



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HCC CAUSE NO. 29 OF 2018 (O.S)

IN THE MATTER OF TRUSTEES ACT CAP No. 167

AND

IN THE MATTER OF THE SHEIKH FAZAL ILAHI NOORDIN CHARITABLE TRUST

MOHAMMED ASHRAF SHEIKHPLAINTIFF

VERSUS

ABDUL WAHEED SHEIKH

ABDUL HAMEED SHEIKH

(Sued as Trustees of the SHEIKH FAZAL ILAHI

NOORDIN CHARITABLE TRUST).....DEFENDANTS

RULING

1. I have considered the submissions filed by both parties in the NOPO dated 22.10.2019 filed by the Defendants on the basis that the Plaintiff has no locus standi or capacity in law to file this Originating Summons or to obtain the prayers sought in this suit.
2. The Plaintiff has filed this suit seeking the Trustees of the SHEIKH FAZAL ILAHI NOORDIN CHARITABLE TRUST (hereafter referred to as the Charitable Trust) to be held to account on their running of the Trust.
3. The Plaintiff is a son of MOHAMMED ASHRAF SHEIKH who was a son of FAZAL NOOR SHEIKH who was a beneficiary of the Estate of the late SHEIKH FAZAL ILAHI NOOR DIN who was the settlor of the Charitable Trust.
4. The Defendants submitted that the Plaintiff does not have Locus standi to file this suit as he is not a beneficiary of the Charitable Trust or as an interested party on behalf of the beneficiaries of the Estate of the settlor.
5. The Defendants further stated in their submissions that the Charitable Trust in this case was not under the Will of the settlor and therefore is not a Will Trust.
6. They said the Charitable Trust was set up by the Settlor Inter vivos under a Trusts deed in 1942, thirteen years before he died in 1955.
7. The Defendants further stated that the Charitable Trust has not failed and it will not fail and further that nothing will revert back to the Estate of the Settlor neither as a residuary bequest nor on an intestacy.
8. The Defendants also submitted that the Plaintiff cannot file this suit on behalf of the beneficiaries of the Estate of the Settlor since this is not a representative suit and the Plaintiff has not disclosed who appointed him to file this suit and neither did he seek leave to file a representative suit.
9. The Defendants also submitted that this is an Application in Equity and the Plaintiff must come to Court with clean hands in that he did not disclose the Judgment and decree of Justice Lenaola (as he then was) and he obtained exparte orders by keeping the Court in the dark and suppressing material facts from the Court.

10. The Defendants are now seeking for Orders that the Preliminary Objection be allowed, the Application dated 8.5.2018 be dismissed and the ex parte orders issued on 30.5.2018 (as amended) be vacated.

11. The Defendants also submitted that the Beneficiaries of the Charitable Trust were initially “the needy and poor Muslims in Mecca and Medina” but by Cypress order of the Court dated 21.12.2017 was changed to “needy and Poor Muslims in Kenya”.

12. The Defendants further said the Plaintiff and his mother who is a daughter of the Settlor are not beneficiaries of the Charitable Trust.

13. The Plaintiff in his submissions said that he is a grandson of the Settlor and the Defendants who are his uncles are known to him.

14. The Plaintiff submitted that his concern is the manner in which the charitable trust is being run by the Defendants and he is seeking Orders to compel the Defendants to render accounts and to protect the assets of the Charitable Trust.

15. The Plaintiff also stated that he expressed doubts if the Charitable Trust objectives are being met by the Defendants and that he engaged the Defendants on this subject in March 2017 and sought evidence to prove that indeed the proceeds of sale were being sent to the named class of beneficiaries. But the Defendants remained non-committal in their responses.

16. The Plaintiff submitted that before the Promulgation of the Constitution in 2010 one was required to obtain the Consent in writing of the Attorney General under section 62 of the Civil Procedure Act before filing an action of this nature but he said the position has now changed.

17. The Plaintiff submitted the Charitable Institution is a Public Institution and therefore not the property of any individuals and he relied on the case of MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 6 OTHERS CA 290 OF 2012 where the Court of Appeal said that the “*Stringent locus standi requirements of Consent of the Attorneys General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history*”.

18. The Plaintiff said he filed this suit for the following reasons:

(i) In Public Interest for the protection of the properties of the Charitable Trust.

(ii) The Poor whether in Mecca, Medina or in Kenya by their very description will never be in a position to bring this action to compel the Trustees to be accountable for the manner in which they have managed Trust.

(iii) To vindicate his concerns raised in March 2017 before the Defendants rushed to Court for a Cypress Order to change the Object of the Trust to make “the poor and needy Muslims in Kenya” beneficiaries.

(iv) There is no better person than the Plaintiff who has knowledge of the Charitable Trust history and its assets given the class of the beneficiaries contemplated would have no clue of the said assets.

19. The Plaintiff also submitted that on matters of law the Constitution of Kenya 2010 is the Supreme Law of the Land and any Law that is inconsistent with the Constitution is void to the extent of the inconsistency and he urged this Court to uphold Articles 22 and 258 of the Constitution of Kenya 2010.

20. The Plaintiff urged the Court to dismiss the Preliminary Objection and not to allow the Defendants to hide behind imagined legal technicalities to circumvent the law which places serious fiduciary obligations upon the Trustees in the running of the Charitable Trust.

21. I have considered the submissions by both parties. I find that it is not in dispute that the Plaintiff is the grandson of the settlor of the Charitable Trust and that the Defendants who are the Trustees of the said Charitable Trust are uncles to the Plaintiff.

22. The issues for determination in the NOPO dated 22.10.2019 are as follows:

(i) Does the Plaintiff have locus standi to file this Originating Summons and Application dated 8.5.2018?

(ii) Should the Ex parte Orders issued on 25.5.2018 be vacated?

(iii) Should the Originating Summons and application dated 8.5.2018 be dismissed?

(iv) Who pays the costs of this NOPO?

23. On the issue as to whether the Plaintiff has locus stand to file the Originating summons and application dated 8th may 2018, I find that the law is very clear that the beneficiaries of a Trust cannot file suit against the Trustees.

24. The Plaintiff is not a beneficiary of the Charitable Trust as the same was initially established for “**the needy and poor Muslims of Medina**” and later by cypress order of the Court the object was changed to “**the poor and needy muslims of Kenya**”.

25. I find that neither the Plaintiff nor his mother who was a daughter of the Settlor fall into that class of beneficiaries.

26. I also find that the Plaintiff has misunderstood Articles 22 and 258 of the constitution as the two provisions deal with enforcement of the bill of rights and not filing of representative suits.

27. I find that Originating summons is neither a representative suit nor a suit filed to enforce the bill of rights.

28. The Plaintiff is not an interested party in this suit as he filed this suit in his capacity as a grandson of the Settlor seeking to hold the Trustees to account on the Charitable Trust and also stating that the Property should revert to the Estate of the settlor if the Charitable Trust has failed.

29. The Defendants have stated that the Charitable Trust is not a creature of the Will of the Settlor as it was created inter-vivos by the settlor thirteen years prior to his demise.

30. I accordingly find that the Plaintiff has no locus standi to bring both the originating summons and application both dated 8.5.2018.

31. I find that the parties are aware of other suits involving the charitable trust such as the suit that issued the Cypress order and the one where the Defendants were granted orders to protect the property of the Charitable Trust and it is not clear why the Plaintiff did not seek redress in those forums.

32. On the issue as to whether the Exparte orders issued on 25.5.2018 should be discharged, I find that the answer is in the affirmative as the said orders were issued pursuant to non-disclosure of all the facts which are now emerging in this NOPO and I find that the plaintiff did not disclose the existence of the other suits when he obtained the Exparte orders.

33. I also find that the Plaintiff has no locus standi to file the originating summons and the application dated 8.8.2018.

34. I accordingly vacate the Exparte orders issued on 25.5.2018 and I dismiss both the originating summons and application both dated 8.5.2018.

35. On the issue of costs I find that it is trite law that costs follow the event and I accordingly grant the Defendants costs of the NOPO, the Application dated 8.5.2018 and the Originating summons of even date.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 7TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.