



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

HC NO. 26 OF 2016 (OS)

IN THE MATTER OF: THE TRUSTEE ACT

IN THE MATTER OF: THE WAKF OF MWANA MISHI BINTI AZIZ BIN JUMA

IN THE MATTER OF: APPOINTMENT OF NEW TRUSTEES

BETWEEN

- 1. KHADIJA KHAMIS SHAFI**
- 2. KULTHUM KHAMIS SHAFI**
- 3. FADHILA ZAHNAN MOHAMED**
- 4. SHAFFA KHAMIS SHAFFI.....APPLICANTS**

VERSUS

ALIYA ZAHNAN.....RESPONDENT

RULING

1. Before me is an Originating Summons dated 15.8.16 in which **Khadija Khamis Shafi, Kulthum Khamis Shafi, Fadhila Zahnan Mohamed and Shaffa Khamis Shaffi**, the Applicants herein seek to be appointed trustees jointly with **Aliya Zahnan**, the Respondent of the Wakf of **Mwana Mishi Binti Aziz Bin Juma** registered in the Lands Registry as No. C.R. 8360/2 ("the Wakf").

2. It is the Applicants case that the Respondent and one Abdulbare Khamis Shaffi were appointed trustees of the Wakf by an order of this Court of 3.11.91 in HCCC No. 488 of 1991. The Respondent who is 80 years old is the only surviving trustee of the Wakf, the other trustee Abdulbare Khamis Shaffi having died on 13.6.04. The Applicants seek to be appointed joint trustees with the Respondent, who by reason of her old age is unable to continue administering the Wakf. The Respondent had executed a power of attorney in favour of 1st and 3rd Applicants which she later revoked. The Applicants aver that they are beneficiaries of the Wakf and that in the best interests of the Wakf and of the beneficiaries including future beneficiaries they ought to be appointed joint trustees with the Respondent.

3. The Application is opposed. She avers that she is fit and capable of administering the Wakf. She states that the power of attorney to the 1st and 3rd Applicants was limited to representing her interests at the Business Premises Tribunal in respect of Title No. Mombasa/Block XXXVII/13. She revoked the power of attorney upon conclusion of the matter before the said tribunal. She denies that she donated her power to the 1st and 3rd Applicants due to her age or inability to administer the Wakf. She further states that the Applicants have no *locus standi* to file this suit and asks that the same be dismissed with costs.

4. The matter proceeded by way of *viva voce* evidence. In her testimony on behalf of the Applicants, the 1st Applicant stated that the Applicants are all sisters while the Respondent is their cousin. Their mothers were sisters. The Applicants are beneficiaries of the Wakf. She stated that when Abdulbare Khamis Shaffi died, the Respondent did not call a meeting to replace him nor did she go to Court to get authority to be sole trustee. The Respondent operates Wakf on her own and has refused to involve the Applicants. She stated Sharia law does not allow the Respondent to operate the Wakf on her own. The Respondent gave the power of attorney to her and the 3rd Applicant to prosecute a case against a tenant because she was unable to prosecute the case herself. She however revoked the power during the pendency of the proceedings and gave a general power of attorney to her grandson Saleh Hussein who is not a beneficiary of the Wakf. She prayed that the Applicants be appointed trustees of the Wakf together with the Respondent.

5. For her part, the Respondent confirms that the Court appointed her and Abdulbare Khamis Shaffi trustees of the Wakf after all previous trustees died. Upon the death of Abdulbare Khamis Shaffi she did not go to Court for appointment of his replacement. She confirms that she gave power of attorney to the 1st and 3rd Applicants but for 3 years they did not succeed in the case before the tribunal. She therefore revoked the power of attorney. She opposes the application stating that she does not need the assistance of the Applicants to administer the Wakf as she is capable and her mental faculties are okay. She acknowledges granting a power of attorney to her grandson Saleh Hussein. She is unable to go out and that is why she has appointed her grandson who assists her. He represents her in all matters and runs everything. She further stated that she has given her daughter a lease of a property of the Wakf for 30 years for Kshs. 30,000/= but did not consult the Applicants. She has been running the Wakf well since the death of Abdulbare Khamis Shaffi. She confirmed that neither her daughter Zainab nor her grandson is a beneficiary of the Wakf.

6. I have carefully considered the Originating Summons, the rival affidavits and submissions. The issues for determination are fairly straight forward :

- i) Whether the Applicants have *locus standi* to bring this Application;
- ii) Whether the administration of the Wakf by the Respondent through of a power of attorney is lawful;
- iii) Whether the Applicants should be appointed trustees jointly with the Respondent.

Whether the Applicants have *locus standi* to bring this Application

7. The issue of *locus standi* must be settled before proceeding any further. In determining the claim that the Applicants do not have locus standi to file the suit herein, I turn to Section 57 of the Trustee Act which provides:

“An order under this Act for the appointment of a new trustee, or concerning any interest in land, stock or thing in action subject to a trust may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.”

8. The above provision is restated in Rule 4 of the Trustee Rules. The law is clear that an applicant seeking appointment as trustee must be a person beneficially entitled in the land subject to a trust. It is not disputed that the Applicants are persons beneficially interested in Title No. Mombasa/Block XXXVII/13, the Wakf property. As beneficiaries of the Wakf, the Applicants have the necessary locus standi under Section 57 of the Act to apply for appointment of new trustees of the Wakf.

Whether the administration of the Wakf by the Respondent through of a power of attorney is lawful

9. It was submitted for the Applicants that the Respondent due to her advanced age is unable to administer the Wakf and is doing so through powers of attorney which is contrary to law. It was further submitted that granting a power of attorney to her grandson Saleh Hussein is tantamount to appointing him a trustee through the backdoor.

10. The Respondent has acknowledged giving a power of attorney to her grandson Saleh Hussein. She stated in her testimony *“My grandson Saleh Hussein assists me. I gave him power of attorney... I am not able to go out hence my appointment of my grandson.”* Section 26 of the Trustee Act permits to a trustee to delegate to any person the trusts, powers and discretions vested in him by means of a power of attorney. Section 26(1) provides as follows:

“(1) A trustee intending to remain out of Kenya for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from Kenya of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons:”

11. It will be noted that the above provision only applies to a trustee who intends to remain out of Kenya for a period exceeding 1 month. No evidence has been adduced to show that the Respondent has been out of Kenya or intends to be out of Kenya for a period exceeding 1 month or for any other period for that matter. Consequently, it is the finding of this Court that the Respondent’s purported delegation of her powers as trustee of the Wakf herein to her grandson Saleh Hussein by means of the power of attorney is not backed by law and is therefore of no effect.

Whether the Applicants should be appointed trustees jointly with the Respondent.

12. It was submitted for the Applicants that the Respondent is the surviving trustee and has been administering the Wakf on her own without involving the Applicants who are beneficiaries of the estate. It was further submitted that the Respondent has run the Wakf property as her own yet the Wakf property does not belong to her. She gave her daughter Zainab a 30 years lease of Wakf property for Kshs. 30,000/= without consulting the other beneficiaries. The Respondent has excluded the beneficiaries who are the owners of the Wakf property in the running of the Wakf. In view of the above, it was submitted that the Respondent has not properly administered the Wakf and that the Applicants should be appointed to manage the same jointly with her.

13. For the Respondent it was submitted that she is of sound mind and no evidence was adduced to the contrary. She is able to run the affairs of the Wakf on her own. The power of attorney given to the 1st and 3rd Applicants was revoked due to their inability to pursue the matter against the defaulting tenant, whereupon the Respondent was able to singlehandedly have the tenant evicted. It was further submitted that age is not a factor in administration of the Wakf. The Respondent is 80 years old while the 1st and 3rd Applicants are 75 and 67 years old

respectively and with age comes advice, experience and expertise.

14. I observed the Respondent as she testified. She is frail, does not hear well and may not be able to move about much on account of age. She was however able to answer the questions put to her and give fairly rational answers. I am not persuaded that her mental faculties are impaired. There is however need for appointment of other trustees to assist her. The Respondent in her testimony informed the Court that she is not able to go out and her grandson Saleh Hussein assists her and that is why she gave him a power of attorney. The Court has found that the said power of attorney is unlawful and of no legal effect. It is therefore necessary to appoint other trustees to assist the Respondent in the administration of the Wakf and for continuity.

15. The Act vests in the Court power to appoint new trustees in substitution of or in addition to existing trustees. Even where there is no trustee, this Court has powers to appoint a trustee. Section 42(1) provides:

“The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable 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 any existing trustee or trustees, or although there is no existing trustee.”

16. The Court notes that the Applicants do not wish to oust the Respondent as trustee but wish to be appointed as trustees in addition to the Respondent as the existing trustee. However, the Applicants are 4 in number and their appointment would increase the number of trustees to 5. Section 36 of the Act limits the number of trustees. Section 36(1) provides:

“Where, at the commencement of this Act, there are more than four 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 until the number is reduced to less than four, and thereafter the number shall not be increased beyond four”

17. In view of the above, I do find that the Applicants may be appointed as Trustees in addition to the Respondent subject however to the provisions of Section 36 of the Act

18. **In the result and in exercise of the powers conferred upon this Court by Section 42 of the Trustee Act**, I do make the following Orders:

a) **Khadija Khamis Shafi and Fadhila Zahran Mohamed** are hereby appointed trustees **in addition to Aliya Zahran** of the Wakf of **Mwana Mishi Binti Aziz Bin Juma** registered in the Lands Registry as No. C.R. 8360/2.

b) There shall be no orders as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of June 2017

M. THANDE

JUDGE

In the presence of: -

.....for the Applicants

.....for the Respondent

.....Court Assistant