



REPUBLIC OF KENYA



Yahya v Board of Trustees of Kibra Nubian Community Land Trust & another (Miscellaneous Application E123 of 2024) [2024] KEHC 12337 (KLR) (Civ) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E123 OF 2024
JN MULWA, J
OCTOBER 15, 2024**

BETWEEN

JAMALDIN YAHYA APPLICANT

AND

**THE BOARD OF TRUSTEES OF KIBRA NUBIAN COMMUNITY LAND TRUST 1ST RESPONDENT
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT**

RULING

1. The Applicant herein, Jamaldin Yahya by the Amended Notice of Motion dated 21/3/2024 seeks orders:-
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to grant an interim measure of protection in the nature of a stay of the proposed election intended to be carried out by the Respondent on 18/02/2024 pending hearing and determination of the substantive arbitration.
 4. That the court be pleased to direct that the dispute between the parties be referred to arbitration in accordance with 16.0 (a) to (b) of the trust Deed dated 30/09/2013.
2. The Application is grounded under provisions of Section 7 (1) of the *Arbitration Act* of 1995, Section 1A 1B and 3A of the *Civil Procedure Act* and Orders 51 Rules 1 & 10 of *the Rules* (CPR) as well as the



grounds stated at its face and supporting Affidavit of the Applicant sworn on even dates and annexures thereto.

3. On 15/02/2024 the applicant was granted interim stay orders which expired and by this application has approached the court for similar orders prompted by a Notice of Nomination dated 19/01/2024.
4. On 13/06/2024, parties desired to file written submissions which was granted, and timelines set by the court with an order of status quo as at that date being observed by both antagonists. Further, both respondents filed Replying Affidavits sworn on 10/06/2024 and 28/05/2024 respectively and grounds of opposition to the application dated 17/04/2024 by the 1st Respondent.
5. The grounds of opposition are stated as follows:-
 1. That there is no suit properly filed before this Honourable Court for determination.
 2. That the present Miscellaneous Application no. E123 of 2024 has been commenced through unprocedural means and thus it is fatally defective and incapable of obtaining the orders sought.
 3. That the application before this Honourable Court is a clear contravention of Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B, 2 and 19 of the Civil Procedure Act, the Civil Procedure Rules 2010 for commencement of a suit and should therefore be rejected.
 4. That the Applicant having commenced the suit via a miscellaneous application dated 15th February 2024 could not amend the same as it was not a pleading per-se.
 5. That the application is fatally defective, incompetent, bad in law and should be struck out with costs to the 1st Respondent.
6. Both parties have not filed submissions despite the directions taken on 13/06/2024. The court shall therefore rely on the pleadings and affidavits on record.
7. The court has perused and considered the Trust Deed dated 30/09/2013 and notes that it governs the Nubian Community's operations in land matters and governance including its membership, appointment and removal of trustees, acceptance of office by new trustees, Resignation and Disqualification of trustees and its Bank Accounts, meetings of trustees, land management and duties of the Management Trustee and other duties.
8. Of concern in this application (case) is dispute resolution mechanism between the parties which is provided at clause 6.0(d). It provides:-

“any other matter arising directly or indirectly out of this trust shall be submitted to and decided by arbitration.”

It continues that:- the arbitration shall be held and concluded within 21 days, after it has been demanded wherein all the parties shall be entitled to representation at the arbitration and further that the arbitration shall be final and binding to the parties upon being made an order by a court of competent jurisdiction at the instance of any party; and that the Deed shall be governed and construed in accordance with the laws of the Republic of Kenya.
9. The applicant by his Supporting Affidavit and grounds of the application submits that a dispute has arisen touching on nomination of a trustee who is purported not to belong to the Nubian Community for lack of proper registration and/or membership of the 1st Respondent, resulting in the dispute before the court.



On the above basis, the applicant seeks that the dispute be referred to arbitration in compliance with clause 6 of the Trust Deed and thus urges the court to grant the orders sought in the application and particularly prayer number 4 and 5 thereof.

10. The 1st Respondent the Board of Trustees of the Kibra Nubian Community land Trust by its Chairman, Suleiman Juma Aganas, and deponent to the Replying Affidavit grounds of opposition fault the procedure of approaching the court by application as opposed to a substantive suit stating further that the procedure is not only flawed, defective but also bad in law.

11. Additionally, it is the 1st Respondents argument that the 2013 Trust Deed is outdated, and citing a 2022 trust deed annexed as SJA -1 and that at clause 31 thereof dispute resolution mechanism is provided.

12. The court has perused and considered the 2022 Trust Deed. It is shown as registered at the Lands Department on 30/11/2022 and is executed by numerous trustees. The applicant Jamaldin Yahya is not one of the trustees therein.

Clause 3 thereof provides for Dispute Resolution Mechanism by several modes – mediation and arbitration, depending on the nature of dispute.

13. The dispute envisaged in the application before the court relates to election of Trustees under the deed. Clause 31.1.1 in the 2022 Trust Deed envisages a dispute in relation to the administration and operation of the Trust and clause 31.1.1.2.3 speaks of a dispute between trustees.

14. It is clear that the Applicant is not a trustee in the 2022 Trust Deed. In that respect therefore, he is not entitled to any of the avenues or modes as non-relates to election of trustees.

15. The court further notes that the 2022 Trust Deed does not expressly provide for resolution of election of trustees disputes but which in my view falls under clause 31.1.1. that provides for a dispute in relation to the administration and operation of the Trust. The court finds it so as administration of the Trust is a duty of the elected trustees and if a dispute arises between a member of the 1st Respondent and the Trustees then, such dispute ought to be resolved not by the court process as the first call but through mediation or arbitration as the case may be.

16. The Applicant is a member of the 1st Respondent. This fact has not been controverted by the 1st Respondent.

It is not clear why the existence of a 2022 Trust Deed has not been disclosed by the Applicant.

17. The 2nd Respondent (IEBC) by its Replying Affidavit sworn on 28/05/2024 by its advocate Douglas Kipruto Bargorett deposes that being a neutral party he is ready and willing to comply with whatever orders the court may ultimately make in regard to conduct of election of trustees of the 1st Respondent.

18. Upon consideration of the parties positions in the application, it is without a doubt that no election of Trustees of the 1st Respondent has taken place or conducted between 2013, 2022 and march, 2024. If such election has been conducted, such material facts have been withheld from the court by both parties.

19. It is instructive that trustees under a duly registered Trust ought to be elected in a general meeting upon a Notice of election of Trustees being issued by the Managing Trustee or as may be specified in the Trust Deed every five years.

20. The court has stated above that since 2013 September no such election has been called, unless as stated such information has been withheld from the court. It has also not been disclosed as to how the Trustees in the 2022 Trust Deed were elected if indeed they were elected.



21. On the 1st Respondents grounds of opposition to the instant application, whereas a substantive suit under the [Civil Procedure Act](#) and the Rules may be a better method to come to court, a litigant may approach the court in several other methods other than by a plaint being by a petition, originating summons and miscellaneous application. Section 19 of the [Civil Procedure Act](#) provides that every suit shall be instituted in such manner as may be prescribed by the rules.
22. Article 159(2) (d) of the 2010 Kenya [Constitution](#) provides that in exercising judicial authority, the courts and tribunals shall administer justice without undue regard to procedural technicalities.
23. As a general rule suits ought to be instituted by way of a plaint as stated in Order 3 Rule 1 of the [Civil Procedure Rules](#).
However, it is permissible for a litigant to come to court or institute a case by way of a miscellaneous application where the orders sought are mere orders, which do not settle any rights or obligations of the parties as held in the cases of [Riro v Kahonge & 3 Others](#) (Environment and land Miscellaneous Application No. E077/2020) (2023 KEEL 16433(KLR)) and [Peter Mwema Kaboro v Benson Maina Gitbetbuki](#) [2005] eKLR.
24. The Applicant herein sought merely orders of interim protection and/or stay orders pending hearing of his complaints by the court inter partes. Considering the nature of reliefs sought nothing much is contested save enforcement of his rights as a member of the 1st Respondent.
I therefore find that the miscellaneous application suffices for enforcement of the Applicants voting rights in election of trustees of the 1st Respondent's Trust Deed.
25. It is trite that want of form in a pleading cannot be used to defeat substantive justice – [Bavid Bundi v Timothy Mwenda Muthee](#) [2022] eKLR, [Wachira Kariari v Bildad Wachira](#) [2016]eKLR, for the proposition that:-
“ the fundamental duty of the Court is to do justice between the parties..... that parties should be allowed a proper opportunity to put their cases upon the merits of the matter When ends of Justice and equity so demand because the powers vested in the court are of a wide scope and ambit”.
26. Citing Section 1A, 1B of the [Civil Procedure Act](#), the court is enjoined to ensure that there is determination of the dispute and that the court should always opt for the lower rather than the higher risk of injustice, finding that the overriding objectives over shadows all technicalities precedent rules and procedure which are in conflict with it and whatever is in conflict must give way.
27. For the foregoing the grounds of opposition raised by the 1st Respondent urging for striking out of the application are found to be devoid of merit.

In conclusion

- a. The Amended Notice of Motion dated 21/03/2024 is allowed in terms of prayer numbers 4 and 5.
- b. The Chairman of the Chartered Institute of Arbitrators Kenya is directed to appoint an Arbitrator to hear the substantive dispute between the parties hereof.
- c. The dispute being between a member of the 1st Respondent and the 1st Respondent each party shall bear own costs of the application.
- d. Mention for status report on 20/02/2025.



Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

