



**Davis & 5 others v Mcdowell & 4 others (Civil Case E188 of 2022)
[2024] KEHC 4709 (KLR) (Civ) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4709 (KLR)

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

CIVIL

CIVIL CASE E188 OF 2022

AN ONGERI, J

MAY 2, 2024

BETWEEN

**MICHAEL DAVIS 1ST APPLICANT
LUTHER BOIS ANUKUR 2ND APPLICANT
LAZARUS MAPFUNDEMATSVA 3RD APPLICANT
CHRISTIAN LAUFENBERG 4TH APPLICANT
GRETHEL AGUILAR ROJAS 5TH APPLICANT
CHARLES OLUCHINA 6TH APPLICANT**

AND

**DAVID MCDOWELL 1ST RESPONDENT
MICHAEL COKERELL 2ND RESPONDENT
ROBERT MALPAS 3RD RESPONDENT
STEVEN NJUGUNA 4TH RESPONDENT
JAMES MUCHIRA 5TH RESPONDENT**

JUDGMENT

1. The applicants herein Michael Davis, Luther Bois Anukur, Lazarus Mapfundematsua, Christian Laufenberg, Grethel Aguilar Rojas and Charles Oluchina (hereafter referred to as the applicants) filed this Originating Summons (OS) dated 20/7/2022 against the respondents .
2. The OS stated as follows;



Let David Mcdowell, Michael Cockerell, Robert Malpas, Steven Njuguna And James Muchiraall of Post Office Box (38200-00200, Nairobi within 15 days after service of this summons on them enter appearance to this summons which is issued on the Application of the above mentioned. Applicants are the current and nominated Trustees of International Union For Conservation of Nature and Natural Resources Registered Trustees (the "Trust") for Orders:-

- i. Thatthis Honourable Court be pleased to grant leave to the Applicants to commence/ institute the instant Originating Summons as the current de facto nominated Trustees of International Union For Conservation of Nature and Natural Resources Registered Trustees although not formally registered as Trustees (the "Trust")
 - ii. Thatthe Honorable Court be pleased to find that it is inexpedient, difficult or impracticable for the Trust to appoint new Trustees in substitution for the Respondents who are the founding Trustees without the assistance of the court for the reason that all the founding Trustees cannot be found or are presumed to be deceased.
 - iii. Thatthis Honourable Court be pleased to discharge the Respondents as the original and founding Trustees from the Trust and from the powers, rights. duties and obligations conferred upon them in the Trust Deed dated 1st March, 1994.
 - iv. Thatthis Honourable Court be pleased to declare the Applicants as the duly appointed Trustees of the Trust and to ratify the appointment of previous Trustees by the Trust and whose appointments were not endorsed by the Registrar against the Certificate of Incorporation for the Trust.
 - v. Thatthis Honourable Court be pleased to dispense with the requirement for endorsement of the names of the previous Trustees by the Registrar against the Certificate of Incorporation for the Trust.
 - vi. Thatthis Honourable Court be pleased to direct that the Order in 4 and 5 above be registered and/or endorsed by the Registrar against the Certificate of Incorporation for the Trust and the Applicants be conferred with powers, rights, duties and obligations pursuant to the Trust dated 1st March, 1994 and the applicable law.
 - vii. Thatthis honourable court be pleased to ratify the actions and resolutions of all the former Trustees of the Trust during the time they served as Trustees of the Trust.
 - viii. Thatcosts of this application be in the cause.
3. The originating summon is supported by the affidavit of Michael Davis sworn on 20/7/2022 in which he stated that on 6th September, 1994, it was resolved by the trustees that the 1st Respondent be appointed as the trustee in place of Mr. Martin Holdgate, the changes to the appointment of the new trustee the 1st Respondent herein was thereafter duly certified and endorsed on the Certificate of Incorporation by the Registrar of Documents on the same date. Annexed hereto and marked MD 5 is a copy of the Certificate of Incorporation with the said changes registered thereon on 6th September, 1994.
4. Thaton 9th December, 1996, the 1st Respondent, Mersie Ejigu and 5th Respondent on his own behalf and on behalf of the 4th Respondent, convened the Fifth (5th) meeting by tele-conference chaired by the 1st Respondent, to deliberate inter alia the first agenda of the meeting was to discuss the retirement of the 1st Respondent (as the 2nd Trustee), Mersie Ejigu (as the 3rd Trustee) and the 4th Respondent (as



- the 4th Trustee). Annexed hereto and marked MD 6 is a copy of the Minutes for meeting of the trustees held on 9th December, 1996.
5. That the second agenda of the meeting was to discuss the appointment of Eldad Tukahirwa (as the 2nd Trustee), Maria Grazia Iuri (as the 3rd Trustee) and Geoffrey Howard (as the 4th Trustee) respectively.
 6. That it was resolved in the fifth meeting held on 9th December, 1996, that the retirement of the 1st Respondent (as the 2nd Trustee), Mersie Ejigu (as the 3rd Trustee) and the 4th Respondent (as the 4th Trustee) respectively was noted and accepted.
 7. That it was also resolved in the fifth meeting held on 9th December, 1996, that Eldad Tukahirwa, Maria Grazia Iuri and Geoffrey Howard be appointed as the 2nd, 3rd and 4th Trustees respectively.
 8. That although the above changes were adopted, the retirement of the 1st Respondent (as the 2nd Trustee), Mersie Ejigu (as the 3rd Trustee) and the 4th Respondent (as the 4th Trustee) and the appointment of Eldad Tukahirwa (as the 2nd Trustee), Maria Grazia Iuri (as the 3rd Trustee) and Geoffrey Howard (as the 4th Trustee) respectively were never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
 9. That on 6th July, 1999, Maritta Koch-Weser, the 5th Respondent, Maria Grazia Iuri and Eldad Tukahirwa, convened the Seventh (7th) meeting chaired by Maritta Koch-Weser, to deliberate inter alia the nomination of Maritta Koch-Weser as a Trustee and the Chairperson of the meeting. Annexed hereto and marked MD 7 is a copy of the Minutes for meeting of the trustees held on 6th July, 1999.
 10. That it was resolved in the seventh meeting held on 6th July, 1999, that the nomination of Maritta Koch-Weser as a Trustee and the Chairperson of the meeting was accepted and adopted.
 11. That although the above changes were adopted, the nomination of Maritta Koch-Weser as a Trustee was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
 12. That on 18th June, 2003, Achim Steiner, Veronique Lavorel, John Mbae, Geoffrey Howard and Eldad Tukahirwa, convened the Tenth (10th) meeting chaired by Achim Steiner, to deliberate inter alia the request of the 5th Respondent to retire as a Trustee and the nomination/appointment of John Mbae as a Trustee, Annexed hereto and marked MD 8 is a copy of the Minutes for meeting of the trustees held on 18th June, 2003.
 13. That it was resolved in the tenth meeting held on 18th June, 2003, that the retirement of the 5th Respondent as a Trustee and the nomination/appointment of John Mbae as a Trustee was accepted.
 14. That although the above changes were adopted, the retirement of the 5th Respondent as a Trustee and the nomination/appointment of John Mbae as a Trustee was never certified and endorsed On the Certificate of Incorporation by the Registrar of Documents.
 15. That on 9th September, 2004, Achim Steiner, John Mbae, Geoffrey Howard and Eldad Tukahirwa, convened the Eleventh (11th) meeting chaired by Achim Steiner, to deliberate inter alia the replacement of Veronique Lavorel as Trustee and the nomination/appointment of Giuseppe Zaccagnini as the 5th Trustee. Annexed hereto and marked MD 9 is a copy of the Minutes for meeting of the trustees held on September, 2004.
 16. That it was resolved in the eleventh meeting held on 9th September, 2004, that the nomination/appointment of Giuseppe Zaccagnini as a Trustee was accepted as a replacement of Veronique Lavorel.



17. That though the above changes were adopted, the nomination/appointment of Giuseppe Zaccagnini as a Trustee in place of Veronique Lavorel was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
18. That on 19th October, 2007, Giuseppe Zaccagnini, Geoffrey Howard, Alison Rowles-Anobile, the 4th Applicant, Audrey Monard and Kelly West, convened the Thirteenth (13th) meeting chaired by Geoffrey Howard, to deliberate inter alia the resignation of John Mbae as a Trustee and the nomination/ appointment of the 4th Applicant as a Trustee. Annexed hereto and marked MD 10 is a copy of the Minutes for meeting of the trustees held on 19th October, 2007.
19. That it was resolved in the thirteenth meeting held on 19th October, 2007, that the resignation of John Mbae as a Trustee and the nomination/appointment of the 4th Applicant as a Trustee was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
20. That on 5th December, 2008, Giuseppe Zaccagnini, Geoffrey Howard, Kelly West and the 4th Applicant, convened the Fourteenth (14th) meeting chaired by Giuseppe Zaccagnini, to deliberate inter alia the resignation of Kelly West as a Trustee. Annexed hereto and marked MD 11 is a copy of the Minutes for meeting of the trustees held on 5th December, 2008.
21. That it was resolved in the fourteenth meeting held on 5th December, 2008, that the resignation of Kelly West as a Trustee was accepted.
22. That though the above changes were adopted, the resignation of Kelly West as a Trustee was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
23. That on 27th August, 2014, the 1st Applicant, 2nd Applicant, 3rd Applicant, 4th Applicant, Mine Pabari and Geoffrey Howard convened a meeting chaired by the 1st Applicant to deliberate inter alia the retirement of Geoffrey Howard as a Trustee and the nomination/appointment of the 2nd Applicant as a Trustee. Annexed hereto and marked MD 12 is a copy of the Minutes for meeting of the trustees held on August, 2014.
24. That it was resolved in the said meeting held on 27th August, 2014, that the retirement of Geoffrey Howard as a Trustee and the nomination/appointment of the 2nd Applicant as a Trustee was accepted.
25. That though the above changes were adopted, the retirement of Geoffrey Howard as a Trustee and the nomination/ appointment of the 2nd Applicant as a Trustee was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
26. That on 18th June, 2015, the 1st Applicant, 2nd Applicant, 3rd Applicant, 4th Applicant, and 5th Applicant convened a meeting chaired by the 1st Applicant to deliberate inter alia the resignation of Giuseppe Zaccagnini as a Trustee and the nomination/appointment of the 5th Applicant as a Trustee. Annexed hereto and marked MD 13 is a copy of the Minutes for meeting of the trustees held on 18th June, 2015.
27. That it was resolved in the said meeting held on 18th June, 2015, that the resignation of Giuseppe Zaccagnini as a Trustee and the nomination/appointment of the 5th Applicant as a Trustee was accepted.
28. That though the above changes were adopted, the resignation of Giuseppe Zaccagnini as a Trustee and the nomination/appointment of the 5th Applicant as a Trustee was never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.



29. That on 13th 2018, the 1st Applicant, 2nd Applicant, 3rd Applicant and 4th Applicant convened a meeting chaired by the 1st Applicant to deliberate inter alia the resignation of Mine Pabari as a Trustee. Annexed hereto and marked MD 14 is a copy of the Minutes for meeting of the trustees held on 15th June, 2018.
30. That it was resolved in the said meeting held on 13th June, 2018, that the resignation of Giuseppe Zaccagnini as a Trustee and the nomination/appointment of Charles Oluchina as a Trustee was accepted. That Charles Oluchina was appointed as a Trustee in place of Mine Pabari.
31. That though the above changes were adopted, the resignation of Giuseppe Zaccagnini as a Trustee and the nomination/appointment of Charles Oluchina as a Trustee were never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
32. That on 10th May, 2022, the 1st Applicant, 2nd Applicant, 3rd Applicant, 4th Applicant, 5th Applicant and 6th Applicant convened a meeting chaired by the 1st Applicant to deliberate inter alia the resignation of Sandrine Friedli Cela as a Trustee. Annexed hereto and marked MD 15 is a copy of the Minutes for meeting of the Trustees held 10th May, 2022.
33. That it was resolved in the said meeting held on 10th May, 2022, that the resignation of Sandrine Friedli Cela as a Trustee and the nomination/appointment of Grethel Aguilar Rojas as a Trustee was accepted. That Grethel Aguilar Rojas was appointed as a Trustee in place of Sandrine Friedli Cela.
34. That though the above changes were adopted, the resignation of Sandrine Friedli Cela as a Trustee and the nomination/appointment of Grethel Aguilar Rojas as a Trustee were never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents.
35. That the reason why the above changes were never certified and endorsed on the Certificate of Incorporation of the Trust by the Registrar of Documents is because we were not properly guided by our then Advocates particularly on the statutory obligation to have every subsequent change endorsed and/or registered.
36. That we have been advised by our Advocates on record which advise we believe to be true that it will be difficult to file the annual trust returns in their current state as required by law in the absence of the duly signed minutes by the Respondents herein who are founding Trustees.
37. That it is impractical to trace or reach out to the founding Trustees given that some retired as Trustees more than 25 years ago and that some are presumed to be deceased and/or their whereabouts is unknown.
38. That we have been advised by our Advocates on record which advise we believe to be true, that in a situation like the present one, persons who are beneficially interested under the Trust the Applicants herein can apply to be appointed as new Trustees of the Trust on the ground that the founding Trustees are either presumed dead and/or their whereabouts is unknown.
39. That we have further been advised by our Advocates on record which advise we believe to be true that owing to the absence, unfitness and incapability of the Respondents as the original and founding Trustees to sign the minutes and the relevant statutory forms to appoint new Trustee, it is difficult or impracticable to appoint the Applicants herein as Trustees without the assistance of this Honourable Court.
40. That they are therefore praying for the assistance of this Honourable Court in the appointment of the Applicants as Trustees of the Trust and or to ratify the appointment of the Applicants as the Trustees of the Trust.



41. That the Respondents will not suffer any prejudice if the Honourable Court grants the Orders sought by the Applicants.
42. That it is in the interest of justice and fairness that the orders sought in this Application are granted.
43. The respondents were served by substituted service and they did not respond to the originating summons.
44. The originating summons proceeded ex parte. The applicants submitted that on 10/3/1994 the International Union for Conservation of Nature and Natural Resources Registered Trustees (the “trust”) was registered as a trust. The said trust convened various meetings over the years where they passed different resolutions. The said resolutions were never certified and endorsed on the certificate of incorporation of the trust by the registrar of documents. The reason why the above changes were never certified and endorsed on the certificate of incorporation was because the applicants were not properly guided by their then Advocates particularly on the statutory obligation to have every subsequent changes endorsed or registered.
45. The applicants submitted that it has therefore been difficult to file the annual trust returns in their current state as required by law in the absence of the duly signed minutes by the respondent herein who are founding trustees thus necessitating the instant application. Section 37 (1) of the *Trustee Act* Cap 167, Laws of Kenya on power of appointing new or additional trustees provides that; -

“Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of Kenya for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees—

 - (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
 - (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee, may, in writing, appoint one or more other persons (whether or not being the person exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Kenya, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant.”
46. The applicant submitted that it is impractical to trace or reach out to the founding trustees given some retired as trustees more than 25 years ago and that some are presumed to be deceased and/or their whereabouts unknown. This position is confirmed by the very fact that the Applicants had to substitute service of the instant Application upon the Respondents by way of an advertisement in one of the local daily newspapers with a nationwide circulation.
47. In a situation like the present one, persons who are beneficially interested under the Trust as is the case with the Applicants herein can apply to be appointed as new Trustees of the Trust on the grounds that the founding Trustees are either presumed dead and/or their whereabouts is unknown. Section 42 (1) of the *Trustee Act* Cap 167, Laws of Kenya on Power of court to appoint new trustees provides that; -

“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.”

48. Section 44 of the Trustee Act Cap 167, Laws of Kenya on Powers of new trustee appointed by the court provides that;

“Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.”

49. Section 56 (3) of the Trustee Act Cap 167, Laws of Kenya on Power of court to authorize dealings with trust property provides that; -

“An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.”

50. The sole issue for determination is whether the old trustees should be terminated and new ones appointed.

51. I find that the originating summons is not opposed and the same is allowed as prayed in the following terms;

- i. That leave be and is hereby granted to the Applicants to commence/institute the instant Originating Summons as the current de facto nominated Trustees of International Union For Conservation of Nature and Natural Resources Registered Trustees although not formally registered as Trustees (the "Trust")
- ii. That this Court finds that it is inexpedient, difficult or impracticable for the Trust to appoint new Trustees in substitution for the Respondents who are the founding Trustees without the assistance of the court for the reason that all the founding Trustees cannot be found.
- iii. That the Respondents be and are hereby discharged as the original and founding Trustees from the Trust and from the powers, rights, duties and obligations conferred upon them in the Trust Deed dated 1st March, 1994.
- iv. That the Applicants are declared as the duly appointed Trustees of the Trust and previous appointments of Trustees are ratified by the Trust though the appointments were not endorsed by the Registrar against the Certificate of Incorporation for the Trust.
- v. That the requirement for endorsement of the names of the previous Trustees by the Registrar against the Certificate of Incorporation for the Trust is dispensed with.
- vi. That the actions and resolutions of all the former Trustees of the Trust during the time they served as Trustees of the Trust be and are hereby ratified.
- vii. The applicants to bear the costs of this OS.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF MAY, 2024.

.....

A. N. ONGERI



JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

