



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 55 OF 2017

MOHAMED SULEIMAN NASSOR

(Suing as a Trustee of the Mazrui Community (Development and Welfare)

WAKF Lands Trust and as a member of the Mazrui Community).....PLAINTIFF/APPLICANT

VERSUS

MBARUK ABDALLA SULEIMAN.....1ST DEFENDANT

MOHAMED KHAMIS OMAR.....2ND DEFENDANT

MOHAMED SULEIMAN ALI.....3RD DEFENDANT

SWABIR MASOUD ABDALLA.....4TH DEFENDANT

SULEIMAN RASHID ABDALLA.....5TH DEFENDANT

NASSIR MASOUD MOHAMED.....6TH DEFENDANT

AND

AHMED MOHAMED SULEIMAN MAZRUI.....1ST INTERESTED PARTY

RASHID MOHAMED SALIM MAZRUI.....2ND INTERESTED PARTY

SALIM MASOUD ABDALLA.....3RD INTERESTED PARTY

KHALFAN ABDALLA MOHAMED.....4TH INTERESTED PARTY

RULING

1. In an application dated 22nd May, 2017 brought under the provisions of Sections 1A, 3A and 63(c) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 rules 1, 2, 3, 4, Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, the applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That a temporary injunction be granted, restraining the defendants/respondents whether by themselves, their agents or servants or any other person claiming under them, from operating, acting or in any way dealing as trustees of the Mazrui Community

(Development and Welfare) Wakf Lands Trust pending the hearing and determination of this suit;

(v) That a temporary injunction be granted restraining the defendants/respondents whether by themselves their agents or servants or any other person claiming under them, from operating, managing or in any other way dealing with the affairs, assets and properties of Mazrui Community Development and Welfare) Wakf Lands Trust, including opening, taking over and/or operating bank accounts in the name of the Trust pending the hearing and determination of this suit;

(vi) That these orders be served upon the Minister for Lands, the Registrar of Societies, the Wakf Commissioners of Kenya, and the bankers of the Trust, including First Community Bank, for the necessary action;

(vii) That the cost of this application be provided for; and

(viii) Any other or further orders that this Honourable court may issue as it deems necessary and expedient in the interest of justice.

2. The application is supported by the affidavit of Mohamed Suleiman Nassor. The respondents on 6th June, 2017 filed a joint replying affidavit sworn by Mbaruk Abdalla Suleiman. The applicant filed a further affidavit on 20th June, 2017. The 1st and 2nd Interested parties on 3rd August, 2017 filed their joint replying affidavit sworn by Ahmed Mohamed Suleiman. The 3rd and 4th Interested parties filed their joint replying affidavit on 25th July, 2017 sworn by Salim Masoud Abdalla. The applicant on 3rd August, 2017 filed a further affidavit in response to the replying affidavit by the 3rd and 4th Interested parties.

3. Mr. Onyony, Learned Counsel for the applicant relied on his written submissions filed on 23rd August, 2017. In highlighting the same, he stated that no valid elections were held on 7th May, 2017 to usher in the respondents as the Trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust (Mazrui Trust). He referred the court to the Trust Deed attached to the applicant's affidavit as annexure MSN1, which spells out the persons who are eligible to be elected as Trustees and what their responsibilities entail.

4. He submitted that the respondents flouted the provisions of the Trust Deed which provides for elections of Trustees in an Annual General Meeting (AGM) as per clause 5(1). He stated that minutes were taken and availed for the AGM but there was no list of *bonafide* beneficiaries who attended the meeting.

5. It was further submitted that the Trust Deed envisages a situation where majority of the members elect Trustees after the issuance of a 21 day notice calling for an AGM. Counsel prayed for the nullification of the elections held. He argued that under clause 12(2) of the Trust Deed, the notice issued must be specific as to the place and time of holding the AGM with a minimum quorum of 10% of the *bonafide* members being present. He referred to a letter marked as MSN2 from the Wakf Commissioners to show that elections should have been supervised, thus the elections were invalid.

6. On the issue of authority to plead, it was contended that the 1st respondent had no authority to sue and plead on behalf of 2nd, 3rd, 4th, 5th and 6th respondents. Counsel submitted that the applicant had established a prima facie case with a probability of success hence he was entitled to injunctive orders.

7. On the principle of irreparable injury, Counsel submitted that the applicant's rights as a Trustee have been violated as any election must be validly done and if the order is not granted, chaos will ensue.

8. He further argued that the balance of convenience tilts in favour of the applicant who wishes to have elections conducted through a lawful and valid process.

9. It was submitted for the applicant that this case is distinct from Mombasa Environment and Land case No. 157 of 2017 and the pleadings by Counsel for the respondents emanating from the said case should be expunged from the record herein. He relied on the case of **Mzee Omar Ali and 5 Others vs Milfan Developers Ltd & Another** [2017] eKLR to show that authority must be given by other litigants to sign and swear affidavits on their behalf.

10. He also cited the case of **Benjamin Leonard MacFoy vs United Africa Co. Ltd** [1962] AC which held that invalid actions are incurably bad. On the same point, the applicant's Counsel cited the case of the **Board of Trustees of African Independent Pentecostal Church of Africa Church vs Peter Mungai Kimani and 12 Others** [2014] eKLR where the court invalidated elections that had been held.

11. Mr. Onyony also relied on the case of **Symon Philip Koech vs Litein Tea Factory and 5 Others** [2014] eKLR, where the court held elections conducted therein null and void as rules and regulations were not followed.

12. Mr. Kimani Muhoro, Learned Counsel for the respondents stated that Mr. Onyony was blowing hot and cold for the reason that the 1st Interested party swore an affidavit on his own behalf and on behalf of the 2nd Interested party but Counsel for the applicant saw nothing wrong with it, but had raised an issue with regard to the 1st respondent not having authority to plead and swear affidavits on behalf of his co-respondents. It was argued that no preliminary objection was raised on the said issue on a point of law. Counsel for the respondents prayed for the objection raised against the 1st respondent's affidavit to be disregarded.

13. On the annexing of proceedings before the Environment and Land Court to the respondents' affidavit, it was submitted that there was nothing wrong with it and no objection was raised before the court and as such, reliance on the said documents could not be raised casually by an objection from the bar. Mr. Kimani argued that the pleadings were annexed to show that there is a situation existing whereby the applicant who seeks to be a Trustee is acting in conflict with the interest of the Mazrui Trust. It was submitted that the said actions render the applicant not eligible to the orders sought for an injunction. Reference was made to annexure MSS5 which is an affidavit that was filed in the

Environment and Land matter which states in paragraphs 17-21 that the applicant is an employee of the company that was to be sued.

14. On the conduct of elections, Counsel submitted that the minutes attached to the applicant's affidavit as MSN4 signed by the applicant and the 1st and 2nd Interested parties state that it was resolved that a letter was to be written to the Wakf Commissioners not to attend the elections which would be conducted without them.

15. It was submitted that in the plaint, the applicant avers that he did not attend the elections but in his affidavit, he states that to their surprise on 7th May, 2017 the respondents came up with a new list.

16. Counsel for the respondents was of the position that the Trust Deed does not state that elections must be done in an AGM. He stated that the elections were done in a General Meeting, thus the register of members was not necessary and a notice of 21 days was also not necessary. He indicated that the applicant did not show which members were excluded as elections were conducted by 30 members.

17. It was submitted that the applicant had not established a prima facie case on a balance of convenience, Counsel stated that the Trust Deed provides that 6 Trustees should conduct the business of the Trust but at present there is no quorum. He propositioned that the applicant could have convened an extraordinary general meeting to remove the 3 Trustees he does not want. He urged the court not to grant the injunction in view of the conflict of interest.

18. Ms Kinyua, Learned Counsel for the 1st and 2nd Interested parties relied on their replying affidavit and her written submissions. She fully associated herself with the applicant's submissions whose cause she supported. She indicated that she filed an authority for the 1st Interested party to plead on his own behalf and on behalf of the 2nd Interested party on 29th May, 2017. She submitted that the meeting of 7th May, 2017 fell short of the provisions of clause 5(2) and clause 14 of the Trust Deed, as well as clause 12 of the regulation of Trustees which provides for conduct of General Meetings. She stated that the meeting held was null and void as no notice was issued to members contrary to clause 14(1) of the Trust Deed which provides for notice to issue 21 clear days before the meeting. She contended that members were absent at the said meeting and the threshold of 10% of the members of the Mazrui Community were not in attendance. In addition, there were no signatures in the documents filed by the plaintiff marked MSN1 to show the validity of the members who attended the meeting.

19. Counsel relied on **Mrao Ltd. vs First American Bank of Kenya Ltd and 2 Others** [2003] eKLR, which defines what a prima facie case is. She also relied on **Nguruman Limited vs Jan Bonde Nielson and 2 Others** [2014] eKLR.

20. Mr. Gathuru, Learned Counsel for the 3rd and 4th Interested parties opposed the application through the replying affidavit filed on 25th July, 2017 and his written submissions. He submitted that the applicants had not established a prima facie case for the reason that an election was held and it was not true that not less than 10% of the community members had to attend the meeting for it to be valid. He made reference to clause 14(3) of the Trust Deed which provides that the quorum at an AGM shall be not less than 10% of the number of members or a number resolved at a General Meeting. He asserted that members can resolve what the quorum will be at a General Meeting and that the Wakf Commissioners need not supervise the elections.

21. It was submitted that the applicant had failed to show the irreparable loss he will suffer if the order for an injunction is denied. Counsel further submitted that there was real danger if the orders for an injunction are to be granted due to the conflict of interest exhibited by the applicant and as such the balance of convenience did not tilt in his favour.

22. In response to the foregoing submissions, Mr. Onyony referred to clause 9.4 of the Trust Deed which provides that members have voting rights and clause 14.3 which provides that the quorum at an AGM or a Special General Meeting shall be a number not less than ten percent (10%) of the *bonafide* members of the Community as at that time, or such other number as shall be resolved in a General Meeting.

23. Counsel argued that the objection to the 1st respondent's lack of authority to swear an affidavit and plead on behalf of the others does not have to come up as a preliminary objection. He further stated that issues of conflict of interest ought to have been raised at the General Meeting. He stated that the respondents had not availed any document to show that the applicant is an employee of Mombasa cement.

ANALYSIS AND DETERMINATION

24. The issues for determination are:-

- (i) If valid elections of Trustees were held on 7th May, 2017;
- (ii) Whether the 1st respondent and 3rd Interested party possess the requisite authority to swear replying affidavits and pleadings on behalf of other respondents and 4th Interested party, respectively;
- (iii) If the applicant has met the principles for granting of the orders of an injunction.

25. The Trust Deed made on 21st February, 2006 brought to effect the Mazrui Community (Development and Welfare) Wakf Lands Trust (Wakf Trust). A copy of the said Trust Deed is attached to the applicant's affidavit as MSN1. Clause 5 thereof makes provisions for the appointment of Trustees. Clause 5.2 provides as follows:-

“The power to appoint and/or remove Trustees who shall hold office shall be exercisable solely by members of the Community in a general meeting and/or a majority vote of the Trustees in accordance of clause 12.1 (d)”

26. Clause 14 of the Trust Deed provides for “General Meetings”. Clause 14.1 states:-

“An Annual General Meeting (AGM) to which members of the community are invited should be held at such time (not being less than 15 months after the holding of the preceding Annual General Meeting) and place as the Trustees shall determine. At least 21 clear days’ notice shall be given in writing by the Trustees to individual members of the community. At such Annual General Meeting the business should include a review of the Trustees work for the past year together with their plans for the coming year; review of the audited report of the Trust’s accounts; and the transaction of any other matters as may from time to time be necessary. The Trustees shall appoint one of their members to chair any general meeting.” (emphasis added).

27. Clause 14.3 thereof provides that:-

“The quorum at an Annual General Meeting or a Special General Meeting shall be a number not less than ten percent (10%) of the bonafide members of the community at that time, or such other number as may be resolved in a general meeting.”

28. The above provisions which I have quoted in *extenso* leave no room for doubt that the Trust envisages two types of meetings; Annual General Meetings and Special General Meetings. A Special General Meeting as per clause 14.2 of the Trust can be called by the Trustees if acting at their sole discretion, or upon receipt of a written request to do so signed by not less than 100 individuals of the community giving reasons for the request. None of the parties herein has contended that a Special General Meeting was held on 7th May, 2017 to elect 3 new Trustees. In the absence of such a contention, the only conclusion that this court can safely arrive at is that the meeting of the said date was an Annual General Meeting. A notice giving the community members 21 days’ notice of the meeting scheduled for 7th May, 2017 should therefore have been issued to members of the Wakf Trust.

29. I have perused the documents attached to the affidavits filed by the parties hereto and none has attached such a notice. Attached to the respondents’ affidavit is annexure MSS2 which appears to be minutes of the 7th May, 2017. In the opening statement, it states that Salim Masoud informed the meeting that it was a follow up of the one held on 16th April, 2017 where an election was to be held but it was not, and members agreed to postpone to 7th May, 2017. Surprisingly neither the respondents nor the 3rd and 4th Interested Parties who are in support of the respondents’ cause attached the notice convening the meeting of 16th of April, 2017 to show that it was validly convened and the minutes of the said meeting to show that a resolution was made for elections to be held on 7th May, 2017.

30. In the case of **Symon Philip Koech vs. Litein Tea Factory and 5 Others** [2014] eKLR the court stated thus:-

“The biggest question here is whether or not the elections were credible and whether they were conducted according to the rules and regulations. If the members or shareholders lose faith in the election process of electing their directors and committee members then such a loss cannot be said to be quantifiable in monetary terms. The plaintiff here, is not seeking to be declared the winner of the vote, but he is simply asking for the election of 7/1/2014 to be interrogated to determine its validity.”

31. Although the 1st respondent in paragraphs 16 and 17 of his affidavit states that the names of Trustees elected on 7th May, 2017 were duly proposed to the more than 100 beneficiaries present and the other five were duly elected to the office of the Trustees, such an assertion can not hold in view of the failure to convene the AGM in line with the provisions of clause 14.1 of the Trust Deed.

32. On whether the 1st respondent had the authority to swear the replying affidavit on behalf of the 2nd, 3rd, 4th, 5th and 6th respondents, the answer is in the negative. In the absence of such authority, the depositions made regarding what he was told by his co-respondents are inadmissible and the offending paragraphs are hereby expunged from the affidavit of the 1st respondent, Mbaruk Abdalla Suleiman. This court will however not take the drastic action of striking out the entire affidavit as some of the depositions made therein are based on matters within the 1st respondent’s own knowledge.

33. The same orders apply to the affidavit sworn by 3rd Interested party Salim Masoud Abdalla who did not also file authority to sue/plead on behalf of the 4th Interested party. It will be up to their Counsel to consider the avenue to pursue to regularize their clients’ pleadings with regard to the main suit.

34. In **Giella vs Cassman Brown**, 1973] EA 358 the court stated as follows;

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

“... But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

35. With regard to the issue of whether the applicant has established a *prima facie* case to warrant the grant of orders of an injunction, the answer is in the affirmative. The applicant has established a *prima facie* case with a probability of success due to the illegality of the elections held on 7th May, 2017.

36. On irreparable injury, the loss herein is not in monetary terms but will be on the fact that the elections of 7th May, 2017 were not conducted in accordance to clause 14.1 of the Trust Deed, thus if the orders for an injunction are not granted, the beneficiaries of the Wakf Trust will not be represented by validly elected officials and any resolutions arising from the meetings of the Trustees will be null and void.

37. It is also apparent that the balance of convenience tilts in favour of the applicant as the Wakf Trust should be run by validly elected officials.

38. One other issue that the court would like to address is in reference to the purported conflict of interest in the applicant herein staying on as a Trustee of the Wakf Trust when he is an employee of Mombasa Cement Limited and for allegedly, in collusion with 2 former Trustees and his employer, creating an illegal lease on part of the Wakf Trust land. This court notes that the case in the Environment and Land Court (ELC) is ongoing. No decision from the ELC was attached to the 1st respondent's affidavit to show that the applicant has been found to have been involved in any illegality or impropriety in so far as the Wakf Trust land is concerned.

39. Furthermore, clause 7 of the Trust Deed has provisions for the resignation, disqualification and removal of Trustees. Due process must be followed if there are intentions of removal of the applicant from holding the position of a Trustee.

40. In conclusion, it is my finding that the applicant is entitled to the following orders:-

(i) A temporary injunction restraining the defendants/respondents whether by themselves, their agents or servants or any other person claiming under them, from operating, acting or in any way dealing as Trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust pending the hearing and determination of this suit;

(ii) A temporary injunction restraining the defendants/respondents, whether by themselves, their agents or servants or any other person claiming under them, from operating, managing, or in any other way dealing with the affairs, assets and properties of the Mazrui Community (Development and Welfare) Wakf Lands Trust, including opening, taking over and/or operating bank accounts in the name of the Trust pending the hearing and determination of this suit;

(iii) That these orders be served upon the Minister for Lands, the Registrar of Societies, the Wakf Commissioners of Kenya, and the bankers of the Trust, including First Community Bank, for their necessary action; and

(iv) The costs of the application will be borne by the respondents and the 3rd and 4th Interested parties.

It is ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. T. Ondego holding brief for Mr. Onyony for the applicant

Mr. Kimani Muhoro for the defendants/respondents and holding brief for Mr. Gathuru for the 3rd and 4th Interested parties

No appearance for the 1st and 2nd Interested parties

Mr. Oliver Musundi - Court Assistant