



Nyakundi & another (Suing on Their Behalf and of the Members of the Nyayo Embakasi Residents Association - NERA) v Teddy Obiero Eddah Marete Andrew Kagume Winnie Obaga (Sued as Former Officials and Members of the Executive Committee of Nera); Registrar of Societies & 2 others (Interested Parties) (Petition E107 of 2024) [2024] KEHC 11495 (KLR) (Constitutional and Human Rights) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E107 OF 2024
EC MWITA, J
SEPTEMBER 27, 2024**

BETWEEN

HELLEN WANGECI NYAKUNDI 1ST PETITIONER

FLORENCE THOITHI 2ND PETITIONER

**SUING ON THEIR BEHALF AND OF THE MEMBERS OF THE NYAYO
EMBAKASI RESIDENTS ASSOCIATION - NERA**

AND

**TEDDY OBIERO EDDAH MARETE ANDREW KAGUME WINNIE OBAGA
(SUED AS FORMER OFFICIALS AND MEMBERS OF THE EXECUTIVE
COMMITTEE OF NERA) RESPONDENT**

AND

REGISTRAR OF SOCIETIES INTERESTED PARTY

**NYAYO EMBAKASI RESIDENTS ASSOCIATION (NERA) INTERESTED
PARTY**

**FRIDAH NAMBAKA IRENE IRUNGU GEORGE LAMENYA LEONARD
WARUINGE ANTONY YONGO (SUED AS TRUSTEES OF NYAYO EMBAKASI
RESIDENTS ASSOCIATION) INTERESTED PARTY**



JUDGMENT

Introduction

1. Florence Thoithi and Hellen Wangeci Nyakundi, (petitioners), members Nyayo Embakasi Residents Association (the association), brought this petition against Teddy Obiero, Eddah Marete, Andrew Kagume and Winnie Obaga, officials and members of the executive committee of the association, the respondents.
2. The petitioners joined the Registrar of Societies, (the Registrar) a public official, appointed under section 8 of the *Societies Act*, Cap 108, (the Act) whose mandate is, among others, to register, de-register and preside over issues involving associations registered under the Act; The association of Residents of Nyayo Estate Embakasi, Nairobi and Fridah Namboka, Irene Irungu, George Lamanya, Leonard Waruinge, Antony Yongo, trustees of of the association as the 1st, 2nd and 3rd interested parties, respectively.

Petitioners' case

3. The petitioners' case is that, on 26th January 2020, the association held its Annual General Meeting (AGM) in which the respondents were elected. They were to hold office until the 25th January 2021 when another AGM was to be held and new officials elected.
4. The petitioners stated that the respondents have failed to call for the AGM, thereby obstructing the elections of new officials of the association. As a result of this failure, the association faces potential de-registration.
5. The petitioners asserted that according to the association's constitution, the respondents' position as officials expired automatically on 25th January 2021, leaving only the 3rd Interested party, a fact also confirmed by the Registrar's letter dated 5th December 2022.
6. The petitioners argued that the foregoing notwithstanding, the respondents have purported to continue acting as officials of the association in violation of the members right to freedom of association guaranteed under Article 36(1) of *the Constitution*.
7. The petitioners stated that the respondents also failed to provide particulars requested for by the Registrar such as audited accounts which would have facilitated the calling of an AGM and holding of elections. Failure to hold elections has effectively hindered the continued existence of the association as a legal entity.
8. According to the petitioners, the Registrar had mandated the Trustees to call for an AGM and conduct elections upon respondents submitting a list of members and names and contacts of the Trustees of the association but to no avail. Meanwhile, the respondents purported to issue a notice dated 1st February 2024, calling for an AGM on 3rd March 2024 without any lawful mandate since they were not officials. The notice was also sent a few select members leaving out a majority of members of the members.
9. The petitioners argued therefore, that the respondents have violated members' rights guaranteed under Article 36(1) of *the Constitution* to associate and hold elections and vie for vacant positions in the decision-making process in the association.



10. The petitioners take the position that the respondents' default has caused vacancy in the office. Their mandate lapsed and, therefore, cannot lawfully call for any AGM and no lawful elections can be held under the *Societies Act*, unless the court extends the time to do so.
11. On the basis of the foregoing, the petitioners seek the following reliefs:
 - a. A declaration that the respondent, and specifically Teddy Obiero, Eddah Marete, Andrew Kagume and WINNIE OBAGA, being immediate former officials / former Chairman, former Secretary, former treasurer and former Organising Secretary respectively of the Executive Committee of the Nyayo Embakasi Residents' Association (NERA), are in office illegally and without the mandate of *the constitution* of the 2nd interested party, the Nyayo Embakasi Residents Association (NERA), w.e.f 25th January 2021.
 - b. A declaration that the respondent's (Teddy Obiero, Eddah Marete, Andrew Kagume And Winnie Obaga) continued acts and omissions after 25th January 2021 and or so, and its obstruction of elections of new officials, were undertaken without the constitutional mandate of the 2nd interested party, the Nyayo Embakasi Residents Association (NERA) and therefore violated the constitutional right to freedom of association guaranteed under article 36 (1) of *the Constitution* of Kenya 2010 of the petitioners and of the residents of Nyayo Estate Embakasi Nairobi, are therefore a nullity and are hereby set aside.
 - c. An order of mandatory injunction compelling the 3rd interested party to call for an annual general meeting under the supervision of the registrar of the societies, the 1st interested party, as guided by NERA's Constitution.
 - d. The legal validity and registration of the Nyayo Embakasi Estate Association (NERA) be and is hereby extended for purposes of elections ordered under this petition.
 - e. An order that a forensic audit of the Nyayo Embakasi Residents' Association (NERA) financial statements and books of accounts be undertaken.
 - f. An order of accounts and a refund by the respondent (Teddy Obiero, Eddah Marete, Andrew Kagume And Winnie Obaga) of any monies of the Nyayo Embakasi Residents' Association that they have withdrawn from its bank account from the 25th January 2021 to date.
 - g. Costs.
 - h. Interest.

Respondents' case

12. The respondents had not filed responses and submissions at the time of hearing this petition, although their advocate had been granted time to do so. However, there are documents on the CTS, namely; an application dated 18th June 2024, seeking to arrest the judgment and to deem a replying affidavit by the 1st respondent duly filed as well as written submissions. The application was not moved and, therefore, the court will not consider these documents.

Determination

13. I have considered the petition, supporting affidavit and written submissions. I have also gone through the supporting affidavit and annexures to that affidavit. The issue for determination is whether the petitioners' rights under Article 36(1) of *the Constitution* have been violated.



14. As already pointed above, on 13th March 2024, the respondents had not filed responses to the petition on grounds that they had not been mapped in the system. The court granted them time to file responses and issued directions on filing submissions by parties and set the date for highlighting of submissions for 3rd May 2024. On that day, 3rd May 2024, the respondents had not filed their documents and sought an adjournment which the court declined. The petition was heard and judgment reserved.
15. As already stated, at the time of writing the judgment, there was a replying affidavit sworn by the 1st respondent, written submissions and an application for leave to admit the replying affidavit and written submissions. That application having not been moved; those documents were not admitted since they were filed after lapse of the time granted.
16. The Petitioners and 1st to 5th respondents are members of the association. The 1st to 4th respondents also double-up as executive committee officials of the association.
17. The petitioners' case is that the respondents as executive committee members have failed to hold an annual general meeting of the association following expiry of their term thereby denying the residents and members of the association the right to elect officials of their association, a violation of their right of association guaranteed under Article 36(1) of *the Constitution*. Further, the association risks deregistration for failure to comply with the provisions of the *Societies Act*.
18. Article 36(1) of *the Constitution* confers on every person the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. On the other hand, the association, the subject of the dispute before court, is a society registered under the *Societies Act*. It is therefore subject to the provisions of that Act and its constitution when it comes to dealing with internal disputes.
19. The dispute herein relates to holding of the association's annual general meeting and election of executive committee members. Holding of meetings and conduct of elections is governed by the association's constitution. I will come to this aspect later.
20. Section 17(1) of the *Societies Act* states that in case of change of officials or title of any office in a registered Society, a notice of such change should be given to the Registrar within fourteen days of that change. The notice has to be signed by three of the officers of the society.
21. On disputes, section 18 provides thus:
 1. If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.
 2. If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
 3. A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.
22. The Act provides a mechanism through which the Registrar may deal with disputes over leadership in a registered society and the actions the Registrar may take, including deregistration. An aggrieved society may appeal against the Registrar's decision to the High Court.



23. I have gone through *the constitution* of the association annexed to the petitioners' affidavit. Clause D of the association's constitution is on general meetings. Clause D-3 states that if the executive committee fails to call annual general meeting by last Sunday of November, the Estate Moderator and Trustees shall declare the Estate Committee seats vacant and proceed to call Special General Election. Should the Estate Moderator and Trustees fail to hold elections by the last Sunday of November, the Estate Council shall appoint other Trustees to oversee election of an Estate Moderator who should in turn, hold special general elections.
24. It is therefore plain, that the association's constitution provides for a clear internal procedure for managing elections should the executive committee fail to do so. Clause D-3 is self-executing and does not require external assistance. There is no evidence, however, that clause D- 3 was invoked if not, no explanation has been given.
25. The petitioners argued that the Registrar wrote to the respondents calling for documents for purposes of resolving the dispute but the respondents did not comply. This appears to agree with the essence of section 18 of the *Societies Act* on how the Registrar may resolve disputes in a society. The petitioners also seem to say that the Registrar is seized of the matter relating to that dispute. If that is true that the Registrar is seized of the matter, which appears to be the case any way, then the dispute herein, if any, is still in the hands of the Registrar who has to make a decision which can then be challenged before this court.
26. In that respect, this petition is premature since the Registrar must be allowed to exercise his mandate under the Act before this court is called upon to review such decision, if necessary.
27. The petitioners argued that they were apprehensive that their association faced the risk of being deregistered because the respondents had not held an annual general meeting and elections for executive committee officials. Apprehension that the association may be deregistered, is not a violation of rights and fundamental freedoms in the Bill of Rights. Furthermore, the law to deregister the association has not been invoked. In any case, there is a remedy in the law that the association may fall back to. The claim of violation of constitutional rights and fundamental freedoms must be real and well-founded, but not a mere conjecture.
28. Moreover, the issue here being an internal matter of elections in a society governed by internal rules and procedures, the petitioners must follow their constitution before alleging violation of constitutional rights and fundamental freedoms guaranteed in Article 36(1) of *the Constitution*. This is because, the right of association is a right of all members and not a few. It would be difficult to hold that there is violation of the right of association when members of the association have not adhered to their own constitution in resolving their internal disputes.
29. Looking at the totality of this petition and the reliefs sought, they are clearly matters that have nothing to do with violation of *the Constitution* and fundamental rights in the Bill of Rights. Consequently, the petition fails and is dismissed.
30. Since the dispute involves residents and members of one association, I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE

