Republic v Principal Registrar of Doucments & 3 others; Yahya & 85 others (Exparte) (Miscellaneous Application E058 of 2023) [2023] KEHC 27022 (KLR) (Judicial Review) (28 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E058 OF 2023

J NGAAH, J

DECEMBER 28, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

PRINCIPAL REGISTRAR OF DOUCMENTS ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS ..... 2ND RESPONDENT

INTERIM TRUSTEES OF KIBRA NUBIAN COMMUNITY LAND TRUST ..... 3RD RESPONDENT

CHIEF REGISTRAR MINISTRY OF LANDS ..... 4TH RESPONDENT

AND

JAMALDYIN YAHYA & 85 OTHERS ..... EXPARTE

JUDGMENT

1. Before court is the applicant's motion dated 20 June 2023. It is expressed to be brought under Articles 47 and 50 of *the Constitution*; sections 8 and 9 of the *Law Reform Act* cap 26 and Order 53 rules 3 and 4 of the Civil Procedure Rules.

2. The prayers have been framed thus:

   (a) an order of certiorari to bring into this court and quash the decision of the 1st respondent on 30th November 2022 to register the impugned trust deed titled Kibra Nubian Community Land Trust Deed of Amendment and Restatement supplemental to the Trust Deed dated 30th September 2013 dated 3rd June 2022.

(b) An order of mandamus compelling the 1st respondent to cancel the registration of the impugned trust deed titled Kibra Nubian Community Land Trust Deed of Amendment and Restatement supplemental to the Trust Deed dated 30th September 2013 within fourteen (14) days of the delivery of the judgment herein.

(c) An order of prohibition to bring into this court to forbid and prohibit the 1st respondent from registering any amendment to the trust deed dated 30th September 2013 in the absence of registration of a duty verified register of members/beneficiaries of the trust in compliance with the trust deed dated 30 September 2013.

2. A declaration be issued that the trust deed dated 30th September 2013 is reinstated.

3. That a declaration be issued that any actions taken by the 3rd respondent on the basis of the impugned trust deed are ultra vires and thereby null and void.

4. That the costs of this application be provided for."

3. The application is based on an undated affidavit purportedly sworn by one Jamaldin Yahya verifying the facts relied upon and a statutory statement dated 29 May 2023.

4. According to these documents, the 1st and 2nd respondents registered what has been described as "an amendment and supplemental trust deed (the impugned trust deed) dated 3rd June 2022" on 30 November 2022. The trust deed is said to be "an irregular substitution and revocation of the previous trust deed dated 30 September 2013, disguised as an amendment and supplemental trust deed, despite notice of irregularities and misrepresentations in the impugned trust deed."

5. The impugned trust deed, according to the applicants, was shrouded in secrecy and kept from the beneficiaries' knowledge until such a time that it was registered. The applicants contend that it was not ratified by 70% of the members of the trust which is a requirement under the terms of the trust deed registered in 2013.

6. The decision to register the impugned trust deed, the applicants state, is in bad faith, irrational and unreasonable. The applicants also claim that the registration has endangered the applicant's right to their ancestral land. In particular, as a result of the impugned trust deed, the trustees are alienating 288 acres of the Nubian ancestral land in Kibra without the express authority of the members of the Nubian community.

7. The applicants contend that they would lose their ancestral land if what they describe as "imposter trustees" are not stopped from alienating what they consider to be their ancestral land.

8. None of the respondents responded to the applicants' application and so when the application came up for hearing on 11 October 2023 all that Ms. Waikwa, the learned counsel for the applicants, told the court was as follows:

> It is the motion dated 20 June 2023. The application was served on all the respondents. No response has been filed. We pray that the application be allowed."

9. Although the application seeks to impeach a decision allegedly made on 30 November 2022, no such decision has been exhibited to the any of the affidavits filed by the applicants. And if the "decision" is what the applicants have described as "an amendment and supplemental trust deed (the impugned trust deed) dated 3rd June 2022" on 30th November 2022", that too has not been exhibited to either the affidavit verifying the facts relied upon or the affidavit that was filed in support of an application that was subsequently filed for interim orders pending the hearing of this suit. Yet the applicants seek an

order of certiorari to quash the purported decision. In the absence of this decision it is impossible for the court to interrogate whether the decision is tainted on any of the grounds of judicial review.

10. Order 53 Rule 7 (1) of the Civil Procedure Rules require a copy of the order, warrant, commitment, conviction, inquisition or record to be exhibited where an order of certiorari is sought to remove proceedings into this Honourable Court for the purpose of their being quashed. That rule reads as follows:

> 7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

11. By necessary implication, an impugned decision, such as the decision in question in these proceedings, ought to be part of the proceedings for the court, not to determine its merits but whether, first, the decision exists in the first place, and second, whether it is tainted on any of the grounds of judicial review. It may be possible, for instance, to tell from the face of a decision when, how and why it was reached. The decision's timing, the means by which it is reached and the reasons behind it will certainly help the court to evaluate it on grounds of illegality, irrationality or procedural impropriety. Again, a court will not quash a decision whose existence has not been proved.

12. In Emmanuel Kaingu Karisa & another v National Land Commission & another; County Government of Lamu & another (Interested Parties) (2021) eKLR the Court of Appeal addressed the need to exhibit a copy of an impugned decision in an application for certiorari and stated as follows:

> Granted, the appellants were clearly disappointed by the demarcation exercise. But to succeed in their application, they were required to identify and specify the decision or decisions they wished to be quashed. This, the appellants did not do, with the result that the burden of proof was not discharged. It is not the function of the court to speculate or fill gaps in the cases brought by parties as this Court directed in Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR, where it said;
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> "Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed." (Emphasis added).

13. That said, there is a more fundamental question in the applicants' application that has not been answered. This is a jurisdictional question and, perhaps for this reason, it ought to have been addressed as a preliminary point.

14. I gather from the applicants' application that the valid trust deed which the respondents are alleged to have breached is the one registered on 3 October 2013. That deed has an arbitration clause which is to the effect that in the event of a dispute as to the interpretation, the effect of, the implementation of or any other matter arising directly or indirectly out of the trust, it shall be submitted to an arbitrator for arbitration. The arbitration clause is clause 16.0 of the deed and it reads as follows:

> 16.0 Arbitration
>
> Any dispute between the parties hereto in regard to;

a. the interpretation of; or

b. the effect of; or

c. the implementation of; or

d. any other matter arising directly or indirectly out of this trust shall be submitted and decided by arbitration.

The arbitration shall be held anywhere convenient to the parties within Kenya but otherwise under the provisions of the arbitration laws then in force in the Republic of Kenya; it being the intention as far as possible that the arbitration shall be held and concluded within 21 (twenty one) days after it has been demanded. All the parties shall be entitled to be represented at the arbitration. The decision of the arbitrator(s) shall be final and binding upon the parties, shall be carried into effect by them and made an order of any competent court having jurisdiction at the instance of any party."

15. The applicants who are members of the trust are bound by this clause and considering that their dispute is largely between members and the trustees or amongst members of the trust themselves, they ought to have submitted their grievances to an arbitrator in line with this arbitration clause.

16. In any event, the issues that the applicants have raised concerning the registration of an amended trust deed supplemental to the deed registered in 2013 and the allegation of alienation of what they have described as their ancestral land are issues that could properly be dealt with by the arbitrator appointed under clause 16 of the trust deed.

17. It follows that the suit is premature and misconceived. It is, therefore, struck out. Considering that the respondents did not respond to the suit, I make no orders as to costs. Orders accordingly.

SIGNED, DATED AND UPLOADED ON THE CTS ON 28 DECEMBER 2023

NGAAH JAIRUS

JUDGE