



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION NO. 18 OF 2016

DAVID KIPSANG KIPYEGO & ABRAHAM KIPTARUS KIPTOO

THE REGISTERED TRUSTEES OF THE SERVE

IN LOVE AFRICA (SILA) TRUST.....PETITIONERS

VERSUS

THE REGISTRAR OF DOCUMENTS..... 1ST RESPONDENT

AMBROSE KIPROP2ND RESPONDENT

DAVID K. CHEMWOREM3RD RESPONDENT

MOSES KIPNGETUNY KIPKULEI4TH RESPONDENT

SAMSON KIPNGETICH KIBII 5TH RESPONDENT

ERIC KIPTUM TEIMUGE INTERESTED PARTIES

JUDGMENT

The petitioners filed the present petition on 7th September 2016 seeking the following orders;

- a) A declaration that the action by the respondent made on 5th May 2015 changing the constitution of the trustees of SILA trust by appointing the interested parties and removing the applicants as trustees was illegal and in violation of the applicant's rights to association, equal protection and benefit of the law and the right to acquire and own property.
- b) An order of certiorari to remove into the high court for the purpose of quashing and/or review the records, register and or decision of the registrar of documents made or entered on 5th May 2015 to effect changes but illegally appointing the interested parties as trustees of SILA trust in place of the petitioners
- c) An order of prohibition prohibiting the registrar of documents from appointing the interested parties as trustees of SILA trust and an order of prohibition prohibiting the interested party from assuming as trustees or acting in any way that will be prejudicial to the applicant's interest over SILA trust.
- d) An order of mandamus compelling the registrar of titles to restore the applicants as the only registered trustees of SILA trust in accordance with the original certificate of incorporation of trust given on 8th July 2009 and registered on 9th July 2009.
- e) An injunction restraining the interested party from assuming the role as trustees of SILA trust and an order of prohibition prohibiting the interested party from assuming as trustees or acting in any way that will be prejudicial to the applicant's interest over SILA trust.

PETITIONERS' CASE

The petitioners in their petition made a number of averments and filed submissions in support of the petition.

The petitioners aver that they were the original founders of the trust which was founded on 9th July 2009. On 5th May 2015 the respondent unlawfully changed the constitution of the trust by appointing the interested parties as trustees and removed the petitioners as trustees illegally. The petitioners relied on their supporting affidavits and the exhibits that were annexed to the affidavits i.e. the trust deed of SILA trust, the certificate of incorporation of trust, a copy of the endorsement in the certificate of incorporation made on 5th May 2015 appointing the respondents and removing the petitioners and an application for the recording of a certificate of appointment of new trustees.

The introductory part in the declaration of trust dated 2nd June 2009 provided that the deed was made between David Kipyego Kipsang and Patrick Kipkogei Kibet and David Kipyego Kipsang. At page 11 of the deed, it was evident that the persons who executed the deed were the petitioners and one Patrick Kipkogei Kibet.

Page 1 of the certificate of incorporation sets out who the trustees of the trust are, that is, the petitioners and Patrick Kipkogei Kibet. They were duly constituted as trustees by a general meeting held on 28th May 2009.

It is clear from the instruments that indeed the petitioners were the original trustees and it is absurd for the interested parties to allege that they were not the co-founders of the trust. The provisions of the deed and certificate answers questions posed by the interested parties allegation in paragraph 10 that the certification of changes in trusteeship could not be done by people who were not trustees or founders then.

Clause 7 of the deed and paragraphs 2 and 3 of the certificate of incorporation provide for the appointment, removal and replacement of trustees. The petitioners cited the paragraphs and submitted that these are the only instruments one would interrogate to ascertain whether the appointment of interested parties and removal of petitioners were done procedural and legally.

The petitioners have deposed to have secured the documents presented to the respondent which facilitated the change of trusteeship which they urged the court to peruse. The document is the application for the recording of the certificate of appointment of new trustees and annexed in the affidavit of David Kipsang Kipyego as DKK 4(a) and (b). DKK4(a) is a certificate of appointment of new trustees dated 30/9/2014 and lodged at the registrar of documents on 5/5/2015 and/or 17/3/2015. It replaced the petitioners as trustees.

The petitioners submitted that the procedure and manner in which the new trustees were appointed did not meet the threshold set out in the trust deed and certificate of incorporation. The trust deed does not provide for removal of founders.

The appointment of the interested parties as trustees was unlawful and unprocedural as the appointment was not certified in writing under the hands of the remaining trustees as set out by clause 3 of the certificate of incorporation. The clause is couched in mandatory terms and non-compliance of the same renders the appointment of new trustees a nullity, same for the removal of the petitioners. The said document was only certified by one trustee.

The trust is an association which was founded by the petitioners and they agreed they would be guided by the rules set out in the trust deed and certificate of incorporation. Article 36 of the constitution guarantees and protects freedom of association. By making appointments of the interested parties as trustees and removing the petitioners unprocedurally, the petitioner's rights to association were violated.

Upon registration, the trustees embarked on various investments and a number of assets are registered in the name of the organization which the petitioners risk being deprived of as a result of their irregular removal. Article 40 of the Constitution safeguards the rights of the petitioners to property.

Article 23 of the constitution grants the court authority to uphold the bill of rights and sets out the reliefs the court may grant including declaration of rights and orders of judicial review such as prohibition, certiorari and mandamus.

The petitioners filed further submissions in response to the replying affidavit and submissions of the respondents and interested parties. They submitted that the trust deed provides that the founders are the petitioners and the argument that changes were done in accordance with the trust deed is misleading.

Patrick Kipkogei Kibet has deposed that his signature in the application for recording the certificate of appointment of new trustees was obtained fraudulently and the changes were done without his authority or participation, allegations of which have not been denied or rebutted.

In the absence of the participation of the founders the action to effect the changes were ultra vires the instruments creating the trust.

The instrument annexed in the affidavit of Julius Maroa Chacha as JCM 3 does not meet the threshold set out in clause 3 of the certificate of incorporation. In reference to annexure JCM 4, the minutes of 30/9/2014, the trust deed and certificate of incorporation do not provide that minutes can be used to change the trustees of the organization. The minutes are also marred with inconsistencies. Nowhere in the minutes was it resolved that the founders be removed or replaced. The minutes are not signed by the secretary, David Kipsang Kipyego.

The changes were ultra vires and ought to be declared a nullity.

RESPONDENT'S CASE

The respondent submitted that they wholly rely on the affidavit sworn by Julius Chacha Maroa on 5th July 2017.

The action of the respondent to change the constitution of the trustees by appointing the interested parties was not ultra vires as the changes were made in accordance with clause 7(a) of the declaration of trust which states that the power of appointing a new trustee or new trustees

shall (subject to 10(c) below) be rested in the founder during the life of the founder.

The respondent submitted that the replacement of the petitioners was made by Patrick Kipkogei Kibet who is a founder and in accordance with clause 7(a) of the declaration of trust of SILA trust hence the changes were not illegal.

The order of certiorari being sought ought not to issue as the respondents did not commit any error of law in effecting the changes of the trustees as they followed the procedure in the trust deed.

An order of prohibition ought not to be granted as the appointment of the interested parties as trustees of SILA trust has already been done and they have already assumed office as trustees hence the order for prohibition has been overtaken by events.

There are no legal grounds to warrant the issuance of an order of mandamus to compel the respondent to restore the applicants as the only registered trustees in accordance with the original trust as the respondent was legally and procedurally moved to effect the changes of the trustees in accordance with the trust deed and the reasons for so doing were valid as per the minutes of the meeting held on 30th September 2014.

The respondent is bound by the trust deed as the primary document and the contents of the certificate of incorporation are merely guidelines which are procedural technicalities and hence the respondent has unfettered discretion to waive them and follow the substantive guidelines in the trust deed.

The petition ought to be dismissed with costs.

INTERESTED PARTIES' CASE

The interested parties submitted that the petitioners have misdescribed themselves as registered trustees. There are necessary parties who have been omitted from the proceedings, the 1st being Patrick Kipkogei Kibet and the 2nd one is the trust itself. The person who presided over the exercise of changing the trustees and communicated the results was Patrick Kipkogei Kibet and therefore ought to have been made a party to the suit. The trust is a separate legal person and the decision going to be made will be enforced against the trust so it ought to have been made a party to the petition. The petition is incompetent for the omission of crucial parties.

The reliefs sought are not tenable. Equal protection of the law does not arise as there is no issue of discriminatory treatment alleged in the petition. There is no discrimination in the way the petitioners have been treated. When the petitioners sought to be registered as trustees the respondent effected it, when the interested parties were to be registered as trustees it was effected as per the request of the trust. There was no discrimination.

The property of the trust does not belong to its founders or trustees as the trust is a separate legal entity from its founders and trustees. No allegation of any property being taken away from the trust has been made. A declaration cannot be made in the absence of tenable proof that there is discrimination or bias in the way the petitioners have been treated by the respondent and they have been denied enjoyment of their property.

An order of certiorari is not available. An order of certiorari must be sought within six months. The action complained about took place in May 2015 and the petition was filed in September 2016. That was almost a year outside the six months' limitation period.

On the issue of prohibition, an order will be issued to prevent something which has not been done. The changes have already been issued and the registrar cannot be prohibited from doing what has already been done.

The order of mandamus is to compel the respondent to register the petitioners as trustees of SILA trust when there is communication that they have been removed therefrom. The respondent is mandated to ensure that the procedural requirements have been met. A resolution to have the interested parties as trustees has been made and the same has been procedurally communicated to the respondent who has acted on it.

The petitioners seek to restrain the interested parties from assuming office as trustees yet they have been in office since 5/5/2015. They cannot be therefore restrained thus the remedy is unavailable.

On the issue of the petitioners being founders, only David Kipsang and Patrick Kipkogei are founders. Abraham Kiptarus is not a founder. There are no changes as to who are the founders thus what is in issue is the changes of trustees.

The trust deed allows for the changes in the composition of the trustees. The trustee deed specifies that a founder has power to remove or replace the trustees during his lifetime. The clause is made subject to clause 10(c) which is non-existent as per the trust deed. In the instant case Patrick Kipkogei Kibet is a founder and he is the one who communicated the appointment of the interested parties as trustees.

The Appointment was procedurally done and cannot be faulted. If it is to be faulted, then the fault should be directed to Patrick Kipkogei who is not a party to the proceedings. David Kipsang was present during the deliberations of 30/9/2014 and was involved in the appointment of the interested parties as trustees. Both founders were involved in the appointment of the trustees. Clause 3 deals with appointment of new trustees and it was fully complied with. The petition is unmerited and should be dismissed.

ISSUES FOR DETERMINATION

- a) Whether the appointment of the interested parties as trustees was illegal
- b) Whether the court can issue orders of certiorari & prohibition
- c) Whether the court can issue orders of mandamus
- d) Whether the court can issue orders of injunction

WHETHER THE APPOINTMENT OF THE INTERESTED PARTIES AS TRUSTEES WAS ILLEGAL

In order to establish this, we must determine the governing documents with regards to removal of trustees. The certificate of incorporation provides at clause 3 as follows:-

The appointment of every new trustee shall be certified to me (the Minister of Lands) in writing under the hands of the remaining trustees and further within one month after expiration of each period of one year after the date of this certificate (or whenever required by me) a return shall be made to me by the then trustees of the names of the trustees at the expiration of each such period with their residences and descriptions.

Paragraph 7 of the trust deed provides;

a) The power of appointing a new trustee or new trustees and the power of removing or replacing trustees shall subject to clause 10(c) below be vested in the founder during the life of the founder.

The certificate of incorporation, particularly at clause 2 states;

Each of the said trustees shall hold office subject to the terms and limitations contained in the trust deed of the body corporate.

The upshot of the foregoing is that the removal and appointment of the trustees is to be governed by the trust deed. Paragraph 7 of the deed refers to the power of appointment being vested in the founder. In the premises, Patrick Kipkogei Kibet and David Kipyego Kipsang are named as the founders in the declaration of trust. Patrick Kipkogei Kibet is not named as the only founder.

Patrick Kipkogei Kibet deponed in his supporting affidavit filed on 31st January 2017 that he did not participate in the registration of the instruments dated 30/9/2014 and deposited at the Lands department on 17/3/2015 or 5/5/2015. He denied that the signature was his, and maintained that it was forged. The same was the case for Abraham Kiptarus Kiptoo.

As per clause 3 of the certificate of incorporation, appointment of new trustees requires the remaining trustees to certify the same in writing. The same was not done as the alleged application for the recording of a certificate of appointment of new trustees was allegedly certified by one founder and not by both founders. Both founders since swore affidavits denying that they were concerned with the signing and the certifying of the application for the recording of a certificate of appointment of new trustees.

Although paragraph 7 of the trust deed only mentions a founder, we must also be cognisant of the fact that the trust had two founders. How then is the court to determine which founder was to have the power of appointment vested in him? In my view the power was vested in both founders. Therefore, there was no valid appointment of new trustees.

In the event that one of the founders had legitimately signed the instrument, it would still not meet the threshold set out in the certificate of incorporation.

My finding is that, the appointment of the interested parties as trustees was illegal and ultra vires the certificate of incorporation and trust deed.

WHETHER THERE WAS VIOLATION OF ANY CONSTITUTIONAL RIGHTS

The basis of the orders sought is the violation of constitutional rights of the petitioners. In order to determine whether the orders sought can be issued, the court must establish if there are any rights that have been violated.

The petitioners claimed that their rights to property under article 40 of the constitution were violated. Further, that their rights to freedom of association under article 36 of the constitution were also violated.

In my finding, I concur with the interested parties that the property registered in the name of the trust does not belong to individuals, it belongs to the trust. Therefore, the petitioners cannot claim that their right to property had been violated.

Article 36(1) of the Constitution provides;

(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

The prayer sought by the petitioner is a declaration that the action by the respondent of 5th May 2015 violated the applicant's right of association and the right to own property. I find that the right to freedom of association is the only right that can be deemed to have been violated given that the removal of the petitioners as trustees was in contravention of the trust deed and certificate of incorporation's provisions.

WHETHER THE COURT CAN ISSUE ORDERS OF CERTIORARI & PROHIBITION

The interested parties submitted that the orders for certiorari were time-barred. However, given that this is a constitutional petition, they cannot be deemed to be time barred. The constitution prescribes that orders of judicial review may be granted in a petition seeking to enforce the bill of rights.

Article 23 of the constitution provides

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

23. (3) (a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

In *Samuel Ngigi Wahogo & 4 others v Attorney General & 2 others; Samuel Chege (Interested Party)* [2019] eKLR the court held;

22. It will be seen from the above, specifically, Article 23 (3) (f) that Judicial Review orders may be sought in a petition. The constitution does not prescribe any limitation of time for such orders. Even then, the Court of Appeal, in the case of *Stephen Kibowen vs The Chief Magistrate's Court Nakuru & 2 Others, Court of Appeal at Nyeri (sitting in Nakuru), Civil Appeal No. 211 of 2013*, held that in a case seeking orders of certiorari to quash the decision of the Land Disputes Tribunal that was made out of jurisdiction, the 6-month limitation period does not apply, for the reason that the award was not made by a body with jurisdiction.

The facts of the case were that the appellant applied for an order of certiorari through judicial review proceedings to quash an award of the Bahati Land Disputes Tribunal. The suit was filed more than 6 months after the award. The suit was dismissed by the High Court, the court holding that it was filed out of time. On appeal, the Court of Appeal stated as follows:

“It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be impeachable but, in the matter before the learned Judge, what was being challenged was not a decision properly made within jurisdiction against which time could run. Rather, it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect.”

23. It therefore does not help any of the respondents to argue that this suit has been filed outside the 6-month period prescribed by Order 53 Rule 2 for filing proceedings seeking orders of certiorari. The Tribunal did not have jurisdiction and their decision could thus not trigger the 6-month rule. There is therefore nothing to bar this court from issuing the orders of certiorari as sought in this petition.

The upshot of the foregoing is that the court can grant orders of certiorari outside the 6 months time limit, given certain circumstances of the matter.

WHETHER THE COURT CAN ISSUE ORDERS OF MANDAMUS

The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996*, the Court of Appeal cited, with approval,

Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

Upon the quashing of the registration of the interested parties as the trustees of the trust, the court in this matter can order for mandamus to restore the applicants as the registered trustees.

WHETHER THE COURT CAN ISSUE ORDERS FOR AN INJUNCTION

The interested parties have already assumed office therefore an injunctive relief at this stage will not be appropriate. Further, given that the orders to quash the decision of the registrar of documents and to compel the restoration of the petitioners as trustees is granted, it follows that the injunctive relief is not necessary.

In the premises the petition succeeds to the extent that the decision of the registrar of documents to register the interested parties as trustees and remove the petitioners as trustees is declared illegal and quashed. Further, the order of mandamus is issued to compel the respondent to restore the petitioners as the trustees.

This court so orders.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of October, 2019

In the absence of:

Mr. Korir for the applicant/Petitioner

Attorney General for the respondent absent

Mr. Momanyi for the interested party absent

And in the presence Ms. Abigail – Court assistant