



**Hamed v Mohamed & another (Environment & Land Case
E049 of 2024) [2025] KEELC 1021 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1021 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E049 OF 2024**

**SM KIBUNJA, J
MARCH 5, 2025**

BETWEEN

MARIAM KIBWANA HAMED PLAINTIFF

AND

YUSUF ABDURAHIM MOHAMED 1ST DEFENDANT

NAHID MOOSA AUMA 2ND DEFENDANT

RULING

[NOTICE OF MOTION 2ND OCTOBER 2024]

1. The defendant moved the court through the application dated the 2nd October 2024, seeking for orders that:
 - a. The plaint herein be struck out and the suit against the defendant be dismissed.
 - b. The plaintiff to pay the costs in the application and suit.

The application is premised on the six (6) grounds on its face marked (i) to (vi), and supported by the affidavit of Yusuf Abdurahim Mohamed, 1st defendant, sworn on the 30th September 2024, inter alia deposing that he is one of the trustees of Madrasatul Hudaa Al-Islamiya, the legal and beneficial proprietor of plot No. 10579/111/MN, suit property, situated in Kilifi County; that the Madrasatul Hudaa Al-Islamiya, wakf, was created by previous registered proprietor of the suit property, Swalehe Abdallah Ngolo, deceased, who at the time of transferring the suit property to the wakf, appointed the defendants and Rajab Swaleh alias Joseph Karisa Swaleh as trustees; that Swalehe Abdallah Ngolo and Rajab Swaleh alias Joseph Karisa Swaleh, have since died; that the plaintiff is neither a trustee nor a beneficiary of the wakf and therefore lacks to institute this suit; that contrary to the claim that the plaintiff is the administrator of the estate of Swalehe Abdallah Ngolo, the administrator was Rajab Swaleh alias Joseph Karisa Swaleh, who is also deceased; that the wakf deed provides the procedure for



filling a vacancy in the office of a trustee, and it is not subject to succession rights; that the plaintiff legal right over the suit property and therefore has no right to institute this suit over the suit property or the wakf; that this suit was filled to intimidate the trustees and deny the wakf peaceful and quiet enjoyment over the suit property; that this court is without jurisdiction to hear this suit that is in regard to the validity of a wakf, its management or its dissolution; that the suit is scandalous, frivolous, vexatious, an abuse of court process and is intended to embarrass the trustees of the wakf, and their prayers should be granted.

2. The application is opposed by the plaintiff through the replying affidavit sworn by Mariam Kibwana Hamed, on the 17th October 2024, inter alia deposing that the application is misconceived, bad in law, an abuse of court process and totally defective for it contravenes Order 2 Rule 15 of the Civil Procedure Rules; that she is the administrator of the estate of both her late husband and Joseph Karisa Swaleh Rajab a.k.a Rajab Karisa Swaleh, and therefore with rights to sue over the suit property belonging to the estate; that the wakf document protects the interests of 1st defendant, who has mismanaged the wakf, put up other investments on the land like Hudaa Integrated School and a structure he rented out as a hardware whose income goes to his pockets and is not accountable to anybody and no audit is done; that the wakf document lacks safe guards to protect the interests of the wakf property; that the 1st defendant has been running the wakf as his private property; that this court has jurisdiction to interrogate the wakf to see whether it was doing the work it was created for, and if found otherwise to have it declared a nullity, as the issues touches on ownership of land; that the 1st defendant made reference to a matter before the Kadhi's court without giving full citation, and to an Assent dated 6th March 2018 without filing it in court to enable her peruse them, thereby placing her at a disadvantage; that the Kadhi's court matter and the Assent appears to have been filed after Mr. Ngolo's death, and therefore illegally done, and this suit should be allowed to be heard and determined on merit.
3. The learned counsel for the defendants and plaintiff filed their submissions dated the 16th January 2025 and 29th January 2025 respectively, which the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the plaintiff has locus to file this suit.
 - b. Whether the court has jurisdiction to hear and determine the issues raised.
 - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited thereon, pleadings filed and come to the following determinations:
 - a. That from the documentary evidence attached, Swaleh Abdallah Ngolo, now deceased, created an Islamic endowment [wakf], over the suit property, in the name of Madrassa Hudaa Al-Islamiya Wakf, for charitable purposes, through the Wakf Deed dated 11th May 2015. The deceased transferred the suit property to the defendants and others as trustees for the said wakf.
 - b. The plaintiff has submitted that she is the administrator of the estate of Joseph Karisa Swaleh a.k.a Rajab Karisa Swaleh, who owned a third of the suit property, with the other shares owned by the defendants. That her late husband and the defendants are trustees of the school on No. 585/11/MN, which is a property of the wakf, and she has a right to enquire about it as it is on land that her late husband had an interest on. That section 45 of the [Law of Succession Act](#) makes it an offence to interfere with the property of a deceased person. The Wakf Deed dated



11th May 2015 at clause 9 provided for replacement of a deceased trustee to be through an appointment by the surviving trustees. The clause states:

“In the event of death or resignation or incompetence of any trustee, the vacancy shall be filled by a new appointment by the remaining trustees.”

The defendants contended and submitted that the plaintiff, who claims to be an administrator of the estate of one of the deceased trustees, is without capacity to sue in this suit, as she is neither a trustee nor a beneficiary of the subject matter, and that trusteeship is not a right in rem. The counsel cited the decisions in the cases of *Alfred Njau & Others versus City Council of Nairobi* [1982] KAR 229 and *Kibera Blessed Academy versus Word Missionary Evangelism of Kenya Registered Trustees & 4 Others* [2016] eKLR, and submitted that as the plaintiff was neither a trustee nor a beneficiary of the subject wakf, then she was without capacity to institute this suit and sustain it in court.

- c. I have perused the Wakf deed and at page on one below the name of the Wakf are the words “in respect of Subdivision Number 585 Section 111 Mainland North (C.R. 17941)”. I have also perused the certificate of title number CR. 7026 of 14th July 2017, and under entry number 2 dated 17th March 2018 is about the Kadhi court order declaring plot No. 10579 a Wakf property and entry number 3 is for Assent dated 6th March 2018 to Yusuf A. M. Omar, Nahid Moosa Umar and Swaleh alias Joseph Karisa Swaleh as trustees of Madrasatul Hudaa Al-Islamiya, the beneficiary. It is quite clear the person named as trustees were not the owners or beneficiaries of the suit property. The trustees, including the plaintiff’s late husband, held the suit property in trust for the Wakf that had been created and could be removed and or replaced in accordance with clause 9 of the Wakf Deed date 11th May 2015. Indeed, contrary to the plaintiff’s contention that obtaining a grant in respect of her late husband’s estate, clothed her with capacity to sue, as a trustee and or beneficiary is not supported by the Wakf Deed or the law, as she has not been appointed as a trustee in accordance with clause 9, above. The court agrees with the defendant’s counsel’s submission that trusteeship under the Wakf deed of 11th May 2015, was not in rem.
- d. In any case, should the plaintiff believe strongly that the suit property is part of the property of the estate of her deceased husband and that the defendants or any other persons are intermeddling with it contrary to section 45 of the Laws of Succession Act chapter 60 of Laws of Kenya, then the court to seek recourse from is not this court, but probably the succession and or criminal courts. The court has perused the plaintiff’s pleadings, and the prayers (a), (b), (c), (d), (e), (f), (g), and (i) are more or less about the running and administration of the Wakf. Only prayer (h) that seeks for title of the plot to be released to the plaintiff for transfer by transmission has something to do with land. However, transmissions are usually done through the successions courts.
- e. The plaintiff submitted that the application contravenes Order 2 Rule 15 of the Civil Procedure Rules because the defendant presented evidence. The said Order provides as follows:

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“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-



- (a) it discloses no reasonable cause of action or defence; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.”

I have perused the heading of the notice of motion dated the 2nd October 2024 has invoked sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya and Order 2 Rule 15 of the Civil Procedure Rules. It is only applications that primarily attack the pleadings for failing to disclose a reasonable cause of action or defence that do not need evidence to be availed in support. Definitely, the defendants application is not entirely predicated on sub-rule 15(1) (a) only as seen above, and the plaintiff’s contention that it contravenes the said sub-rule is incorrect.

- f. On jurisdiction, the plaintiff submitted inter alia that section 4 of the *Environment and Land Court Act* provides for this court as a superior court of records with the status of the High Court, and section 13 clothes the court with jurisdiction, both original and appellate, to hear and determine all disputes in accordance with Article 163(2) (b) of *the Constitution*. That this court therefore has the powers to hear and determine this suit and the Wakf Act cannot deter it. The defendants submitted that the court is without jurisdiction in view of section 29 of the Wakf Act that gives jurisdiction to the Kadhi’s court to determine wakf matters in the first instance. The counsel cited the decision in the case of Ali & 22 others versus Said & Another [2023] eKLR, where the court made reference to section 29 of the Act and held that the court of first instance is the Kadhi’s court. This court is in agreement with that finding. The counsel then referred to the decision in the case of The Owners of Motor Vessel “Lillian S” versus Caltex Oil Kenya Limited [1989]KLR, and submitted the court is without jurisdiction to grant the prayers sought .
 - g. Having found favour with the defendants’ application, and in view of section 27 of the *Civil Procedure Act* that provides for costs to follow the event unless where for good cause the court orders otherwise, the defendants are awarded costs.
6. The determinations set out above leads the court to the following findings and orders:
- a. That the defendants’ notice of motion dated the 2nd October 2024 has merit and is allowed as prayed.
 - b. The plaintiff’s suit commenced through the plaint dated the 24th May 2024 is hereby struck out.
 - c. The plaintiff to pay the defendants’ costs.
- Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF MARCH 2025.



S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Mwanzia

Defendants : Mr Hemed

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

