



**Aress & 2 others (Suing on their Behalf and on Behalf of Phase II Diamond Estate Association) v Ng'ang'a & 4 others; Registrar of Societies (Interested Party) (Commercial Case E242 of 2024) [2024] KEHC 11381 (KLR) (Commercial and Tax) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E242 OF 2024**

**MN MWANGI, J  
AUGUST 23, 2024**

**BETWEEN**

**ABIDIRIZAK BISHAR ARESS ..... 1<sup>ST</sup> APPLICANT  
FEISAL MOHAMED ..... 2<sup>ND</sup> APPLICANT  
SULEKHA MOHAMED KHALIF ..... 3<sup>RD</sup> APPLICANT  
SUING ON THEIR BEHALF AND ON BEHALF OF PHASE II DIAMOND  
ESTATE ASSOCIATION**

**AND**

**DOUGLAS NG'ANG'A ..... 1<sup>ST</sup> RESPONDENT  
MOHAMED HUSSEIN OMAR ..... 2<sup>ND</sup> RESPONDENT  
ABDULLAHI IBRAHIM MOHAMED ..... 3<sup>RD</sup> RESPONDENT  
ABDIKADIR AHMED ALI ..... 4<sup>TH</sup> RESPONDENT  
MAHAT DAHIR NOOR ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**REGISTRAR OF SOCIETIES ..... INTERESTED PARTY**

**RULING**

1. The defendants/applicants filed an application dated 26<sup>th</sup> July, 2024 brought under Order 51 Rule 1 of the Civil Procedure Rules and the inherent powers of the Court seeking the following orders-



- i. Spent;
  - ii. The ruling date for 15<sup>th</sup> October, 2024 be brought forward to a closer date in the current term;
  - iii. The Court do grant any other relief as it may deem fit in the circumstances; and
  - iv. The cost of this application be provided for.
2. The application is supported by an affidavit sworn on 26<sup>th</sup> July, 2024 by Abdullahi Ibrahim Mohammed, who states that he is the Secretary of Phase II Diamond Estate Association Likoni Road and authorized by the 2<sup>nd</sup> to 6<sup>th</sup> defendants to swear the affidavit on their behalf and on behalf of the Society.
  3. The plaintiffs filed a relying affidavit sworn by Abdirizack Bishar Aress sworn on 1<sup>st</sup> August, 2024 in opposition to the application dated 26<sup>th</sup> July, 2024.
  4. After going through the affidavit filed by the applicants, and the allegation that the Court orders of 7<sup>th</sup> May, 2024 were obtained fraudulently, on 2<sup>nd</sup> August, 2024, I directed the applicants to explain by way of a further affidavit how the said orders were obtained fraudulently. The applicants as such filed a supplementary affidavit sworn on 8<sup>th</sup> August, 2024 by Mohammed Abdullahi Ogle, who stated that he wrote the WhatsApp message exhibited to the replying affidavit, from telephone No.+254 745 880072, a number registered to Mohammed Abdullahi, wherein he indicated that the management of the Estate was in a mess following “a Court order obtained fraudulently by a few individuals”, and also indicated that they had taken steps to respect the Court order and that the processes were moving well, and that they would give updates of the Court proceedings.
  5. Mr. Ogle explained that his statement that “the Court Order was obtained fraudulently by a few individuals” was in reference to the actions of the plaintiffs when they obtained the ex parte orders of 7<sup>th</sup> May, 2024, through their application of 2<sup>nd</sup> May, 2024. He asserted that there was no suggestion at all in the WhatsApp message that the Court itself has been involved in any fraud. He stated that the allegations contained in the WhatsApp message was consistent with the position taken by the defendants in these proceedings in their response to the plaintiffs’ application dated 2<sup>nd</sup> May, 2024, as well as in their own application dated 9<sup>th</sup> May, 2024 to inter alia set aside the ex parte order of 7<sup>th</sup> May, 2024.
  6. He contended that the applicants have raised the issue of fraud on the part of the plaintiffs in the various affidavits and other documents filed, alleging that the plaintiffs approached this Court with unclean hands and failed to disclose material facts to the Court which led the plaintiffs to obtain the ex parte on 7<sup>th</sup> May, 2024.
  7. Mr. Ogle further contended that the plaintiffs fraudulently falsified the minutes of the alleged meeting and elections of 13<sup>th</sup> April, 2024 which they attached to the supporting affidavit of Abdrizack Bishar Aress sworn on 2<sup>nd</sup> May, 2024 to support their application orders from the Court.
  8. He averred that in the further affidavit sworn by Abdullahi Ibrahim Mohammed on 23<sup>rd</sup> May, 2024, the applicants brought to the attention of the Court that most of the people who were alleged to have attended the meeting of 13<sup>th</sup> April, 2024 during which the plaintiffs were purportedly elected as officials of the Society did not, in fact, attend the said meeting, which affidavits are before the Court.
  9. He deposed that it is in the context of the foregoing that he stated that if the plaintiffs had withheld material facts, misrepresented some facts to the Court, and produced falsified documents, the Court



would not have issued the ex parte order that put the plaintiffs in charge of the Society, being the position taken by the applicants in these proceedings in the pending applications before this Court.

10. Mr. Ogle reiterated that the allegations of fraud were not in any way directed to the Court, and neither he individually, nor the applicants collectively have any basis at this stage to believe or even suspect that the Court has been involved in any fraud, as he and the other applicants remain confident in the Court and have continued to participate in these proceedings and even recently made an application to this Court to deliver a ruling on the two applications dated 2<sup>nd</sup> May, 2024 and 9<sup>th</sup> May, 2024 earlier than the scheduled date.
11. On 2<sup>nd</sup> August, 2024, the Advocates for the parties made brief rival submissions. Mr. Tugee for the applicants stated that the crux of the application is to have the Court deliver a ruling for the two applications dated 2<sup>nd</sup> May, 2024 and 9<sup>th</sup> May, 2024, earlier than on 15<sup>th</sup> October, 2024, due to the contentious nature of the matter and conflicting interest. He urged for an earlier date for delivery of the ruling so as to avoid wastage of assets as the interim officials that were imposed by the Court have been harassing residents and mismanaging the assets of the Estate.
12. Mr. Tugee expressed shock that the plaintiffs had in their reply to the application indicated that there was no need to expedite the ruling. Counsel stated that their application does not seek drastic orders against anyone, yet the plaintiffs are saying in the month of August that they were not in a hurry.
13. Mr. Tugee submitted that it is extremely unfair for a party to be enjoying interim orders and then pray for the ruling not to be dealt with expeditiously. He urged this Court to consider vacating the orders earlier issued.
14. He stated that the instant application was anchored on Order 40 Rule 5 of the Civil Procedure Rules, 2010 which requires a Court to deliver a ruling within thirty (30) days or give a reason for delivering a ruling later. He prayed for the two applications to be determined as soon as possible.
15. On his part, Mr. Abdiaziz, learned Counsel for the plaintiffs stated that this is the first time that he was dealing with an application of this nature. He stated that for the first two (2) months when the interim officials came into office, there was a grace period for non-payment of security services and garbage collection. He contended that the applicants herein were inciting the Estate residents against paying service charge for services rendered, and that they had incited eighty-one (81) people not to pay the same, and that the five (5) applicants herein, have not been paying service charge.
16. He stated that since July 2024, garbage collection was being done at 8.00 a.m. to 8.30 a.m. every morning. He also stated that the monies collected so far have been utilized well and the accounts were being posted on the WhatsApp group. Mr. Abdiaziz expressed the view that there is no urgency in this matter and that the instant application is without merits.
17. Mr. Abdiaziz however in the same breath stated that they had no objection to the ruling date being brought forward as that is a matter at the discretion of the Court.
18. In a rejoinder, Mr. Tugee submitted that whether or not his clients (applicants) have paid service charge does not bar them from approaching this Court. He stated that notices demanding for service charge were served on his clients and they were given seven (7) days from 7<sup>th</sup> August, 2024 to pay. He stated that this Court will give a decision either way, and that their client is interested in getting the Court's position, but the applicants had not asked the Court to deliver a ruling in their favour. He further stated that he was shocked that the plaintiffs who moved the Court under certificate of urgency now say that there is no urgency.



19. He submitted that based on the provisions of Order 40 Rule 5 of the Civil Procedure Rules, 2010, he was praying for the ruling of the two applications to be brought forward, and if that is not possible, he urged this Court to give directions where both parties can make a decision in the management of the Estate.

### **Determination**

20. The application dated 26<sup>th</sup> July, 2024 seeks an order for the ruling scheduled for 15<sup>th</sup> October, 2024 to be brought forward to the term that was ending on 31<sup>st</sup> July, 2024. It was however not possible to meet that request within the said period. I must however point out that from the Court file, the ruling date for the two (2) applications is 25<sup>th</sup> October, 2024 and not 15<sup>th</sup> October, 2024 as indicated by the applicants.
21. This Court invited both the Advocates to make brief representations to establish if the ruling could be brought forward for delivery after resumption of work after the High Court Vacation ending 15<sup>th</sup> September, 2024.
22. It is apparent from the depositions made by the plaintiffs and the applicants in their respective affidavits that they continue to level accusations and counter-accusations against each other concerning the conduct of the plaintiffs and the applicants in the management and/or mis-management of the affairs of Phase II Diamond Estate Association, its members and the residents.
23. The plaintiffs in their replying affidavit sworn on 1<sup>st</sup> August, 2024 are opposed to having the ruling of their application dated 2<sup>nd</sup> May, 2024 and the one dated 9<sup>th</sup> May, 2024 filed by the defendants rescheduled to an earlier date other than 25<sup>th</sup> October, 2024. In his oral submissions, the plaintiffs' Advocate however stated that he had no objection to the delivery of the ruling being brought forward.
24. The application dated 26<sup>th</sup> July, 2024 is premised on the provisions of Order 40 Rule 5 of the Civil Procedure Rules, 2010, which provides as follows –
- “In all applications for injunction, the Court shall, after interpartes hearing deliver its ruling either at once or within thirty days of the conclusion of the hearing with notice to the parties and their Advocates;
- Provided where the ruling is not delivered within thirty days, the Judge shall record the reason therefor and immediately fix a date for ruling”.
25. As earlier explained orally to the Advocates for the parties herein, it was not possible to deliver a ruling before 31<sup>st</sup> July, 2024 due to work constraints. The High Court vacation however leaves me extra time in my hands to work on pending rulings and judgments.
26. Contrary to what the plaintiffs stated in their affidavit that my vacation should not be disturbed, Court vacation is not a time for Judges to lounge, it is a time for them to deal with certificates of urgency filed during High Court vacation, and also make some progress in writing of pending rulings and judgments. I therefore wish to disabuse the plaintiffs of the notion they have that Court vacation is a time to relax and enjoy the break.
27. I do not wish to delve into the accusations and counter-accusations made by both parties as that is a matter to be determined in the applications dated 2<sup>nd</sup> May, 2024 and the other one dated 9<sup>th</sup> May, 2024.



28. Since the High Court is now on vacation, and I now have extra time in my hands, if time allows for me to write a ruling for the two (2) pending applications in this matter, I will render the same on either 20<sup>th</sup> or 27<sup>th</sup> September, 2024, and if not, I will deliver the same on 14<sup>th</sup> October, 2024.
29. As stated by Mr. Tugee, the instant application before me boils down to the exercise of my discretion. The applications dated 2<sup>nd</sup> and 9<sup>th</sup> May, 2024 were both filed under certificate of urgency, and they raise fundamental issues of the management of Phase II Diamond Estate Association. It is therefore not an abuse of the Court Process for the applicants herein to apply for an expeditious determination of the said applications.
30. The doctrine of “Judicial Discretion” as Desmith defined it, is -
- “the legal concept of discretion which implies power to make a choice between alternative causes of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say somebody has a discretion presupposes that there is no uniquely right answer to his problem.” (See SA Desmith and J.M. Evans Judicial Review of Administrative Action 4<sup>th</sup> Edition [1980] 278.
31. Having considered the application and the response made, I hereby exercise my discretion, and allow the application dated 26<sup>th</sup> July, 2024 with costs to the defendants/applicants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF AUGUST, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Anjiko h/b for Mr. Abdiaziz for the plaintiffs/respondents

Mr. J. Tugee for the defendants/respondents

Mr. Otieno for the interested party

Ms B. Wokabi – Court Assistant.

