



**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) [2024] KEELC 5325 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5325 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION 2 OF 2023**

**AA OMOLLO, J  
JULY 11, 2024**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10 (1), (2), 35 (1) (B), 40, 47, 48, 56 (A), 60 (1), 61 (2), 63, 66 (1) OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 13, 23 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTION 3 (1) (A), 4 (1), (3), 5 (1) OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF THE COMMUNITY LAND ACT 2016**

**AND**

**IN THE MATTER OF KIBRA NUBIAN COMMUNITY LAND TRUST**

**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 C. 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. The Petitioner filed the application dated 8<sup>th</sup> March 2023 under the provisions of articles 22, 23, 35, 40, 47, 48, 56 et al of *the Constitution*; Section 3 of the *Trustees (Perpetual Succession) Act*; sections 5 & 16 of the *Community Land Act*, 2016 and section 3 – 5 of the *Fair Administration Actions Act*. The Petitioners/Applicants sought to be granted the following orders:
  - i. Spent
  - ii. Abandoned
  - iii. Abandoned
  - iv. That pending the hearing and determination of this matter, an order of prohibition do issue to bring into this honorable court for the purpose of prohibiting the 1st and 2nd Respondents whether by themselves, or any of their employees or agents or any person claiming to act under their authority from acting any further on the Kibra Nubian Community land.
  - v. That pending the hearing and determination of this matter, an order of prohibition do issue to bring into this honorable court for the purpose of prohibiting the implementation of the Deed of amendment and restatement supplemental to the trust deed dated 30<sup>th</sup> September 2013.
2. The application was premised on the grounds on its face inter alia:
  - a. That the subject trust deed states explicitly under the transition clause that it is an interim trust; and that the kibra Nubian Community beneficiaries are the absolute owners of the properties under the trust and further; that members shall participate in governing their trust and the members' resolutions shall be adopted by the trustees and implemented by the managing committee.
  - b. That the 1<sup>st</sup> Respondent has made it impossible for the beneficiaries of the trust to implement their wishes on provisions of the Trust Deed including but not limited to appointment of trustees, disqualification of trustees, land management, winding up, dispute resolutions, dissolution and transmission. Consequently, the beneficiaries have been championing for an amended trust as the registered one was for interim purposes.
  - c. That the registered trust by virtue of not serving its purpose, its existence remains detrimental and injurious to the members of the Nubian Community and their community land rights.
  - d. That in a letter dated 3<sup>rd</sup> March, 2021, the applicant/petitioner wrote to the Kenya Urban Roads Authority, seeking information over ongoing road construction which would require demolition of existing structures within the 288 acres of land held in trust by the 1<sup>st</sup> respondent.



This is after members of the Nubian Community sought information and audience from the 1<sup>st</sup> respondent which information and audience was unreasonably denied and or ignored.

3. The application was further supported by the affidavit of ..... who deposed that the 1st respondents have unilaterally and unreasonably without adequate and or substantial public participation of the beneficiaries of the trust; nor access of information to the beneficiaries the trust; effected a Deed of Amendment And Restatement Supplemental to the Trust Deed Dated 30 September 2013 and therefore the constitutional right envisioning basic elements of public participation include the dissemination of information, invitation to participate in the process and consultation, Accountability, responsiveness and openness are the cornerstones and public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.
4. The Applicants submit that It is the wishes of the Applicant and the beneficiaries of the Trust that the Trust deed is revoked and the community land reverts back to being managed and governed pursuant to the [Community land Act](#), 2016 and the community land Regulations 2017, since the only reason that the Trust Deed was created was due to the fact that at the time of issuance of title, the [Community Land Act](#) had not been enacted and the Nubian community were required to have a trust deed to get the ownership over the subject land.
5. The Applicants submit that the 1st respondent is acting from impugned authority against the wishes of the Nubian community by the so-called Deed of amendment and restatement supplemental to the trust deed dated 30 September 2013. They cited the case the American decision of [Wolf v. Superior Court](#) (2003) 107 Cal.App.4<sup>th</sup> 25, 29 [130Cal.Rptr.2d 860] defines a fiduciary relationship as ...

“any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter’s knowledge or consent. . .”
6. In concluding their submissions, the Applicants state that, “A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires or if he does what as trustee he is not entitled to do.” [Stephens & 6 others v Stephens & another](#) [1987] eKLR. They urged the court to grant the orders sought.
7. The 1<sup>st</sup> Respondent in opposition to the application filed a replying affidavit sworn by Suleiman Juma on the 15<sup>th</sup> June 2023.
8. The 1<sup>st</sup> Respondent submitted that the orders cannot be granted because one, the trustees are already working under the duties and responsibilities enshrined in the Deed of Amendment and restatement supplemental to the Trust Deed dated 30th September, 2013. That prohibiting the Trustees from working or prohibiting the implementation of the Trust Deed at this juncture is likely to cause havoc and disarray amongst the members of Kibra Nubian community.
9. The 1<sup>st</sup> Respondent avers that stopping the trustees and the continued implementation of the trust Deed is akin to finalising the suit without proper recourse as to how the land will be protected and managed. They stated that the threshold of the orders sought were summarized out in [Board of management of Uhuru Secondary school v City County Director of Education & 2 others](#) (2015) eKLR, thus;



- i. The need for an applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
  - ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of rights.
  - iii. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substance will be rendered nugatory.
10. The 1<sup>st</sup> Respondent submitted that the Applicants have not demonstrated a prima facie case because Public participation has been conducted from the village level, and the Kibra Nubian community in the respective villages even appointed their own representatives. That The 1st Respondent has held numerous consultation and sensitization drives with the Kibra Nubian community on civic education and called for proposal for any amendments to the Trust Deed of 3rd October, 2013. It is their argument that the Applicant has not demonstrated any 'real danger' posed that is imminent so much as to deserve immediate remedial attention nor have they proved that they will suffer substantial loss if the orders are not granted.
11. They further submit that should the court allow the prohibitory orders against the Trustees implementing their mandate and prohibiting the implementation of the Amended Trust Deed which is already being utilized, then the same would be tantamount to quashing the Amended Trust Deed and subsequently the substance of the main petition. They urged the court not to grant the orders as it the Nubian Community who will suffer harm.
12. I have considered the pleadings filed in support of and against the application as well as the submissions rendered. As defined by the case cited by the 1<sup>st</sup> Respondent of *Invesco assurance co ltd. v MW(minor suing thro' next friend and mother)* (2016)eKLR which held as follows;

A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
13. The 1<sup>st</sup> Respondent have averred and submitted that as trustees, they undertook public participation which resulted in the amendment of the Nubian Community Trust deed of 2013. Secondly, they confirm that they have started the process of implementing the contents of that amended trust deed. Consequently, if the orders sought are granted, the Community are likely to suffer and the court should disregard the individual interests being pursued by the Petitioners. They also stated that the Petitioners were aware of and participated in the public engagements seeking amendments.
14. It is clear from the Pleadings that the Petitioners are members of the Nubian Community and are likely to be affected by the implementation of the amended and restatement of the supplemental trust deed of 30<sup>th</sup> Sept 2013. The gist of the Petition is challenging the amendment. Hence, if the 1<sup>st</sup> Respondent is allowed to proceed to implement the impugned trust deed, then the hearing and determination of the Petition would be rendered an academic exercise. Further, the process of undoing the actions of the 1<sup>st</sup> Respondent in the event the Petition succeeds may affect innocent parties.
15. Since the purpose of conservatory order is to preserve the suit property in its current state pending determination of the suit and in this case, parties are making reference to land belonging to the community. It would serve the interest of all parties if the implementation of the contested trust deed until parties agree through mediation /arbitration or until this suit is heard and determined. The



1<sup>st</sup> Respondent has not persuaded me on the specificity of the losses the community will suffer by temporarily putting their actions on hold.

16. Consequently, I find merit in the application. The orders sought are granted to last a period of 12 months within which period, this petition ought to have been concluded.
- a. That pending the hearing and determination of this Petition, a temporary order of prohibition is issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves, or any of their employees or agents or any person claiming to act under their authority from undertaking and or making any further decisions over the property in dispute.
  - b. That pending the hearing and determination of this Petition, an order of prohibition is issued prohibiting any further implementation of the Deed of Amendment and Restatement Supplemental to the Trust Deed dated 30<sup>th</sup> September 2013.
  - c. Each Party to bear their respective costs of the application.

**DATED, SIGNED & DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2024**

**A. OMOLLO**

**JUDGE**

