



**Nubian Rights Forum v Registered Trustees of Kibra Nubian Community Land Trust & 4 others; Kenya Nubian Council of Elders & 2 others (Interested Parties) (Petition 2 of 2023) [2023] KEELC 22323 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION 2 OF 2023  
AA OMOLLO, J  
DECEMBER 20, 2023**

**BETWEEN**

**NUBIAN RIGHTS FORUM ..... PETITIONER**

**AND**

**THE REGISTERED TRUSTEES OF KIBRA NUBIAN COMMUNITY LAND TRUST ..... 1<sup>ST</sup> RESPONDENT**

**TASKFORCE ON KIBRA NUBIAN LAND ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER KIBRA SUB COUNTY ... 4<sup>TH</sup> RESPONDENT**

**PRINCIPAL REGISTRAR OF DOCUMENTS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NUBIAN COUNCIL OF ELDERS ..... INTERESTED PARTY**

**NUBIANS JUSTICE FORUM ..... INTERESTED PARTY**

**KIBRA LAND COMMITTEE ..... INTERESTED PARTY**

**RULING**

1. By Notice of Motion dated 8<sup>th</sup> December, 2023 the Petitioner seeking among others, orders of Prohibition against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from acting on the Kibra Nubian Community Land and from the implementation of the Deed of Amendment and restatement supplemental to the trust deed dated 30 September 2013 (the Trust Deed); and orders of Certiorari to bring into this honourable



- court for the purpose of quashing Gazette Notice No. 1414 of 2023 and the 1<sup>st</sup> Respondent's registration of said Trust Deed
2. Opposing the Petition itself and the said application, the 1<sup>st</sup> Respondent filed a Preliminary Objection dated 12<sup>th</sup> June 2023 in which it raised the following grounds of objection:
    - a. This honourable court's jurisdiction has not been properly invoked by dint of the Petitioner not having exhausted internal dispute resolution mechanisms contrary to Article 159(2)(c) of the Constitution of Kenya, 2010, Section 9(2) of the Fair Administrative Action Act and Clause 31 of the Kibra Nubian Community Land Trust Deed of Amendment and Restatement Supplemental to the Trust Deed dated 30<sup>th</sup> September, 2013, which provides for Dispute resolution, types of disputes, process of mediation and arbitration as the last resort.
    - b. That the continued pendency of the Petitioner's application and suit is an abuse of court process.
    - c. That the Petitioner's Application and petition be dismissed with costs.
  3. The Preliminary Objection (P.O) was disposed of by way of written submissions. The 1<sup>st</sup> Respondent filed its submissions dated 29<sup>th</sup> September, 2023 in support of the P.O. In the said submissions, Counsel argued that the Petitioners sought to craftily coax this Honourable Court to hear and determine a dispute yet there existed a dispute resolution mechanism under that The Kibra Nubian Community Land Trust Deed of Amendment and Restatement Supplemental to the Trust Deed dated 30<sup>th</sup> September 2013 (hereinafter referred to as "the Trust Deed").
  4. Counsel contended that the dispute stems from the Trust Deed. He reproduced an extract of the alleged Clause 31 of the Trust Deed, which provided that any dispute would be resolved through Mediation and/or Arbitration in the first instance. Counsel further submitted that Article 159(2) of the Constitution promoted the use of alternative forms of dispute resolution (Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR). Counsel further submitted that under Section 9(2) of the Fair Administrative Act also required the exhaustion of internal remedies before moving to court, and also referred the court to the provisions of Section 6 of the Arbitration Act, 1995. Counsel submitted that the Petitioner's claim disregards the available internal dispute resolution mechanisms and the same ought to be dismissed with costs.
  5. It was submitted that the P.O dated and filed on 12<sup>th</sup> June, 2023 is a proper P.O as enunciated in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. and Avtar Singh Bhamra & Another v Oriental commercial Bank [2004]eKLR. That the P.O is founded on the Petitioner's failure to exhaust the dispute resolution mechanisms in the Trust Deed. Counsel relied on the cases of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR, Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] and East Africa Pentecostal Churches Registered Trustees & 1754 others v Samuel Muguna Henry & 4 others [2015]eKLR. He urged that the Petition and Application dated 8<sup>th</sup> March, 2023 be dismissed with costs for want of Jurisdiction.
  6. The Petitioner responded by filing its submissions dated 16<sup>th</sup> October, 2023, where it was submitted that a P.O must be on a pure point of law (Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA). Counsel submitted that the law arising is not clearly implicated and this preliminary objection filed cannot dispose of the suit. It was submitted that in Oraro vs Mbaja [2005] eKLR, a valid P.O must not be blurred with factual details liable to be contested, yet in the instant Petition, the factual details are contested by both parties. Further, that the Trust Deed itself is wholly



contested hence the purported arbitration clause is non-existent. That consequently, this Court has jurisdiction to hear and determine the substantive issues before it, and counsel beseeched the court to dismiss the PO with costs.

7. By way of rejoinder, the 1<sup>st</sup> Respondent filed further Submissions dated 28<sup>th</sup> October, 2023 where Counsel reiterated arguments in his earlier submissions. Counsel added that the PO satisfies the requirements established for the raising of a PO as it raises a pure point of law and he relied on *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR. In addition, that Clause 31 of the Trust Deed, constitutes an arbitration agreement as per the *Arbitration Act* and provisions therein applicable including Section 10 of the *Act*. Counsel further relied on *Mutbinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR.

### **Analysis and Determination**

8. In the often-cited *Mukisa Biscuits vs West End Distributors Ltd* (supra), it is settled that a Preliminary Objection on a point of law should be pure that it should not require proof through evidence. The 1<sup>st</sup> Respondent is referring this court to a Trust Deed which was not annexed to the P.O in so far as the determination of the P.O raised requires this court to outsource for the evidence, the same automatically fails the threshold set out in the *Mukisa Biscuits Case* (supra).
9. The 1<sup>st</sup> Respondent provided the contents of the relevant clauses of the Trust Deed in their submissions filed and dated 3<sup>rd</sup> October, 2023. The 1<sup>st</sup> Respondent had the option of objecting on the jurisdiction of the court *vide* an application which avenue would have given them opportunity to adduce evidence. Unfortunately, the law is settled that parties cannot adduce evidence through submissions. In *Dare v Pulham* (1982) 148, C.L.R. 658, the High Court of Australia persuasively set out functions of pleadings as follows:-

“Pleadings and particulars have a number of functions, they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff’s claim in aid of the defendant’s right to make a payment into Court .....”
10. The 1<sup>st</sup> Respondent was thus invited the court to refer to evidence which it did not plead. Secondly, it is not possible in the manner the P.O. was framed to determine if the document is binding the parties as there was no copy provided. Without such evidence, this court cannot firmly ascertain that the Petitioner ought to have approached the dispute resolution mechanism provided in the Trust Deed.
11. The case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR would only apply if the PO met the threshold set on what constitute a pure point of law. The end result is that the PO is dismissed with costs to the Petitioners.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2023**

**A. OMOLLO**

**JUDGE**

