



**Kimotho & another v Kihumba (Environment & Land Case
E018 of 2022) [2023] KEELC 18231 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E018 OF 2022**

**AA OMOLLO, J
JUNE 22, 2023**

BETWEEN

WILSON GIKONYO KIMOTHO 1ST APPLICANT

JOHN MAGU 2ND APPLICANT

AND

STEPHEN MACHARIA KIHUMBA RESPONDENT

JUDGMENT

1. The Applicant filed an Originating Summons dated 6th May 2022 supported by the affidavit sworn by Wilson Gikonyo Kimotho on the same date seeking for the following orders;
 - a. Whether the Honourable Court should appoint the Applicants as trustees of the Assets of the welfare group known as Kairu Kiruri and Partners being Land Reference Number 209/2820/26 and Plot No.173 Section One Eastleigh.
 - b. Whether the newly appointed trustees should be allowed to execute Agreement for Sale and Transfer Forms as trustees for the group's parcels of land known as Land Reference Number 209/2820/26 and Plot No.173 Section One Eastleigh or such other documents as may be required to facilitate disposal of the two properties in behalf of the group.
 - c. Whether there should be any orders as to costs
2. The 1st Applicant stated that he is a co-administrator of the Estate of the Late Kimotho Gikonyo pursuant to a grant issued in H.C Succession Cause No.137 of 2011. The OS was filed on the grounds that Land Reference Number 209/2820/26 is registered in the names of Kimotho Gikonyo and Kihumba Kariuki, both deceased and that Plot No.173 Section one Eastleigh is registered in the names of Kimotho Gikonyo, Wanjiku wife of Gichure Mwangi, Macharia Gachira, Gichana Chege, Kamau Mariyu, Kariri Thura, Jeni Githinji, and Kihumba Kariuki.



3. The Applicants stated that by an indenture dated 30/9/1971 and registered on 6/11/1971, Plot No.173 was transferred to Kimotho Gikonyo and Wanjiku w/o Gichure Mwangi (holding an undivided one half share in common in equal shares) and to Macharia Gachira, Gichana Chege, Kamau Mariyu, Kariri Thura, Jeni Githinji, Kihumba Kariuki and Kimotho Gikonyo holding an undivided half share as tenants in common in equal shares.
4. They pleaded that in HCCC No.475 of 2006, John Gikonyo Gituthu & Joseph Muguku Munyua vs Kimotho Gikonyo and 9 Others, Lady Justice M.A. Angawa adopted a consent on 25/9/2008 declaring that the aforesaid registered proprietors were registered as trustees over the two parcels of land hereafter referred to as “the suit property” holding on their behalf and on behalf of several other individuals as was listed in the order.
5. The Applicants stated that the registered owners were members of a welfare group known as Kairi Kiruri and Partners and those that were holding as trustees are now deceased. That the members of the group have resolved to sell the two properties as per the meeting held on 11/12/2021, which resolution require appointment of trustees.
6. The Applicants stated that the Respondent is an administrator of the estate of the late Kihumba Kariuki-deceased who was one of the trustees, sold all his interests to one Newton Gakuru therefore he no longer has no interest in the properties. However, he has continued to obstruct the smooth running of the affairs of the group and declared himself a trustee in a sworn affidavit filed in the High Court Commercial and Admiralty Division case No. E837 of 2021. That this has made it impossible to amicably agree on the appointment of the trustees without the assistance of the court.
7. The Respondent filed a replying affidavit sworn on 28th September 2022 deposing that the OS is supported by an affidavit of the 1st Applicant which referred to one Karuga Kihato Kagiri who is not a party to the suit. That an application under the provisions of the Trustee Act has to be supported by affidavit evidence therefore the 2nd Applicant and Karuga Kihato Kagiri should be considered persona non grata.
8. The Respondent stated that the grant of representation relied upon by the 1st Applicant is inoperative as Section 76(d) (i) of the Law of Succession Act states that a grant of representation may at any time be revoked or annulled if the court decides either on application or of its own motion. He deposes that the person to whom the grant was made has failed, after due notice and without reasonable cause apply for confirmation of the grant within one year from the date of issue.
9. The Respondent contended that Kairi Kiruri Partners is an amorphous group that do not deserve recognition before the court and that the exhibits marked ‘WG4’ ‘WG5’ and ‘WG6’ do not pass the threshold of documentary evidence stating that the group is unlawful since it is not registered.
10. The Respondent avers further that the registered proprietors of the plot have never been declared as Trustees over the same and that he is the Trustee by dint of the court order dated 26th September 2008 in HCCC 475 of 2006. He deposed that the affairs of the beneficiaries of the plot can be effectively carried out by himself and other lawful representatives of the deceased Trustees. He asserted that the Applicants have not tabled any evidence to show authority to act as administrators of any of the deceased Trustees thus they do not qualify to be appointed as Trustees.
11. The Respondent further stated that he is not objecting to disposal of the plots but as a Trustee he is seized by law to execute the documents pertaining to the said contemplated disposal. In addition, he claims as against the beneficiaries with respect to expenses incurred over a period of two decades



or more which ought to be resolved either before or during negotiations over sale of the plots. He particularized the expenses as;

- a. Remitted Rental Income Tax (RIT) over the suit properties in the amount of Kshs.718,206/ (exclusive of interest over 6 years and counting)
- b. Legal fees in the amount of Kshs.850,000 as paid to M/S Kigano & Associates to pursue an appeal in Nairobi HCCC 475 of 2006
- c. Goodwill in the amount of Kshs.500,000 owed to the Estate of the late Kihumba Kariuki for preserving the suit properties.

Evidence

12. The parties tendered viva voce evidence by dint of the affidavits filed being treated as parties' witness statements and the annexures taken as exhibits. The court granted leave to the 1st Applicant to file authority of the 2nd Applicant giving him powers to give evidence on his behalf and the same was filed as dated 13th February 2022.
13. PW1 produced the 10 documents annexed to his affidavit as PExh 1-10 and testified that the grant issued in July 2011 appointed the two of them as administrators. Pw1 averred that the grant had been confirmed although he had not produced the Certificate of grant before this court. On cross examination, PW1 testified that by the consent order issued in HCC 475 of 2006, the court declared that the Defendants in the filed case were the Trustees and that some of them were deceased. He asserted that the Respondent ceased being a trustee because he sold his land.
14. In opposing the Summons, the Respondent and adopted the documents annexed to his replying affidavit as Dex 1-3. He testified that the group Kairu Kiruri has 34 members but it is not registered. That in HCC case no. 476 of 2006, he among other Defendants were appointed as Trustees and four (4) of the Trustees are still alive.
15. DW1 admitted that he had sold his share to Newton Gakuru and thus he was no longer an owner. He further testified that his claim are the amounts that Mr.Gakuru used to bail the estate of KRA dues to the tune of Kshs.700,000, financed the 6 families with legal fees of up to Kshs.800,000 and goodwill which money has not been refunded. He conceded he did not make the payments, however, Mr. Newton Gakuru made the payments under his instructions. He further averred that his father was to be paid good will after winning the case and which goodwill he quantified at Kshs.500,000.
16. DW1 stated that he had donated POA to Mr.Gakuru and also listed the current trustees as Wilson Gikonyo (1st Applicant), Urban Chege, Heitho Nyambura, Stephen Macharia Kihumba (the Respondent), Gideon Mwangi Kamau, Mary Wangari Githinji adding that he had no objection to their appointment as trustees[.

Submissions.

17. The Applicants and Respondent filed their submissions dated 20th February 2023 and 3rd March 2023 respectively.
18. The Applicants submitted that by virtue of a court order issued in HCCC 475 of 2006, a large group of people referred to as Kairi Kiruri were declared to be the owners of two parcels LR No.209/2820/26 and Plot No.173 Section One Eastleigh declaring that the registered proprietors were only holding in trust for all the members.



19. The Applicants submitted that the Respondent should not be a trustee and cannot oppose appointment of trustees because, he is not registered as a proprietor in the titles, his entitlement to the properties was in his capacity as a beneficiary/administrator of his late father who was in the titles and he already confirmed that he had sold all his shares to one Newton Gakuru therefore has no interest in the properties.
20. The Applicants further submitted that the court has a wide discretion to appoint a new trustee or new trustees or even substitute existing trustees as per Section 42(i) of the *Trustee Act* which provides that the court may, whenever it is expedient to appoint a new trustee or new trustees and it is found inexpedient, difficult or impractical to do so without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to existing trustee or trustees. The Applicants submitted that they do not object the persons proposed by the Respondent to be appointed as joint trustees but excluding the Respondent as he does not qualify under section 57 of the *Trustee Act*.
21. The Respondent submitted that the 1st Applicant has not been able to prove his beneficial interest in the properties because the grant produced is dated 15th July 2011 and the same was not confirmed noting that Section 76(d)(i) of the *Law of Succession Act* provides that such a grant may be revoked on court's own motion or on application. In support of stating that the 1st Applicant does not have beneficial interest therefore cannot be appointed a trustee, he cited the case of *Khadija Khamisi Shafi &ja Khamisi Shafi & others v Aliya Zahran [2017]Eklr* which ruled on Section 57 of the *Trustee Act* that an applicant seeking appointment as trustee must be a person beneficially entitled in the land subject to a trust.
22. The Respondent submitted that the 2nd Applicant has failed to provide affidavit evidence in support of his application therefore do not have the locus standi to bring this application and in support cited the case of *Joseph Ruhoni Njoka v Registrar of Titles & 3 others [2008] Eklr* where it was held that there is no way one can file an Originating Summons in court without supporting the issues raised therein through an affidavit.
23. The Respondent further submitted that at least 5 trustees being alive, appointment of the Applicants as trustees would be irregular as it is provided in section 36(1) of the *Trustee Act* that where there are more than four (4) Trustees holding land on trust for sale, no new Trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed. In supported the cited the case of *Khadija Khamisi case (supra)*.
24. The Respondent submitted that this court should observe the doctrine of stare decisis and cannot set aside the consent order given by Nairobi Commercial Court in HCCC 475 of 2006 where he was among the parties declared as Trustees of the plots.

Analysis

25. It is my understanding that there is a group by the name Kairu Kiruri in which the Applicants and Respondents are members on the basis of being beneficiaries to the original members. It is also brought to the knowledge of this court that a suit was filed being HCCC 475 of 2006 in which a consent order directed that the Defendants therein, that included the Respondent were registered as trustees of the plots for their own benefit and for the benefit of the persons named in the order. The Respondent then sold his share in the plots to Mr. Newton Gakuru and donated his power and authority over the plots to him vide specific power of Attorney dated 15th December 2011.



26. It is discerned from the pleadings and evidence presented that the members have agreed to sell the plots and are therefore seeking from this court an order to appoint trustees excluding the Respondent. The Respondent has opposed the said application stating that he has a claim for the expenses in remitted Rental Income Tax (RIT), legal fees and goodwill as set out in his replying affidavit and listed herein above.
27. The issues for determination in this suit are who are the trustees of the suit properties and whether the Respondent should be refunded the amounts claimed.
28. On the first issue, it is not disputed that the Respondent was a registered trustee by dint of the consent order issued by court on 16th October 2008. However, as the Respondent rightfully put it, a trustee must be a person beneficially entitled in the land subject to a trust. This is provided in Section 57 (1) of the Trustee Act that any application concerning any interest in land which is subject to a trust must be made by a person beneficially entitled in the land subject to a trust and has been applied in the case of *Akokor & another v Kitelapong & 2 others* ((Legal Representatives of The Estate of James Mariachi Kokita (Deceased)); *Kokita & 3 others* (Interested Parties) (Environment and Land Misc application 7 of 2020) [2022] KEELC 2825 (KLR) (29 June 2022) (Ruling) and *Khadija Khamis* case (supra).
29. The Respondent discharged himself from all or any of the trusts or powers reposed in or conferred on him to Mr. Newton Gakuru whom he sold to his interest in the suit properties. A cursory perusal of the pleadings and the evidence tendered reveals that, the Respondent currently has no beneficial interest in the plots thus have no interest in the affairs of the same. The Respondent is therefore not a trustee of the suit properties.
30. Consequently, the originating summons dated the 6th of May 2022 is allowed appointing the Applicants as trustees alongside the surviving trustees appointed vide the consent order given on 26th September 2008 and issued on the 16th October 2008 but excluding the Respondent. The limb of prayer (b) of the summons is also granted allowing the newly appointed trustees to execute the agreement of sale and transfer forms for the group's parcels of land L.R. No. 209/2820/26 and Plot No. 173 Section One Eastleigh and such other documents as may be required to facilitate the disposal of the two properties on behalf of the group.
31. The Respondent contended that he has claim for the expenses incurred that should be refunded to him. He has not presented the claim in a substantive application/suit for determination by this court hence, I will say nothing about it.
32. The Applicants are awarded the costs of this application

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023

A. OMOLLO

JUDGE

In the presence of

Odek H/B for S. N Nganga for App

Owino for Respondent

