to the writer in guidance, advice, and motivation.
3. Dr. Sudirman. M.A., as the Head of Al-Ahwal Al-Syakhshiyyah Department of Sharia Faculty in State Islamic University of Maulana Malik Ibrahim Malang.
4. Dr. Zaenul Mahmudi, MA., as the supervisor in writing this thesis. Thanks for all time has been given to me for guidance, briefing, and motivation in completing this thesis.
5. Dr. Hj. Tutik Hamidah, M.Ag as faculty trustee during the author's course of study in the Al-Ahwal Al-Syakhshiyyah Department of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim, Malang.
6. All lecturers for their sincere and dedicated teaching and supevisory efforts. May Allah (swt) shower them with His blessings.

7. Staffs, and Employees of Sharia Faculty of Maulana Malik Ibrahim State Islamic University of Malang for participating in the completion of this thesis.
8. All my teachers from small until now without expection, in particular to all the Lectures of the Syariah Faculty which has been to educate, guide, teach and shed knowledge and experiences to the author.
9. And the unforgettable, the writter's beloved Father "H. Nur Komari," and beloved mother "Hj. Prasetyo Rita Dewi", my sister "Rahmatul Hasanah", " Afifah" , in this occasion, i would like like to thank for all du'a, support, advice, guidance, and scifice which has given to me during this thesis. Million thanks to Almighty God, Allah SWT. Who has given me parent who have always struggle, support, love and pray for me. Now, this time foe me to be mture individual, on the other hand, my parent goes older. My wish that i could give a happiness and pride to them.
10. Thanks to the dear Qonita Sholihatul Bustani and Fahrudin Firmansyah are full patience to accompany my days during this time, accepted all the shortcomings that I have and teach the real meaning of manhood, thank you too have become my friends, thanks for the support and prayers.
11. The writter's beloved KH. Imam Mslimin and Mom Chusnul Chaidarah and family and people Pesma Anshofa, provide support as well as teach the real meaning of life, thank you for the time you guys so that I can complete this thesis as well as learning to become tough.
12. The writter's beloved family of International Class Program of 2012, Chandra Irawan, Robert Amrullah, Zahrotul Jannah, Aisya Rahmaini, Nur Hadi, Nur Hamida, Ahmad Rizza Habibi, Agus Hariadi, Vivid Fatiyah Anwar, Fitrotin Najiyah, Nurunnisaul, Moh Syahroni, Ahsanut Taqwim, Ahsanur Roziqin and Muhammad Iqbal.
13. The writter's beloved friends of Al-Ahwal Al-Syahshiyyah 2012.
14. All parties who helped this thesis

Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia State Islamic University of Maulana Malik Ibrahim

Malang, it will benefit all readers and the author himself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far from perfection, the author appreciates constructive critism and suggestions for the improvement and betterment of this thesis.

Malang, 26th of April 2017
Author,

Achmad Hadi Pawiro Negoro
NIM 12210015

TRANSLITERATION GUIDENCE

A. Consonant

Arab	Latin	Arab	Latin
أ	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	‘
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H
ش	Sy	ء	‘
ص	Sh	ي	Y
ض	Dl		

B. Vocal, long-pronounce and diphthong

Vocal *fathah* = A

Vocal *kasrah* = I

Vocal *dlommah* = U

Long-vocal (a) =	A	e.g.	قال	become	Qala
Long-vocal (i) =	I	e.g.	قيل	become	Qila
Long-vocal (u) =	U	e.g.	دون	become	Duna
Diphthong (aw) =	و	e.g.	قول	become	Qawlun
Diphthong (ay) =	ي	e.g.	خير	become	Khayrun

C. **Ta' marbûthah (ة)**

Ta' marbûthah transliterated as "*t*" in the middle of word, but if *Ta' marbûthah* in the end of word, it transliterated as "h" e.g. السنة become *al-sunnah* and the word حقوقالنسانيةالضرورية become *huquq al-insaniyah al-dharuriyyah*, or in the standing among two words that in the form of *mudlaf* and *mudlaf ilayh*, it transliterated as *t* and connected to the next word, e.g. فىرحمةالله become *fi rahmatillâh*.

D. **Auxiliary Verb dan Lafdh al-Jalâlah**

Auxiliary verb "al" (ال) written with lowercase form, except if it located it the first position, and "al" in lafadh jalâlah which located in the middle of two word or being or become *idhafah*, it remove from writing.

a. Al-Imâm al-Bukhâriy said …

b. Wahmah al-Zuhailiy said….

c. Al-Bukhâriy in muqaddimah of his book said …

ABSTRAK

Achmad Hadi Prawiro Negoro, NIM 12210015, 2017. Pertimbangan Hakim dalam Memutuskan Dua Sertifikat pada Putusan Kasus waris No. 783/Pdt.G/2014/PA.Gs. Perpektif *Maslahah Mursalah*. skripsi.Jurusan Al-Ahwal Al-Syakhshiyyah Fakultas Syari'ah Universitas Islam Negeri Maulan Malik Ibrahim Malang. Pembimbing : Dr. Zaenul Mahmudi, MA

Kata Kunci : Double Sertifikat, Pembagian Waris, *Maslahah Mursalah.*

Tanah merupakan aset yang sangat penting dan bisa dikelola dengan berbagai macam cara, mulai dengan bentuk usaha, tempat tinggal, apartemen, kos, kontrakan, villa dll. Karena fungsinya yang banyak serta harga jual tanah yang tidak akan turun, serta bertambahnya jumlah manusia maka sering terjadi perebutan tanah, jika terdapat alat/surat bukti kepemilikan tanah sehrusnya sudah jelas kepemilikan tanah tersebut, namun ada saja pihak yang mampu memalsukan sertifikat, seperti salah satunya terdapat pada Pengadilan Agama Gresik, dalam kasus ini pembagian harta warisan, seharusnya telah di bagi waris kepada ahli waris yang berhak, namun harta warisan tersebut tidak dibagikan oleh salah satu ahli waris kepada yang lain dengan dalil pemberian hibah, maka ahli waris yang tidak mendapatkan warisan tersebut menggugatnya ke Pengadilan, saat pembuktian terdapat dua sertifikat yang sama dalam satu tempat, milik penggugat masih bernama pewaris sedangkan milik tergugat sudah berubah nama menjadi milik tergugat, maka dalam hal ini perlu diadakan penyelidikan lebih lanjut mengenai kebenaran double sertifikat tersebut.

Dalam penelitian ini, penulis merumuskan beberapa masalah, yaitu : Bagaimana pertimbangan hakim dalam menerapkan Putusan No. 783/Pdt.G/2014/PA.Gs. atas kasus waris tentang double sertifikat dalam satu tempat? Dan Bagaimana pertimbangan hakim dalam menerapkan Putusan No. 783/Pdt.G/2014/PA.Gs. atas kasus waris tentang double sertifikat dalam satu tempat perspektif *Maslahah Mursalah?*

Penelitian ini tergolong penelitian empiris yang menggunakan metode pendekatan yuridis sosiologis, sumber data penelitian ini diperoleh dari wawancara langsung kepada para hakim Pengadilan Agama sebagai data primer, serta dari Putusan Pengadilan Agama Gresik dan literatur yang sesuai dengan tema sebagai data sekunder.

Hasil dari penelitian tersebut, para hakim PA Gresik tidak membenarkan adanya double sertifikat, maka harus dilakukan pembuktian secara lengkap. Setelah dilakukannya pembuktian, penggalian hukum dan dilanjutkan dengan putusan, maka para hakim memenagkan penggugat dan menghukum tergugat karena terbukti melakukan kecurangan. Maslahah pada putusan tersebut yaitu masing-masing ahli waris mendapat bagiannya secara adil, dan memberikan efek pelajaran terhadap penggugat terlebih kepada tergugat dan kepada masalah seperti ini untuk selanjutnya jika terulang kembali.

ABSTRACT

Achmad Hadi Prawiro Negoro, NIM 12210015, 2017. Judges Interpretation In The Inheritance Case 783/Pdt.G/2014/PA.Gs. About Double Certificate Of Land Property In *Maslahah Mursalah* Perspective Thesis. Major of Al-Ahwal Al-Syakhshiyyah. Faculty of Sharia. State University of Maulana Malik Ibrahim Malang. Advisor: Dr. Zaenul Mahmudi, MA

Keywords: Double Certificate, Inheritance Sharing, *Maslahah Mursalah.*

Land is one of important assets which could be managed in various different ways, in the form of labor, house, apartment, boarder house, rented house, villa, and in many other forms. Since, it has a lot of functions and it costs high with no loss possibility as well. Nowadays, some people fight and prosecute land proprietary with other, if an instrument is found in the form of evidence of proprietary right receipt, it is clear enough to claim whom the proprietary of land belongs to. However, like the case in Religion Court of Gresik, where the inheritance had been shared to the all deserved inheritors except one inheritor. Therefore, one who might feel suffering from this case decided to propose this lawsuit to the court, both of them showed their certificate as well as witness. In this case found two similar certificates of a similar place, the certificate belonged to the prosecutor was for the name of inheritant, whereas the certificate of the prosecuted party was for the name of himself. To solve this case, it needs to conduct further investigation relates to the truth of both certificates.

Within this research, the researcher formulates several research problems: 1) How does the judge take consideration of solving the double certificates case within a single place on the inheritance case 783/Pdt.G/2014/PA.Gs in Religious Court in Gresik? and 2) How does the judge take consideration of solving the double certificates case within a single place on the inheritance case 783/Pdt.G/2014/PA.Gs in Religious Court in Gresik according to the perspective of *Maslahah Mursalah*?

This research is categorized into empirical research which uses method of juridical sociological approach. As for, the data of research is collected from the live interviews to the judges of religion court as primary data, as well as from the verdict taken in the religion court of Gresik and some related literature as secondary data.

The result indicates that, the judges of Religion Court of Gresik do not confirm the double certificate, then it must be done a proof complete. After it has done the proof, the excavation law and the decision by judges, the judicial decisions accept a plaintiff's lawsuit and punish defendant because he is lying before the law. The judicial decision on *maslahah* perspective, all the heirs have their share fairly. It is giving moral lesson to the plaintiff, the defendant and the problem as mentioned if it is happened again.

ملخص البحث

أحمد هادي فراويرا نجارا، رقم القيد 12210015, 2017. مناهج اجتهاد القاضي في اتخاذ القرار على الشهادتين في قضاء مسالة الإرث رقم PA.Gs/2014/ Pdt.G/783 . عند نظرية المصلحة المرسلة (الدراسة الحالية في المحكمة الشرعية جريسيك). شعبة الأحوال الشخصية, كلية الشريعة, جامعة مولانا مالك إبراهيم الحكومية الإسلامية مالانج. المشرف: الدكتور زين المحمود الماجستير.

الكلمات الرئيسة: الشهادتين، تقسيم الميراث.

الأرض هي أصل مهم جداً ويمكن أن تدار بمتنوع الطريق المختلفة، من الأعمال التجارية، والمسكنة، والشقق، والمأوى و البيت المستأجر و غير ذلك. بكون وظائفها الكثيرة، و ثمنها التي لم تمكن أن تنحط، و كذلك بإزداد عدد البشر، يسببون كل ذلك غالباً الى الاستيلاء على الأرض، و يكون تلك الإستيلاء كثيرا في المجتمع. ولكن إذا كان هناك الشهادة على ملكية الأرض قد وضح حق التمليك، ولكن هناك أولئك الذين يزوفون الشهادات التي قد ظهرت أصحابها، ومثل ذلك كما وقعت في المحكمة الشرعية جريسيك، وهذا الحال حول تقسيم الميراث التي تلك الميراث كانت تنبغي أن تُقسم قانونيا الى أهل ألوارث بحكم الإرث، و لكن تلك الميراث لا يقسمها احد أهل الإرث الى أهل الوارث ألآخر بظنه على أن تلك الميراث هبة له ، حتى إدعى عليه أهل الوارث الذي لا يوجد التقسيم إلى المحكمة الشرعية، حتى يقدمان الأدلة من الشهادة و الشهود. وعند وقت تقديم الأدلة هناك شهادتين في نفس المكان، وتنتمي إلى المدعي مازال اسمها اسم الوارث وبينما المدعي عليهم قد أصبحت ملكا للمدعي عليهم، ثم في هذه المسألة تحتاج إلى التحقيق فيما يتعلق بالشهادة المزدوجة.

وضع المؤلفون بعض المشاكل في هذا البحث، وهي: ما نظر القضاض في تطبيق الحكم رقم 783/ PA.Gs/2014/Pdt.G على مسألة الورثة من شهادة مزدوجة في مكان واحد؟ وما نظر القضاض في تطبيق الحكم PA.Gs/2014/ Pdt.G/783 . على مسألة الورثة من شهادة مزدوجة في مكان واحد عند مفهوم المصلحة المرسلة؟

نوع البحث المستخدم في هذا البحث هو البحث التجريبي الذي يستخدم الى منهج علم الاجتماع القانوني، وأساليب المنهج المستخدمة في جمع البيانات لهذا البحث هي مصادر البيانات البحثية من مقابلات مباشرة لقضاض المحكمة الشرعية كالبيانات الأولية، وكذلك من الحكم في المحكمة الشرعية في جريسيك والكتب التي تناسب مع الموضوع كبيانات ثانوية.

الحاصل من ذلك التفتيش, لا يحقق الحكام من الحكمة الدينية كريسك وجود شهادتين, فيحتاج اداء الاثبات كاملا. و بعد ادئها, استنباط الحكم ثم الى الاثبات, فيلغب الحاكم على المدع ويحم المدعى لانه يقررعامل الغش. المصلحة على ذلك الاثبات انه كل اهل الورث ينالون نصيبهم عادلا ويؤثر اثرا على المدعي بل على المدعى والى المسئلة لما يليها اذا احدث مرة اخرى.

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CHAPTER I

INTRODUCTION

A. Background of Research

A land is a mercy and gift from Allah SWT which is deliberately created for all creatures' living. The case of land becomes significant in human's living and regarded as a long term asset that could be managed by the owner covering several different concepts. Several concepts of land right and proprietary right should also completed by the existence of evidence which asserts that the land is owned.

The evidence of propriety right in national administrative law is established in the form of certificate. A certificate is considered as written

document established or published by National Land Authority[1], as right evidence and one of means for fulfilling pre-requirement of land registration. If the certificate is considered as a formal document as well as written evidence of land right, then it indicates the existence of legal entity who manage the land certificate, have authority and right on every piece of land. Within 23rd and 24th code of PP 24 year 1997 about the land registration refers that law construction which requires certain evidences which could be used to prosecute the state about the right of land people owned.

As it is well known within the concept of civil law which discusses about the proprietary right of land also the law of proprietary in real, in order to be acknowledged, valued, honored, and could not be intruded or claimed by anyone. The proprietary right then becomes source of life for the land owner. Therefore, people who already have legal right according to the law should get protection from the state.

Most Indonesian citizen have known the law of inheritance sharing, which would be shared after someone is died. However, some of them are still not capable enough to differentiate between inheritance, grant *(hibah)*, and testament. They think that wealth given by someone to them before he dies is already their right to own.

Actually, this matter still needs further consideration and calculation about the inheritance they might get. If a died person still has a wife, son or daughter, and siblings. Then, the inheritance from that died person would be shared fairly to

[1] Peraturan Pemerintah Nomor 24 tahun 1997

the inheritor according the legal law. But, not all Indonesian citizens know about this rule. Most of them still apply grant or testament principle without a fair share to those inheritors who actually deserve to receive it. By the evidence that the inheritance is not shared fairly, it then impacts negatively to the relationship among related families.

Based on the recent situation, nowadays there are a lot of lawsuits in the matter of land. This situation demand a maximal and professional role from the Land Authority Officials which do not explicitly practice any exact rules which regulate time restriction to arrange the legal registration of land owned and if there are any mistakes during the implementation process of land legal registration in the Land Officials.

This actually relates to the land certificate itself, which means: providing rule of law concerning to the human rights in both individually and corporately. The certificate means the strong evidence which shows the exact rule of law printed in that certificate, and this certificate should be handled by the genuine right holders.

If someday happens any lawsuit of land which refers to the inheritance sharing, while that person is Islam[2], then, this matter could be proposed to a religious court. The religious court is counted in the absolute authority of religious court.[3] There are a lot of things to settle down in order to attain justice.

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[2]Sudikno Mertokusumo, *Hukum dan Politik Agraria*, (Jakarta: Karunika Universitas Terbuka, 1988), h. 445.

[3] M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama Undang-Undang Nomor 7 Tahun 1989*, (Jakarta: PT. Garuda Metropolitan Press, 1993, 2013), h. 213.

Therefore, the religious court needs to have evidence by investigating and calling any related witnesses, collecting some related files needed to help processing in the case submission, having premise and oath from the lawsuit side.

Therefore, the researcher takes one of the land lawsuits in the Religious Court in Gresik on case: 783/Pdt.G/2014/PA.Gs. This case related to the proprietary of inheritance rights which was being disputed. Within the case 783/Pdt.G/2014/PA.Gs, the judge clarified that the certificate of proprietary right 75th of Banjarsari Village Manyar Sub district Gresik Regency, at one's request named H. Abdul Aziz who was acknowledged that the land certificate of him was granted to H. Abdul Rouf as a defendant side who did not have any legal force as well as acknowledgement from the litigant side, H. Moh. Wafiq Aziz and H. Nur Syafi'I bin Wasil who declared that they did not get any inheritance share and there were still no any grants to anyone. Within this case, the writer found two certificates which each were owned by each lawsuit side that was able to strengthen each premise in front of the judge. According to this case, the researcher attempts to work through the methods used by the judge in taking decision of the case and also to underline the justice which should always be applied in the court.

B. Statement of Problems

Based on the validity of the controversy over the land certificate of inheritance cases above, this research provides the answers with formulation of the problem as follows:

1. How did the judge solve the problem of double certificates within a single place on the inheritance case 783/Pdt.G/2014/PA.Gs in Religious Court in Gresik?
2. How is the judge consideration viewed from the perspective of *Maslahah Mursalah*?

C. Objective of Research

Based on the research problems declared above, the objective of research are as follows:

1. To identify the judge's consideration in solving the double certificates case within a single place on the inheritance case 783/Pdt.G/2014/PA.Gs in Religious Court in Gresik.
2. To clarify the judge's consideration in solving the double certificates case within a single place on the inheritance case 783/Pdt.G/2014/PA.Gs in Religious Court in Gresik in the perspective of *Maslahah Mursalah*.

D. Significance of Research

Based on the objectives of research, it is hoped this research can provide benefits in both theoretical as well as practical. This research is conducted as a framework to expand the scientific knowladge in community. As for, the significant of research are follows:

1. Theoretical

   Hopefully, this research could provide theoretical contribution in the scientific knowledge in general and in particular about the double

certificates case in single place and be able to add valuable knowledge of *Al-Ahwal As-Syakhshiyyah* relates to the implementation of adjudication of religious court in Gresik on the inheritance sharing case that has double certificates in single place (case study in the religious court in Gresik).

2. Practical

   This research could be beneficial as further scientific knowledge for other researchers to contribute actively in the society's life. Also, this research is also able to give understanding to the civil society that state has a law effort which should be arrange in order to clarify inheritance sharing according to the existed law. Furthermore, this research could be a reference in solving cases related to this matter.

E. Discussion Structure

This research exerts systematic discussion consisting of five chapters which is covering several principles of discussion and sub-principles of discussion refer to the problems taken by the researcher. As for, the systematic discussion of this research as follows.

Chapter I introduction, the introduction is divided into some sub-chapters as follow: First, research background, which explains several reasons of taking the title of research; Second, research problems, which determines the principles of problems taken in the research; Third, research objectives; Fourth, research significances; Fifth, systematic discussion, which explains the discussion of research in general.

Chapter II review of related literature, the review of related literature contains sub-chapters of previous literatures as theoretical frameworks used in this research to analyze the data obtained from the research findings. Besides, this review of related literature is also exerted in order to be reference relating to the findings and discussion. Since, in this chapter, the researcher mentions several citations from the books, articles, journals, and many other sources to help understanding the research. The review of related literature consists of: *First*, explanation about the definition of certificates, according to both *Fiqh* perspective and law; *Second*, explanation about some matters relates to the authorities of religious court; *Third*, explanation about the area of land right; *Fourth*, explanation about several things which usually could have proprietary right; *Fifth*, explanation about inheritance; and *Sixth*, explanation about the limitations of judge's authority.

Chapter III research methods, In the research methods, the researcher outlines the Type of Reseach, research approach, research location, data and source type, data collection method, and data analysis method.

Chapter IV research findings and discussion, int this chapter analyzes the data concerning to the process of judge in considering the verdict or decision taken in the court relates to the inheritance case of double certificates in single place (case study in Religious Court in Gresik). In short, this chapter will be a part where the researcher analyzes and clarifies the problems of research.

Chapter V conclusion, in this chapter contains concluding remarks and suggestions. The conclusion of research means general remark summarized by the

researcher from the research findings and discussion in a brief and clear statement. Also, the conclusion is regarded as the answers of research problems in this research.

F. Technical Terms

To get a brief and clear highlight about this research, the researcher mentions several important points, so there will be no any misunderstandings and mistakes in understanding the findings of this research. The important key terms that are used repeatedly within this research are mentioned as follow:

1. **Authorities of Religious Court:**

   The authorities of religious court are to have duty and authority to investigate, decide, and solve the cases in the first level among Islamic society.[4]

2. **Double Certificates:**

   The existence of two or more certificates where the data object could be fully the same, but the subject data could be the same of different.[5]

3. **Definition of Judge**

   It means the judge on judicature corporate in all judicature domains which is under the authority of Supreme Court and judge court.[6]

[4] Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: CV. Rajawali,1992), h. 25.
[5] Sri Kuntjoro, "Sertipikat Ganda", https://srikuntjoro.wordpress.com/2010/04/10/sertipikat-ganda/ diakses pada tanggal 17 Januari 2017
[6] Pasal 1 ayat 5 Undang-Undang Nomor 22 Tahun 2004 tentang Komisi Yudisial

4. Inheritance

When died people bequeath the properties and wealth they have to the live inheritors who are already determined by Islam in the form of wealth, land, or anything which has legal right.[7]

5. Maslahah Mursalah

Maslahah Mursalah[8] as goodness with no Islamic argumentation to be either acknowledged or cancelled.

[7]Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t. th), h. 28
[8] Abdul Wāhab Khalāf, *Ilmu Ushūl al-Fiqh* (Kairo; Dār al-Fikr, 1996), h. 80

CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Research

This research needs review of previous research as a base supporting the researcher to conduct and accomplish this research. After doing some reviews, the researcher could infer that the previous research related to the inheritance law cases are counted into a great enough scale. However, form all cases found, the research finds that the case of double certificates in single place is still unclear. Since, the previous research did not put enough attention specifically into the implementation of adjudication of inheritance case 783/Pdt.G/2014/PA.Gs of Religious Court in Gresik.

From the result of investigation which the researcher has done toward the research subject, the researcher did not find any same topic with this recent

research. But, the researcher found some research titles which are considered having similar discussion about family tree *(faraidh*), they are:

1. Ika Islamiatiningsih, State University of Maulana Malik Ibrahim Malang, Sharia Faculty, 2010, under the title Inheritance Sharing According to the Economic Prosperity of Inheritors in Langkap Village, Bangsalsari District, Jember Regency. This research used case study research which employed qualitative approaches. The primary data sources of this research were the result of interviews and literature studies as the secondary data. this research resulted some points: 1) reason which had been a basis of the Langkap Village citizen in the matter of sharing inheritance (inhertitance, grant, and testament) with consideration to the economic situation of the inheritors because of the feeling of sorry, 2) steps and manners to prevent conflicts among the inheritors in the matter of inheritance sharing under economic consideration of the inheritors, so the share would be the same and fair for everyone, and to conduct discussion and transfer the case to the higher authority.

   The research conducted by Ika Islamiatiningsih has similarity with the recent research that both of these researches investigate the aspect of inheritance sharing even in different cases. However, the recent research is quite different with the previous one because the previous research identifies the share under consideration of economic situation of inheritors. It indicates that the previous research did not follow the existing law of inheritance. Therefore, this recent research decided to identify the

inheritance case under the evidence that every party of inheritors has their own land certificate upon the same land, which then would be solved by the methods employed by the judge in deciding verdict of the case.

2. Shofa, Wiwin Ima, State University of Maulana Malik Ibrahim Malang, Sharia Faculty, 2008, under the title Force of Law Status of Donated Property with No Certificate (Case Study in Lumbang Rejo Village, Prigen District, Pasuruan Regency). This research was categorized into a case study research which supported qualitative research approach. This previous research had primary data source from the result of interviews and literature reviews as secondary data. The result of this previous research inferred that 1) the procedure of donated property in Lumbang Rejo Village still followed the embedded religious tradition where the citizens of that village tended to believe anyone who has given donation mandate rather to the existing formal law. 2) several factors beyond the donated properties which were not certified yet: first, the absence of socialization from the local government, second, minimum educational degree that the citizens of the village had was elementary school degree, third, the high cost of certificate. 3) the absence of legal law for the donated properties which did not filled administrative requirements regulated by the law 41 year 2004 as well as the regulation of application within PP 42 year 2006 specifically owning the certificate. Hence, those donated properties could be beneficial and appropriate to the objectives of giving donation especially when they could be expanded.

The research which had conducted by Shofa has similarity with the recent research that the important aspect investigated within the research is the existence of certificate even in different law cases. As for, the basic difference of both researches is that the previous research discusses about how far the force of law could be used in donated property certificate, whereas the recent research discussed the judge's verdict of religious court in Gresik in solving the lawsuit of inheritance where the each party has their own evidence in the form of proprietary certificate upon the same inherited land (double certificates),which then would be settled down by employing the judge's method in deciding the adjudication of case.

3. Auliansyah Reza, State University of Maulana Malik Ibrahim Malang. Sharia Faculty, 2015, under the title Basis of Judge's Consideration in Deciding Adjudication of Collective Wealth in Religious Court of Malang). This research was categorized into normative study. The primary data source of this research was the result of literature reviews. This research resulted: 1) the implementation of the collective inheritance sharing in religious court of Malang was based on the law 1 year 1974 about marriage and Islamic law compilation, therefore, the inheritance which was derived from both husband or wife party should be the collective right for both parties, and if the marriage was over, each party deserved to get half from the wealth.

The research which had done by Auliansyah Reza has similarity with the recent research that the implementation aspect of collective inheritance

sharing in religious court of Malang is based on the law 1 year 1974 relates to the marriage and Islamic law compilation. The previous research highlights at how far the judge's consideration in solving the lawsuit of collective inheritance. However, the recent research is quite different from the previous one, where the recent research discusses the judge's adjudication in religious court of Gresik in solving the lawsuit of unshared inheritance where each party has their own evidence in the form of land proprietary certificate (double certificates case), which then would be solved by the method used by the judge.

B. Theoretical Frameworks

1. Land Certificate as An Evidence of Proprietary Right

One of the purposes of the land registration as mentioned in 3rd article of government regulation (PP) 24th year 1997, is to provide the legal law to the land proprietary right upholders, units of flat, and other certified rights in the hope that it would be easier to prove the related right upholders. This intends to give a legal and protected law towards the involved right upholders to be given the certificate of land proprietary.

Within 19th article 2nd paragraph C letter Principal rules of Agraria is asserted that the last policy of land proprietary which is held by the government is the extending of right receipt, which is valid as the strong evidence. UUPA does not state the name of land right receipt that is being registered. Recently, in 13rd article 3rd paragraph government regulations (PP) 10th year 1961 is revised that the registered receipt of land right is

named as a certificate, which means a copy receipt of land right and measurement receipt pieced together within a paper cover established by agrarian minister.[9]

This is the first time that the policy of land registration produces receipt of right proof, in the form of certificate. The definition of certificate according 1st article number 20th government regulation (PP) 24th year 1997, is a proof receipt of right as asserted in 19th article 2nd paragraph letter C Basic Agrarian Law for the land right, management right, donated property or land, proprietary right upon unit of flat, and insurance right which each has accounted in the related land right book.

The certificate is published by the defense office of district. As for, the officials who are obliged to sign the certificate [10]mentioned as follow:

a. Systematically, in the land registration, the certificate is signed by the head of adjudication committee for the name of the head of defense office of district/city.
b. Sporadically, in the land registration which is specifically individual, the certificate is signed by the head of defense office of district/city.
c. Sporadically, in the land registration which is collective, the certificate is signed by the head of defense office of district/city.

The certificate publication in the land registration policy intends to facilitate the right upholders to prove that they are the real right upholders

[9] Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: CV. Rajawali, 1992), h. 26.
[10] Urip Santoso, *Hukum Agraria Kajian Komprehensif*, (Jakarta: Kencana, 2012), h. 316.

for their property or land. The certificate is published for the sake of the related right upholders based on the physical data and juridical data which have been registered in the land book.

As for, the receiver parties of certificate transfer which is published by the defense office of district are:

a. For the land or unit of flat proprietary right which owned individually, the certificate is permitted for the mentioned party in the land book as the proprietary right upholder or another party where the right is charged on him.
b. For the donated property, the certificate is given to *Nadzir* or another party which the right is charged on him.
c. For the matter of right upholders after his death, the certificate is given to the inheritors or one of them under the approval of the other inheritors.
d. For the insurance right, the certificate is given to the party whose name is mentioned in the related land book or the party whose right is on him.

There are plenty types of certificate according to the object of land registration mentioned as follow:[11]

a) Certificate of Proprietary Right
b) Certificate of Labor Right
c) Certificate of Construction Right on the Nation's Land

[11] Peraturan Pemerintahan Nomor 40 Tahun 1996 dan Peraturan Pemerintah Nomor 24 Tahun 1997

d) Certificate of Construction on Management Right's Land

e) Certificate of Right of Use on Nation's Land

f) Certificate of Right of Use on Management Right's Land

g) Certificate of Management Right's Land

h) Certificate of Donated Land

i) Certificate of Proprietary Right on Unit of Flat

j) Certificate of Proprietary Right on Non-unit of Flat

k) Certificate of Insurance Right

The certificate is verified as right evidence as it is mentioned within the 19th article 2nd paragraph letter c Principal rules of Agraria, asserted that the certificate is used as the strong evidence, the physical and juridical data contained in the certificate is considered as valid as long as the validity is does not proved as the other way by the other instruments of evidence in the form of certificate or other. Based on this type of evidence, the party who might suffer from the certificate publication could propose the lawsuit to the court in order to invoke that the published certificate is not valid. If the court's verdict has a permanent legal law which states that the certificate is not valid, then the Head of National Land Authority of Indonesia would publish the verdict of certificate annulment. The existence of certificate is considered as strong evidence. It has several characteristics mentioned below:[12]

[12]Pasal 32 Peraturan Pemerintah Nomor 24 Tahun 1997

1. Certificate is considered as evidence receipt of proprietary right which is valid as the strong evidence containing the physical and juridical data, as long as the data are prescribed by the existing data in measurement receipt and involved land book.
2. When a valid certificate of right of piece of land has published in the name of personal or corporation which gained that land legally, then the other parties who might claim that land could not prosecute the right if along five years since its publication, they did not show any written objection to the certificate upholder and the head of land officials or they did not propose any lawsuit to the court about the land proprietary and certificate publication.

According to 32nd article 1st paragraph government regulation (PP) 24 year 1997, which clarifies the rule of 19th article 2nd, paragraph Basic Agrarian Law, which asserted that the land registration produces the valid evidence receipt as strong evidence. As for the rule of 32nd article 1st paragraph PP 24 year 1997, the publication system of land registration which is used is negative publication system where the certificate is only considered as strong evidence receipt and absolutely does not mean as evidence receipt. This means that the physical and juridical data within the certificate has its force of law and should be accepted by the judge as a valid official statement as long as there will be no other evidences to prove the opposite way. Hence, the court has authority to decide which evidence

instrument is valid, and conduct some revisions and corrections when it is needed.

However, the rule of 32nd article 1st paragraph PP 24 year 1997 has weakness that the nation does not guarantee the truth of physical and juridical data presented as well as have not guarantee for the certificate upholders. They might be prosecuted by other party anytime the other parties realize suffering from the certificate publication.

To cover up the weakness of the rule in 33rd article 1st paragraph PP 24 year 1997 and to protect the law of those certificate upholders from the suit also to put the certificate to be an absolute evidence, therefore the government issues the rule of 32nd article 2nd paragraph PP 24 year 1997, which states that the certificate is regarded as a right evidence receipt which is absolutely used if it filled the elements required cumulatively:

a. The certificate is published legally for the name of personal or corporate
b. The land is obtained in good manner
c. The land is real authorized
d. Within five years since the certificate has been published, there would be no anyone who might prosecute any written objection to the certificate upholders and the head of land official of local district or anyone who might also prosecute any suit to the court about the land and certificate publication.

2. Judge and Court Authorities

Court has legitimacy and authority which relates to the procedure of law:

a. Relative authority

Relative authority means a sort and a level of judicature authority, which is different with the judicature authority of common type and level.[13]

The basis which is used to decide relative authority of religion court refers to the rule of 118th article HIR or 142nd article R Bg jo. 73rd article UU 7 year 1989. This relative establishment is quite different from the rule that establishes which religion court the suit will be proposed in order to fill the formal requirements. The 118th article 1st paragraph HIR believes the basis that the authorized one is the local nearest court where the lawsuit exist.

b. Absolute authority

Absolute authority means judicature authority relates to the type of suit or the type of court or the level of court which is different with the other suit type or court type or court level. Appropriately, the absolute authority owned by the religion court is lawsuit of marriage, inheritance, grant, donation, and gift *(shadaqah)*.[14]

[13]M. Fauzan, *Pokok-pokok Hukum Acara Perdata Peradilan Agama dan Mahkamah Syariyah di Indonesia*, (Jakarta: Kencana, 2007), h. 33.

[14] M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama Undang-Undang Nomor 7 Tahun 1989*, (Jakarta: PT. Garuda Metropolitan Press, 1993, 2013), h. 213.

3. Judge's Restriction and Authority

Normatively, based on the Laws of Indonesia 1945, judge is[15]supreme judge and general judge who are in court corporate under the authority of Supreme High Court and Justice Constitution.

Etymologically, Bambang Waluyo, S.H. asserted that judge means[16]a corporation of court or justice which well understand about the laws, have obligation and duty to maintain the justice of both written or unwritten lawsuit (the lawsuit which is proposed to the court with unclear law), is not in contradiction to the basis of law predetermined by Allah SWT. From this definition asserted by Bambang Waluyo, S.H. it is known that his definition of judge is not quite different with the definition mentioned in the Laws 22nd year 2004, which states that the supreme judge, the judge who is in the court corporate, also constitutional judge are involved in the body corporation of justice who are supposed to understand the law in order to be able to maintain the justice.

According to Al Wisnu Broto, judge is[17] a form law and justice concretization in abstract. Moreover, somebody considered the judge as a representative of God in the world to maintain the law and justice.

If those two definitions are combined, normatively, judge is defined as an institution which has authority of judgment, covering the Supreme High Court and all court corporations under its authority up to

[15]Pasal 1 ayat 5 Undang- Undang Komisi Yudisial Nomor 22 Tahun 2004
[16]Bambang Waluyo, S.H. *Implementasi Kekuasaan Kehakiman Republik Indonesia*, (Edisi 1, Cet. 1. Jakarta: Sinar Grafika, 19912), h. 11.
[17]Al. Wisnu Broto, *Hakim Dan Peradilan Di Indonesia (dalam beberapa aspek kajian)*, (Yogyakarta: Penerbitan Universitas Atma Jaya, 1997), h. 2.

the Constitutional Court. Generally, the judge means individual who is supposed to have responsibility, integrity, and ability to bring the justice in his adjudication.

Generally, judge is defined as all sorts of judge on all court level such as supreme judge, which means the judge in the court corporate in all court level under the authority of Supreme High Court and Justice Constitution.

4. Role, Function, and Duty of Judge

Basically, judge is interpreted as an individual who has duty to maintain the justice and truth, punish everyone who did wrong and crime, as well as justify the good one. In running his duty, he does not only be responsible for the lawsuit parties, but also to take responsibility to Allah SWT.

The responsibility and role of judge is very great, till then responsibilities has mentioned in the laws. Within the Laws 14 year 1970 relates to the basic principles of judge's authority which then altered to the Laws 35 year 1999 and adjusted to the Law 4 year 2004 about authorities of judiciary. It is also mentioned in the Laws 8 year 1981 about the procedure o criminal (KUHAP), judicial commission, and other related regulations. Moreover, in every adjudication asserted by the judge is always begun by this sentence: "For the name of Justice, The One God, Allah SWT".

Even, the judge is committed to the rules of law in doing his duty in the court, as in 158th article of KUHAP which interprets: The judge is prohibited to behave or declare any statement in the process of court about the confidence to decide whether the defendant is wrong or just the opposite way. Also, in judging the evidence instrument, the Laws have been so explicit to warn the judge to act wisely.[18] Furthermore, the judge is supposed to have high integrity and good behavior, honest, wise, professional, and well-knowledgeable in the field of law.[19]

This profession has a significant role, since actually this profession who would serve the citizens to maintain justice in the field of law. Therefore, the judge is supposed to have high morality and responsibility which are very beneficial in performing the basic principles of ethical code of the judge, they are:[20]

1. Principle of freedom

   This principle represents juridical freedom which means pre-requirement towards the rule of law and basic guaranty of a fair judgment. Therefore, the judge should maintain and present a good model representing the freedom of fair judgment in both personal and institutional aspect.

2. Principle of non-alignment

[18] Pasal 188 ayat 3 KUHAP
[19] Pasal 32 Undang- Undang Nomor 4 Tahun 2004
[20] pasal 32 Undang- Undang Nomor 4 Tahun 2004
[20] Disiplin F. Manao, "Hakim sebagai pilihan profesi," Jakarta, 19 Juli 2003.

This principle is regarded as important point in running the court. This principle is not only valid in deciding adjudication itself, but also in the process of considering the final adjudication.

3. Principle of integrity

   This principle of integrity is also significant in the process of judgment.

4. Principle of behavior

   This principle covers behavior and image represented by the judge in running all activities as a judge.

5. Principle of equality

   This principle relates to the way of judge treating all lawsuit parties equally during the court session, which is very important in running the fair judgments.

6. Principle of competence and loyalty

   This principle becomes pre-requirements fulfilled before having juridical session. Seeing to this importance, it is reasonable that the judge profession is on higher position in the nation.

Within 3rd amendment Constitutional Law 1945, 24th article 1st paragraph states the dominance of judicature is free dominance to held the judgment in the purpose of maintaining the law and justice; 2nd article states the dominance of judicature by a Supreme High Court and Court Corporation which are under the area of general court, religion court, military court, administrative court, and by the constitutional court.

Besides, the conditions to promote and dismiss the judge are already established by the law.[21] This matter intends to guarantee the judge in running their duty and have independence, in freedom from all influences of government dominance or the other dominance in the nation.

The existence of ethical and judge's behavior guideline is very needed to keep and maintain the honor as well as prestige, and the behavior value of the judge. This ethical and behavioral judge guideline is regarded as important core of the judge, since it represents the behavioral code loads the ethical and moral value, to bring the court into the real justice. However, to bring it to the reality, there are some obstacles such as problems come up from inside the court especially which relates to inefficiency of internal supervision, and tends to increase to the different forms of authority abuse of the judge.[22]

Definition of judge is supreme judge and all sorts of judge within a court corporation in all court circles under the dominance of Supreme High Court and Supreme High Judge.[23]

Authorities of Judge (Right and Obligation), the judge as a law and justice maintainer is obliged to investigate, obey, and understand the existed law values in society.[24]

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[21] Pasal 25 amandemen Undang-Undang Dasar 1945

[22] "Pengertian Hakim Tugas Fungsi dan Kedudukan Hakim Sarjanaku", http://Pengertian Hakim Tugas Fungsi dan Kedudukan Hakim Sarjanaku.com.html diakses tanggal 14 januari 2017

[23] Pasal 1 ayat 5 Undang-Undang Nomor 22 Tahun 2004 tentang Komisi Yudisial

[24] Pasal 27 ayat 1 Undang-Undang Kekuasaan Kehakiman Nomor 35 Tahun 1999

When a judge confronts society who still understand the unwritten laws, or during certain turbulent times, the judge is supposed to be the one who should formulates and investigates the law values which are existed in that society surroundings. For this sake, the judge might understand the law and feel the justice in that society. Then, the judge could order an appropriate verdict based on the law and justice of society.

In considering the punishment, the judge has to look the behaviors of defendant.[25] In this matter, either good or bad behavioral conduct of the defendant has to be well considered by the judge in deciding the punishment. Moreover, personal situation of the defendant should also be accounted in ordering the equitable and fair punishment. The information of defendant's personal situation could be derived from his surroundings, neighbors, psychiatrist, and other.

Dominance of judge In order to support the judge in performing this noble duty, it needs the independence of judge. The basis of judge's independence in handling the lawsuit could be seen in the rule of 24th article of Constitutional Law 1945 that "The dominance of judge is a free dominance" which means that in deciding the verdict of lawsuit, the judge's dominance is apart from the government's dominance. According to this law, it needs to conduct guaranty in the law relating to the status of judge.[26]

[25] Pasal 27 ayat 1 Undang-Undang Kekuasaan Kehakiman Nomor 35 Tahun 1999

[26] Al. Wisnu Broto, *Hakim Dan Peradilan Di Indonesia (dalam beberapa aspek kajian*), (Yogyakarta: Penerbitan Universitas Atma Jaya, 1997), h. 2.

The Constitutional Law 1945 Chapter IX 24th article interprets the dominance of judicature is a free dominance to held the court in order to maintain the law and justice.

1. The dominance of judge is performed by the supreme high court and all juridical corporations under the scope of general court, religion court, military court, administrative court, and the other constitutional high court.
2. Other corporation bodies which the functions are related to the dominance of judge are regulated in the law

5. Scope of Right Upon the Land

The law rule of land proprietary right has already settled in 4th article 1st paragraph Principal rules of Agraria., "Based on the basis of proprietary right upon a piece of land as it is mentioned in 2nd article is regulated some kinds of right upon the land, which could be given and owned by somebody, either personal or collective with other people or law corporations." The right of land is based on the command right of the state upon the piece of land, that could be given to both personal Indonesians or foreigners and collective individuals, as well as law corporation of either private law or public law.

As for, the sorts of land right which are loaded in 16th article and 53rd article Principal rules of Agraria which are then classified into three levels:

a. Permanent land right

Right of this land would be permanently existed as long as Principal rules of Agraria lasts or does not appear the new law. This sort of land right covers some rights: Proprietary Right, Labor Right, Construction Right, and Foresting Right.

b. Land right established by the law

It means all right land which would only be determined by the law. However, this sort of right is still not existed.

c. Temporary land right

The right of land which tends to be temporary, in the short time, it would be eliminated because this land right is considered having characteristics of exploitation, feudal, and apart from the value of Principal rules of Agraria, they are: Pawning Right, Production Sharing Right, Joining Right, and Rental Farm Right.

The right upon the piece of land is categorized into two levels:

a. Primary land right

This land right is derived from the nation's land. There are several rights of land like Proprietary Right, Labor Right, Construction Right upon Nation's Land, Use Right upon Nation's Land.

b. Secondary land right

This land right is derived from other party's land. There are plenty of land right such as Construction Right upon Management Right, Construction Right upon Proprietary Right of Land, Renting Right

upon Construction, Pawning Right, Production Share Right, Joining Right, and Rented Farm Right.

6. Proprietary Right

A. General Rules

Rules of proprietary right are asserted in 16th article 1st paragraph letter c Principal rules of Agraria. Specifically, it is determined in 20th article up to 27th article Principal rules of Agraria. According to 50th article 1st paragraph Principal rules of Agraria., further rules relates to the proprietary right is regulated in the law. In fact, this intended law is still not existed up till now. Therefore, it would regulate by 56th article Principal rules of Agraria., which interprets that as long as the law of proprietary right has not formed yet, then the rules of customary law and other rules would replace as long as the customary law does not apart from the Principal rules of Agraria..

B. Definition of Proprietary Right

According to 20th article 1st paragraph Principal rules of Agraria, proprietary right is right of hereditary which is owned by certain individuals upon the piece of land regarding to the rules in 6th article.

C. Transfer of Proprietary Right

Proprietary right upon piece of land could be transferred to the other parties.[27] There are two forms of transferring the proprietary right upon the land which would be explained below:

1) Transferring

   It means that the proprietary right upon the piece of land is being transferring from the first owner to the other parties because of certain law affairs.

2) Transferred right

   It means that the proprietary right would be transferred from the owner to the other parties because of the existence of law affairs.

D. Subject of Proprietary Right

Subject of proprietary right according to Principal rules of Agraria. and its implementation rules are:

1) Personal, according to 21st article 1st paragraph that only the Indonesian who might have this kind of proprietary right. This rule determines Indonesian personal who could be able to have this right.
2) Law corporation, the government establishes law corporations who could own this proprietary right with its requirements (21st article 2nd paragraph of Principal rules of Agraria.)

[27] Pasal 20 ayat 2 UUPA

E. Place of Proprietary Right

Proprietary right upon piece of land could be existed by three manners as mentioned in 22nd article Principal rules of Agraria:

1) Proprietary right of land from the perspective of Customary Law
2) Proprietary right of land from Government Decree
3) Proprietary right of land from the Rule of Law

F. Obligation of Proprietary Right Registration

Proprietary right of piece of land, as well as its right transfer, right charge with other rights, and elimination of proprietary right must be registered to the Land Officials of Local District/City.

G. Use of Proprietary Right by Non-Owner

Basically, the owner of land is obliged to make use of the land actively. There are several forms of cultivation and use of land which could be tried by the land owner:

1) Proprietary Right upon land which is being charged by Construction Right
2) Proprietary Right upon land which is being charged by Use or Cultivation Right
3) Rented Right for Construction
4) Pawning Right (Land Pawning)
5) Production Sharing Right
6) Joining Right

7) Rented Farm Right

H. Charge of Proprietary Right with Insurance Right

According to 25th article Principal rules of Agraria., proprietary right upon a land could be a debt assurance in the condition of Insurance Right. The Insurance Right here means the insurance right which would be charged to the proprietary right of land as it is ruled in the Law 5 year 1960 relates to the Principal rules of Agraria.

In order to be valid, the Insurance Right should firstly filled three cumulative elements such as:

1) Agreement of credit
2) Certificate of Insurance Right
3) Registration certificate of Insurance Right

I. Elimination of Proprietary Right

The 27th article Principal rules of Agraria determined some factors which cause the elimination proprietary right upon a land and affect to the proprietary right would be given to the nation. The factors are mentioned below:

1) Elimination of right based on 18th article
2) Voluntary transfer from the owner
3) Useless or passive land
4) Subject of proprietary right upon a land does not fulfill the requirements

5) Transfer of right to the other parties does not fill the requirements of being the new subject of proprietary right of land.

6) Proprietary right upon a land could be eliminated because the land turns broken or destroyed by disaster.

7. Inheritance

A. According to linguists

Al-miirats (الميراث) in Arabic is a form of infinitive word *(mashdar)* from the word (وَرِثَ يَرِثُ إِرْثًا وَمِيْرَاثًا) *waritsa-yaritsu-irtsan-miiraatsan*. As for, its meaning according to the linguist is 'the process of transferring an object from an individual to other individual, or from corporation to the other corporation.[28]

This definition is not only restricted for the objects relating to the wealth, but also covering non-wealth. A plenty of ayat Qur'an which clarifies this matter as well as Prophet Muhammad SAW had said in his Hadits.

وَوَرِثَ سُلَيْمَانُ دَاوُودَ

"And Prophet Sulaiman has inherited something from Daud" [29]

وَكُنَّا نَحْنُ الْوَارِثِين

"... And We are the one who inherit."[30]

Moreover, we also find within hadits of Prophet Muhammad SAW:

العُلَمَاءُ وَرَثَةُ الأَنْبِيَاءَ

[28] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t. th), h. 28.
[29] QS. An-Naml: 16
[30] QS. Al-Qashash: 58

'Ulama is the inheritors of Prophet Muhammad'.

(HR At-Tirmidzi dari Abu Ad-Darda radhiallahu 'anhu)[31]

B. According to Sharia's perspective

According to terminological definition, the word al-miirats means the process of transferring proprietary right from died people to the alive inheritor, the inheritance could be either wealth (money), land, or other forms as long as it has legal proprietary right from the perspective of Islam.

a. Inheritance, Grant (Hibah), and Testament

There are three different terms but still have some similarities in certain aspects, they are inheritance, hibah, and testament. Those three terms have similarity with each other; therefore certain people find difficulty to distinguish the meaning. In this session, the researcher would show the table of those three meaning:[32]

	INHERITANCE	**GRANT (HIBAH)**	**TESTAMENT**
Time	After death declaration	Before death declaration	After death
Receiver	Inheritor	Inheritor & Non-inheritor	Other than inheritor
Value	Appropriately to	Free	1/3 at maximal

[31] Abu Usamah bin Rawiyah An Nawawi, "Ulama Pewaris Nabi", http://asysyariah.com diakses pada tanggal 17 januari 2017

[32] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t.th), h. 30-31.

	Faraidh		
Law	Obligatory	Optional	Optional

b. Time

From the time aspect, the inheritance is not shared to the inheritors, and is not determined its measurement for each inheritor, except when the owner (muwarrits) has died. In other word, the inheritance sharing could be conducted when the death of inheritance owner has declared. Therefore, the one who might share the inheritance is definitely not the inheritance owner.

On the other hand, the determination of the grant is determined when the owner is still alive. It distinguishes from the determination of inheritance sharing, which the grant does not wait the owner dies. Whereas, the testament is determined by the wealth owner when he is alive, but the process of transferring the wealth proprietary would be done after the owner dies.[33]

c. Receiver

The inheritance is only shared to people who are included in the inheritor lists without being covered by *hijab hirman*. Also, the inheritors' status should not be invalid.

The testament is prescribed if it is given to the inheritors. The one who deserves to get the testament is people out of the

[33] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t.th), h. 32.

inheritor circles. Since, the inheritors have received wealth from the result of inheritance sharing, therefore, it is prescribed for the inheritors to receive any other wealth like from the result of testament.

As for the wealth sharing from the result of grant *(hibah)* is permitted for either the inheritors or non-inheritor. *Hibah* could be shared to anyone with no restrictions.

d. Values

Seeing to the aspect of values, the shared wealth has its own measurement, as it is determined in the science of *faraidh*, whereas the quantity of wealth allowed for the testament is only a third (1/3) at maximal from the total quantity of wealth. Although, the testament is such a request from died owner, but in Islam, Allah has mentioned the rule of the testament which asserts that the testament is only about a third of existed wealth. If the testament quantity is more than 1/3, it is greatly prescribed *(haram)*.

e. Law

Inheritance sharing is an obligatory for the wealth owner *(muwarrits)*. It should be shared after the owner is died because the inheritance sharing is one of obligatory of having wealth. As for testament sharing is optional as well as sharing the grant *(hibah)*.[34]

C. Terms in Faraidh

[34] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t.th), h. 33.

In almost every branch of science has their specific term use, where that term might be different with the common terms. The following are some terms which are typically appear in understanding the science of Faraidh.

Tarikah (تركة) is also read *tirkah*, which means every single thing left or inherited by the inheritance owner, in the form of money or other. Then, principally, all objects which are left by died person is dedicated as inheritance.

Credit or usually known as debt is included in *tirkah*, either the credit relates to the main of wealth (wealth in pawning status) or credit relates to personal obligatory (in example: payment of credit or *mahar* which has not given yet to the wife).[35]

Fardh (فرض) means a part of wealth which is derived by the inheritors who are already determined in Al-Qur'an, As-Sunnah, and *Ijma* of ulama. *Fardh* is presented in the form of fractions, they are ½, 1/3, ¼, 1/6, 1/8, and 2/3. The shared inheritance is divided appropriately by the determined number of *fardh*. In example, a wife who is left by her husband is definitely determined to get 1/8 from her husband's wealth, under the condition if the husband has children. If the husband does not have any children, then the wife deserves to get ¼ of the husband's total wealth.

[35] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011). h. 554-555.

Ashabul furudh (أصحاب الفروض) means people who deserve to get the inheritance according to the *fardh*. They have their own definite part from the total inheritance of died owner. They are including husband, wife, mother, father, and other.

The total quantity of shared inheritance is already mentioned in Al-Qur'an and As-Sunnah based on the recent situation. In example, if a wife is left by her husband, then, she would definitely obtain a part of the husband' total wealth around ¼ or 1/8. If the husband has children, then the wife would get 1/8 from the husband's wealth. But, if the husband does not have any children, the wife deserves to get ¼ of the total wealth owned by the husband.

If a husband is left by his wife, he would get a part from the wife's total wealth, around ½ or ¼ depends on the existence of children in the family tree. If the wife has children, then the husband would get ¼ from the total wealth of wife. But, if the wife has not any children, the husband would get a half (1/2) from the wife's total wealth. In short, *ashabul furudh* is list of inheritors who already have their certain determined part of the owner's wealth.

Term of *ashabah* (عصبة) is opposed to the term *fardh*, means a part of wealth which is derived by the inheritors, which the amount is not ensured clearly. Since, this wealth is the rest amount of shared inheritance which has already been shared to the inheritors who are included in *ashabul furudh*.

The amount of *ashabah* could be 0% up to 100% depends on how much the shared wealth counts in the listed inheritors *(ashabul furudh)*. If the amount of listed inheritors is much, then the wealth shared as *ashabah* is in small quantities. But, if they have only a few of listed inheritors, then the amount of *ashabah* would be in greater quantities.

In example, if a son is inheritor of *ashabah* from the wealth of his died father. His mother is inheritor from *ashabul furudh* who deserves to get 1/8 from the total wealth of the husband. Then, this son deserves to get inheritance as *ashabah*, or the rest of what is being shared to his mother, around 1-1/8 = 7/8.

Sahm (سهم) is a term to name a part of wealth which is given to every inheritor who comes from *Nasab*. *Nasab* is a blood relation of individual. It could be from the father, grandfather, and so on. This up relation is called *abuwwah*. Also, it could be from the next generation like child, grandson, and so on. This down relation is called *bunuwwah*.

In the perspective of *Faraidh*, the term *al-far'u* (الفرع) means son or daughter from died person who would be the inheritor of the wealth, including the grandson or granddaughter if they are existed. As for the term Al-far'ul-warits means son and daughter or the next inheritors after them.

The term of *al-ashl* (الأصل) is father and mother, including father and mother from the grandfather. Then, the grandfather and grandmother here are regarded as *al-jaddu ash-shahih*.

8. Evidence

A. Definition of Evidence Instrument

Instrument of evidence has various forms and types, which is able to clarify and give information needed about the lawsuit in the court. Based on the collected information of evidence gathered by the judge, he could assess which party is true with his/her evidence.

Then, the lawsuit parties could only prove the truth of evidence in both claim and rebut argumentation based on the facts and their instrument type of evidence.[36] In Indonesia, the law of delivering evidence is still heading toward certain instrument types of evidence.

However, the involved parties in the court (judge-prosecuted-prosecutor) are not allowed freely to accept and deliver the instrument of evidences during the court session. The Law has established which instrument of evidence is considered to be valid for the final judgment. In other word, the law of delivering evidence which is existed in Indonesia is still restricted. In some nations like Dutch[37], the law of evidence in the court has been altered into the opened system of law of evidence.

[36] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011). h. 556.
[37] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), h. 149.

The truth is not only derived from certain evidences, but it could also be derived from whatever evidence as long as the evidence is acceptable and legal and is not contradicted to the public interest.

However, up to nowadays, the law of delivering evidence in Indonesia has not encountered yet into any renewal or revision as in the other developed nations. The lawsuit parties and the judge are still exerting old system in the court. They do not dare enough to renew and accept further instruments of evidence, except what are mentioned in the existing law. [38]

B. Types of Evidence Instrument

According to HIR system, judge is bound with only valid instruments of evidence within the procedure of civil law, which means that the judge is only able to decide the lawsuit through instruments of evidence that are pre-determined by the law. The instruments of evidence that are included in the rule of law are: written instrument of evidence, witness, presuppositions, confession, and oath (mentioned in ps. 164 HIR, ps. 1866 KUH Perdata).

a. Written instrument of evidence

This instrument consist the information about an incident, situation, and certain related points. Within the procedure of civil law, it is known several kinds of written instrument of evidence.

[38] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011), h. 566.

First, letter consists of some sentences which intends to explore what are the involved parties feel in their heart or to convey what are the involved parties have in their mind which is could be the evidence of lawsuit.

Letter as a written instrument of evidence is divided into two, they are official document and non-official document. As for the official document is divided into authentic document and non-authentic document.

Second, official document is a document which is used as evidence instrument and being signed, which tells about the chronology of happened incident which has been the lawsuit of the court. It is made for the sake of delivering evidence.[39] Moreover, to legalize the evidence, this official document should be signed.

Authentic document is a document which is written in the form determined by the law in front of the authoritative officials exactly at where the document is made (mentioned in ps. 1868 KUH Perdata).

From above explanation, it is concluded that the authentic document is made by or in the presence of authoritative officials who are then called as general officials. If the document is made by incompetent official, then the document is considered as not valid since it does not fulfill the formal requirement of authentic

[39] Sudikno Mertokusumo, Hukum Acara Perdata Indonesia, (Yogyakarta: Liberty, 2006), hal. 158

document. But, this kind of document is still useful as non-authentic document.

This non-authentic document is deliberately made to be the evidence of certain parties who might not get any help from the officials.

Non-authentic document is formulated in 1874th article of KUH of civil law. According to this article, the non-authentic document is defined as:

a) Statement or document which is unsigned
b) Document is not made and signed by the competent officials
c) Specifically, the existence of non-authentic document corporately made by at least two parties.

One-side confession document is a document which is not included into the corporate non-authentic document, but it is a one-side confession letter made by the prosecuted party.[40] Therefore, the assessment and implementation of this kind of document is subjected to the rule of 1878th article KUH of civil law. This document should also meet the requirements mentioned below:

a) All document contents should be written by hand-writing of the writer and the signer.

[40] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), h. 607.

b) Or at least, the document clarifies the amount or related objects, and is written by hand-writing of the writer and the signer.

Furthermore, there are some additions of written instrument of evidence which should be completed but firstly to take the authentic evidence or the real instrument of evidence such as copy of evidence, quotation of evidence, and photocopied evidence. However, these instruments of evidence need to be completed by the real version of evidence.[41]

b. Witness

The instrument of evidence by delivering witness in the court session is established in 139th-152nd article, 168th-172nd of HIR and 1902nd-1912nd of BW. The witness is such a certainty given to the judge in the process of court about the lawsuit problem by employing oral and personal declaration by someone who is not from each lawsuit party and asked to come in the court session.[42]

Then, the information given by single or more witnesses is from the real incident he/she has encountered by themselves, whereas the opinion and presumption derived from his/her mind is not included into the instrument of witness.

c. Presupposition

[41] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011), h. 616-622.
[42] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), h. 166.

According to 1915 article KUH of civil law, presupposition is a conclusion which is drawn by the law or the judge from an incident that is commonly acknowledgeable to the uncommon incident. The presupposition is also known as *vermoedem* which means presumption or presumptive.[43]

d. Confession

Confession *(bekentenis confession)* is regulated in HIR 174-176 article and KUH of civil law 1923-1928 article. The confession means one-side information, so this evidence does not need any approval from the opposite party. The confession should represent a clear statement. If the confession is stated unclearly, it would not help to prove the truth of court problems.[44]

e. Oath

Oath is a solemn statement which is delivered or stated when someone states his promise and information that is bound over the name of Almighty God, and believes that whoever give wrong information would be punished by Him.[45] HIR clarifies three types of oath which could be the instrument of evidence:

1) Oath of *Supletoir*/Complement (155th article of HIR)

Oath of *supletoir* is an oath which is ordered by the judge because of his position to one of parties to complete the evidence of incident which has been the lawsuit of

[43]Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011), h. 684.
[44] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), h. 181.
[45] Sudikmo mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), h. 154.

court, in the hope that the judge could solve and decide the final verdict.

2) Oath of *Aestimatoir*/Appraiser (155th article of HIR)

Oath of *aestimatoir* is an oath which is ordered by the judge because of his position to the prosecutor to determine amount of money for indemnification.

3) Oath of *Decisioir*/Decider (156th article of HIR)

Oath of *decisioir* is an oath which is charged upon the one's request of involved party to the opposite party. It is different from *supletoir* oath where this oath could be charged even there is no any evidence at all; therefore, the *decisioir* oath could be done at any time during the investigation of the court session.

f. Local Investigation

Due to the law of evidence, local investigation is also needed even formally this is not included into the evidence instrument mentioned in 1866th article KUH of civil law. The law of the local investigation is found in 153rd article of HIR which represents that:

The process of court investigation which is properly done in the court could be moved to the place where the lawsuit is happened.

a) Conducting the court session in the place where the lawsuit is found aims to know the real situation of the lawsuit object.

b) Conducting the court session in the place where the lawsuit is happened could be done by single or more members of involved assembly with the help of clerk of court.[46]

g. Master of Law

It is important to understand exactly the statement and information stated by the master of law, so the intended message of the master's investigation could be well obtained.

Generally, master means the individual who has specific knowledge in certain field. Raymon Emson states "specialized are of knowledge".

According to the judge, a master of law is:

a) Having specific knowledge or specialization

b) The specialization is in the form of skills and experiences

c) In such manner, the specialization guides the judge to find the facts of the lawsuit in higher possibility than the other ordinary people.[47]

[46] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011), h. 781.
[47] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2011), h. 789.

From those definitions, we could draw a simple conclusion that not all people could be promoted to be the master. Especially, when it is related to the process of investigation of the lawsuit, the specialization has to be in compliance with the area of lawsuit.

C. Objectives of Evidence

Basically, proposing evidence aims to result the valid adjudication, which declares which part is win and lose in the lawsuit, or to produce a decree (like in voluntary court). Then, the evidence has objectives relates to the judge's final adjudication which is considered by the existence of enough evidence.

According to formal juridical status, the lose party of lawsuit becomes the suffered party who would accept the sentence. As well as if the prosecuted party in the criminal lawsuit is proven to be wrong, this part would have criminal sentence.

In connection with this matter, does type of punishment which is sentenced to certain party depend on his deed?, in other word, is the deed connected to the law as a casual relationship?

Hans Kelsen states one of popular theories, the theory of *toerekeningstheoris* (responsibility theory). According to this theory which is then followed by Paul Scohlten, certain party's action and the sentence is not causal responsibility.

This interprets that the final punishment accepted by one party is not from the result of his action, but it is the responsibility he has to bear as the consequence with his actions. Therefore, it indicates that to decide a right adjudication, the judge needs enough evidences in the court session.

As the purpose of delivering the evidence should be in line with the general purpose of lam, that the law of evidence is simply sub-system from the whole system of law.

D. Law principles of Evidence

Specifically, within civil law evidence is known their own principles, which is different from the principles of other evidence law. This civil law has specific characteristics as a private law (privaatrecht [Dutch], private law [England], droit prive [France], and privatrecht [Germany].

Those principles meets the characteristics of civil law, they are:

a. Principle of *Audi Et Alteram Partem*

This classical term is dynamic principle of *"Audi Et Alteran Parten"* or *"Eines Manres Rede Ist Keines Mannes Rede"* as the similar principle of both lawsuit parties in the court session.

b. Principle of *Ius Curia Novit*

Principle of *"Ius Curia Novit"* is a principle which represents the ability of judge to understand well the law of

investigated lawsuit. The judge is not allowed to decide any verdict if he does not know its law better than other.

c. Principle of *Nemo Testis Indoneus In Propria Causa*

Principle of *"Nemo Testis Indoneus In Propria Causa"* refers that there is no anyone who is permitted to be a witness in his own lawsuit.

The rule also forbids several classes who are considered to be "incapable" in being the witness (recusatio):

a) Absolute incapable individual

The following are rejected people to be witness in the court session:

1. Family or temporary relatives according to the linear heredity from one of lawsuit parties
2. Husband or wife from one of lawsuit parties, even has divorced.

b) Incapable individual in accordance with nisb

The following lists are allowed to state the related information, but not to be the witness of the court session:

1. Children under fifteen years old
2. Insane person, even sometimes his memory is returned

d. Principle of *Ultra Ne Petita*

This principle is a principle which functions to restrict the judge, so the judge is only allowed to grant according the lawsuit. The judge is forbidden to grant more than the lawsuit asked by the prosecutor.

e. Principle of *De Gustibus Non Est Disputandum*

Principle of *"De Gustibus Non Est Disputandum"* is actually a peculiar principle which is applied in the law. This principle relates to the sense or desire which could not be prosecuted.

f. Principle of *Nemo Plus Juris Transferre Potest Quam Ipse Habet*

This principle refers that people could not shift much right than they actually have.

E. Charge of Evidence

The general guidelines dedicated for the judge to divide the charge of evidence are mentioned in 163 article of HIR/283 article of RBg/1865 article of BW which asserts:

> *"Who says that he/she has right, or mentions an event to clarify the right, or to argue other people's right, then he/she must prove the right or the incident"*

It is fair that the party who prosecutes the right must prove the right if it is real existed or the event affects to that right. As for the

prosecuted party who argues the prosecutor's right might also prove the event which is able to eliminate or reject the prosecutor's right.[48]

If the prosecuted or prosecutor party could not prove any evidence, then the other part could be defeated easily. The material law often regulates the division of evidence charge as mentioned below:

1. State of emergency has to be proven by debitor (1244 article of BW).
2. Who prosecute the indemnification caused by breaking the law has to prove that the other party is wrong (1365 article of BW).
3. Who shows three recent receipts is considered to have paid all installments (1394 article of BW).
4. Who belongs to a property is considered as its owner (1977th article 1st paragraph of BW).

9. Perspective of *Maslahah Mursalah*

A. Definition of Maslahah Mursalah

Maslahah mursalah is etymologically derived from two words, maslahah and mursalah.[49] Word maslahah is derived from Arabic verb which means the source of goodness.[50] The word

[48] H. Riduan Syahrani, *Buku Materi Dasar Hukum Acara Perdata*, (Bandung: PT. Citra Aditya Bakti, t. th)
[49] Rahmat Syafe'i, *Ilmu Ushul Fiqih* (Cet.III; Bandung: Pustaka Setia, 2007), h. 118.
[50] Chaerul Umam, *Ushul Fiqih I* (Bandung: Pustaka Setia, 2000), h. 135.

maslahah sometimes means looking for goodness.[51] As for word mursalah is derived from Arabic adverb in the form of tsulasi, with additional letter "alif" in the beginning. Etymologically, the word mursalah means to be apart from and free. If the word "apart from" and "free" is correlated together with the word maslahah, it means "to be apart and free from the rule which states the possibility and impossibility of doing something".[52]

The correlation between these two words "maslahah mursalah" refers to the principle of goodness which is used to establish an Islamic law. Also, it refers to an action which is containing value of goodness and benefit.

There are several different definitions formulated about maslahah mursalah, however each definition has similarity and closes to other definitions. The definitions are mentioned below:

1. AL-Ghazali in *al-Mustasyfā* book formulated that maslahah mursalah is every goodness that does not have any evidence as well as certain related law to cancel and pay attention to this matter.[53]
2. As-Syaukani in *Irsyād al-Fuhūl* book defined that maslahah mursalah is goodness which is whether Islam refused or considering for this matter is still unknown.

[51] Abdul Wāhab Khalāf, *Masādir al-Tasyrī' al-Islāmi Fī mā Lā Nassa Fīh* (Cet.III; Kuwait: Dār al-Qalām, 1972), h. 85.
[52] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h. 332
[53] Abu Hamid al-Ghazāli, *Al-Mustasyfā fī 'Ilm al-Ushūl* (Beirut; Dār al-Kutūb al-Ilmiyyah, 1993), h.311.

3. Ibnu Qudaima from ulama Hambali formulated maslahah as goodness which does not have any certain evidence or instruction that could either cancel or consider for this matter.
4. Yusuf Hamid Al-alim formulated maslahah as a thing which does not have any Islamic instruction towards its implementation which could either cancel or consider for it.
5. Jalal al-Din Abd al-Rahman formulated the broader definition[54] that he formulated maslahah as everything which is appropriated to Islamic objectives (syar'i). But, it does not have certain instruction to prove its acknowledgment and cancellation.
6. Abdul Wahab al-Khallaf formulated maslahah mursalah[55] as goodness with no Islamic argumentation to be either acknowledged or cancelled.
7. Muhammad Abu Zahra defines quite similar definition[56] with Jalal al-Din, that maslahah is goodness which is supposed to be appropriated to the Islamic objectives and certain instructions that could prove the acknowledgment and cancellation.
8. Imam Malik as mentioned by Imam Syatibi in *al-I'tishām* book, maslāhah mursālah is goodness which is appropriate to the objective, principle, Islamic argumentation (nash), which

[54] Asyyaukani, *Irsyād al-Fuhūl* (Beirut; Dār al-Kutūb al-Ilmiyah, 1994), h. 333
[55] Abdul Wāhab Khalāf, *Ilmu Ushūl al-Fiqh* (Kairo; Dār al-Fikr, 1996), h. 80
[56] Muhammad Abū Zahrah, *Ushūl al-Fiqh* (Beirut; Dār al-Fikr, 1957), h. 278.

functions to heal sorrow in either *dhārurīyah* (primer) or *hajjīyah* (secondary).[57]

From above definitions, it could be drawn a conclusion that the basis of maslāhah mursālah are:

a. It is every reasonable thing under the consideration to be able to create goodness or prevent badness for human;
b. Every reasonable thing which appropriates and meets the purposes of Islam in deciding the law;
c. Every reasonable thing connects to the Islamic purposes which has not any certain instruction which specifically refuses or admits it.[58]

B. Position of Maslahah Mursalah and Its Legal Ground

It could not be denied that within circle of former scientific thoughts (mazhab ushul) is existed different opinions relates to the position of maslahah mursalah and its legal ground in Islamic law either the law of acceptance or refusal. Imam Malik and his fellows were the group of people who clearly exerted maslāhah mursālah as their method of ijtihad. Imam Muhammad Abu Zahra even mentioned that Imam Malik and his fellows were mazhab who formulated this maslāhah mursālah as law argumentation and hujjah syariyyah.[59] Maslāhah mursālah was also used in the circle of non-Maliki like ulama Hanabilah. According to them, maslāhah mursālah is induction

[57] Abu Ishak asy-Syāthibi, *Al-I'tisham Jilid II* (Beirut; Dār al-Ma'rīfah, 1975), h. 39.
[58] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h. 334
[59] Muhammad Abū Zahrah, *Ushūl al-Fiqh* (Beirut; Dār al-Fikr, 1957), h. 280

form of logic of *nash* collection, which is not similar to the detailed *nash* as found in *qiyas*.[60] Even, Imam Syatibi stated that the existence of quality of maslāhah mursālah is *qat'i*, although within the implementation is *zhanni* (relative).[61]

As for ulama Hanafi regarded maslāhah mursālah had different mentions. According to al-Hamidi, there are plenty of ulama Hanafi who did not applied maslāhah mursālah, but according to Ibnu Qudaimah, some of ulama Hanafi applied maslāhah mursālah. It seems that this last opinion is more valid since this method is closed to the istihsan in the circle of ulama Hanafiah.[62] Moreover, according to ulama Syafi'iyah, there is different opinion. Al-Amidi and Ibnu al-Hajib in their *al-Bidākhsyi,* asserted that ulama Syafi'iyah did not employ maslāhah mursālah, since Syafi'i did never tell about this method in his *al-Risālah* book. Ulama al-Ghazali mentioned that imam Syafi'i did ever use this method in delivering *hujjah*. But, Imam Syafi'i put it into *qiyas*.[63]

As for the circles of ulama that refused the use of maslāhah mursālah is al-Zahiriyah. Mazhab Zahiriyah is the main opponent *mazhab* of the maslāhah mursālah method. [64]Moreover, ulama Syi'ah,

[60] Nasrun Haroen, *Ushul Fiqh* (Cet.II; Jakarta: Logos Wacana Ilmu, 1997), h. 121.
[61] Abu Ishak asy-Syāthibi, *Al-Muwafaqāt fī Ushūl asy-Syarī'ah Jilid IV* (Beirut; Dār al-Ma'rīfah, 1975), h. 207.
[62] Abu Ishak asy-Syāthibi, *Al-Muwafaqāt fī Ushūl asy-Syarī'ah Jilid IV* (Beirut; Dār al-Ma'rīfah, 1975), h. 207.
[63] Abu Hamid al-Ghazāli, *Al-Mustasyfā fī 'Ilm al-Ushūl* (Beirut; Dār al-Kutūb al-Ilmiyyah, 1993), h. 311
[64] Wahbah Zuhaily, *Al-Wajīz Fī Ushūl al-Fiqh* (Beirut-Libanon; Dār al-Fikr Muasir, 1995), h. 93.

some of ulama Mu'tazilah, and *Qādhi al-Baidhāqi* rejected the implementation of maslāhah mursālah in their *ijtihad*.

The following mentioned about different opinion among the circles of mazhab ushul who accept and reject the method of maslāhah mursālah and their argumentation:

a. First group stated that maslāhah mursālah is one of law source as well as hujjah syariah. As for the argumentation they had:
   1) The existence of Prophet's taqrir (acknowledgement) on the explanation of Mu'az bin Jabal who used ijtihad bi al-ra'yi that it could be applied if certain law which is used to settle the law cases is not found in Al-Qur'an and As-Sunnah. This ijtihad refered to the use of logical reasoning or things regarded as maslahah.
   2) The existence of practice which had been widespread in the circle of Prophet's sahabah about the implementation of maslāhah mursālah as an acceptable condition. In example, when sahabah had pieced Al-Qur'an in one mushaf, and this is done because they feared that this Holy Book would gone someday. This idea was not told and even existed in the period when Prophet Muhammad was alive, and it was also not prohibited as well. The idea of gathering pieces of Al-Qur'an into one mushaf was done for the sake of all Muslim's goodness. Then, practically, sahabah had practiced the idea

implemented by the method of maslāhah mursālah which was not regulated in Al-Qur'an. Sahabah had exerted this method for the noble purpose, then, it should be respected. Therefore, heading toward maslāhah mursālah is an obligatory.[65]

3) If the method of maslāhah mursālah was clear and appropriate to the Islamic law (syar'i), then the implementation of this maslahah had met the Islamic purposes as well, even it was not found any specific argumentation related to this method. If this method was not used for establishing the law, it was considered as fobbing of the purposes. Therefore, in the process of maslāhah mursālah implementation, it had better implement under Islamic principles.[66]

4) Actually, the purpose of law was to create goodness and prevent damage in human life. This maslahah would always develop and change by the centuries, conditional and surrounding change. If this maslahah was not carefully controlled and responded with the recent and valid regulations, or in the fact that this maslahah was only bound by the argumentation, certainly this maslahah would disappear from the human life.[67]

[65] Romli SA, *Muqāranah Mazāhib fil Ushūl* (Cet.I; Jakarta: Gaya Media Pratama, 1999), h. 168.
[66] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h.339-340
[67] Zaky al-Din Sya'ban, *Ushūl al-Fiqh al-Islāmi* (Mesir; Matba'ah Dār al-Ta'lif, 1965), h. 176.

b. Second group said that maslāhah mursālah was not acceptable as hujjah in deciding the law. The argumentation of this notion are explained below:[68]

1) If the valid instructions was existed within maslahah, then this method included into part of performing qiyas. If the valid instructions which could correct its implementation was not existed, so it would be impossible to name this one as maslahah. Implementing such action out of Islamic instructions was similar to the action of admitting that AL-Qur'an and As-Sunnah was incomplete.
2) Implementation of maslahah without having valid acknowledgement from *nash* would effect to the wrong implementation of law because it was based on own desire. This reason had explained the reason of ulama Al-Ghazali did not exert this method in his *hujjah*.
3) Implementation of *maslahah* without having valid acknowledgement from *nash* would affect to the existence of freedom in deciding law which then affect to treat other badly in the name of law. This situation is contradicted to the principle of Islamic law, "it is forbidden to cause damage and to be damaged"

[68] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999).

4) If it is allowed to conduct ijtihad without having valid acknowledgment from nash, it would affect possibility for the change of Islamic law under the reason of different period and space time as well as different subjects. If this is occurred freely, the validity of law will disappear.

From the point of view of different opinion existed among ulama with their own argumentation, ulama who accepted and rejected the method of maslāhah mursālah in ijtihad do not have any difference principally. In fact, the group who accepted this method did not accept maslāhah mursālah absolutely; even they put some hard requirements before the method implementation. As well as the group who refused to have the method of maslāhah mursālah were afraid of coming to the possibility of doing mistake if they decided the law in their own course and desire. If this afraid could be cleared as having the similarity with the basic principle, they would employ this method in their ijtihad, as Imam Syafi'i did.

In conclusion, the method of maslāhah mursālah is part of syariat which could not be pushed away. Even though, this method is not mentioned in the nash textaually, it is needed by human substantially, especially with things related to their principle need. Therefore, Zaky al-Din Sya'ban asserts that maslāhah mursālah as one of tasyri' which has been an important basis enables to create

values of goodness, especially if the experts are able and willing to care about it.[69]

C. Conditions of Maslāhah mursālah

When maslāhah mursālah was employed as hujjah, ulama tried to very carefully, they were afraid of causing the wrong law based on own course and desire. Based on this situation, ulama arranged some conditions of the implementation of maslāhah mursālah as a basis to form the law:[70]

1. Maslahah here is the real maslahat for goodness sake. It represents that the maslahah aims to form the new law which could produce goodness and prevent from damage. If the maslahah is only based on the presumption, the law would never bring any goodness. In example, in the case of a husband who is prohibited to divorce his wife, and if he wants, he is obliged to propose this divorce right to the court. Actually, this kind of law is not containing goodness; on the other hand, it causes the damage of house hold harmony. In fact, to tell the truth that the relation between this couple is maintained by the force element of law, not by their own sincerity, affection, and love.[71]
2. Maslahah is dedicated for general, not for personal. It means that by forming the law based on this method, people could

[69] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h 179
[70] Burhanuddin, *Fiqih Ibadah* (Cet.I; Bandung; Pustaka Setia, 2001), h. 162
[71] Chaerul Umam, *Ushul Fiqih I* (Bandung: Pustaka Setia, 2000), h. 137

bring some benefits for many people. Imam Al-Ghazali gave an example for it, ther non-muslim had shielded himself from the muslim. If the muslim is prohibited to kill them, so the non-muslim thought that he was the winner and would kill off all muslim. And, if the muslim against on the other muslim who protected those non-muslim, then that danger possibility would disappear. [72]This shows the action done for the sake of maintaining maslahat of all muslim by destroying against the enemies.

3. Maslahah should not be contradicted to the existed Islamic argumentation (Nash, Al-Qur'an, As-Sunnah, Ijma, and Qiyas). This method of maslāhah mursālah is conducted when it is really needed. When the problems is not solved by this method, then the muslim would be in suffer and difficulty.
4. Maslahah mursalah should be done in the needed situation, so the muslim would not live in sorrow.[73]

Imam Al-Ghazali asserted a number of conditions have to fulfill when using maslahah as hujjah in establishing the law, they are:[74]

1. Maslahah should appropriate to Islamic rules

[72] Alaiddin Koto, *Ilmu Fiqih dan Ushul Fiqih* (Cet.I; Jakarta: Raja Grafindo Persada, 2004), h. 145.
[73] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h. 337
[74] Abu Hamid al-Ghazāli, *Syifā' al-Ghalil fi Bayān al-Sya'bah wa al-Mukhil wa Masālik al-Ta'lil*, tahqiq ahmad al-Kabisi (Baghdad; Mathba'ah al-Irsyād, 1971), h. 182.

2. Maslahah should not contradicted to the nash existed in Islam
3. Maslahah is categorized into *dharuriyah*, which covers both personal goodness and universal goodness, which then to be valid for all muslim.

D. Objects of Maslāhah Mursālah

Ulama who had exerted method of maslahah mursalah determined its use restriction. This maslahah was only allowed to use out of the matter of worship, like the matter of association and custom. In the matter of worship, the method of maslahah mursalah was not allowed to use at all. Since, this method was based on the logical consideration about the goodness and badness of the found problem, whereas the logic could not be used for everything related to worship.

All actions related to the worship (*ta'abbudi* dan *tawqifih*), means that we only follow what has mentioned in Islamic instruction within nash and in this context, the logical consideration could not be employed at all. In example, we would never be able to consider the goodness and badness from determining the time and period of prayer.[75]

If the matter is out of the worship context, then this method is permitted to use. Since, even though we do not know about the certain reasons beyond that law, it is generally rationale and logical. In

[75] Amir Syarifuddin, *Ushul Fiqih Jilid 2* (Cet.I; Jakarta: Logos Wacana Ilmu, 1999), h. 340-341

example, drinking wine (khamar) is haram because this drink could damage human intelligence. So, the determination of punishment for drunk people is good, in the hope that would not be any intelligence damage which then cause to some further criminal acts. Shortly, it is known that the use of maslāhah mursālah focuses on the matters which are not found in nash (Al-Qur'an, As-Sunnah, Ijma', and Qiyas).

As for the examples of facts and events which exert this maslahah in establishing the law mentioned below:[76]

1. Gathering pieces of Al-Qur'an into one mushaf for the sake of preventing this Holy Book from the loss and damage, since a large number of hafidz at that period were died.
2. Khulafah ar-Rasyidin established an obligation to be responsible of the financial loss of the laborer. Actually, they had a full authority of them which was based on the reliance. In fact, if they were not obliged by this kind of responsibility, they might hurt and break the obligation of protecting the other's wealth who were under their responsibility.
3. Umar bin Khattab RA consciously spilled the milk which had been mixed with some water. This action aimed to give them a warn to not repeat the dishonest deed.
4. The allowance of promoting *mafdhūl* leader (who was not the best one). This action was permitted in the condition of

[76] Muhammad Abū Zahrah, *Ushūl al-Fiqh* (Beirut; Dār al-Fikr, 1957), h. 281

preventing the state from damage, attack, and empty government.

5. If the state's finance experienced deficit and could not fulfill the needs of soldier financing, so the government was allowed to conduct tax to the rich citizens to cover this urgent need.
6. If all (haram) prohibited conditions was spread in the world or in certain countries where the citizen experienced some obstacles to move into the other country, and found difficulty in getting permitted occupation (halal) and urged to fill the daily need in order to keep living, then it was allowed for the to accept that bad occupation for the sake of urgent situation.

CHAPTER III
RESEARCH METHOD

A. Type of Reseach

Type of Reseach relates to the technique, instrument, and design which are employed in the research. The Type of Reseach has to be suitable with the research taken. Also, the procedure, technique, and instrument used in the research have to be suitable with the determined research method.

This research is categorized into field research, which aims to describe and provide solution of the problems found in the daily life.[77]

[77] SaifuddinAzar, *MetodePenelitian* (Yogyakarta: PustakaPelajar, 1998), h. 36.

Within the field research, the research is conducted by immediately coming to the location of research method in order to obtain the needed data relates to the practice of land proprietary right which has double certificates on the inheritance case 783/Pdt.G/2014/PA.Gs, and completed by some literatures to support this research.

B. Approaches

The approach which is used in this research represents scientific perspective of how to understand the data. This research employs the method of juridical and sociological approach. The researcher decided to use this method since this research is investigating the law in action study. This law research will identify effectiveness of the rule of law which is basically categorized into comparative research between the reality of law and the ideal of law.[78]

The juridical and sociological approach is intended to draw and analyze the implementation of verdict in Religion Court of Gresik in clear and detailed explanation. This case refers to the existence of double certificates in single place on the inheritance lawsuit 783/Pdt.G/2014/PA.Gs. therefore, the use of this approach is based on the real incident happened in Religion Court of Gresik which aims to find facts, discover lawsuit, and then solve problem.

Hence, the researcher will analyze the data relates to the implementation of adjudication taken in Religion Court of Gresik

[78] Amiruddin, Zainal Asikin, *Pengantar Metode Penelitian Hukum,* (Jakarta: PT Raja Grafindo, 2006), h.137.

about the double certificates in similar place on the case of inheritance 783/Pdt.G/2014/PA.Gs by employing the juridical and sociological approach to compare between the reality and ideal of law.

C. Research Location

Based on the research title and problems taken, this research is conducted in the Religion Court of Gresik. As for the object of the research focuses on the judges in the Religion Court of Gresik who will solve the inheritance lawsuit which has double certificates.

D. Data Sources

This research is categorized into empirical research that collects the data from the field immediately.

1. Primary Data Source

The primary data source is derived directly from the main source that has been the main notion or research object, in the form of the sentences or actions taken by the object. This data is collected from the result of interview process directly with the informant. According to this method, this research object is chosen based on certain characteristics which are considered as having relation with this research.[79] Within this research, the researcher is only able to have interview with one of them who is ordered by the Head of Religion Court of Gresik to give the data needed to the researcher H. M. Arufin, Drs. H. M. Bisyri, AH. Fudloli.

[79] Sugiono, *Memahami Penelitian Kualitatif* ,(Bandung: CV Alfabeta, 2008), h. 62.

2. Secondary Data Source

The secondary data source refers to the source of law which clarifies the primary data source, like draft bill of law, result of previous researches, law books including thesis and dissertation relating to the law, and law journal. This research exerts seven cases of hereditary determination in 2015, but the researcher focuses on one hereditary determination. The following are the secondary data source exerted by the researcher:

a. Adjudication of Religion Court 783/Pdt.G/2014/PA.Gs;
b. Law 1st year 1974 relating to Marriage;
c. Islamic Law Compilation (Presidential Directive 1st year 1991);
d. Result of research report.

E. Data Collection

Techniques of data collection have an important function in doing the research. The success of research is determined by the techniques of data collection used during the research. The following are the techniques of data collection employed by the researcher:

1. Interview

Interview is a process of obtaining information for the objectives of conducting the research which is done by delivering

question-answer in face-to-face between the interviewer and the informant, with or without any interview guidelines.[80]

This method is direct question-answer done to the judge in the Religion Court of Gresik. By using this method, the researcher could obtain needed information, so will be able to collect the data accurately and completely.

In this context, the researcher only employs a technique of interview which consists of some question outlines. Here, the creativity of researcher is much needed, since the most result of interview depends on the interviewer himself.

2. Documentation

Documentation is an activity of gathering the data relates to the certain matters and variables such as notes, transcript, book, newspaper, magazine, agenda, and so on.[81] This documentation becomes complement data and authentic data of the situation happened in the past objectively. In this research, the researcher exerts the adjudication from the case of determination of double certificates in one place (lawsuit 783/Pdt.G/2014/PA.Gresik), laws, related books and journals.

Then, this documentation method could be useful to seek the data relates to the application of verdict taken in the Religion Court concerning to the double certificates case in one place of the

[80] Burhan Bungin, *Penelitian Kualitatif Komunikasi, Ekonomi, Kebijakan Publik, dan Ilmu Sosial Lainnya* (Jakarta: Kencana Prenada Media Group, 2010), h. 108.
[81] Moh Nadzir, *Metedologi*, h. 175.

inheritance lawsuit 783/Pdt.G/2014/PA.Gs case study in the Religion Court of Gresik as this research title.

F. Data Analysis

To understand the collected data and make sure that the data is structured in well-ordered and systematically, therefore, the data should be analyzed by several significant steps:

1. Data edit

   This first step is done by re-examining the collected data from the interview result of the Judge Court. The data should be complete, clear, appropriate and relevant with the other data. The data are gathered through some notes and question sheet which are read and revised by the researcher if there are several errors.

2. Data classification

   The result of interview is then classified into certain categories. This categorization aims to make the data readable, understandable, and informative of the needed object.

   The data categorization is done according to the similarities during the interview and other references or literatures.[82]

3. Data analysis

   Analysis is an activity of understanding and classifying the data into some units which could be analyzed and found the

[82] Lexy J Maleong, *Metodologi Penelitian Kualitatif edisi revisi* (Bandung: PT Remaja Rosdakarya, 2009), h. 252.

importance points. On the other word, the data analysis is a process of data simplification, so both the researcher and the reader are able to understand and interpret the research easily. The analysis method used in this research is descriptive analysis, which describes the situation or legal status of phenomenon, and then analyze them with the instruments such as reference, research focus, subject background, and personal opinion of the researcher.

4. Conclusion

   Drawing the conclusion is the last step of the research where the researcher generalizes or draws general conclusion from the result of data analysis.

G. Research Validity

The validity of data could be examined by using the method of triangulation. Triangulation method means a technique of checking and examining the data validity by utilizing the use of source. The researcher compare between the result of interview with the informants and the documents related to the verdict of Religion Court 783/Pdt.G/2014/PA.Gs and the final decree of the Religion Court of Gresik from the double certificates case in one place. Then, the researcher could identify the reasons and statements told by the Judge Court which has been formulated in the rule of law and compare them with the information which is obtained during the interview.

CHAPTER IV

RESEARCH FINDINGS AND DISCUSSION

A. Findings

1. Profile of Religion Court of Gresik

According to Juridical formal, religion court is a judicature corporation which is associated in national system which had been established firstly in Indonesia (Java and Madura) on August, 1st, 1882, based on the 24th verdict of King of Netherland (Konninklijk Besluit), named King Willem III on January, 19th, 1882 which then contained in 152nd of Staathblad 1882. This judicature corporation was called Priesterraden which was legally called as Rapat Agama or Raad Agama and then as Pengadilan Agama. The King of Netherland's verdict was

declared validly from August, 1st, 1882 contained in 153rd of Staatblad 1882. Raad Agama was existed in Gresik and located in Northern porch of Masjid Jami' of Gresik.

Then in 1942, Moslem inhabitants of Gresik donated a building under the name of Raad Agama (appropriate to marbled charter hang on the wall of building) which was located on 2nd of KH. Wahid Hasyim Street (western town square of Gresik). The name of Raad Agama was altered into Pengadilan Agama (Religion Court) of Gresik in 1957. In 1980, the new office of Pengadilan Agama of Gresik was built on 45th of DR. Wahidin Sudiro Husodo Street by Ministry of Religious Affairs of Indonesia through the project decision of Religion Court meeting in 1979/1980. Then in 1984, Pengadilan Agama got the construction project of official house from the Ministry of Religious Affairs. In 2004, this Pengadilan Agama (Religion Court) under the authority of Supreme High Court by 21st of presidential decree in 2004 concerning to the Transfer of Administrational and financial organization in the area of General Court, Civil Service Arbitrational Court, and Religion Court up to Supreme High Court.

In 2006, a new building was built in the same place from the annual budget of 2006. This project was begun from August 2006 and then firstly used in the beginning of 2007 up to now.

Since it was existed in 1882, the Religion Court of Gresik has experienced several changes of leadership as mentions below:

1) KH. MOH. CHOLIL (1942 - 1952)
2) KH. MOH. SYUKRON (1952 – 1957)
3) KH. ABDUL KARIM (1957 – 1962)
4) KH. RIDUAN RAZMANY (1962 – 1964)
5) KH. CHASBULLAH (1964 – 1974)
6) Drs. H. YASKUR (1974 – 1984)
7) H. QAANI; AHYAD, SH. (1984 – 1993)
8) H. MOH. SYA'RONI (1993 – 1998)
9) Drs. H. MOH. SOFWAN NURHADI (1998 – 1999)
10) H ABU YAZID, SH. (1999 – 2000)
11) PLH. DRS. H. MOH. SOFWAN NURHADI (2000 – 2001)
12) Drs. H. HASAN BISRI, SH. MH. (2001 – 2008)
13) Drs. H. DAMANHURI, S.H. (2008 – 2010)
14) Drs. H. NANANG FAIZ (2010 – 2012)
15) Hj. ATIFATURRAHMANIYAH ,S.H (2012 – 2014)
16) Dra. Hj. HASNAWATY ABDULLAH, SH, MH. (2014 – this year)

As for the jurisdiction territory of Religion Court of Gresik covers sixteen sub-districts approximately 1.191,25 Km² in wide range and 1,5 – 40 Km from the village to the Religion Court office of Gresik. Here is the list of surrounding villages: Sub-district of Gresik (consisting of 22 Districts), Sub-district of Kedamean (consisting of 15 Districts), Sub-district of Menganti (consisting of 22 Districts), Sub-district of Kebomas

(radius I) (consisting of 22 Districts), Sub-district of Balongpanggang (consisting of 22 Districts), Sub-district of Manyar (consisting of 23 Districts), Sub-district of Sidayu (consisting of 21 Districts), Sub-district of Cerme (consisting of 25 Districts), Sub-district of Ujungpangkah (consisting 13 Districts), Sub-district of Benjeng (consisting of 25 Districts), Sub-district of Panceng (consisting of 15 Districts), Sub-district of Bungah (consisting of 21 Districts), Sub-district of Driorejo (consisting of 25 Districts), and Sub-district of Dukun (consisting of 27 Districts).

The Religion Court building of Gresik is regarded as 1st B class of Religion Court located in Gresik Regency, precisely on 45th of DR. Wahidin Sudirohusodo Street, Phone number 031-3991193, Facsimile 031-3981685, Randuagung Village, Kebomas Sub-district, Gresik Regency 61121.

2. Case Chronology

Formerly, there was lived a man named H. Abdul Aziz in Banjarsari Village, Manyar Sub-district, Gresik Regency who was died on September, 10th , 2004. He lived in this village until the time he died.

The parents of deceased H.Abd.Aziz (Mr. Abd. Rohman and Mrs. Aslihatun) had firstly passed away before him. During his life, H. Abdul Aziz (INHERITANCE OWNER) has married to a woman (PROSECUTED PARTY). From this marriage, they have five children, they are H. Moh. Wafiq Aziz (Prosecutor I), Hj. Qurrotul Ainiyah

(Prosecuted III), H. Abd. Rouf (Prosecuted I), H. Nur Syafi'I (Prosecutor II), and H. Faishol (Prosecuted II).

Those people are the list of inheritor of the deceased H. Abdul Aziz, since they have right to inherit the inheritance of him.

Along H. Abdul Aziz's life, almarhum (INHERITANCE OWNER) owned some inheritance wealth (Tirkah) which has not been shared until this time in the form of:

a. Unit of permanent house, stonewall, tilled-roof, and ceramic floor, wide approximately 7X25 M, as well as a lot of land approximately 7,5X25 M, fishpond of Drudus approximately 28.000 M^2 persil 72 kelas D II.
b. A fishpond of Sialo approximately 20.000 M^2 persil 72 kelas D II.
c. A fishpond of Pekerangan approximately 9.750 M^2 persil b kelas D II.
d. A lot of land approximately 1.200 M^2 persil 12 kelas D III.

All objects are located in Banjarsari Village, Manyar Sub-district, Gresik Regency. Those objects are physi cally owned by the prosecuted parties. Previously, this matter is never been told by the prosecutor parties. Due to the feeling of being offended, it makes the prosecutor party to propose the matter to Religion Court. The beginning of this case was when the prosecutor party was adopted by his aunty, and when the aunty was passed away, all her inheritance is granted to him. One day, the father bought a fishpond. He was always sharing the fishery result to the

prosecutor party when he was alive. The prosecutor had given four hundred million rupiah for this fishpond. But, since the father was died, the siblings of the prosecutor party did not share any fishery result to him. Then, he was offended by the siblings' conduct (from prosecuted party).

Therefore, the prosecutor asked the prosecuted one to return the money because of the prosecuted party's confession that the inheritance was granted to the prosecutor. In fact, the prosecutor part only received two hundred million rupiah instead of the demanded amount of money. The prosecutor has tried to meet and make agreement to the prosecuted party to give the rest of money, but it seemed to be disregarded. Due to this reason, the prosecutor proposed this matter to the Religion Court to be proceeding. During the proofing process, it was found double certificates, where every party has their own certificate of the same object. After the judge conducted some further investigation, it was found that there was a false on the prosecuted party's certificate, where the name of inheritance owner was changed to the name of prosecuted party. But actually, the inheritance was still not shared legally to all inheritor under the evidence that the prosecutor party has not gotten their inheritance right. The prosecuted party altered the certificate name of the first owner to the name of prosecuted party by reason of conversion, that there was a change from one system to another system[83]; in this case, the certificate name was altered to their name under the help of the chief of village. Seeing to this

[83] http://kbbi.web.id/konversi accessed on January, 20 th, 2017

fact, the general judge agreed to state that the certificate of prosecuted party was ruled out, because in the process of gaining the name, this certificate was not good and legal. The inheritance was not shared fairly to all inheritors.

In last session, the Religion Court decides that the granted wealth from the parent could be the inheritance based on KHI 21st article which called it as tirkah, then this kind of wealth should be automatically shared to the other inheritors who deserved to get.

After the adjudication was declared, the prosecuted party proposed to conduct appeal to review the decision taken by the judge. However, since the claim of the prosecuted party was unclear then it continued to the stage of cassation. After this cassation stage, the adjudication was revoked by the prosecutor party. The prosecutor party offered an agreement that the prosecuted party had to pay four hundred million rupiahs to them.

3. Interview Result with Judge in Applying Adjudication of 783/Pdt.G/2014/PA.Gs. on Double Certificates Decision from Inheritance Case in Religion Court of Gresik

Currently, sharing inheritance is proved by the certificate ownership. However, this certificate is often falsified and causes problem and quarrel concerning to the evidence of real certificate. Therefore, in deciding which certificate is true and original, it needs to conduct *ijtihad*.

The writer then held interview session with the judges who were involved in the Religion Court of Gresik, in order to obtain several

explanations concerning to the opinion of the judges about the adjudication of the two certificates in the inheritance case. For this matter, the judges said:

> **Arufin :** *We are as judge, in deciding the adjudication of double certificates case; we take the theory of maslahah for the inheritors as our module, theory of legal law (grand theory), principle of utility, and principle of legal law. Those principles could be exerted as applicative theory for the inheritors.*[84]

Other judges also give their opinion about the adjudication of this double certificates problem in the inheritance case, as follow:

> ***Bisri :*** *We are the judge exert some evidences collected from both prosecutor and prosecuted party, statement clarification from the witnesses. We will examine formally, if one of them is proved to have false evidence or weak evidence, then the Religion Court has only the right to declare that the certificate does not have force of law, but not to declare the certificate off. The one who has right to declare it off is State Court.*[85]

The opinion told above showed that to create a fair judgment, according to 164th article of HIR, valid evidence in every lawsuit: "Legal instrument of evidence are 1) written evidence, 2) witness, 3) presupposition, and 4) oath." In deciding the adjudication of a lawsuit, the judges of Religion Court have several considerations. The consideration of judge is regarded as a lawful consideration used which is based on Al-Qur'an, Hadits, Constitutional Law (UU), KHI, and *ijtihad*.

> ***Fuholi :*** *When we encountered to this kind of phenomenon, our opinion is to see the transfer form of inheritance. After examining and proofing the evidence collection from the witnesses, we finally find that within this inheritance transfer, the false unsure and formality*

[84] Arufin, *Interview* (Gresik, September, 11 2016)
[85] Bisri, *Interview* (Gresik, Desember ,12 2016)

> *abuse are existed with bad intention. This false evidence could be proved and seen from the fact that the certificate contains right transfer on the basis of conversion. This is not the act of presenting right or granted wealth.*[86]

The important thing from Fuholi's opinion that if this case is concerning to the granted wealth, then the way of alteration should be underlined, and the certificate of granted wealth should be made in written certificate under the notary act. This statement is based on the rule asserted in 37th article 1st paragraph of PP 24/197:

> *transfer of land right and proprietary right upon unit of house by purchase and sale, exchange, grant (hibah), company's income, and other forms of right transfer, except right transfer by auction which only could to be registered if it is proved by the related PPAT's certificate based on the existed rule of Constitutional Law.*

In fact, it is not happened in this case, since in this case, the prosecuted party only has approval of the chief of village. The opinion of judges tends to decide the lawsuit of double certificates in same place in very strict way. In particular, they ask for the strong evidences to prove the real status of certificate.

The way or method which is used by the judge in solving the lawsuit is through several considerations, the consideration could be both theoretically and sociologically. Usually, the judge exerts theoretical consideration:

> ***Bisri :*** *In our theoretical consideration, we also employ HIR. If problem is not regulated in HIR, so we will particularly look for the rule in KHI, PERDATA, book of two jurisdictions, one of book which is used as the judge's guidance in solving the lawsuit. Our next consideration is inheritance transfer from the inheritance owner to the*

[86] Fudholi, *Interview* (Gresik, Desember, 12 2016)

> *prosecuted party. In this case, the prosecuted party has less evidence, contains falseness, formality abuse and bad intention. These conditions are shown by the fact that the certificate of right transfer is on the basis of conversion, not presenting right/granted wealth*.[87]

As for, the sociological consideration of judge generally is decided from the result of reviewing previous similar cases:

> ***Arufin :*** *our consideration about the inheritance sharing where the double certificates are belonged to both parties is to consider which party's evidence contains more Maslahah for the inheritors. If the inheritance is not shared fairly (based on faraidh), then it will raise injustice even the granted wealth could be given to the inheritors. Based on the facts of this case, the General Court concludes that the collective agreement among the inheritors (evidence T.4) is formally defected, since the content of agreement is disclaimed by the opposite party. Then, the formal and evidence force as ABT is revoked, it loses its legality as certificate and evidence instrument, as mentioned in 1876th article of KUH Perdata and jurisprudence of MARI 167 K/Sip/1959 in June, 20, 1959. Therefore, the certificate of prosecuted party is ruled out. It is asserted that the inheritance (belonged to Wasil/H. Abdul Aziz is not being shared yet to all inheritors.* [88]

The opinion above asserted briefly that the law could be seen through sociological aspect. This is also mentioned in the book of **Lawrence M. Friedman** under the title *The Legal System Social Science Perspective*, 1975: law system consists of law structure (legal institution), rule of Constitutional Law, and law culture. Those three components support the law system of a state.

According to social reality, the existence of law system in the citizen experiences several changes affected by modernization or globalization in both evolutionally and revolutionarily. [89]

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[87] Bisri, *Interview* (Gresik, December, 12 2016)
[88] Arufin, *Interview* (Gresik, September, 11 2016)
[89] Saifullah, *Refleksi Sosiologi Hukum*, (Malang: PT.Refika Aditama, 2007), page 26.

In some existed cases, most lawsuit parties are not familiar to the difference of inheritance and granted wealth (hibah). They often regard that when they have been shared the inheritance, that wealth is totally belonged to them. For this matter, one of judges has a notion that:

> ***Fudholi :*** *it is important to know that inheritance and hibah are different things. Hibah is wealth given by the owner when he is still alive, whereas inheritance is shared when the owner is already died. Also, it needs to be considered at what extent the certificate changes in case of inheritance. Is it a right shift or purchase and sell or parent's debt to the son? it should to be known when the precise time of hibah. The amount of hibah is not more than a third of owner's total wealth. If it is more than a third, this hibah should be shared. Hibah could be categorized as inheritance (waris) if it is more than the inheritance, if it has certificate, then the certificate does not mean any force of law.*[90]

Those opinions show that in solving the lawsuit needs to investigate the root of problem by exerting legal method. Justice is all people want when they are proposing the lawsuit to the Religion Court. In QS. An-Nahl:90 :

> إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ ۚ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ
>
> *"In truth, Allah ordered (human) to act fairly and do goodness, help other human. He banned human to act bad, munkar, and hostile. He taught you these, so you can have some lessons to remember."*

Adjudication of 783/Pdt.G/2014/PA.Gs delivered much contribution to the inheritors. By this adjudication, the inheritors' right will be fulfilled fairly according to the protion. Then, the inheritors will have their right. This is also beneficial to the next similar cases to be

[90] Fudholi, *Interview* (Gresik, December, 12 2016)

reviewed. Following are the opinions stated by the judge concerning to the benefit/effect of this case for both citizens and Religion Court:

> ***Bisri :*** *in the process of jurisdiction, the prosecuted party does not accept the adjudication, then he is allowed to propose an appeal, and if he still does not find any justice for him in appeal session, so he could propose cassation. Furthermore, if in the cassation, the prosecuted one does not satisfied to the judge's verdict, the case will turn into jurisprudence, and the certificate is disregarded in the perspective of law. Then, the inheritance right will be shared fairly according to faraidh in order to establish new legal certificate.*[91]

As it is mentioned in the book written by Surojo Wignjodipuro under the title Pengantar Ilmu Hukum (Alumni, Bandung, 1974, page 71) asserted that adjudication made by the judge upon a lawsuit is considered as persistent decision of judge over certain lawsuits. The law of this adjudication is named as jurisprudential law.

Jurisprudence as one of law source which means a legal determination from Indonesia government as judge's decision, which is established to solve the lawsuit. Therefore, the adjudication of judge is always in the form of determination applied to concrete matters which has been quarrel between two or more parties.

Finally, the Religion Court decreed that the granted wealth from parents is called inheritance based on KHI 21st article which called it as *tirkah*, and this kind of inheritance should automatically shared to the other inheritors.

> ***Arufin :*** *"In last, we are as judges decree that all granted wealth come from the parent is called as inheritance according to KHI 21st article and called it as tirkah, and this inheritance should*

[91] Bisri, *Interview* (Gresik, December, 12 2016)

automatically shared to the other inheritors. But, if the prosecuted party does not accept this decree, so he could propose an appeal to the judge. In fact, the claim of prosecuted party is still unclear, then, it is continued to the process of cassation. After cassation stage, the adjudication is revoked by the prosecutor party by offering an agreement for the prosecuted party to pay the rest of four hundred million rupiahs. Finally, the judge makes a final decree that the lawsuit is settled by the agreement between two opposite parties."

After this final decree, the prosecuted party could propose an appeal to the judge. However, the claim of prosecuted party is unclear, then, it is continued to the process of cassation. After the stage of cassation, the adjudication is revoked by the prosecutor party by offering an agreement for the prosecuted party to pay the rest of four hundred million rupiahs. Lastly, the judge makes a final decree that the lawsuit is settled by the agreement between two opposite parties.

B. Discussion

1. Judge's Consideration in Applying Adjudication 783/Pdt.G/2014/PA.Gs. on Double Certificates Decision from Inheritance Case in Religion Court of Gresik

According to the interview result that the researcher has conducted to the judges, in this part, the researcher formulates several methods which are employed by the judges in deciding the inheritance case of 783/Pdt.G/2014/PA.Gs. on the double similar certificate. The followings are the chronology and basic reasons beyond the judge's adjudication in the inheritance case 783/Pdt.G/2014/PA.Gs.

In the case chronology, the prosecuted party stated that all argumentation of prosecutor party was true concerned to the inheritance request except inheritance share, since according to the prosecuted party, the inheritance had been shared. According to the prosecuted party's statement, tirkah belonged to Wasil (H. Abdul Aziz) had been all granted to the prosecuted party I (H. Abd. Rouf). Based on Sudikno Mertokusumo's book, the procedure of civil law in Indonesia has clarified that confession is one of evidence instruments which is in the form of prosecuted party's witness to confess that the inheritance request that is asserted by the prosecutor party is true. This witness means *lawsuit certainty is given to the judge through oral and personal statement by one of the lawsuit parties in the court session*[92], to put it briefly, the given information in the court session is based on the prosecuted party consciousness.

On the other hand, the prosecutor party sent three witnesses, they are H. Munawir Bin Moch. Kholil, Shodiqin bin Abdul Ghoni, and H. Ainur Rofiq bin H. Shohaimi while the prosecuted party sent Nurhasan bin Akhwan, H Rifa'I bin Abdul Halim, and Masrukh bin Abu Na'im as their witnesses. All witnesses had fulfilled formal requirements as mentioned in the rule of 144th and 147th article of HIR:

144th Article

1) *The witnesses should come in the determined day will be called and entered to the court session one by one.*

[92] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), page. 166.

2) *The chief of court session will ask then name, occupation, age, and address. He will also ask them whether the witness is relative by which lawsuit party. Besides, the witness is also asked to confess if one of lawsuit party has personally forced to help them to win the lawsuit.*

145th Article

1) *Who are not allowed to be witness:*
a) *Family by blood and family by marriage of one of the lawsuit parties in linear relation*
b) *Wife and husband of one of the lawsuit parties even they have been divorced*
c) *Children who are generally not able to be a legal witness, they are under fifteen years*
d) *Insane individual even sometimes they have their memory back*
2) *Blood family and marriage family relation of one of the lawsuit parties are not rejected as witness in certain conditional lawsuits such as labor contract according to the civil law.*
3) *People mentioned in first and second of 146th article are not allowed to refuse the obligation as witness in the court session.*
4) *State Court have authority to conduct investigation without stating oath to the children witness in the first paragraph, or insane individual who sometimes get the memory back as long as their statements are only regarded as an explanation (KUHPerd 1910-1912).*

146th Article

1) *People who are allowed to refuse giving witness are mentioned below (KUHPerd 1909)*
a) *Sibling and brother/sister in law of one of lawsuit parties, either man or woman;*
b) *Blood family in linear relation and siblings of the husband or wife of one of lawsuit parties;*
c) *People who have legal position and occupation who are obliged to keep in secret, except certain matters.*
d) *State Court will be the one who might take and value the collected information into account, that some witnesses are obliged to keep in secret.*

147th Article

If the witness does not back off from his obligation to present witness, or his withdrawal is considered as unreasonable, then he should take an oath based on his religion before giving witness in the court (KUHPer 1991).

Those witnesses' information is acceptable as instrument of evidence especially when the information is matched one another. According to HIR system, within the procedure of civil law, the judge is restricted to the legal instruments of evidence, which means that the judge is only permitted to decide the adjudication of lawsuit through the instruments of evidence which are predetermined by the Constitutional Law. The instruments of evidence which are mentioned in Constitutional Law are: *written evidence, witness, presupposition, confession and oath (ps. 164 HIR, ps 1866 KUH Perd)*. If the witnesses are fulfilled those requirements, then the evidence is acceptable. Further, the prosecuted party also submitted evidence in the form of certificate marked by (T.1 up to T.4) as well as three witnesses. The certificate marked as T.1 up to T.4 are presented in the form of photocopy from the original one, therefore this evidence is acceptable according to 1899th article of KUH Perdata:

If the original evidence does not exist any longer, then the copied version could replace it as evidence, under the requirements below:

1) *First copy (gross) presents the same evidence with the original certificate; as well as the copied version which is made under the judge's order in front of both parties or after both parties are legally called as the copied version is made in front of both parties under their approval.*
2) *Another copy made after the first copy without judge's intermediary or approval from both parties or notary or official who has duty to keep the original certificate and allowed to make some copies is acceptable by the judge as an instrument of evidence when the original one is lost.*
3) *If the copy is not made according to the original certificate by the related notary or official who has duty to keep the original certificate, then this copy of certificate is not*

acceptable as instrument of evidence, but rather as written evidence.

4) *The authentic copy from the first copy or signed certificate could conditionally present beginning of written evidence.*

The witness I from the prosecutor party named H. Munawir bin Kholil, clarified that the content of certificate was changed by witness I from the prosecuted party (Nurhasan bin Akhwan) who is the chief of Banjarsari Village, Manyar Sub-district, Gresik Regency. This statement is proved by the fact that the certificate contained so many writings without any correction completed by signature in the border of certificate[93]. Also, the certificate was not signed by certain witness who has duty to prove its legal status. According to Bisri, the process of name shifting in prosecuted party's certificate contains:

> *"The existence of falseness in the process of certificate name shifting under the help of related officials, chief of village, on behalf of policy of mass conversion. Actually, this case could be brought to the criminal case, but it is not our authority. Since, we are only able to handle the civil lawsuit."*[94]

On the other hand, prosecutor party sent three witnesses, but all witnesses asserted that there was no inheritance sharing in the name of Wasil (H. Abd. Aziz) since the granted wealth was admitted by the prosecuted party I.

Based on those facts, the judge concluded that the agreement made by the inheritors (evidence T.4) was formally defected, since the content was already disclaimed by the opposite party, then either formal force or evidence force as underhand agreement (ABT) was useless. Moreover, its

[93] http://kbbi.web.id/renvoi diakses tanggal 22 Januari 2017
[94] Bisri, *Interview* (Gresik, December, 12 2016)

certainty and safety as an agreement and evidence was broken. This condition is mentioned in 1876th article KUH Perdata and jurisprudence MARI 167 K/Sip/1959 on June, 20th, 1959 that this agreement should be put aside, then the inheritance belonged to Wasil (H. Abd. Aziz) could be clarified as unshared wealth to the inheritors including the prosecutor party I.

The objection from the prosecuted party was not supported by convincing evidences, since there was nobody who could be a witness for the granted wealth. Substantially, according to 211st article of KHI, "Wealth which is granted by parents to their son could be categorized as inheritance." Therefore, the confession made by the prosecuted party actually was acceptable, but it was accounted as inheritance[95]. When the inheritors received granted wealth from their parents more than determined portion, this excess portion should be shared to the other inheritors, including prosecutor party I, as had been clarified by Fudholi that:

> *"Hibah is not more than a third of died person's total wealth, if it is so, then it should be shared as inheritance (waris). If it is called hibah, then it should have proof."*[96]

Therefore, the judge assessed the presupposition made by the prosecuted party is unreasonable in the perspective of law, so this evidence instrument should be ruled out. It is important to differentiate between

[95] Arufin, *Interview* (Gresik, September, 11 2016)
[96] Fudholi, *Interview* (Gresik, December, 12 2016)

waris and hibah. According to the book written by Ahmad Sarwat in Fiqh Mawaris book:

There are three different terms but have similarity in some aspects, they are waris, hibah, and wasiat.[97]

From the aspect of time, the inheritance is not either shared to the inheritorsor determined its portion, except when the inheritance owner is died. In other word, the inheritance sharing is conducted after the wealth owner is died. Then, the one who might share the inheritance is not the owner.

On the other hand, the determination of hibah and wasiat is conducted when the wealth owner is still alive. To make it different is that hibah is immediately given at that time, without waiting for the owner's death, whereas wasiat is determined by the wealth owner when he is still alive but the ownership shift would be valid after the wealth owner died.[98]

People who deserved to receive inheritance are people who are listed as wealth inheritors who are not hit by hijab hirman and invalid status, whereas, wasiat is not allowed to share to the inheritors. The receiver of wasiat is not the receiver of inheritance (waris) because the inheritor have already had wealth from inheritance sharing line, so it is haram for him/her to receive hibah in the same way. Wealth which is shared through hibah could be given to the inheritor or non-inheritor. Hibah is permitted to everyone.

From the aspect of proportion, inheritance should be shared according to determined proportion regulated in faraidh. As for, the proportion allowed for wasiat is about a third of the total wealth maximally. Even though, wasiat is statement left by the died person, Allah has already regulate the rule in Al-Qur'an to defend the account of inheritor by restricting wasiat not more than a third of total wealth because it is haram to add more proportion.

Inheritance sharing is wajib to conduct after the wealth owner is died because it is one of human's obligation upon the wealth, whereas wasiat and hibah is sunnah.[99]

In posita point of 5.1 of prosecutor party, within the certificate was mentioned at the name of H. Abd. Rouf. The judge assessed that this certificate is one of ownership evidence, but the way of receiving the wealth should be examined. In this way, the prosecuted party answered

[97] Ahmad Sarwat, *Fiqih Mawaris*,(Cet-2, 3, 4. DU CENTER, t th), page. 30.
[98] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t.th), page. 31.
[99] Ahmad Sarwat, *Fiqih Mawaris*, (Cet-2, 3, 4. DU CENTER, t.th), page. 32.

that the wealth (lawsuit object) in posita point 5.1 from the claim of prosecutor party had already shared by Wasil (H.Ab. Aziz) to the prosecuted party (H. Abd. Rouf). Furthermore, this ownership certificate was changed on the name of H. Abd. Rouf. In this condition, the judge said that this lawsuit object was unshared wealth left by Wasil (H.Abd. Aziz).

The judge then had notion that the right shift upon the lawsuit object which is in the form of certificate 75th on the name of H. Abd. Rouf should be stated as not having any force of law, because the shifting process contained falseness, formality abuse, and bad intention. Those were proven by the fact that this certificate was shifted on the conversion base from one system to another system[100], which was identified that this form was not hibah.

If we conduct further investigation about this lawsuit, it could be included in criminal case, because it contained bad unsure in the process of right shifting by changing the certificate name where it was still belonged to the died parent, Wasil (H. Abd. Aziz) as well as falseness through the help of chief of village. According to Fudholi, the judge of State Court[101] had authority to declare this certificate off. But, the inheritance was not shared yet in this case, so the Religion Court was permitted to decide according 49th Article 1st paragraph and 50th Article 2nd paragraph Constitutional Law 3, 2006 that,:

[100] http://kbbi.web.id/konversi accessed on January, 22 2017
[101] Pasal 50 ayat 1 Undang-Undang Nomor 3 Tahun 2006

> *"Religion Court has duty and competent to investigate, decide, and solve the first stage of lawsuit among Muslims in the area of: a. Marriage, b. Inheritance (waris), c. Wasiat, d. Hibah, e. Wakaf, f. Zakat, g.Infaq, h. Shadaqah, and i. Sharia Economics."*

As for 50th Article 1st and 2nd paragraph asserted that:

> *"(1) if the lawsuit of proprietary right is existed as it is explained in 49th Article, the lawsuit object should be firstly decided by the court in the area of General court; (2) if the proprietary right lawsuit as explained in 1st paragraph where the subject legality is among Muslims, this lawsuit object and other kinds of quite similar lawsuit as mentioned in 49th article should be decided firstly by the Religion Court."*

From this rule, it is clearly stated that the Religion Court is permitted to decide and solve the lawsuit. Moreover, according to M Yahya Harahap's book, **the lawsuit of marriage, waris, wasiat, hibah, wakaf, and shadaqah**[102] are included into the absolute authorities of Religion Court.

After decreeing the lawsuit, the judge would divide each proportion which had been determined to the inheritors of Wasil (H. Abdul Aziz) as follow:

Wasil's wife as one of prosecuted party received 1/8 of the total wealth because Wasil had son, this was appropriated to the regulation found in Al-Qur'an Surah An-Nisa' ayat 12 and 180th Article of Islamic Law Compilation:

وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمُ الرُّبُعُ مِمَّا تَرَكْنَ مِنْ بَعْدِ وَصِيَّةٍ يُوصِينَ بِهَا أَوْ دَيْنٍ وَلَهُنَّ الرُّبُعُ مِمَّا تَرَكْتُمْ إِنْ لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ

[102] M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama Undang-Undang Nomor 7 Tahun 1989*, Jakarta: PT. Garuda Metropolitan Press, 1993, 2013. page. 213.

كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكْتُمْ مِنْ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَا أَوْ دَيْنٍ وَإِنْ كَانَ رَجُلٌ يُورَثُ كَلالَةً أَوِ امْرَأَةٌ وَلَهُ أَخٌ أَوْ أُخْتٌ فَلِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ غَيْرَ مُضَارٍّ وَصِيَّةً مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيم (١٢)

"And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then the eighth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or a woman have a distant heir (having left neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is Knower, Indulgent." (12)

Since, Prosecutor I, Prosecuted III, Prosecuted I, Prosecutor II, and Prosecuted II are the son and daughter of died person, then according to Islamic Law: son and daughter are regarded as ashabah, by comparison that the son has two comparing one of the daughter's proportion. This is ruled in 176th Article of Islamic Law Compilation and Q.S. An-Nisa; ayat 11:

يُوصِيكُمُاللَّهُ فِي أَوْلادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنْثَيَيْنِ

"Allah (obliged) human to (share the inheritance to) your children, (where) the proportion of son is equal to two proportion of daughter."

Based on this ayat, to put in detail, the inheritor proportion is mentioned below:

1) Wife (one of prosecuted party) 1/8 = 9/72
2) H. Moh. Wafiq Aziz bi Wasil – (as son) Ashobah binafsi = 14/72
3) Hj. Qurrotul Ainiyah binti Wasil – (as daughter) Ashobah bilghoir = 7/72
4) H. Abd. Rouf bin Wasil – (as son) Ashobah biafsih = 14/72
5) H. Nur Syafi'I bin Wasil – (as son) Ashobah binafsih = 14/72
6) H. Faishol bin Wasil – (as son_ Ahobah binafsih = 14/72

2. Judge's Opinion Concerning to Adjudication 783/Pdt.G/2014/PA.Gs. on Decision of Double Similar Certificates in Similar Place from Inheritance Case in Religion Court of Gresik from Perspective of *Maslahah Mursalah*

According to case chronology, the researcher inserts this case into method of ijtihad, Maslahah Mursalah. The researcher decides to exert this case to Maslahah Mursalah rather than the other method, since this case has not supported argumentation (nash) in detail, but it is supported by the implicit meaning from existed argumentation.

The researcher exerts Maslahah Mursalah as method of analysis within this case. The researcher uses this method which is belonged to Abdul Wahab Khalaf, he stated in his book that:

> *"Maslahah Mursalah (public welfare) is how to absolute (the common maslahah) according to term of ulama ushul[103] is maslahah where nash syar'i do not regulate the law yet to legal this maslahah, also it is not found any argumentation which relates to the approval and cancellation of this maslahah. This maslahah is absolute, since it is not restricted by either the approval or cancellation argumentation."*

In this case,the judge put aside one of certificates belonged to the prosecuted party which was valued as not having any force of law on the lawsuit object in posita point 5.1 form the prosecutor party's claim. The following are the judge's reason to put aside and declare the certificate as not having any force of law:

1) Certificate belonged to prosecuted party I had turned its name into H.Abdul Rouf, whereas the certificate belonged to prosecutor party was still on the name of almarhum.
2) Act of prosecuted party I to shift the certificate name when the inheritance was still claimed by the other inheritor affected to the judge's decision that the truth of its acquiring process needed to be proven.
3) When the evidence session, three witnesses form the prosecuted party explained that during the inheritance meeting, there was no any inheritance sharing form the wealth of almarhum Wasil (H. Abd. Aziz), since it had already admitted by prosecuted party I as hibah.

[103] Abdul Wahab Khalaf, *Kaidah-Kaidah Hukum Islam Ilmu Ushul Fiqh*, (Cet ke 3; t.p., PT. Raja Grafindo Persada, 1993), page. 126.

4) The inheritance was not appropriately shared yet, since the prosecutor party denied that they had not receive anything, and moreover the argumentation of prosecutor party was mentioned in 1876th of KUH Peerdata:

"Whoever encounters underhand certificate submitted by the opposite party to claim over him, the opposite party must admit or deny the signature explicitly, for the inheritors or people who deserved to obtain the right from them, it is enough for them to do not admit the signature as their guardian's signature."

5) Hibah could be categorized as inheritance, as it is mentioned in 211st article of KHI, *"Hibah from parents to their children could be accounted as inheritance."*

A. Judge's principle besides his final decree:

1) If it is true that the prosecuted party received hibah from almarhum, then the proportion of prosecutor party would not be more than 1/3 from the proportion of prosecuted party, the excess proportion should shared to the other inheritor according to faraidh.

2) Judge considered this lawsuit by exerting several different principles, the following are the principles exerted by the judge during this case:

a) Principle of benefit

The principle which participates in the principle of justice and rule of law[104] means all adjudication made by the judge in the court session should be assessed, considered, and based on benefit or maslahah obtained from this adjudication. In particular, within this case, the judge was having double certificates where he should decide which certificate was true to maintain the justice. Therefore, the judge decided to win the prosecutor party since the evidence belonged to the opposite party containing falseness in the acquiring process, and basically the inheritance should be shared to all inheritors based on faraidh. If the prosecuted party admitted that they received the inheritance through hibah, then the proportion would be 1/3. This way was called as maslahah mursalah, where the adjudication of judge should be assessed and based on the situation whether it would produce the benefit (maslahah) or not after the adjudication was declared. Since the beginning the prosecuted there is no goodwill to the plaintiff take the iniative to go to court to give a deterrent effect on mutual relations.

b) Principle of rule of law

[104] http://www.islamcendekia.com accessed on January, 20 2017

It means a principle which gives priority to the basic rule of Constitutional Law, worthiness, and justice in every government's policy. In particular, as it is shown at this case, which employed 1876th article of KUH Perdata, *"Whoever encounters underhand certificate submitted by the opposite party to claim over him, the opposite party must admit or deny the signature explicitly, for the inheritors or people who deserved to obtain the right from them, it is enough for them to do not admit the signature as their guardian's signature."* This statement of rule became the judge's basic principle to divide the inheritance which previously was occupied by the prosecuted party and unshared to the other inheritors.

c) Principle of doable

It means a principle where in the process of establishing a rule, we should consider at how this rule could be effective to the citizen philosophically, sociologically, and juridical[105]. For instance, within this case, the effectivity of this case: if the prosecuted party did not satisfy and feel the justice after judge's adjudication, they might propose for appeal, and if the prosecuted party did not find any justice from this appeal, they might propose for cassation, and if

[105] http://www.artikelsiana.com accessed on January, 20 2017

the prosecuted party still did not find justice for them, the adjudication would turn into jurisprudence, which affected to the empty claim and unworthy certificate, since it lost its force of law. Henceforth, this adjudication could be reference for the next similar lawsuit in the Religion Court of Gresik.

B. Consideration of *Maslahah Mursalah* in this case:

Actually, the basic problem of this lawsuit is unshared inheritance. Therefore, the researcher is interested to investigate and examine this case in further focus. In fact, within this case investigation, the researcher found several improper things.

The improper things is presented by the fact where the prosecuted party occupied the unshared inheritance belongs to the other inheritors. The beginning of this case was when the prosecutor party was adopted by his aunty, and when the aunty was passed away, all her inheritance is granted to him. One day, the father bought a fishpond. He was always sharing the fishery result to the prosecutor party when he was alive. The prosecutor had given four hundred million rupiah for this fishpond. But, since the father was died, the siblings of the prosecutor party did not share any fishery result to him. Then, he was offended by the siblings' conduct (from prosecuted party). Therefore, the prosecutor asked the prosecuted one to return the money because of the prosecuted

party's confession that the inheritance was granted to the prosecutor. In fact, the prosecutor part only received two hundred million rupiah instead of the demanded amount of money. The prosecutor has tried to meet and make agreement to the prosecuted party to give the rest of money, but it seemed to be disregarded, the prosecuted parties claimed that they did not receive the inheritance from their parents yet. Therefore, the prosecuted parties proposed this lawsuit to the Religion Court of Gresik to acquire the power of justice.

In the process of court session, both parties were asked to submit needed evidences. Within this process, the prosecutor parties asserted that they did not have their right to receive inheritance, on the other hand, the prosecuted partied denied this claim that the inheritance was unshared and inheritance which they had was hibah from almarhum.

Then, the prosecutor part continued to present the certificate belonged to almarhum as well as supporting witnesses. The prosecuted party also attached their certificate whose the ownership name had been changed and supporting witnesses. Since, both parties had their certificate; the judge had to exert method of ijtihad to decide which party was true. As for, the basic principle used by Arufin in solving this problem, *"which one will produce greater maslahah for all parties"* also the basic

consideration, "principle of benefit, principle of rule of law, and principle of doable."

From those three principles was formulated a theory to solve the lawsuit. If one of the inheritor claimed that he did not get his/her inheritance right, so the inheritance should be shared to him/her fairly, as it is asserted in 1876 article of KUH Perdata, *"Whoever encounters underhand certificate submitted by the opposite party to claim over him, the opposite party must admit or deny the signature explicitly, for the inheritors or people who deserved to obtain the right from them, it is enough for them to do not admit the signature as their guardian's signature."* If the prosecuted party rejected the claim by 211st article of KHI, *"Hibah from parents to their children could be accounted as inheritance."* Then, the judge should consider and decide which rule was more beneficial for the two parties. Finally, the judge decided that 1876th article of KUH Perdata was more beneficial, since the prosecutor party had not receive their inheritance right which indicated that the principle of benefit had not fulfilled yet in this case. Seeing to this principle, both parties would receive fair proportion of inheritance left by their parents.

After the judge decreed this adjudication, the prosecuted party proposed for an appeal. But, it was not succeed, since the claim was unclear. Then, the prosecuted party proposed for a

cassation. After this cassation stage, finally the adjudication was cancelled by an agreement that the prosecuted parties have to pay four hundred million rupiahs to the prosecutor one. Finally, the General Court decreed a peace for this case, solved by an the agreement between both parties. This adjudication was then fulfilled by the prosecuted parties to pay the prosecutor parties. The judge agreed to this decision, since it was the request from the prosecutor party, also the judge considered to both impact and benefit for both parties and that this final decision was good for both parties.

After the consideration of the judges, the parties of interest shall be entitled to their respective right. Based on this case, to put in detail, the inheritor proportion is mentioned below (basic problem 72 = 72/72) :

1) Wife (one of prosecuted party) 1/8 = 9/72
2) H. Moh. Wafiq Aziz bi Wasil – (as son) Ashobah binafsi = 14/72
3) Hj. Qurrotul Ainiyah binti Wasil – (as daughter) Ashobah bilghoir = 7/72
4) H. Abd. Rouf bin Wasil – (as son) Ashobah biafsih = 14/72
5) H. Nur Syafi'I bin Wasil – (as son) Ashobah binafsih = 14/72
6) H. Faishol bin Wasil – (as son_ Ahobah binafsih = 14/72

From the devision of the estate, maka prosecutor no money back 400 which should be the right of the prosecutor but able to give effect to the prosecuted. After the ruling the prosecutor have obtained juctice, as well as for the prosecuted have obtained justice and lessons in order to grant the right of others who are already entitled. Mudhorot for the parties is when, not decided the parts of this inheritance then there will be one of the parties who feel harmed the prosecutor. On the contrary that brings benefits to the parties of inheritance is devided equitably on the parties entitled to receive it.

This final adjudication made by the judge is appropriately matched to the definition of Maslahah Mursalah, which intends to emphasize public welfare, which decision will produce more benefit for all involved parties, although it is not regulated yet in the Islamic law (nash). The practice of Maslahah Mursalah aims to establish a fair decision from the judged to examine collected evidenced from each party, even the related argumentation of either approval or cancellation is not mentioned yet in nash. Maslahah is absolute, since it is not restricted by approval or cancellation argumentation.

CHAPTER V

CONCLUSION

A. Conclusion

1. The judge's consideration of Religion Court of Gresik in implementing the adjudication 783/Pdt.G/2014 is appropriately to the existed Constitutional Law. The following are several consideration made by the judge which are based on Constitutional Law:
    a. Consideration concerning to hibah, it is categorized into inheritance (warisan) for the hibah's receivers.
    b. Consideration concerning to inheritor, that the inheritor should only deny if within the certificate is found falseness.

c. Consideration concerning to inheritance sharing, refers to the amount of inheritance which should be received by all inheritors.

From those three considerations, the judges of Religion Court of Gresik offer contribution for the inheritors to receive their right fairly. The certificate status is still on the name of almarhum which then automatically put aside the certificate belongs to the prosecuted party. Moreover, all parties could receive their inheritance right fairly according to *faraidh* and 176th Article of Islamic Law Compilation which obliged to divide the inheritance based on orientation where the male inheritor would receive two and female inheritors would receive one from total inheritance (1:2).

2. The judge's consideration is based on *Maslahah Mursalah*, where it emphasizes on how the impact of the adjudication made by the judge including impact and benefit for both parties in court session.

If in the last session, the judge did not decide this adjudication, it would impact to one of parties who would feel suffered after the end of this case, the prosecutor party. On the contrary, this adjudication would be beneficial for both parties that every party received their inheritance in fair proportion.

From the devision of the estate, maka prosecutor no money back 400 which should be the right of the prosecutor but able to give effect to the prosecuted. After the ruling the prosecutor have obtained

juctice, as well as for the prosecuted have obtained justice and lessons in order to grant the right of others who are already entitled. Mudhorot for the parties is when, not decided the parts of this inheritance then there will be one of the parties who feel harmed the prosecutor. On the contrary that brings benefits to the parties of inheritance is devided equitably on the parties entitled to receive it.

This final adjudication made by the judge is appropriately matched to the definition of Maslahah Mursalah, which intends to emphasize public welfare, which decision will produce more benefit for all involved parties, although it is not regulated yet in the Islamic law (nash). The practice of Maslahah Mursalah aims to establish a fair decision from the judged to examine collected evidenced from each party, even the related argumentation of either approval or cancellation is not mentioned yet in nash. Maslahah is absolute, since it is not restricted by approval or cancellation argumentation.

In brief, the judges exert the other method in solving each lawsuit, which means that the judges always emphasize maslahah for all lawsuit parties who propose the problem to the Religion Court.

B. Suggestion

Based on the research findings and analysis of the adjudication made by the judges in the Religion Court of Gresik over a case of inheritance 783/Pdt.G/2014 in solving the lawsuit of double certificates in a same place, the researcher would like to suggest:

1. For all judges in Religion Court of Gresik, in the process of consideration toward the certificate status is needed to conduct clarification from National Land Agency (BPN), in the hope that it would give much help for the judges to solve the next similar cases. Then, the judge should only divide the inheritance right to the inheritors fairly.
2. For all citizens, basically the act of shifting original ownership certificate is illegal and criminal, so the doer could be punished. Therefore, if someday we face to this kind of case, we need to have clarification from National Land Agency (BPN). But, if the case of civil law is related to inheritance (warisan), hibah, wasiat, and so on, then this case could be proposed to the Religion Court.

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APPENDIX

V SALINAN **PUTUSAN**

Nomor 783/Pdt.G/2014/PA.Gs.

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

Pengadilan Agama Gresik yang memeriksa dan mengadili perkara-perkara tertentu pada tingkat pertama telah menjatuhkan putusan sebagai berikut dalam perkara "Pembagian Harta Warisan", antara:

[redacted], Umur 60 tahun. Agama Islam. Tempat tinggal di desa Sembayat RT.021 RW.002, kecamatan Manyar, kabupaten Gresik, selanjutnya disebut sebagai " Penggugat I."

[redacted] Umur 44 tahun. Agama Islam. Tempat tinggal Poncokosumo RT.002 RW.002 kecamatan Poncokosumo Malang, sekarang mengambil domisili di desa Sembayat RT.021 RW.002, kecamatan Manyar, kabupaten Gresik, selanjutnya disebut sebagai "Penggugat II".

melawan

[redacted] Umur 52 tahun. Agama Islam. Tempat tinggal di Jl.KH. Ali Irfan, desa Banjarsari, kecamatan Manyar, kabupaten Gresik, selanjutnya disebut sebagai "Tergugat I".

[redacted] Umur 40 tahun. Agama Islam. Tempat tinggal di desa Pedukuan Giri, kecamatan Kebomas, kabupaten Gresik, selanjutnya disebut sebagai "Tergugat II".

[redacted] Umur 55 tahun. Agama Islam. Tempat tinggal di Jl.KH. Ali Irfan desa Banjarsari, kecamatan Manyar, kabupaten Gresik, selanjutnya disebut sebagai "Tergugat III".

TURUT TERGUGAT, Umur 82 tahun. Agama Islam, bertempat tinggal di Jl.KH. Ali Irfan desa Banjarsari, kecamatan Manyar, kabupaten Gresik, selanjutnya di sebut sebagai “Turut Tergugat“.

- Pengadilan Agama tersebut;
- Telah membaca dan mempelajari berkas perkara;
- Telah mendengar keterangan pihak-pihak yang berperkara dan para saksi di persidangan;

DUDUK PERKARA

Menimbang, bahwa Penggugat I dan Penggugat II yang selanjutnya disebut para Penggugat berdasarkan surat gugatannya tertanggal 12 Mei 2014 yang terdaftar di Kepaniteraan Pengadilan Agama Gresik dengan Register Perkara Nomor 783/Pdt.G/2014/ PA.Gs., tanggal 12 Mei 2014, telah mengemukakan hal-hal sebagai berikut :

1. Bahwa dahulu di desa Banjarsari, kecamatan Manyar, kabupaten Gresik pernah hidup seorang laki-laki yang bernama PEMBERI WARIS, yang telah meninggal dunia pada tanggal 10 September 2004 dan bertempat tinggal terakhir di desa tersebut ;
2. Bahwa orang tua almarhum H.Abd.Aziz (Bpk. Abd. Rohman dan Ibu Aslihatun) telah meninggal lebih dulu daripada almarhum H.Abd.Aziz ;
3. Bahwa semasa hidupnya PEMBERI WARIS tersebut menikah satu kali, dengan seorang wanita yang bernama TURUT TERGUGAT, dari pernikahan tersebut dikaruniai 5 (lima) orang anak, masing-masing bernama H. Moh. Wafiq Aziz (Penggugat I), HJ.Qurrotul Ainiyah (Tergugat III), H. Abd. Rouf (Tergugat I), H. Nur Syafi’i (Penggugat II), dan H. Faishol (Tergugat II);
4. Bahwa Para Penggugat dan para Tergugat serta Turut Tergugat adalah merupakan ahli waris dari Almarhum PEMBERI WARIS, yang karenanya mempunyai hak mewaris harta peninggalan PEMBERI WARIS;

5. Bahwa almarhum PEMBERI WARIS semasa hidupnya mempunyai harta warisan (Tirkah) yang belum pernah di bagi sampai sekarang berupa :
   1. Bangunan Rumah permanen dinding Tembok, atap genting dan lantai kramik, seluas 7X25 M dengan batas-batas sebagai berikut :
      - Sebelah Timur : Rumah -
      - Sebelah Utara : Rumah -
      - Sebelah Barat : Tanah Kapling
      - Sebelah Selatan : Jalan Kampung

      Beserta satu kapling tanah luas 7,5X25 M dengan batas-batas sebagai berikut
      - Sebelah Timur : Rumah -
      - Sebelah Barat : Rumah -
      - Sebelah Utara : Rumah -
      - Sebelah Selatan : Jalan Kampung
   2. Tambak Drudus luas kurang lebih 28.000 M^2 persil 72 kelas D II, dengan batas-batas sebagai berikut :
      - Sebelah Timur : Tambak -
      - Sebelah Barat : Kali/sungai
      - Sebelah Utara : Tambak -
      - Sebelah Selatan : Tambak H. Sowimin
   3. Tambak Sialo luas kurang lebih 20.000 M^2 persil 72 kelas D II dengan batas-batas sebagai berikut :
      - Sebelah Timur : Tambak -
      - Sebelah Barat : Tambak -
      - Sebelah Utara : Tambak -
      - Sebelah Selatan : -

      Tanah/ Tambak ini 50% milik - Aziz
   4. Tambak Pekerangan luas kurang lebih 9.750 M^2 persil b kelas D II dengan batas-batas sebagai berikut :
      - Sebelah Timur : Tambak -
      - Sebelah Barat : Tambak -
      - Sebelah Utara : Tambak -
      - Sebelah Selatan : Tambak -
   5. Tanah Kavling luas kurang lebih 1.200 M^2 persil 12 Kelas D III dengan batas-batas sebagai berikut :
      - Sebelah Timur : Jalan Kampung

- Sebelah Barat : Tanah -
- Sebelah Utara : Tanah -
- Sebelah Selatan : Tanah -

Yang kesemua objek tersebut terletak di desa Banjarsari, kecamatan Manyar, kabupaten Gresik, obyek fisik tersebut dari dulu sampai sekarang di kuasai oleh Para Tergugat ;

6. Bahwa sepeninggal almarhum (PEMBERI WARIS) Para Penggugat telah berupaya untuk menemui dan mengajak secara damai kepada Tergugat untuk membagi harta warisan peninggalan PEMBERI WARIS tersebut kepada anak-anak PEMBERI WARIS selaku ahli waris lainnya tetapi para Tergugat tidak menanggapinya;
7. Bahwa oleh karena surat sebagai bukti kepemilikan objek tersebut di kuasai oleh Tergugat I, maka Tergugat I atau siapapun yang memperoleh hak darinya haruslah dihukum untuk menyerahkan bagian warisan Para Penggugat seketika setelah putusan ini;
8. Bahwa berdasarkan uraian tersebut di atas, mohon agar para Penggugat, para Tergugat dan Turut Tergugat ditetapkan secara hukum sebagai ahli waris sah dari Almarhum PEMBERI WARIS. Dan menetapkan bagian masing-masing ahli waris tersebut di atas menurut hukum waris Islam ;
9. Bahwa oleh karena gugatan para Penggugat ini didasarkan atas alat bukti yang otentik, sah dan mengikat maka mohon kiranya putusan ini dapat dijalankan terlebih dahulu meskipun ada perlawanan, banding ataupun upaya hukum lainnya;

Berdasarkan atas dalil-dalil tersebut diatas, Penggugat mohon dengan sangat kepada Bapak Ketua Pengadilan Agama Gresik c.q Majelis Hakim yang memeriksa dan mengadili perkara ini untuk memanggil dan memeriksa para Tergugat selanjutnya menjatuhkan putusan yang amarnya berbunyi :

1. Mengabulkan Gugatan Penggugat untuk seluruhnya;

2. Menetapkan bahwa PEMBERI WARIS telah meninggal dunia pada tanggal 10 September 2004, dengan meninggalkan ahli waris sebagai berikut :
    1. TURUT TERGUGAT (Istri almarhum H. ABD. AZIZ bin ABD. ROHMAN) sebagai turut Tergugat.
    2. H. MOH. WAFIQ AZIZ (anak laki-laki kandung) sebagai Penggugat I.
    3. HJ. QURROTUL AINIYAH (anak perempuan kandung) sebagai Tergugat III.
    4. H. ABD. ROUF (anak laki-laki kandung) sebagai Tergugat I.
    5. H. NUR SYAFI'I, (anak laki-laki kandung) sebagai Penggugat II.
    6. H. FAISHOL, (anak laki-laki kandung) sebagai Tergugat II.
3. Menetapkan bahwa Almarhum H. ABD. AZIZ bin ABD. ROHMAN meninggalkan harta warisan yang harus di bagi kepada ahli waris tersebut diatas, sebagai berikut:
    1. Bangunan Rumah permanen dinding Tembok, atap genting dan lantai kramik, seluas 7X25 m^2 dengan batas-batas sebagai berikut
    - Sebelah Timur : Rumah -
    - Sebelah Utara : Rumah -
    - Sebelah Barat : Tanah Kapling
    - Sebelah Selatan : Jalan Kampung

    Beserta satu kapling luas 7,5X25 m^2 dengan batas-batas sebagai berikut :
    - Sebelah Timur : Rumah -
    - Sebelah Barat : Rumah -
    - Sebelah Utara : Rumah -
    - Sebelah Selatan : Jalan Kampung

    2. Tambak Drudus luas kurang lebih 28.000 m^2 persil 72 kelas D II, dengan batas-batas sebagai berikut :
    - Sebelah Timur : Tambak -
    - Sebelah Barat : Kali/Sungai
    - Sebelah Utara : Tambak -
    - Sebelah Selatan : Tambak H. Sowimin

    3. Tambak Sialo kurang lebih 20.000 m^2 persil 72 kelas D II dengan batas-batas sebagai berikut :
    - Sebelah Timur : Tambak -
    - Sebelah Barat : Tambak -

- Sebelah Utara : Tambak -
- Sebelah Selatan : Tambak H. Sowimin

  Tanah ini 50% milik - Aziz

4. Tambak Pekerangan kurang lebih 9.750 m^2 persil b kelas D II dengan batas-batas sebagai berikut :

- Sebelah Timur : Tambak -
- Sebelah Barat : Tambak -
- Sebelah Utara : Tambak -
- Sebelah Selatan : Tambak -

5. Tanah Kavling luas kurang lebih 1.200 m^2 persil 12 Kelas D III dengan batas-batas sebagai berikut :

- Sebelah Timur : Jalan Kampung
- Sebelah Barat : Tanah -
- Sebelah Utara : Tanah -
- Sebelah Selatan : Tanah -

4. Menetapkan bagian masing-masing ahli waris atas harta tersebut, menurut Hukum Islam ;
5. Menghukum para Tergugat atau siapapun yang mempunyai hak darinya untuk menyerahkan harta warisan bagian Para Penggugat tersebut;
6. Menyatakan putusan ini dapat dijalankan terlebih dahulu meskipun ada upaya hukum dari para Tergugat;
7. Biaya Perkara menurut hukum.;

Apabila Pengadilan berpendapat lain :

Mohon putusan yang seadil-adilnya *(ex aequo et bono)*

Menimbang, bahwa pada hari sidang yang telah ditetapkan, para Penggugat dan para Tergugat (Tergugat I,Tergugat II dan Tergugat III) serta Turut Tergugat hadir di persidangan secara pribadi;

Bahwa Majelis Hakim telah memerintahkan kepada para pihak untuk menempuh mediasi, namun berdasarkan surat pemberitahuan dari AZHAR AMRULLAH HAFIZH,LC.,M.Th.I, Mediator Pengadilan Agama Gresik tertanggal 11 Juni 2014 yang pada pokoknya menyatakan mediasi antara para pihak telah gagal;

Bahwa pada setiap persidangan Majelis Hakim juga selalu berusaha menasehati/mendamaikan para pihak agar perkaranya tersebut diselesaikan secara damai dan kekeluargaan, tetapi tetap tidak berhasil;

Bahwa selanjutnya dibacakan surat gugatan para Penggugat, yang maksud dan isinya tetap dipertahankan oleh para Penggugat;

Bahwa atas gugatan para Penggugat tersebut, pada sidang tanggal 12 Agustus 2014 Para Tergugat (Tergugat I, Tergugat II dan Tergugat III) serta Turut Tergugat mengajukan jawaban secara lisan yang pada pokoknya, sebagai berikut :

- Bahwa para Tergugat membenarkan semua dalil gugatan Para Penggugat, kecuali masalah pembagian harta tinggalan H.Abd. Aziz adalah tidak benar kalau belum dibagi, yang benar adalah harta tinggalan almarhum H.Abd. Aziz sudah dihibahkan kepada Tergugat I (H.Abd.rouf) kemudian oleh Tergugat I diberikan kepada semua ahli waris hanya saja Penggugat I tidak mau menerima bagiannya;

Bahwa atas jawaban para Tergugat tersebut, para Penggugat telah mengajukan replik secara lisan yang pada pokoknya sebagai berikut:

- Bahwa jawaban para Tergugat tidak benar, yang benar harta tinggalan almarhum H.Abd.Aziz sampai saat ini belum dibagi ;

Bahwa atas replik para Penggugat tersebut, para Tergugat (Tergugat I, Tergugat II dan Tergugat III) serta Turut Tergugat telah mengajukan duplik secara lisan yang pada pokoknya tetap pada jawabannya;

Bahwa untuk meneguhkan dalil-dalil gugatannya, pada sidang tanggal 19 Agustus 2014 para Penggugat mengajukan alat-alat bukti surat, berupa :

1. Fotokopi surat pernyataan dibawah tangan yang dibuat, H.MOH WAFIQ AZIZ Bin H. ABD. AZIZ, tanpa Nomor dan tanggal , bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.1;

2. Fotokopi surat pernyataan tanpa Nomor tertanggal 18 Agustus 2014, yang dibuat oleh Kepala Desa Banjarsari Kecamatan Manyar Kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.2;

3. Fotokopi Deskripsi masalah Hukum Pengakuan mendapat hibah tanpa saksi, yang dibuat oleh Pengurus Ranting NU Kecamatan Bungah Kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.3;
4. Fotokopi surat pernyataan tanpa Nomor dan tanggal , yang dibuat oleh Kepala Desa Banjarsari Kecamatan Manyar Kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.4;
5. Fotokopi Surat Kematian atas nama Alm. H.ABDUL AZIZ tertanggal 29 Agustus 2014, yang dibuat oleh Kepala Desa Banjarsari Kecamatan Manyar Kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.5;
6. Fotokopi Buku Tanah Hak Milik No. 32 atas nama WASIL bin H. ABDUL RAHMAN, keadaan tanah berupa Tambak, yang terletak di Desa Banjarsari Kecamatan Manyar Kabupaten Gresik, yang dikeluarkan Badan Pertanahan Nasional Kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda P.6;

Bahwa atas bukti-bukti surat yang diajukan oleh Penggugat tersebut, Tergugat tidak memberikan tanggapan;

Bahwa disamping bukti surat, para Penggugat juga menghadirkan 3 (tiga) orang saksi, sebagai berikut :

Saksi I : H. MUNAWIR bin MOCH. KHOLIL, umur 51 tahun, agama Islam, pekerjaan Tani, tempa t tinggal di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa saksi kenal dengan Pewaris almarhum H.Abd. Aziz bin Abd. Rohman karena saksi keponakannya dan saudara sepupu dengan para pihak;
- Bahwa saksi kenal dengan para Penggugat, para Tergugat dan Turut Tergugat;

- Bahwa sekarang H.Abd. Aziz telah meninggal dunia sekitar 10 tahun yang lalu karena sakit;
- Bahwa sebelum almarhum H.Abd. Aziz bin Abd. Rohman meninggal dunia telah menikah dengan Hj. Zubaidah binti Nur Salam (Turut Tergugat), dan dari pernikahannya tersebut dikaruniai 5 orang anak, yaitu : H.Moh. Wafiq bin H.Abd.Aziz (Penggugat I), H. Nur Syafi'i bin H.Abd.Aziz (Penggugat II), H. Abd, Rouf bin H.Abd, Aziz (Tergugat I), H. Faisol bin - (Tergugat II) dan Hj. Qurrotul Ainiyah binti H.Abd. Aziz (Tergugat III), dan kesemuanya sampai sekarang masih hidup;
- Bahwa pada waktu almarhum H.Abd. Aziz bin Abd. Rohman meninggal dunia, disamping meninggalkan para ahli waris tersebut, beliau juga meninggalkan harta peninggalan yang diperoleh sebelum ia menikah, yang berupa :

1. Tanah dan Bangunan rumah yang terletak di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik, seluas ± 175m² dengan batas-batas :

   Sebelah utara : Rumah -

   Sebelah Timur : Rumah -

   Sebelah Barat : Tanah kapling

   Sebelah Selatan: Jalan kampung

   Tanah dan Bangunan rumah tersebut sudah sertifikat atas nama Tergugat I dan dikuasai oleh Tergugat I;

2. Tanah kapling dengan luas kurang lebih 187.5 m² yang terletak di Desa Banjarsari, Manyar, Gresik dengan batas-batas sebagai berikut :

   -Sebelah Timur dengan Rumah H.Abdul Aziz;

   -Sebelah Barat dengan -;

   -Sebelah Utara dengan - dan

   -Sebelah Selatan dengan jalan kampung;

   Tanah kapling tersebut dikuasai oleh Tergugat I;

3. Berupa Tanah tambak bernama tambak Drudus dengan luas kurang lebih 28.000 m^2, dengan batas-batas sebagai berikut :

   -Sebelah Timur dengan tambak H.Abd.Aziz,

   -Sebelah Barat dengan kali/ sungai,

   -Sebelah Utara dengan tambak H.Wafiq,

   -Sebelah Selatan dengan tambak H Sowimin;

   Tanah tambak tersebut dikuasai oleh Tergugat I

4. Berupa tanah tambak yang bernama tambak Sialo dengan luas kurang lebih 20.000 m², dengan batas-batas sebagai berikut :

   -Sebelah Timur dengan tambak H.Abd. Aziz,

   -Sebelah Barat dengan tambak H.Abd.Aziz,

   -Sebelah Utara dengan tambak H.Abd. Wafiq, dan

   -Sebelah Selatan dengan tambak H. Sowimin;

   Tanah tambak tersebut dikuasai oleh Tergugat II;

5. Berupa Tanah tambak yang bernama tambak Pekerangan luas kurang lebih 9.750 m², dengan batas-batas sebagai berikut :

   -Sebelah Timur berbatasan dengan tambak H.Muhtar;

   -Sebelah Barat dengan tambak H.Abd.Aziz;

   -Sebelah Utara dengan -, sedangkan;

   -Sebelah Selatan dengan tambak H.Abd. Hamid;

   yang menguasai tambak Pekerangan tersebut adalah Penggugat II;

- Bahwa, ketiga tambak tersebut sudah bersertipikat, dan ketiga sertipikatnya atas tambak tersebut masih atas nama H.Abdul Aziz;
- Bahwa, sepengetahuan saksi selain harta tersebut di atas masih ada harta peninggalan H.Abd.Aziz berupa tanah kavling dengan luas

kurang lebih 1200 m² juga terletak di Desa Banjarsari,Kecamatan Manyar, Kabupaten Gresik yang batas-batasnya sebagai berikut :

-Sebelah timur dengan jalan kampung;

-Sebelah barat dengan tanah H.Hamim;

-Sebelah utara berbatasan dengan tanah -;

-Sebelah selatan dengan tanah -;

- Bahwa, tanah tersebut belum bersertipikat, dan yang menguasai tanah tersebut adalah H. Abd. Rouf (Tergugat I);
- Bahwa semua harta peninggalan H.Abd. Aziz tersebut diperoleh sebelum ia menikah dengan Turut Tergugat (Hj. Zubaidah binti Nur Salam);
- Bahwa, sepengetahuan saksi harta benda almarhum H.Abd. Aziz belum dibagi, sebab saksi pernah diundang oleh Tergugat I (H.Abd. Rouf) untuk menyaksikan pembagian waris, tetapi isinya pengakuan hibah dari Tergugat I (H. Abd. Rouf);
- Bahwa, seingat saksi yang hadir pada saat itu adalah : Pak Khotim, Pak Munawir, Pak Humaidi, H.Munifah, Abd. Syukur, Kepala Desa Banjarsari (Ach. Nurhasan), dan H. Rifa'i, serta Agus Musraf dari pondok pesanteren Leran Manyar;
- Bahwa, seingat saksi Tergugat I (H.Abd.Rouf) pada waktu pertemuan tersebut berkata bahwa, harta peninggalan alm. H.Abd. Aziz telah dihibahkan semuanya kepada saksi (H.Abd.Rouf), sebab hanya saksi (H.Abd.Rouf) anak yang paling jowo;
- Bahwa saksi menambahkan keterangan yang berkaitan dengan tanah tambak Sialo, bahwa pada saat itu Alm. - beli tanah tambak Sialo dari ibu saksi yang bernama Ibu Muslikah, dibeli sewaktu saksi kelas 3 Tsanawiyah, harga sawah tersebut ditukar dengan 2 bidang sawah, satu bidang milik - dan 1 bidang milik H. Moh. Wafiq;
- Bahwa, pada saat pertemuan tersebut disepekati Tergugat I dan Penggugat II mengganti harga sebidang tanah sawah milik - yang

ditukarkan ke ibu saksi tersebut sebesar Rp 400.000.000,- (empat ratus juta rupiah), namun sampai saat ini belum dibayar oleh Tergugat I maupun Penggugat II, jadi belum ada pembagian warisan kepada Penggugat I ;

Bahwa atas keterangan saksi pertama para Penggugat tersebut, para Penggugat membenarkan dan menyatakan dapat menerima, demikian juga para Tergugat tidak mengajukan pertanyaan lagi kepada saksi tersebut ;

Saksi II : Shodiqin Bin Abdul Ghoni, umur 54 tahun, agama Islam, pekerjaan Tani, tempat tinggal di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa saksi kenal dengan para pihak karena saksi adalah tetangga dekat para Penggugat, para Tergugat dan Turut Tergugat;
- Bahwa, para Penggugat dan para Tergugat adalah saudara kandung, anak dari pasangan suami isteri - dan Hj. Zubaidah (Turut Tergugat), mereka berjumlah 5 orang masing-masing bernama : H. Moh. Wafiq, Hj. Qurrotul Ainiyah, H. Abd. Rouf, H. Nur Syafi'i dan H. Faisol;
- Bahwa, - telah meninggal dunia sekitar antara tahun 1977 - 1978, sedangkan Hj. Zubaidah sampai sekarang masih hidup;
- Bahwa, semasa hidupnya, yang saksi ketahui almarhum H.Abd Aziz memiliki harta peninggalan dari orang tuanya sebagai berikut :
  1. Tanah dan bangunan rumah yang terletak di JL. KH Ali Irfan Desa Banjarsari Manyar;
- Bahwa, sepengetahuan saksi tanah dan bangunan rumah tersebut saat ini dikuasai oleh H. Abd. Rouf (Tergugat I);
- Bahwa, yang saksi ketahui luas tanah dan bangunan tersebut adalah ± 175 m² dengan batas-batas sebagai berikut :

  -Sebelah Timur dengan rumah H.Hamim;

-Sebelah Utara dengan Rumah -;

-Sebelah Barat dengan tanah kavling;

-Sebelah Selatan dengan Jalan Kampung;

- Bahwa, sepengetahuan saksi tanah tersebut sudah bersertipikat, dan sertipikatnya atas nama Tergugat I (H. Abd. Rouf);

2.Tanah Kavling dengan ukuran 7,5 X 25 m, dengan batas-batas sebagai berikut :

- Sebelah Timur dengan Rumah H. ABD. AZIZ;

- Sebelah Barat dengan -;

- Sebelah Utara Rumah H.Mahir;

- Sebelah Selatan dengan Jalan Kampung;

- Bahwa, sepengetahuan saksi tanah tersebut sudah bersertipikat, dan sertipikatnya masih atas nama almarhum H. Abd.Aziz, sedangkan yang menguasai tanah tersebut adalah H. Abd.Rouf (Tergugat I);

3. Berupa tanah tambak dengan nama tambak Drudus, dengan luas kurang lebih 28.000 m² dengan batas-batas sebagai berikut :

-Sebelah Timur dengan Tambak -;

-Sebelah Barat dengan Kali/ Sungai;

-Sebelah Utara dengan Tambak H. Moh. Wafiq aziz;

-Sebelah Selatan dengan Tabak H. Sowimin;

- Bahwa, sepengetahuan saksi tambak tersebut sudah bersertipikat, namun masih atas nama Alm. - dan saat ini yang menguasai tambak tersebut adalah H. Abd. Rouf (Tergugat I);

4. Berupa Tanah Tambak yang bernama tambak Sialo, di Desa Banjarsari Kecamatan Manyar, dengan luas kurang lebih 20.000 m² dengan batas-batas sebagai berikut :

- Sebelah Timur dengan Tambak H. Abd Aziz;

- Sebelah Barat dengan Tambak H. Abd.Aziz;

-

- Sebelah Utara dngan Tambak H. Moh. Wafiq Aziz;

- Sebelah Selatan dengan Tambak H. Sowimin;

- Bahwa, sepengetahuan saksi tambak tersebut sudah bersertipikat, namun masih atas nama Alm. - dan saat ini yang menguasai tambak tersebut adalah H. Abd. Rouf (Tergugat I);

5.Berupa Tanah tambak yang bernama tambak Pekerangan yang terletak di Desa Banjarsari, Kecamatan Manyar, dengan ukuran luas kurang lebih 9.750 m² dengan batas-batasnya sebagai berikut :

-Sebelah Timur dengan tambak -;

-Sebelah Barat dengan Tambak -;

-Sebelah Utara dengan Tambak H. Moh. Wafiq Aziz;

-Sedangkan sebelah Selatan denagn Tambak milik -;

- Bahwa, sepengetahuan saksi tambak tersebut sudah bersertipikat, namun masih atas nama Alm. - dan saat ini yang menguasai tambak tersebut adalah Hj. Qurrotul Ainiyah (Tergugat III);

6. Tanah kavling yang terletak di Desa Banjarsari Kecamatan Manyar dengan luas kurang lebih 1.200 m², dengan batas-batas sebagai berikut :

-Sebelah Timur dengan Jalan Kampung;

-Sebelah Barat dengan Tanah milik -;

-Sebelah Utara dengan Tanah milik -;

-Sebelah Selatan dengan Tanah milik -;

- Bahwa, sepengetahuan saksi tanah tersebt belum bersertipikat, hanya berupa petok D, dan saksi tidak mengetahui siapa yang menguasai tanah tersebut;

- Bahwa, sepengetahuan saksi harta warisan dari almarhum - sampai saat ini belum pernah dibagi kepada para ahli warisnya, termasuk kepada H. Moh Wafiq Aziz;

- Bahwa, saksi tidak pernah mendengar bahwa H. Moh. Wafiq Aziz (Penggugat I) menolak atau tidak mau menerima bagian warisan dari alm. -;

- Bahwa, saksi tidak pernah mendengar bahwa H. Abd.Aziz pernah berkata bahwa, H. Moh. Wafiq Aziz tidak usah diberi Warisan;

- Bahwa saksi menambahkan keterangan yang berkenaan dengan tanah tambak Sialo bahwa, tambak tersebut dibeli oleh alm - bersama dengan H. Moh.Wafiq, dengan perhitungan 50 % uang milik H. Moh. Wafiq, yang mana tambak tersebut tidak dibayar kontan, namun tukar guling berupa sawah, dan pada saat itu, Penggugat I menghendaki uang pembelian tanah tambak tersebut diminta kembali, tapi sampai sekarang tidak pernah dibayar oleh Tergugat I;

Bahwa atas keterangan saksi kedua para Penggugat tersebut, Penggugat I dan Penggugat II membenarkan dan menyatakan dapat menerima, sedang para Tergugat tidak mengajukan pertanyaan lagi kepada saksi tersebut ;

Saksi III : H. Ainur Rofiq bin H. Shohaimi, umur 64 tahun, agama Islam, pekerjaan Sopir, tempat tinggal di Jln. Sunan Giri Nomor 11, kecamatan Kebomas, kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa saksi kenal dengan para Penggugat, dan para Tergugat karena saksi adalah saudara sepupu para Penggugat, para Tergugat;
- Bahwa saksi kenal dengan para Penggugat dan para Tergugat sejak saksi masih kecil;
- Bahwa, H. Abdul Aziz telah meninggal dunia sekitar 10 tahun yang lalu, sedangkan H. Zubaidah isteri Alm. H.Abdl Aziz sampai sekarang masih hidup;
- Bahwa, anak kandung H. Abl Aziz dan Hj. Zubaidah, berjumlah 5 masing-masing bernama : H.Moh. Wafiq bin H.Abd.Aziz, , H. Nur

Syafi'i bin H.Abd.Aziz, H. Abd, Rouf bin H.Abd, Aziz, H. Faisol bin - dan Hj. Qurrotul Ainiyah binti H.Abd. Aziz, dan kesemuanya sampai sekarang masih hidup;

- Bahwa, Para Penggugat ke Pengadilan Agama untuk mengajukan gugatan waris yang mana harta warisan peninggalan alm H.Abd. Aziz menurut para Penggugat sampai saat ini belum dibagi pada ahli waris;
- Bahwa, yang saksi ketahui harta benda peninggalan almarhum H.Abdul Aziz adalah sebagai berikut :

a.Tanah dan Bangunan rumah yang terletak di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik;

-Bahwa luas tanah dan bangunan tersebut adalah 175 m², dengan batas-batas tanah tersebut adalah sebagai berikut :

Sebelah timur : Rumah H.Hamim,

sebelah Utara : Rumah H. Hamin,

sebelah Barat : Tanah Kapling dan

sebelah Selatan dengan jalan Kampung;

-Bahwa tanah tempat bangunan rumah tersebut sudah bersertipikat, dan sertifikat tersebut atas nama H. Abd. Rouf;

-Bahwa, sepengetahuan saksi Tanah dan Bangunan rumah tersebut saat ini ditempati serta dikuasai oleh H. Abd. Rouf (Tergugat I) dan Ibu para Tergugat;

b.Tanah kavling dengan ukuran 7.5 X 25 m yang terletak di Desa Banjarsari, Manyar, dengan batas-batas sebagai berikut : Sebelah Timur dengan Rumah H.Abdul Aziz, sebelah barat dengan -, sebelah utara dengan - dan sebelah selatan dengan jalan kampung;

- Bahwa tanah kavling tersebut dikuasai oleh Tergugat I (H. Abd. Rouf)

c- Berupa tanah tambak dengan nama tambak Drudus dengan luas kurang lebih 28.000 m², dengan batas-batas : sebelah timur dengan tambak H.Abd.Aziz, sebelah barat dengan kali/ sungai, sebelah

utara dengan tambak H.Wafiq, sebelah selatan dengan tambak H Sowimin;

- Bahwa saksi tidak mengetahui siapa yang menguasai tambak Drudus tersebut;

d- Berupa Tanah tambak yang bernama tambak Sialo dengan luas kurang lebih 20.000 m², namun mengenai batas-batasnya saksi tidak mengetahui;

- Bahwa, saksi tidak tahu siapa yang menguasai tambak tersebut;

e- Berupa Tanah tambak yang bernama tambak Pekerangan luas kurang lebih 9.750 m², namun mengenai batas-batasnya saksi tidak tahu;

- Bahwa saksi tidak mengetahui siapa yang menguasai tambak Pekerangan tersebut, sebab saksi hanya tahu, bahwa, - mempunyai tambak Pekerangan tersebut;

- Bahwa, ketiga tambak tersebut sudah bersertipikat, dan ketiga sertipikatnya masih atas nama Wasil alias -;

- Bahwa, sepengetahuan saksi selain harta tersebut di atas masih ada harta peninggalan WASIL alias - berupa tanah kavling dengan luas kurang lebih 1200 m² juga terletak di desa Banjarsari, kecamatan Manyar, namun mengenai batas-batasnya saksi tidak mengetahuinya;

- Bahwa, tanah tersebut belum bersertipikat, dan yang menguasai tanah tersebut adalah H. Abd. Rouf (Tergugat I);

- Bahwa, sepengetahuan saksi harta benda almarhum **WASIL alias** H.Abd. Aziz belum dibagi oleh ahli waris, sebab H. Moh.Wafiq Aziz (Penggugat I) belum dapat warisan;

- Bahwa, benar pernah dilaksanakan musyawarah antar keluarga, dan saksi juga turut hadir pada musyawarah tersebut;

- Bahwa, yang diketahui saksi, hasil akhir dari musyawarah tersebut H. Moh.Wafiq (Penggugat I) belum dapat warisan, sebab saat itu tidak ada pembagian warisan, karena tirkah WASIL alias - sudah dihibahkan kepada salah satu putranya yaitu H. Abd. Rouf (Tergugat I);

- Bahwa, menurut KH. Rifai, hibah yang dilakukan oleh - itu sudah sah, sehingga H. Moh. Wafiq Aziz, tidak diberi warisan;

- Bahwa, sepengetahuan saksi, memang ada kesepakatan ganti rugi atas tanah milik H. Moh. Wafiq yang digunakan untuk tukar dengan tambak sialo dari ibu Muslikhah dan H. Abd. Rouf harus menganti sebesar Rp. 400.000.000.- yaitu 50% dari luas tanah tambak Sialo;

- Bahwa, sepengetahuan saksi uang ganti rugi dari Tergugat kepada Penggugat sampai saat ini belum dibayar oleh Tergugat;

- Bahwa, yang saksi ketahui kesepakatan pembayaran ganti rugi tersebut ada batas waktu pembayarannya, namun saksi lupa tanggal pastinya;

Bahwa atas keterangan saksi ketiga para Penggugat tersebut, Penggugat I dan Penggugat II membenarkan dan menyatakan dapat menerima, sedang para Tergugat tidak mengajukan pertanyaan lagi kepada saksi tersebut ;

Bahwa untuk meneguhkan dalil-dalil jawaban/ sanggahannya, para Tergugat mengajukan alat-alat bukti surat, berupa:

1. Fotokopi Sertipikat Hak Milik No. 75 tangal 03 September 2001, atas nama/nama pemegang Hak, H. Abdul Rouf, keadaan tanah berupa Tanah Perumahan, luas 445 m², yang terletak di desa Banjarsari kecamatan Manyar kabupaten Gresik, yang dikeluarkan Badan Pertanahan Nasional kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda T.1;

2. Fotokopi Sertipikat Hak Milik No. 30 tangal 17 Oktober 1990, atas nama/nama pemegang Hak, Wasil Bin Haji Abdul Rahman, keadaan tanah berupa Tambak, luas 225 m², yang terletak di desa Banjarsari kecamatan Manyar kabupaten Gresik, yang dikeluarkan Badan Pertanahan Nasional kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda T.2;

3. Fotokopi Sertipikat Hak Milik No. 31 tangal 17 Oktober 1990, atas nama/nama pemegang Hak, Wasil Bin Haji Abdul Rahman, keadaan tanah berupa Tambak, luas 24.675 m², yang terletak di Desa Banjarsari Kecamatan Manyar Kabupaten Gresik, yang dikeluarkan Badan Pertanahan Nasional kabupaten Gresik, bermeterai cukup dan telah cocok dengan aslinya, diberi tanda T.3;

4. Fotokopi surat kesepakatan bersama ahli waris, tanggal 14 Desember 2013 bermeterai cukup dan telah cocok dengan aslinya, diberi tanda T.4;

Bahwa atas bukti surat (T.1, T.2 dan T.3.) para Penggugat dan para Tergugat menyatakan kebenarannya dan menambahkan keterangan bahwa nama Wasil bin H.Abd. Rahman itu adalah nama H.Abd. Aziz bin H.Abd. Rahman sebelum haji, jadi Wasil alias H.Abd. Aziz ;

Bahwa disamping alat bukti surat, para Tergugat juga menghadirkan 3 orang saksi, masing-masing bernama :

Saksi I : Nur Hasan Bin Akhwan, umur 50 tahun, agama Islam, pekerjaan Kepala desa Banjarsari, tempat tinggal di desa Banjarsari, kecamatan Manyar, kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa saksi kenal dengan para Penggugat, dan para Tergugat karena saksi berteman dengan mereka sejak masih kecil;
- Bahwa Mereka adalah anak-anak WASIL alias H.Abd. Aziz dan istrinya bernama Hj. Zubaidah dengan jumlah anak 5 orang masing-masing

bernama : H.Moh. Wafiq Aziz, H. Abd. Ruof, H. Nur Syafi' Hj. Qurrotul Ainiyah dan H. Faisol dan mereka semuanya sampai saat ini masih hidup;

- Bahwa, WASIL alias - telah meninggal dunia pada tahun 2004 sedangkan istrinya Hj. Zubaidah sampai saat ini masih hidup;
- Bahwa, sepengetahuan saksi setelah WASIL alias H.Abd. Aziz meninggal dunia ada meninggalkan harta benda dari orang tuanya berupa :

1. Tanah dan bangunan rumah yang terletak di Jln. KH. Ali Irfan desa Banjarsari kecamatan Manyar, dengan ukuran kurang lebih 7x25 m dengan batas-batas sebagai berikut :

   -Sebelah Timur dngan Rumah -;

   -Sebalah Barat dengan Rumah -;

   -Sebelah Utara dengan Tanah Kavling;

   -Sebelah Selatan dengan Jalan Kampung;

   - Bahwa, sepengetahuan saksi tanah tersebut sudah besertipikat, dan sertipikat tersebut atas nama H. Abd. Rouf, dan sekarang tanah dan bangunan tersebut dikuasai dan ditempati oleh H.Abd. Rouf dan ibunya, Hj. Zubaidah;

2. Tanah kavling ukuran 7,5 x 25 m yang terletak di Desa Banjarsari, degan batas-batas sebagai berikut :

   -Sebelah Timur dengan Rumah -;

   -Sebelah Barat dengan Rumah -;

   -Sebelah Utara dengan Rumah -;

   -Sebelah Selatan dengan Jalan Kampung;

   - Bahwa, sepengetahuan saksi tanah tersebut sudah besertipikat menjadi satu dengan rumah yang ditempati oleh H. Abd. Rouf, dan ibunya tersebut karena ganding dengan rumah tersebut;

3. Berupa tanah Tambak bernama tambak Drodus luas kurang lebih 27.000 m² terletak di desa Banjarsari, kecamatan Manyar, dengan batas-batas sebagai berikut :

-Sebelah Timur dengan Tambak -;

-Sebelah Barat dengan Kali/Sungai;

-Sebelah Utara dengan Tambak H.Moh. Wafiq Aziz;

-Sebelah Selatan dengan Tambak H. Sowimin;

-Bahwa, sepengetahuan saksi tanah tersebut sudah besertipikat, dan sertipikat tersebut masih atas nama Wasil bin H.Abd. Rahman alias -, dan sekarang dikuasai oleh H.Abd. Rouf (Terguggat I);

4. Tanah Tambak bernama tambak Sialo, terletak di Desa Banjarsari, Kecamatan Manyar, dengan luas kurang lebih 20.000 m², dengan batas-batas sebagai berikut :

-Sebelah Timur dengan Tambak -;

-Sebelah Barat dengan Tambak H.Abd. Aziz;

-Sebelah Utara dengna Tambak H. Moh. Wafiq Aziz, dan

-Sebelah Selatan dengan -;

-Bahwa, sepengetahuan saksi tanah tersebut atas nama WASIL alias -, tetapi belum besertipikat dan tanah tersebut sekarang dikuasai oleh H. Faisol (Tergugat II) dan Hj. Qurrtol Ainiyah (Terguggat III);

-Bahwa, menurut pengakuan Penggugat I (M.Moh.Wafiq Aziz, tanah tersebut 50 % milik Penggugat I, yang dibeli dari Ibu Muslikhah, tetapi saat pembeliannya saksi lupa, apalagi waktu itu saksi belum menjabat sebagai Kepala desa Banjarsari, kata Penggugat tambak Sialo tersebut sebagian beli dan yang sebagian lagi tukar guling;

5. Tanah Tambak yang bernama tambak Pekerangan dengan luas kurang lebih 9.750 m² dengan batas-batas sebagai berikut :

- Sebelah Timur dengan Tambak -;

- Sebelah Barat dengan Tambak -;

- Sebelah Utara dengan Tambak H.Abd. Wafiq Aziz; dan

- Sebelah dengan Tambak H.Abd. Hamid;

- Bahwa, sepengetahuan saksi tambak tersebut sudah besertipikat, atas nama WASIL alias H.Abd. Aziz, dan dikuasai oleh H. Nur Syafi'i (Penggugat II);

6. Tanah kavling luas kurang lebih 1200 m² terletak di Desa Banjarsari, Kecamatan Manyar, dengan batas-batas sebagai berikut :

-Sebelah Timur dengan Jalan Kampung;

-Sebelah Barat dengan tanah -;

-Sebelah Utara dengan tanah -;

-dan Sebelah Selatan dengan tanah -;

-Bahwa, sepenetahuan saksi tanah tersbeut dibiarkan kosong;

-Bahwa, sepengetahuan saksi tanah tersbeut belum besertipikat, hanya berupa Petok D dan tanah tersebut dikuasai oleh Tergugat I;

-Bahwa, saksi tidak mengetahui bahwa semua harta peninggalan alm. WASIL alias H.Abd. Aziz telah dihibahkan kepada H.Abd. Rouf, namun sekitar tanggal 14 Desember 2013, saksi diundang oleh H.Abd. Rouf (Tergugat I) kerumahnya dan saksi diminta untuk menyelesaikan pembagian waris, tetapi dalam pertemuan tersebut bukan penyelesaian pembagian waris, sebab ada pengakuan dari H. Abd. Rouf, bahwa harta benda peninggalan alm. H. Abd. Aziz telah dihibahkan semua kepada saksi (H.Abd. Rouf/(Tergugat I), karena saksi (H.Abd. Rouf/(Tergugat I) yang paling loman, sekalipun dapat hibah, tetapi tambak-tambak itu masih diberikan kepada saudara-saudaranya yang lain, namun pada saat itu H.Moh. Wafiq Aziz (Penggugat I) hanya minta ganti uangnya yang dipakai untuk membeli tambak Sialo sebesar Rp. 400.000.000.-(empat ratus ribu rupiah) dalam jangka waktu 2 bulan;

-Bahwa, uang ganti rugi tersebut sampai saat ini belum dibayar oleh Tergugat I, hanya saja saksi pernah mendatangi Penggugat I;

-Bahwa, pada tanggal 07 Februari 2014, saksi sendirian pernah datang ke kantor Penggugat I yang beralamat di GKB untuk membayar uang ganti rugi, karena sudah ada kesepakatan dengan membawa uang sebesar Rp. 200.000.000.- tetapi uang itu tidak saksi tunjukkan kepada Penggugat I masih saksi letakkan dijok sepeda motor, tetapi Penggugat I menyatakan tidak mau menerima karena perjanjiannya tidak sah sebab isinya tidak sesuai dengan hasil kesepakatan.

-Bahwa batas waktu pembayaran uang tersebut sampai tanggal 14 Februari 2014;

-Bahwa, sepengetauan saksi H.Moh. Wafiq Aziz belum dapat bagian warisan dari Alm. H.Abd. Aziz;

-Bahwa, saksi tidak mengetahui proses balik nama sertipikat tanah dan bangunan rumah yang saat ini ditempati oleh Tergugat I tersebut;

-Bahwa semua harta benda peninggalan dari alm. H.Abd Aziz berada di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik;

Bahwa atas keterangan saksi I para Tergugat tersebut, para Tergugat membenarkan dan menyatakan dapat menerima, sedang para Penggugat menyatakan bahwa tentang pembayaran uang ganti rugi tersebut tidak pernah dibayarkan oleh saksi I tersebut dan memang Penggugat I mengatakan perjanjian itu tidak sah karena isinya dirubah oleh saksi I;

Saksi II : H. Rifai Bin Abdul Halim, umur 54 tahun, agama Islam, pekerjaan Konfeksi/Kerja Borongan, tempat tinggal di Rt. 03 Rw. 05 desa Leran, kecamatan Manyar, kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa saksi kenal dengan Penggugat I, sejak 30 taun yang lalu, namun dengan Penggugat II ngerti namanya, tetapi tidak tahu orangnya;

- Bahwa saksi kenal dengan Tergugat I, sejak 5 tahun yang lalu, sedang dengan Tergugat II tidak kenal, namun hanya ngerti orangnya;
- Bahwa Mereka adalah anak kandung dari WASIL alias H.Abd. Aziz dan ibunya bernama Hj. Zubaidah;
- Bahwa, H.Abd. Aziz telah meninggal dunia kurang lebih 10 tahun yang lalu, sedangkan Hj. Zubaidah sampai sekarang masih hidup;
- Bahwa selama dalam perkawinan - dan Hj. Zubaidah dikarunia anak 5 orang, dan saat ini mereka semua masih hidup, yang nama-namanya sebagai berikut : H.Moh. Wafiq Aziz, H. Abd. Rouf, H. Nur Syafi'i Hj. Qurrotul Ainiyah dan H. Faisol;
- Bahwa, yang saksi ketahui setelah Alm. WASIL alias H.Abd. Aziz, meninggal dunia almarhum meninggalkan harta benda sebagai berikut :

1. Tanah dan bangunan rumah dengan ukuran 7x25 m yang terletak di Jln. KH Ali Irfan Desa Bajarsari Manyar dengan batas-batas sebagai berikut :

   -Sebelah Timur dengan rumah -;

   -Sebelah Utara dengan rumah -;

   -Sebelah Barat dengan tanah kavling;

   -Sebelah Selatan dengan jalan kampung;

   -Bahwa, tanah tersebut sudah besertipikat atas nama H. Abd. Rouf dan saat ini rumah tersebut dikuasai serta ditempati oleh Tergugat I bersama dengan Hj. Zubaidah ibu kandung para Penggugat dan para Tergugat;

2. Tanah kavling ukuran kurang lebih 7,5 x 25 m yang bersebelahan dengan rumah peninggalan alm. H.Abd.Aziz, namun batas-batasnya saksi tidak mengetahuinya;
3. Bahwa, saksi tidak mengetahui secara pasti lokasi mengenai Tambak Drudus, namun pernah dengar dari cerita H.Abd. Rouf (Tergugat I) ada tambak di kidulnya Deso Banjar, kecamatan Manyar;

- Bahwa, saksi tidak mengatehui luas dan batas-batas dari tambak tersebut;

- Bahwa, tambak tersebut saat ini dikuasai oleh Tergugat I;

- Bahwa, saksi tidak mengetahui sendiri, tentang tanah kavling dan tambak Sialo,tetapi saksi pernah mendengar dari cerita Tergugat I;

- Bahwa, saksi juga tidak mengetahui keberadaan tambak yang bernama tambak Pekerangan;

- Bahwa, saksi pernah diundang kerumah H.Abd.Rouf (Tergugat I) menyaksikan pembagian warisan dari alm. H.Abd.Aziz;

- Bahwa, harta warisan tidak jadi dibagi, karena ada pengakuan dari H.Abd.Rouf bahwa ada hibah dari - kepada H. Abd. Rouf, kata alm. H.Abd.Aziz " Nak harta tinggalanne Bapak tak weno awakmu kabeh " begitu kata H. Abd. Rouf, kemudian pada saat pertemuan itu, maka warisan tidak jadi dibagi, cuma Penggugat I minta ganti rugi sebesar 50 % dari tambak Sialo, sebab uang yang dipakai ketika membeli tambak sialo separonya milik Penggugat I;

- Bahwa saksi percaya atas pengakuan hibah dari Tergugat I tersebut;

- Bahwa saksi tidak mengetahui apakah ada saksi yang mengetahui atau tidak pernyataan hibah alm. H.Abd. Aziz kepada H.Abd. Rouf tersebut;

- Bahwa saksi pada saat pertemuan itu memberikan fatwa bahwa hibah tersebut sah, sekalipun tidak ada saksi.

- Bahwa, sepengetahuan saksi H.Moh.Wafiq. Aziz belum mendapat harta waris dari almarhum -;

- Bahwa, pada saat itu Penggugat minta ganti rugi sebesar Rp. 400.000.000.-

- Bahwa, saat itu belum ada pembayaran, karena jangka waktu pembayaranya 2 bulan;

- Bahwa, yang membayar uang ganti rugi itu adalah Tergugat I dan Penggugat II;

Bahwa atas keterangan saksi II para Tergugat tersebut, para Tergugat membenarkan dan menyatakan dapat menerima, sedang para Penggugat menyatakan bahwa tentang pembayaran uang ganti rugi tersebut tidak pernah dibayarkan oleh Tergugat I;

Saksi III : H. Masrukh Bin Abu Na'im, umur 46 tahun, agama Islam, pekerjaan Tani tambak/ Guru Swasta, tempat tinggal di Rt. 01 Rw. 05 desa Leran Banjarsari, kecamatan Manyar, kabupaten Gresik;

Di hadapan persidangan saksi telah memberikan keterangan dibawah sumpah sebagai berikut :

- Bahwa, saksi kenal dengan Penggugat I, sejak 30 tahun yang lalu, sedang dengan Penggugat II sejak kecil;
- Bahwa, saksi kenal dengan Tergugat I sejak kecil, sedang dengan Tergugat II baru 2 tahun;
- Bahwa Mereka adalah anak kandung dari H.Abd. Aziz dan Hj. Zubaidah;
- Bahwa, H.Abd. Aziz telah meninggal dunia, namun saksi lupa tahunnya, sedangkan Hj. Zubaidah sampai sekarang masih hidup;
- Bahwa selama dalam perkawinan - dan Hj. Zubaidah dikarunia anak 5 orang, dan saat ini mereka semua masih hidup, yang nama-namanya sebagai berikut : H.Moh. Wafiq Aziz, H. Abd. Rouf, H. Nur Syafi'i Hj. Qurrotul Ainiyah dan H. Faisol;
- Bahwa, yang saksi ketahui selain meninggalkan anak, Alm. H.Abd. Aziz, juga meninggalkan harta peninggalan sebagai berikut :
  1. Tanah dan bangunan rumah dengan ukuran 7x25 m yang terletak di Jl. KH Ali Irfan Desa Bajarsari Manyar dengan batas-batas sebagai berikut :

- Sebelah Timur dengan rumah -;

- Sebelah Utara dengan rumah -;

- Sebelah Barat dengan tanah kavling;

- Sebelah Selatan dengan jalan kampung;

Tanah tersebut sudah besertipikat atas nama H. Abd. Rouf dan saat ini rumah tersebut dikuasai serta ditempati oleh Tergugat I dengan Hj. Zubaidah ibu kandung para Penggugat dan Tergugat;

2. Tanah kavling ukuran kurang lebih 7,5x25 m yang bersebelahan dengan rumah peninggalan alm. H.Abd.Aziz, namun batas-batasnya saya tidak mengetahui;

- Bahwa, saksi tidak mengetahui secara pasti lokasi mengenai Tambak Drudus, namun pernah dengar dari cerita H.Abd. Rouf (Tergugat I) ada tambak di kidulnya deso Banjar, kecamatan Manyar;
- Bahwa, saksi tidak mengatehui luas dan batas dari tambak tersebut;
- Bahwa, tambak tersebut saat ini dikuasai oleh Tergugat I;
- Bahwa, saksi tidak mengetahui sendiri, tentang tanah kavling dan tambak Sialo, tetapi saksi pernah mendengar dari cerita Tergugat I;
- Bahwa, saksi juga tidak mengetahui keberadaan tambak yang ada di dusun Pekerangan;
- Bahwa, saksi mengetahui, sampai sekarang harta peninggalan dari alm. H.Abd.Aziz belum dibagi waris;
- Bahwa saksi pernah mendengar adanya pertemuan ahli waris alm. H.Abd. Aziz dirumah H.Abd.Rouf (Tergugat I), untuk membagi warisan peninggalan dari alm. H.Abd.Aziz ;
- Bahwa setahu saksi dalam pertemuan itu tidak jadi dilaksanakan pembagian waris atas peninggalan alm. H.Abd. Aziz, karena ada pengakuan dari H. Abd. Rouf kalau semua harta peninggalan - sudah dihibahkan kepada salah satu anaknya bernama H. Abd. Rouf, lalu H.Wafiq minta haknya karena merasa ikut andil dalam membeli tambak Siola, kemudian dibuat surat kesepakatan yang di tanda

tangani oleh semua ahli waris agar Tergugat I mengembalikan kepada - ganti rugi sebesar Rp.400.000.000,- dalam jangka 2 bulan;

- Bahwa saksi tidak mengtahui yang hadir pada pertemuan itu siapa saja;
- Bahwa saksi juga tidak mengetahui, apakah uang ganti rugi - itu sudah dibayar atau belum oleh Tergugat I;

Bahwa atas keterangan saksi III para Tergugat tersebut, para Tergugat membenarkan dan menyatakan dapat menerima, sedang para Penggugat menyatakan bahwa tentang pembayaran uang ganti rugi tersebut tidak pernah dibayarkan oleh Tergugat I;

Bahwa untuk mengetahui keberadaan dan lokasi obyek sengketa yang tersebut dalam gugatan Penggugat, pada tanggal 24 Oktober 2014, Majelis Hakim telah melakukan pemeriksaan setempat, hal mana telah tertuang dalam Berita Acara Pemeriksaan Setempat Nomor : 783/Pdt.G/2014/PA.Gs. tanggal 24 Oktober 2014, yang pada pokoknya ditemukan fakta bahwa obyek sengketa tersebut benar adanya dengan batas-batas sebagaimana terurai dalam gugatan para Penggugat, namun mengenai obyek sengketa pada posita 5.1 luas tanahnya adalah 443 M², sesuai dengan sertipikat No.75, obyek sengketa pada posita 5.2 luas tanahnya adalah 225 M² sesuai sertipikat No.30 ditambah 24.675 M² sesuai dengan sertipikat No.31, obyek sengketa pada posita 5.3 luas tanahnya adalah 20.000 M² persil 72, obyek sengketa pada posita 5.4 luas tanahnya adalah 9.705 M² sesuai dengan sertipikat No.31 dan obyek sengketa pada posita 5.5 luas tanahnya adalah 1.200 M² sesuai dengan persil 12;

Bahwa pada sidang tanggal 18 Nopember 2014 para Penggugat menyampaikan kesimpulan secara lisan, yang pada pokoknya tetap pada gugatannya, namun menambahkan pernyataan bahwa Penggugat I menyatakan tidak meminta ganti rugi atas tambak Sialo dan merelakan menjadi tirkah dari almarhum Wasil alias H.Abd. Aziz, sedang para Tergugat tidak datang dan tidak mengajukan kesimpulan;

Bahwa untuk mempersingkat uraian putusan ini, maka ditunjuk segala hal sebagaimana yang tercantum dalam Berita Acara Persidangan yang merupakan bagian yang tidak terpisahkan dari isi putusan ini;

PERTIMBANGAN HUKUM

Menimbang, bahwa maksud dan tujuan gugatan Penggugat adalah sebagaimana telah terurai di atas;

Menimbang, bahwa para pihak masing-masing telah hadir di persidangan dan telah memberikan keterangan secukupnya;

Menimbang, bahwa Majelis Hakim telah berusaha maksimal mendamaikan para pihak baik melalui mediasi oleh H. Azhar Amrullah Hafizh,LC.,M.Th.I (Mediator Pengadilan Agama kelas IB Gresik) sebagai Mediator atas perkara a quo, sesuai dengan laporan tanggal 11 Juni 2014, namun tidak berhasil, maka hal ini telah memenuhi ketentuan Peraturan Mahkamah Agung RI. Nomor 1 Tahun 2008, demikian pula pada setiap persidangan Majelis Hakim juga telah berusaha dengan maksimal mendamaikan para pihak agar menyelesaikan sengketanya tersebut secara damai dan kekeluargaan, namun tetap tidak berhasil, maka hal ini telah pula memenuhi ketentuan Pasal 130 HIR;

Menimbang, bahwa para Penggugat, para Tergugat, turut Tergugat dan objek sengketa dalam perkara ini berada di wilayah yuridiksi Pengadilan Agama kelas I B Gresik, oleh karena itu maka perkara ini menjadi wewenang Pengadilan Agama kelas I B Gresik;

Menimbang, bahwa perkara ini tentang gugatan pembagian harta waris dan subyek hukumnya adalah orang-orang yang beragama Islam, berdasarkan pasal 49 Undang Undang nomor 7 tahun 1989 yang telah diubah pertama kali dengan Undang-Undang nomor 3 tahu 2006 dan untuk kedua kalinya dengan Undang Undang Nomor 50 tahun 2009, maka Majelis hakim berpendapat bahwa Pengadilan Agama Gresik berwenang memeriksa dan mengadili perkara a quo;

Menimbang, bahwa dalil-dalil gugatan para Penggugat merupakan rangkaian dalil yang pada pokoknya meminta agar harta warisan pewaris (Wasil alias H.Abd. Aziz), berupa sebidang tanah berdiri diatasnya bangunan rumah di desa Banjarsari, kecamatan Manyar, Kabupaten Gresik, (obyek sengketa 5.1), tanah tambak dengan nama tambak Drudus di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik (obyek sengketa 5.2), tanah tambak dengan nama tambak Sialo di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik (obyek sengketa 5.3), tanah tambak dengan nama tambak Pekerangan di Desa Banjarsari, kecamatan Manyar, kabupaten Gresik (obyek sengketa 5.4) dan sebidang tanah kavling, di Desa Banjarsari, kecamatan Manyar, kabupaten Gresik (obyek sengketa 5.5) dibagi waris kepada para ahli warisnya (para Penggugat, Para Tergugat dan turut Tergugat) berdasarkan hukum Islam;

Menimbang bahwa dalam jawabannya Tergugat membenarkan semua dalil-dalil gugatan para Penggugat kecuali masalah pembagian harta warisnya, yang benar telah dibagi karena harta tinggalan almarhum Wasil alias H.Abd. Aziz telah dihibahkan semua kepada Tergugat I (H.Abd.Rouf);

Menimbang, bahwa atas jawaban Tergugat tersebut para Penggugat mengajukan replik secara lisan sebagaimana tersebut di atas ;

Menimbang, bahwa atas Replik para Penggugat tersebut, Tergugat mengajukan Duplik secara lisan sebagaimana tersebut di atas ;

Menimbang, bahwa untuk membuktikan dalil-dalilnya para Penggugat telah mengajukan bukti-bukti surat yang diberi tanda P-1 sampai dengan P-6 dimana bukti-bukti surat yang diberi tanda P-1 sampai dengan P-6 adalah berupa fotokopi yang setelah dicocokan dengan asli ternyata cocok dan telah dinazegelen, maka mempunyai kekuatan pembuktian sebagaimana salinan yang sah sebagaimana maksud pasal 1889 KUH Perdata;

Menimbang, bahwa para Pengugat juga mengajukan 3 orang saksi, yaitu yang bernama H.Munawir Bin Moch. Kholil, Shodiqin bin Abdul Ghoni dan H.Ainur Rofiq bin H.Shohaimi sebagaimana tersebut di atas dimana para saksi tersebut telah memenuhi syarat formal sebagaimana diatur oleh pasal 144, 145, 146 dan 147 HIR, maka keterangan 3 orang saksi tersebut dapat diterima sebagai alat bukti;

Menimbang, bahwa dari segi materi keterangannya, keterangan para saksi satu dengan yang lain saling bersesuaian dan ada relevansinya dengan pokok perkara, oleh karena itu memenuhi syarat materiil saksi;

Menimbang, bahwa untuk meneguhkan dalil-dalil jawaban dan atau bantahannya, para Tergugat telah mengajukan alat bukti surat yang ditandai dengan (T.1. s.d. T.4) dan 3 (tiga) orang saksi;

Menimbang, bahwa bukti surat yang diberi tanda T.1 sampai dengan T.4 berupa fotokopi yang setelah dicocokan dengan aslinya ternyata cocok, maka mempunyai kekuatan pembuktian sebagaimana salinan yang sah sebagaimana aslinya sesuai dengan pasal 1889 KUH Perdata;

Menimbang, bahwa saksi-saksi yang diajukan Tergugat bernama Nurhasan bin Akhwan, H.Rifa'i bin Abdul Halim, dan Masrukh bin Abu Na'im sebagaimana tersebut di atas adalah telah memenuhi syarat formal sebagaimana diatur oleh pasal 144, 145, 146 dan 147 HIR, maka keterangan saksi-saksi tersebut dapat diterima sebagai alat bukti;

Menimbang, bahwa oleh karena dalil gugatan Para Penggugat diakui oleh para Tergugat tentang meninggalnya pewaris, ahli warisnya dan harta peninggalan/tirkahnya pewaris sebagaimana tersebut di atas, maka berdasarkan Pasal 174 HIR. pengakuan merupakan alat bukti yang sempurna dan mengikat bagi pihak yang mengakuinya, sedangkan dalil-dalil gugatan Para Penggugat yang dibantah oleh Tergugat tentang belum dibaginya tirkah/harta peninggalan pewaris, maka Para Penggugat harus membuktikan dalil gugatannya dan para Tergugat juga harus membuktikan dalil-dalil bantahannya tersebut berdasarkan pasal 163 HIR;

Menimbang, bahwa mengenai bukti surat yang diberi tanda P.1 sampai P.5 oleh karena merupakan akta dibawah tangan, maka berdasarkan pasal 1874 KUH Perdata bukti tersebut tidak memenuhi syarat formal akta dan karenanya maka tidak mempunyai kekuatan pembuktian yang sempurna, hanya merupakan bukti awal yang harus didukung oleh bukti yang lain;

Menimbang, bahwa mengenai bukti surat yang diberi tanda P.6 adalah merupakan bukti akta yang otentik sehingga mempunyai kekuatan pembuktian yang sempurna ;

Menimbang, bahwa mengenai bukti surat yang diberi tanda T.1 sampai T.3 adalah merupakan bukti akta yang otentik sehingga mempunyai kekuatan pembuktian yang sempurna, sedang T.4 akan dipertimbangkan tersendiri;

Menimbang, bahwa pertama-tama harus dipertimbangkan apakah orang bernama Wasil adalah orang yang juga bernama H.Abd. Aziz;

Menimbang, bahwa berdasarkan pengakuan para Peggugat dan para Tergugat, bukti yang diberi tanda (P.6) (T.2), (T.3), dan saksi-saksi terbukti bahwa orang bernama Wasil adalah orang yang juga bernama H.Abd. Aziz;

Menimbang, bahwa berdasarkan pengakuan para Penggugat dan para Tergugat, bukti yang diberi tanda (P.5), dan saksi-saksi terbukti bahwa orang bernama Wasil alias H.Abd. Aziz benar-benar telah meninggal dunia pada tanggal 10 Oktober 2004 di desa Banjarsari, kecamatan Manyar, kabupaten Gresik karena sakit dan tetap memeluk agama Islam;

Menimbang, bahwa tentang kewarisan yang menjadi kewenangan Pengadilan Agama, berdasarkan Pasal 49 ayat (3) Undang-undang Nomor 7 Tahun 1989 tentang Peradilan Agama sebagaimana telah diubah dengan Undang-undang Nomor 3 Tahun 2006 dan perubahan kedua dengan Undang-undang Nomor 50 Tahun 2009 adalah meliputi : penentuan siapa-siapa yang menjadi ahli waris, penentuan mengenai harta peninggalan, penentuan bagian masing-masing ahli waris, dan melaksanakan pembagian harta peninggalan tersebut;

Menimbang, bahwa memperhatikan gugatan para Penggugat, Majelis Hakim menilai petitum gugatan para Penggugat telah sesuai dengan ketentuan Pasal 49 ayat (3) Undang-undang Nomor 7 Tahun 1989 tersebut;

Menimbang, bahwa setelah memperhatikan dalil-dalil gugatan para Penggugat, jawaban para Tergugat, replik duplik, serta alat-alat bukti dari masing-masing pihak, maka diperoleh fakta-fakta sebagai berikut:

Tentang Ahli Waris

Menimbang, bahwa dalil-dalil para Penggugat tentang ahli waris almarhum Wasil alias H.Abd.Aziz pada pokoknya dapat disimpulkan sebagai berikut :

- Bahwa seorang laki-laki bernama Wasil alias H.Abd.Aziz telah menikah sekali dengan seorang perempuan bernama Hj. Zubaidah binti Nursalam**.** Dalam pernikahannya tersebut telah dikaruniai 5 (lima) orang anak, yaitu masing-masing bernama: H. Moh. Wafiq Aziz (Penggugat I),

HJ.Qurrotul Ainiyah (Tergugat III), H. Abd. Rouf (Tergugat I), H. Nur Syafi'i (Penggugat II), dan H. Faishol (Tergugat II);

- Bahwa ayah dan ibu dari almarhum Wasil alias H.Abd. Aziz telah meninggal dunia lebih dahulu dari pada Wasil alias H.Abd. Aziz;

- Bahwa isteri almarhum Wasil alias H.Abd. Aziz yang bernama Hj. Zubaidah binti Nursalam sampai saat ini masih hidup (turut Tergugat);

Menimbang, bahwa dalil-dalil para Penggugat tentang para ahli waris almarhum Wasil alias H.Abd. Aziz telah diakui oleh para Tergugat dan telah dikuatkan pula dengan alat bukti surat (P.4) dan saksi-saksi, baik saksi-saksi dari para Penggugat maupun para saksi dari para Tergugat, maka dalil para Penggugat tentang para ahli waris almarhum Wasil alias H.Abd. Aziz tersebut patut dinyatakan terbukti sehingga patut dikabulkan;

Menimbang, bahwa sesuai dengan ketentuan hukum Islam (Al Qur'an surat An Nisa' ayat 11 dan 12 serta Pasal 174 Kompilasi Hukum Islam) bahwa di antara ahli waris yang tidak bisa dihijab adalah anak dan isteri/janda;

Menimbang, bahwa berdasarkan fakta yang ditemukan dalam persidangan tersebut, dan dengan mendasarkan pada Q.S. An Nisa' ayat 11 dan 12 serta Pasal 174 KHI (Kompilasi Hukum Islam) tersebut, maka petitum gugatan angka 2 patut dikabulkan dengan "Menetapkan bahwa almarhum Wasil alias H.Abd. Aziz telah meninggal dunia pada tanggal 10 Oktober 2004 dengan meninggalkan ahli waris seorang isteri (Hj. Zubaidah binti Nursalam) dan 5 (lima) orang anak kandung, yaitu : H. Moh. Wafiq Aziz (Penggugat I), HJ.Qurrotul Ainiyah (Tergugat III), H. Abd. Rouf (Tergugat I), H. Nur Syafi'i (Penggugat II), dan H. Faishol (Tergugat II) sebagaimana akan dinyatakan dalam amar putusan ini

<u>Tentang Harta Warisan</u>

Menimbang, bahwa para Penggugat mendalilkan almarhum Wasil alias H.Abd. Aziz disamping meninggalkan ahli waris juga meninggalkan

harta warisan sebagaimana tersebut dalam posita gugatan, dimana harta ini diperoleh almarhum Wasil alias H.Abd. Aziz dari warisan orang tuanya;

Menimbang, bahwa atas dalil para Penggugat tersebut, para Tergugat memberikan tanggapan yang pada pokoknya para Tergugat mengakui almarhum Wasil alias H.Abd. Aziz meninggalkan harta sebagaimana tersebut pada posita gugatan para Penggugat, tetapi harta itu telah dihibahkan semua kepada Tergugat I (H.Abd.Rouf), yang kemudian diberikan kepada saudara-saudaranya kecuali Penggugat I (H.Wafiq Aziz) tidak diberi karena ia menyatakan tidak minta hanya meminta haknya yang digunakan untuk tukar tambak Sialo dengan Hj.Maslikhah dengan ganti rugi sebesar Rp 400.000.000,- (empat ratus juta rupiah) yang ditanggung oleh Tergugat I sebesar Rp 200.000.000,- (dua ratus juta rupiah) dan yang Rp 200.000.000,- (dua ratus juta rupiah) ditanggung oleh Penggugat II ;

Menimbang, bahwa oleh karena dalil para Penggugat disanggah oleh para Tergugat, maka para Penggugat dibebani wajib bukti;

Menimbang, bahwa berdasarkan bukti surat (P.1) dan keterangan 3 (tiga) orang saksi Penggugat dan 3 (tiga) orang saksi Tergugat dibawah sumpahnya, maka diperoleh fakta bahwa Penggugat I memang benar-benar belum mendapatkan warisan dari almarhum Wasil alias H.Abd. Aziz, karena pada saat diadakan pertemuan di rumah Tergugat I ada pengakuan dari Tergugat I bahwa harta tinggalan almarhum Wasil alias H.Abd. Aziz itu telah dihibahkan kepadanya dan oleh H.Rifa'i dinyatakan hibah tersebut sah, sehingga pada saat itu belum ada pembagian waris atas harta peninggalan almarhum Wasil alias H.Abd. Aziz, maka dengan demikian Majelis berpendapat bahwa dalil para Penggugat tentang hal ini dinyatakan terbukti, sedang bantahan para Tergugat yang menyatakan bahwa harta peninggalan almarhum Wasil alias H.Abd. Aziz telah dibagikan kepada ahli waris patut dinyatakan lemah dan tidak beralasan, apalagi para Tergugat juga tidak bisa membuktikan bantahannya ;

Menimbang, bahwa mengenai pengakuan Tergugat I atas Surat Kesepakatan bersama ahli waris (bukti T.4) yang dibuat pada pertemuan

di rumahnya tanggal 14 Desember 2013 bahwa Penggugat I menyatakan tidak meminta warisan dari harta peninggalan almarhum Wasil alias H.Abd. Aziz telah dibantah isinya oleh Penggugat I, Penggugat II maupun saksi-saksi yang ikut hadir pada saat itu diantaranya saksi I Para Penggugat yang bernama H.Munawir Bin Kholil, menerangkan bahwa isi surat itu telah dirubah isinya oleh saksi I para Tergugat (Nurhasan bin Akhwan) yang tidak lain adalah Kepala desa Banjarsari, kecamatan Manyar, kabupaten Gresik, hal itu terbukti bahwa surat tersebut banyak coretan dan coretan tersebut tidak dirinvoi dan terbukti pula surat tersebut ada saksi yang belum membubuhkan tanda tangannya;

Menimbang, bahwa atas bantahan para Penggugat tersebut, maka para Tergugat diwajibkan untuk membuktikannya, dan para Tergugat telah menghadirkan 3 orang saksi, namun kesemua saksi tersebut menerangkan bahwa pada saat pertemuan tersebut tidak ada pembagian warisan atas harta peninggalan almarhum Wasil alias H.Abd. Aziz karena sudah ada pengakuan hibah dari Tergugat I, sehingga dengan pengakuan tersebut, maka Penggugat I hamya meminta ganti rugi haknya yaitu sawah yang digunakan tukar guling dengan tambak Sialo dari ibu Muslikhah;

Menimbang, bahwa berdasarkan fakta-fakta tersebut di atas, maka Majelis berkesimpulan bahwa surat kesepakatan bersama ahli waris (bukti T.4) tersebut cacat formal, karena isinya disangkal oleh pihak lawan, maka kekuatan formilnya maupun kekuatan pembuktianya sebagai akta bawah tangan (ABT) runtuh anjlok, hilang kepastian dan keamanannya sebagai akta dan alat bukti, sebagaimana yang dukehendaki oleh pasal 1876 KUHPerdata dan Yurisprudensi MARI No. 167 K/Sip/1959 tanggal 20 Juni 1959, oleh karenanya harus dikesampingkan, sehingga harta peninggalan almarhum Wasil alias H.Abd. Aziz harus dinyatakan belum dibagi kepada semua ahli warisnya termasuk kepada Penggugat I ;

Menimbang, bahwa tentang jawaban para Tergugat yang menyanggah bahwa harta yang tersebut pada posita gugatan para Penggugat telah dihibahkan/ diberikan oleh almarhum Wasil alias H.Abd.

Aziz kepada Tergugat I (H.Abd.Rouf bin Wasil alias H.Abd. Aziz) sehingga sudah menjadi milik sah para Tergugat, dapat dipertimbangkan sebagai berikut :

- Bahwa menurut Pasal 211 Kompilasi Hukum Islam (KHI), "Hibah dari orang tua kepada anaknya dapat diperhitungkan sebagai warisan";

Menimbang, bahwa berdasarkan pertimbangan tersebut di atas, disamping bantahan para Tergugat tersebut tidak didukung dengan bukti-bukti yang kuat karena pada waktu terjadinya hibah tidak ada saksi yang tahu, secara Substansial menurut Pasal 211 KHI tersebut hibah yang demikian itu – kalaupun benar – juga harus diperhitungkan sebagai warisan, sehingga jika ahli waris menerima hibah dari orang tuanya melebihi bagian yang seharusnya diterima, maka kelebihan tersebut harus diberikan kepada ahli waris lain yang berhak, termasuk Penggugat I, oleh karena itu Mejelis Hakim menilai sanggahan para Tergugat yang demikian itu tidak berdasarkan/tidak beralasan secara hukum, sehingga harus dikesampingkan;

Menimbang, bahwa adapun tentang bukti surat (T.1) atas obyek sengketa pada posita point 5.1 gugatan para Penggugat, dimana pada surat bukti tersebut berupa Sertipikat tercantum atas nama H. Abd. Rouf, Mejelis Hakim menilai bahwa surat bukti tersebut merupakan bukti kepemilikan tetapi cara perolehnya yang perlu dibuktikan kebenarannya;

Menimbang, bahwa dalam jawabannya para Tergugat juga menyatakan harta obyek sengketa pada posita point 5.1 gugatan para Penggugat, yang menurut para Tergugat - telah dihibahkan oleh almarhum Wasil alias H.Abd. Aziz kepada Tergugat I (H.Abd. Rouf) dan oleh Tergugat I telah dibaliknama atas nama H.Abd. Rouf, maka Majelis berpendapat bahwa obyek sengketa tersebut merupakan harta peninggalan almarhum Wasil alias H.Abd. Aziz yang belum dibagi waris ;

Menimbang, bahwa oleh karena obyek sengketa posita point 5.1 tersebut merupakan harta peninggalan Pewaris yang belum dibagi waris, maka Majelis berpendapat bahwa peralihan hak atas obyek sengketa tersebut yang berupa sertipikat nomor 75 atas nama H.Abd.Rouf harus

dinyatakan tidak mempunyai kekuatan hukum, karena dalam proses peralihannya mengandung kebohongan, mengandung penyalagunaan formalitas, yakni dengan iktikad tidak baik, hal tersebut terbukti pada sertipikat tersebut tertulis peralihan haknya atas dasar Konversi bukan pemberian hak/hibah;

Menimbang, bahwa gugatan harta waris termasuk gugatan perdata, yang dalam Hukum Islam termasuk *"hak adami"*, karena itu sikap Penggugat I yang pada tahap kesimpulan menyatakan *mengikhlaskan* ganti rugi atas tambak Sialo tersebut untuk menjadi *Tirkah* dari almarhum Wasil alias H.Abd. Aziz, dapat dibenarkan, karena meskipun secara hukum seharusnya Penggugat I juga mendapatkan hak ganti rugi atas tanah tambak dimaksud tetapi dengan sikapnya tersebut berarti Penggugat I telah ikhlas melepaskan haknya khusus terhadap tanah tambak Sialo dimaksud. Sikap yang demikian ini tidak merugikan pihak Tergugat justru menguntungkan para Tergugat.;

Menimbang, bahwa berdasarkan pertimbangan tersebut, maka dalil para Penggugat yang menyatakan harta obyek sengketa sebagaimana tersebut pada gugatannya sebagai harta peninggalan almarhum Wasil alias H.Abd. Aziz yang diperoleh dari warisan orang tuanya, dinyatakan terbukti, sehingga patut dinyatakan sebagai fakta yang tetap;

Menimbang, bahwa mengenai keadaan senyatanya obyek sengketa dimaksud – dengan memperhatikan bukti P.6, T.1,T.2 dan T.3 yang menerangkan tentang denah dan luas tanah – serta memperhatikan fakta di lapangan sebagaimana tertuang dalam Berita Acara Pemeriksaan Setempat Nomor: 783/Pdt.G/2014/PA.Gs. tanggal 24 Oktober 2014, diperoleh fakta bahwa harta peninggalan almarhum Wasil alias H.Abd. Aziz yang diperoleh dari warisan orang tuanya dimaksud adalah berupa: obyek sengketa pada posita 5.1 luas tanahnya adalah 443 M², sesuai dengan sertipikat No.75, obyek sengketa pada posita 5.2 luas tanahnya adalah 225 M² sesuai sertipikat No.30 ditambah 24.675 M² sesuai dengan sertipikat No.31, obyek sengketa pada posita 5.3 luas tanahnya adalah 20.000 M² persil 72, obyek sengketa pada posita 5.4 luas tanahnya adalah

9.705 M² sesuai dengan sertipikat No.31 dan obyek sengketa pada posita 5.5 luas tanahnya adalah 1.200 M² sesuai dengan persil 12;

Menimbang, bahwa berdasarkan pertimbangan tersebut, maka petitum gugatan Penggugat angka 3 dapat dikabulkan, sebagaimana akan dinyatakan dalam amar putusan ini;

Tentang Bagian Ahli Waris :

Menimbang, bahwa mengenai bagian ahli waris, oleh karena Majelis Hakim telah menetapkan para ahli waris dan harta warisan almarhum Wasil alias H.Abd. Aziz sebagaimana terurai di atas, maka berdasarkan hal tersebut petitum gugatan Penggugat angka 4 yang memohon agar Pengadilan menetapkan bagian masing-masing ahli waris sesuai hukum yang berlaku (in casus hukum Islam karena para pihak beragama Islam dan diselesaikan melalui Pengadilan Agama), patut dikabulkan;

Menimbang, bahwa adapun bagian masing-masing ahli waris almarhum Wasil alias H.Abd. Aziz adalah sebagai berikut :

a. Turut Tergugat selaku isteri mendapatkan 1/8 X harta warisan karena Pewaris meninggalkan anak, hal ini sesuai dengan ketentuan Al Qur'an Surat An Nisa' ayat 12 dan Pasal 180 Kompilasi Hukum Islam. Dalam Q.S. An Nisa' ayat 12 Allah SWT berfirman :

فَإِنْ كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ ...

Artinya : "…… Jika kamu (Pewaris) mempunyai anak maka para isteri memperoleh seperdelapan";

b. Penggugat I, Tergugat III, Tergugat I, Penggugat II dan Tergugat II, karena hubungan mereka ini dengan Pewaris (almarhum Wasil alias H.Abd. Aziz) sebagai anak, maka menurut hukum Islam: anak laki-laki dan anak perempuan sebagai ashabah, dengan perbandingan bagian anak laki-laki adalah dua berbanding satu dengan bagian anak perempuan. Hal ini sesuai dengan ketentuan Pasal 176 Kompilasi Hukum Islam dan Al Qur'an Surat An Nisa' ayat 11, yang berbunyi :

يُوصِيكُمُ اللَّهُ فِي أَوْلادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنْثَيَيْنِ

Artinya : "Allah mensyari'atkan (mewajibkan) kepadamu tentang (pembagian warisan untuk) anak-anakmu, (yaitu) bagian seorang anak laki-laki sama dengan bagian dua orang anak perempuan";

Menimbang, bahwa berdasarkan hal tersebut, maka secara rinci bagian masing-masing ahli waris Wasil alias H.Abd. Aziz atas harta warisan Pewaris Wasil alias H.Abd. Aziz adalah sebagai berikut (asal masalah 72 = 72/72) :

1. TURUT TERGUGAT (isteri) mendapat 1/8 = 9/72 bagian;
2. H. Moh. Wafiq Aziz bin Wasil alias - (anak laki-laki) mendapa Ashobah binafsih = 14/72 bagian;
3. Hj.Qurrotul Ainiyah binti Wasil alias - (anak perempuan) mendapat Ashobah bilghoir = 7/72 bagian;
4. H. Abd. Rouf bin Wasil alias - (anak laki-laki) mendapat Ashobah binafsih = 14/72 bagian;
5. H. Nur Syafi'i bin Wasil alias - (anak laki-laki) mendapat Ashobah binafsih = 14/72 bagian;
6. H. Faishol bin Wasil alias - (anak laki-laki) mendapat Ashobah binafsih = 14/72 bagian;

Menimbang, bahwa oleh karena obyek sengketa dikuasai oleh para Tergugat dan Penggugat II, maka para Tergugat dan Penggugat II patut dihukum untuk membagi harta peninggalan tersebut dan menyerahkan bagian masing-masing, jika tidak dapat dibagi secara natura, dapat dinilai dengan uang, atau dijual, atau dilelang, kemudian hasilnya dibagi sesuai dengan bagian masing-masing sebagaimana akan dinyatakan dalam amar putusan ini;

Menimbang, bahwa mengenai petitum gugatan angka 6 agar putusan di dalam perkara ini dapat dijalankan terlebih dahulu walaupun ada upaya hukum, Majelis Hakim berpendapat, bahwa perkara ini adalah sengketa kewarisan yang diselesaikan berdasarkan hukum formil dan hukum materiil, petitum tersebut bertentangan dan tidak berdasar Hukum, karenanya petitum gugatan angka 6 harus ditolak;

Menimbang, bahwa berdasarkan pertimbangan dan uraian tersebut, maka secara keseluruhan gugatan para Penggugat yang terbukti kebenarannya patut dikabulkan, sedang yang tidak terbukti patut ditolak sebagaimana akan dinyatakan dalam amar putusan ini;

Menimbang, bahwa oleh karena para Tergugat adalah pihak yang dikalahkan dalam perkara ini, maka biaya perkara harus dibebankan kepada para Tergugat, hal ini sesuai dengan ketentuan Pasal 181 ayat (1) HIR.;

Mengingat, segala peraturan perundang-undangan yang berlaku dan hukum syar'i yang berkaitan dengan perkara ini.

M E N G A D I L I

1. Mengabulkan gugatan para Penggugat sebagian;
2. Menetapkan bahwa Wasil alias - bin H.Abd. Rahman telah meninggal dunia pada tanggal 10 September 2004, dengan meninggalkan ahli waris sebagai berikut :
   2.1. TURUT TERGUGAT (isteri);
   2.2. H. Moh. Wafiq Aziz bin Wasil alias - (anak laki-laki);
   2.3. Hj.Qurrotul Ainiyah binti Wasil alias - (anak perempuan);
   2.4. H. Abd. Rouf bin Wasil alias - (anak laki-laki);
   2.5. H. Nur Syafi'i bin Wasil alias - (anak laki-laki);

2.6. H. Faishol bin Wasil alias - (anak laki-laki);

3. Menetapkan bahwa harta berupa :

3.1. Bangunan Rumah permanen dinding Tembok, atap genting dan lantai kramik, seluas 7X25 M berdiri diatas tanah seluas 445 M^2 Sertipikat Nomor 75 atas nama H. Abd. Rouf dengan batas-batas sebagai berikut :

- Sebelah Timur : Rumah -
- Sebelah Utara : Rumah -
- Sebelah Barat : Rumah -
- Sebelah Selatan : Jalan Kampung

3.2. Tambak Drudus, Sertipikat Nomor 30 atas nama Wasil bin Haji Abd. Rahman seluas 225 M^2 dan Sertipikat Nomor 31 atas nama Wasil bin Haji Abd. Rahman seluas 24.675 M^2 batas-batas sebagai berikut :

- Sebelah Timur : Tambak -
- Sebelah Barat : Kali/sungai
- Sebelah Utara : Tambak -
- Sebelah Selatan : Tambak H. Sowimin

3.3. Tambak Sialo luas kurang lebih 20.000 M^2 persil 72 kelas D II dengan batas-batas sebagai berikut :

- Sebelah Timur : Tambak -
- Sebelah Barat : Tambak -
- Sebelah Utara : Tambak -
- Sebelah Selatan : -

3.4. Tambak Pekerangan, Sertipikat Nomor 32 atas nama Wasil bin Haji Abd. Rahman seluas 9.705 M^2 dengan batas-batas sebagai berikut :

- Sebelah Timur : Tambak -
- Sebelah Barat : Tambak -
- Sebelah Utara : Tambak -
- Sebelah Selatan : Tambak -

3.5. Tanah Kavling luas kurang lebih 1.200 M^2 persil 12 Kelas D III dengan batas-batas sebagai berikut :

- Sebelah Timur : Jalan Kampung
- Sebelah Barat : Tanah -
- Sebelah Utara : Tanah -
- Sebelah Selatan : Tanah -

Yang kesemua objek tersebut terletak di Desa Banjarsari, Kecamatan Manyar, Kabupaten Gresik adalah harta peninggalan/tirkah almarhum Wasil alias - bin H.Abd. Rahman yang belum dibagi waris;

4. Menyatakan peralihan hak yang dilakukan oleh H. Abd. Rouf atas harta peninggalan almarhum Wasil alias - pada diktum nomor 3.1 di atas tidak mempunyai kekuatan Hukum;
5. Menetapkan bagian masing-masing ahli waris almarhum Wasil alias - atas harta warisan tersebut pada diktum nomor 3 di atas adalah sebagai berikut :
   5.1. TURUT TERGUGAT (isteri/turut Tergugat) mendapat 9/72 bagian;
   5.2. H. Moh. Wafiq Aziz bin Wasil alias H.Abd. Aziz (anak laki-laki/Penggugat I) mendapat 14/72 bagian;
   5.3. Hj.Qurrotul Ainiyah binti Wasil alias H.Abd. Aziz (anak perempuan/Tergugat III) mendapat 7/72 bagian;
   5.4. H. Abd. Rouf bin Wasil alias H.Abd. Aziz (anak laki-laki/Tergugat I) mendapat 14/72 bagian;
   5.5. H. Nur Syafi'i bin Wasil alias H.Abd. Aziz (anak laki-laki/Penggugat II) mendapat 14/72 bagian;
   5.6. H. Faishol bin Wasil alias H.Abd. Aziz (anak laki-laki/Tergugat II) mendapat 14/72 bagian;
6. Menghukum para Tergugat dan atau siapa saja yang menguasai harta yang tersebut pada amar putusan nomor 3 di atas untuk membagi dan menyerahkan bagian para ahli waris sesuai dengan bagian masing-masing, jika tidak dapat dibagi secara natura, dapat dinilai dengan uang, atau dijual, atau dilelang, kemudian dibagi sesuai dengan bagian masing-masing;
7. Menolak gugatan para Penggugat untuk selain dan selebihnya;
8. Menghukum para Tergugat untuk membayar biaya perkara sebesar Rp. 2.966.000,- (*dua juta sembilan ratus enam puluh enam ribu rupiah*)

Demikian putusan ini dijatuhkan di Gresik pada hari Selasa tanggal 09 Desember 2014 Masehi bertepatan dengan tanggal 16 Shofar 1436 H.,

oleh kami H.M.ARUFIN,S.H.,M.Hum. sebagai Hakim Ketua Majelis serta Drs.H.MASNGARIL KIROM,S.H. dan Hj.ALVIA AGUSTINA RAHMAH,S.H. sebagai hakim-hakim Anggota serta diucapkan oleh Ketua Majelis pada hari itu juga dalam sidang terbuka untuk umum dengan dihadiri oleh para hakim Anggota serta HUJAIDI,S.H. sebagai panitera pengganti dan dihadiri oleh para Penggugat dan para Tergugat;

Hakim Anggota,	Ketua Majelis,
Ttd.	Ttd.
Drs.H.MASNGARIL KIROM,S.H.	H.M.ARUFIN,S.H.,M.Hum.
Ttd.	
Hj.ALVIA AGUSTINA RAHMAH,S.H.	

Panitera Pengganti,

Ttd.

HUJAIDI,S.H.

Perincian Biaya Perkara:

Pendaftaran	Rp	30.000,-	Untuk salinan yang sama bunyinya
Proses	Rp	50.000,-	Oleh
Panggilan	Rp	1.300.000,-	Panitera Pengadilan Agama Gresik
Pemeriksaan setempat	Rp	1.575.000,-	
Redaksi	Rp	5.000,-	
Meterai	Rp	6.000,-	
Jumlah	Rp	2.966.000,-	

(*dua juta sembilan ratus enam puluh enam ribu rupiah*) Hj. Mudjiati, S.H.