



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Cause 22 of 2007

1. Land and Environmental Law Division

2. Subject of main Petition

i) The interpretation and opinion be given by court of Section 14. Trustees (Perpetual Succession Act) Cap.164 Laws of Kenya

Petitioners are incorporated under the Trustees (Perpetual Succession) act and registered by the Registrar of documents as trustees of the Agricultural Society of Kenya.

iii) Registrar of documents registered the new Trustee on

7 May 2007 (nine in total).

iv) Respondent alleged to be registered as new trustees and shown as new office bearers for year 2007.

v) Respondent alleged constitution was amended to curtail tenure of trustee by age up to 65 years old.

vi) New constitution adapted by parties-cross petition that they be declared trustees.

vii) Arguments by respondents advocates, the petitioners have no locus before court.

3. Held: Opinion

a) The petitioner have locus to bring reference – section IX of act.. The two original trustees are so far trustee.

b) Only 4 Trustee are registered trustees.

3.1. Where Kimtai Martin

3.2. James Raymond Njenga

3.3. George K. Mwai

3.4. J. Mbongori

4. Case law

5. Statute law

a) Trustee (Perpetual Succession) Cap.164 formerly published as Cap.286 and later Cap.160 laws of Kenya

6. Advocates:

W.K. Gathogo for Motende & Co. Advocates for the plaintiff- present

C.M. Mitema for C.M. Mitema & Co. Advocates for the defendant- present

**IN THE MATTER OF THE TRUSTEES
(PERPETUAL SUCCESSION) ACT CAP 164**

SECTION 14

AND

IN THE MATTER OF THE AGRICULTURAL SOCIETY OF KENYA

1. WILLIAM K. MARTIN.....1ST APPLICANT/PETITIONER

2. JOSEPH ADERA OWINY.....2ND APPLICANT/PETITIONER

3. EVANS AGGREY LUSENO.....3RD APPLICANT/PETITIONER

VERSUS

1. NELSON OGOMBE 1ST RESPONDENT

2. DAVI KELI KIILU2ND RESPONDENT

3. TIMOTHY O. OMATO..... 3RD RESPONDENT

4. BROWN ONDEGO4TH RESPONDENT

5. ISAAC NJOGU5TH RESPONDENT

6. RUTH SAINA6TH RESPONDENT

RULING

1: Background

1. I have before me a petition filed under the Trustee (Perpetual Succession) Act Cap.64, by three petitioners who alleged that they are the rightful trustees to the Agriculture Society of Kenya.

2. They claim that they and others are duly appointed as trustee and are not allowed to freely and properly to operate as trustees and others have illegally been appointed. The work of the trustee are deliberately being implied.

3. The petitioners therefore filed this petition to court seeking prayers under Section 14 of the Trustees (Perpetual Succession Act) Chapter 164 Laws of Kenya that the court gives its opinion and declare them lawful trustees.

II: Section 14 of Trustees (Perpetual)

Succession act Cap.164.

4. The section reads as follows:-

“1. When any question arises as to whether a person is a member of a body incorporated under this act, any person interested in that question may apply by petition to the High Court for its opinion hereon.

2. Notice of the hearing shall be given to such persons and in such manner as the court shall think fit, and any opinion given by the court on an application under this section shall be deemed to have the force of a declaratory decree.”

5. The Petitioners pray that further that

M/s Darius Mbela

James Raymond Njenga

George Mwai

Isaac Njogu

Joshua Kulei

And Francis Ruto

be declared the Registered Trustee of the Agricultural Society of Kenya – a decree to accordingly issue.

II Historical Background

6. The Agricultural Society of Kenya was originally established during the colonial period under the name of the Royal Agriculture Society of Kenya (herein referred to as the society) some time in 1953. It was established as a society and had its own constitution and rules. The society was exempt from the registration as a society.

7. The constitution that was revised on 24 February 1975 provided for the establishment of different types of members, the office bearers, the patrons, and the role of the Minister for Agriculture. It established the various branches and how the counsel membership would be constituted. An Executive Committee, management and how the annual general meeting would be held at the level of the branches and the main meeting.

8. The aim and objectives of the society was and still is to provide and assist the Agriculture Industry. This is done by holding.

“Competitive shows and exhibition of livestock and Agriculture, horticultural produce economic products implements, machinery and trade goods and to organize trials of skills in the use of implements and machinery employed in the industries.”

9. It is therefore common to see in various regions in Kenya Agricultural Society shows being held.

10 Within the constitution of revised 1975 Clause 8 is provisions of the Trustees which is what requires that this High Court gives its opinion on.

IV Trustees.

11. The constitution provides that “the society shall by resolution in a General Meeting appoint not less than 3 and not more than 5 Trustee in whom shall be vested all its properties”.

12. Their task was to deal with the society reports as the council may direct, sue and recover money debts and property.

13. Within the society, they are Ispo facto honorary members of the society. They were required under the society rules to apply for incorporation under the then Land (Perpetual Succession) Act Cap.163 ordinance. Now the Trustee (Perpetual Succession) Act Cap.164 that was formerly under cap.286 Laws of Kenya.

14. The Trustee (Perpetual Succession) Act Cap.164 is

“an act of pertinent to provide for the incorporation of certain trustee for the purpose of perpetual succession to property and for purposes committed therewith.”

15. Under this act the trustee are incorporated. This basically gives them powers to have a legal entity as one would have in a limited liability company. The said registered Trustee of the Agricultural Society of Kenya would sue and be sued in the said name They would have some form of protection and would have limited liability attributed to them. They are in effect distinct and separate in the role they have within the society – one can say that they are independent. Their role as stated earlier to be the custodian of the property by ensuring all property debts suits are instituted and to generally represent the society.

16. Under the Royal Agriculture Society of Kenya the first trustee appointed by the then Governor of Kenya Evelyn Baring in 1963 was:-

16.1 Humphrey Slade Of North Kinagop, settler

16.2. Cenydd David Hill Of Nakuru, settler.

17. It was a requirement that the trustee shall hold office until they retire, cease to be ordinarily resident within the colony or become insolvent. Every time there is a new Trustee to be appointed, the governor was to be notified and every five years return to the governor is made a month to the expiry of the five years at to whom the trustees are. The trustees had a common seal of the corporate body having the words “Registered Trustee of the Royal Agriculture Society” circumference and the words “in Kenya” at the centre. There were conditions set as to how the seal would be used and kept. A schedule of property held was also listed.

The Registrar of documents registered the trust so incorporated on 19 March 1953.

18. When Kenya gained independence in 1963 no change took place until 1967 (with the trust) when the Minister of Lands and Settlement Jackson Harvester Againe in terms of the resolution of the society changed the name of the registered trustee from the Royal Agricultural Society of Kenya to the Trustee of the Agriculture Society of Kenya. The seal was accordingly changed.

19. The Society was officially exempt from registration under the Society Act in 1965.

20. There was no change to the trustees until 9 January 1973 when one B.M. Gecaga replaced Humphrey Slache after being so appointed and on unknown date Bernard A. Kempt replaced Cenydd David Hill.

21. For ten years no change to the trustees were made until 22 August 1983 whereby three trustees were appointed and notification was duly given. These trustees were:-

21.1. William Kimtai Martin

21.2. Lavan Ngatia Mucheru

21.3. James Raymond Njenga

22. As stated earlier the society constitution duly revised in 1975 provided that there be a minimum of three trustees but not more than five trustees. No change took place to this constitution until sometime in the year 2006.

23. It appears that it was the intention of the society to revise the constitution. A special council meeting was held on 13 June 2006 that discussed the constitution. In the Min.C10/2006 article 19 it proposed the amendment of the clause to read:-

“a) There shall be nine Trustees nominated by the Council and appointed by the Annual General Meeting of the society from amongst persons of integrity and respectable members of the society by who are either life governors or vice Patrons who have not attained the age of sixty five at the time of election.”

“Trustees shall be appointed from all regions/province of the country.”

(b) A trustee shall hold office for a period not exceeding ten years from the date of resumption of office PROVIDED THAT a trustee may be resolution of a specifically convened meeting be removed from office for gross misconduct or mismanagement of the society assets thereby and replaced by another person.

c) The trustee shall deal with the property of the society in such manner as the council may direct and they shall have authority to sue for and recover all monies debts and property whatsoever else or belonging to the society and generally to represent and act for the society in all legal matters. They will not participate in the day to day running of the society.

d) In the event of vacancy accruing amongst trustee, the council shall appoint a member of the society in his stead who shall remain in office until the next following Annual General Meeting when such appointment shall be ratified. Should any trustee ceased to be ordinarily resident within Kenya, or become indolent or be of unsound mind the trusteeship shall become vacant.

e) A trustee shall cease to be such only by council resolution and after approval by the Annual General Meeting of the society.

f) The trustee shall Ipso facto be honorary members of the society and shall not participate in the day to day running of the society.

g) The trustee shall ensure that all the society properties are fully insured.

h) Trustees shall be registered pursuant to and be subject the provision of Trustees (Perpetual Succession) Act 164 Laws of Kenya.

24. I have underlined the words originally contained in the 1975 revised construction. The other aspect of the trustee was what was recommended for the trustees.

25. The significance of this amendment is that the trustee is NOT to take part in the day to day running of the society. The 1975 Revised Construction described the Executive Committee as including the trustees of the society, namely:-

“The Executive Committee of the Society shall include:-

The Chairman of the Society

The Deputy Chairman of the society

The Immediate past chairman of the society

The Trustee of the society

The Chairman of each Branch Committee (or his nominee, who must be a member of the council representing the same branch). Three members to be nominated by the council from amongst its members.”

26. This clause remained in tact and was never amended or revised. The original society constitution intended that the trustee be in the executive council and participate in the day to day running of the society. How else, as custodian of the society property would they know how the property and assets, where the shows are held, are being utilized. I will return to this point later on below.

27. After the council had their meeting of 13 June 2006, the construction with the proposed amendments was tabled before the Special Annual General Meeting 14 June 2006 held at Jamuhuri Park Nairobi at 11.00 a.m. (This meeting should have been referred to as a Special General meeting.)

28. At that meeting the constitution was discussed and amendments were unanimously passed. The legal adviser notified the Chief Executive in writing that the meeting of 14 June 2006 was a Special General Meeting whose agenda was to discuss the proposed construction only. It was duly presented for adoption and the meeting ended. At the end of the meeting most members and staff left. Some members remained to make certain resolution to bind the society. The legal adviser notified the Chief Executive that any reconvening of the meeting after the meeting was dissolved was irregular and any reaction taken was not binding.

29. The Chief Executive officer forwarded the amended constitution to the Registrar of Societies on the 22 January 2007. The Senior deputy Chairman of the society Major Rtd F. Matu Stephen Mwangi Maina – member filed objections to this constitution and purported elections there after. The senior deputy chairman gave reasons that the construction was never passed in an Annual General Meeting whilst the members objected to a purported elections of 23 February 2007.

30. The Chief executive officer deposed in his affidavit that an annual general meeting was held and the constitution was adopted.

31. The adopted constitution on the trustees change slightly in that the trustees were to be from amongst the Governors, Vice-Patrons whose age limit was restricted to sixty five. The time limit of holding an office by a trustee was limited to 10 years only.

32. The executive committee under the new article 41 does not disclose the members save that it shall have 20 members and be held in accordance with the rules. It provided in other schedules 2 that the Chairman of the society would be the chair of the executive committee.

IV: Nominations/appointments.

33. By a meeting of the council of 22 March 2007 at Jamuhuri park Nairobi 10.00 a.m. the council noted “that the following members had been appointed as Trustees:-

“Mrs. Ruth Saina

Timothy O. Omato

Nelson Ogombe

Brown Odengo

David Kiilu

Isaac Njogu.”

“G.K. Mwai

Dairus Mbea

Isaac Mbogori”

Continue serving as trustees

34. The Petitioners on the other hand claim that the correct trustee are:

W.K. Martin

J.R. Njenga

That the other trustee making a total of three called L.G. Mugeni was being replaced by:-

J.A. Owiny

E.A. Luseno

G.K. Mwai

D. Mbela

I. Mbogori

J. Kulei

F. Ruto

35. The above nine were duly registered as trustee on the 7 May 2007 and are duly so registered by the Registrar of documents. A comparison of the two lists are therefore as follows:-

Registered Trustee

35.i. **W.K. Martin**

L.G. Mugeni (replaced)

J.R. Njenga

New Trustees

Trustees by society

1. **J.A. Owiny**

1. **R. Saina**

2. **E.A. Luseno**

2. **I. Njogu**

3. **G.K. Mwai**

3. **G.K. Mwai**

4. **D. Mbela** 4. **D. Mbela**
5. **J. Mbogori** 5. **J. Mbogori**
6. **J. Kulei** 6. **T.O. Omato**
7. **F. Ruto** 7. **O. Ogombe**
8. **D.K. Kiilu**
9. **B. Ondego**

36. Those who are on both lists are **G.K. Mwai, D. Mbela and J. Mbogori**. It is public knowledge that D. Mbela has since passed away. That the following members are vice patrons.

N.N. Ogombe

D.K. Kiilu

T.O. Omato

37. These two parties found it difficult to work. The petitioners were not permitted access to the officers of the society. In his petition they sought this courts permission under section 14 to declare and find that they are indeed trustees

38. The advocate for the 1,2,3,4,5 and 6 respondents stated that :-

- i) The petitioner are all over 75 years old.**
- ii) The retirement age is 65 years old.**

That the petitioners were never nominated by the council of the Annual General Meeting

ii) That it is the Chief Executive Officer who presents the name of the trustees to the Registrar of documents.

39. The respondents cross petition that they be registered as trustees.

40. The respondents attempted to argue that the Petitioners have no locus to bring this matter to court.

V) Opinion

41. I must commend the very good and important work that the Agriculture Society of Kenya is doing in encouraging the Agriculture Sector and Industry in upholding high standards pertaining livestock, horticultural and agriculture produce.

42. The society was established in such a way as to have checks and balance to regulate itself. Unfortunate by the revised constitution of 2006, these checks and balances have been partially dismantled.

43. This is seen when the trustee allegedly appointed by the society are taken from the members themselves. A vice patron and the Governors should not be appointed as trustee due to the conflict of interest except where there is a vacancy a member may hold the position of a trustee till the next general meeting.

44. The parties must realize that the society is exempt under the Society's Act. They are therefore

regulated by the constitution of the society with its rules. As a society each of the members are personally liable for any wrong doing of the society and are held accountable.

45. The trustee on the other hand have a different instrument that governs them. This is the incorporation known as the Registered Trustees of the Agriculture Society of Kenya. It is this instrument having its own seal the forms into a corporate body similar to a limited liability company. The trustees would not be required to be personally liable as in the case of a society.

46. The Trustees are given their terms in which they hold office under this instruments. This is that:-

“Each of the Trustee shall hold office until retirement or until he [she] ceases to be ordinarily resident within the said colony (Kenya) or becomes insolvent.

47. William Kantai Martin, the Lavan Ngatia Mucheru and James Raymond Njenga were appointed as trustee in August 1993. It appears that Lawan Ngatha Mucheni is to be replaced. The two trustee remain trustees for life unless they retire or become insolvent. The society is duly bound by this and they cannot change it by a new constitution amendment as their appointments were made in the past.

48. My opinion is that William Kantai Martin and James Raymond Njenga are trustees for life.

49. The other trustees were registered on 7 May 2007 after the adoption of the revised 2007 construction. This could explain putting down seven/nine trustees instead of three or five trustees.

50. The law requires where you have a Limited liability company or a society you are permitted to have a registered Trustees to deal with the assets. The parent organization, in this case, the society would have only one task pertaining to the trustee and that is to nominate to the General meeting a trustee to replace another. Thus prior to 2006, the society is not permitted to remove the trustees but only replace them when they die or retire.

51. By their 2006 amendment the society again can only replace the trustee but not remove them. I do not see how the petitioners were appointed. This must be done by the society. The two list before me shows parties who are or had been on both list . These are G.K. Mwai, D. Mbela (now deceased) J. Mbongori. These three are now duly registered on the document. Others duly registered but not appointed by the Society as trustees are J.A. Owiny, E.A. Luseno J. Kulei and F. Ruto. I would declare that they were never appointed as trustee (F.K. Ruto owns Ksh.264,760/- from the head office and Ksh.25,000/- from the Eldoret branch that was written off on 22 March 2007).

D. Mbela (now deceased) requires to be replaced as a trustee.

I declare that M.N. Ogombe, D.K. Kiilu T.O. Omato cannot be as vice patrons and trustees at the same time.

This leaves R. Saina, J. Njogu, B. Odengo whose nomination and criteria of appointments is not reflected in the Minutes despite their appointment. They are not registered.

52. Thus, the lawful registered trustee are:-

52.1 William Kintai Martin

52.2. James Raymond Njenga

52.3. George K. Mwai

52.4. J. Mbongori

53. That the following alleged trustees required to be nominated and appointed by the society but were

not.

53.1. Joseph Adera Owiny

53.2. Evans Aggrey Luseno

53.3. Joshua Kulei

53.4. Francis Ruto (owns moneys)

54. I declare that they are not trustee.

55. In the cross petition. I hold that the following are vice patron and are therefore not trustees.

55.1. M.N. Ogombe

55.2. D.K. Kiilu

55.3. T.O. Omato

56. That the following though named by the society to be members were never registered.

56.1 I.R. Saina

56.2. J. Njogu

56.3. B. Odengo

And thus not trustees

57. The advocate for the respondent gave this court the impression that once the trustees are appointed they are referred by the Chief executive officer to the Registrar of Society. This is not correct. The matter is referred to the Registrar of Documents in the Lands Department. In Kenya it is the Minister of Lands (not the President) who is notified.

58. The other arguments the advocate for the respondent brought is that the petitioner have no locus. The petitioners, I hold had locus to file this reference under section 14 of the act in question. The authorities referred to all concerns the Society Act and representative suit. This court was dealing with the Trustees (Perpetual Succession) Act Cap.164.

59. The amendment to the constitution as to the trustee may need to be revisited to bring it line and not in conflict with Cap.164 and with the duties of the executive.

60. I accordingly award costs to the petitioners to be paid by the respondents. The cross petition is hereby dismissed with costs.

Dated this 15th day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

W.K. Gathogo for Motende & Co. Advocates for the plaintiff - present

C.M. Mitema for C.M. Miema & Co. Advocates for the defendant - present