



**REPUBLIC OF KENYA**

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

**Civil Case 4421 of 1992**

**SHABAN SALIM & 4 OTHERS.....PLAINTIFFS**

**VERSUS**

**ALI OMAR & 8 OTHERS.....DEFENDANTS**

**JUDGMENT**

Parties to this Suit are all members of Riruta Muslim Community. They own property thereon otherwise known as Dagoretti/Riruta/901, 908 and 909. This property is managed, administered and/or preserved by a board of trustees of 5 of the members. On the property are a mosque, a Primary School, a Nursery School, a Clinic, a Cemetery and Madrassa Classes.

Previously there were 5 trustees who were managing these properties, namely, Ali Hamisi, Salim Nga'nga, Abdalla Muiruri, Abdul Baru Mutonga and Ali Chege. It is not known exactly when but they all died prior to 1993.

On 24th April 1991 a meeting was called by members in order to elect new trustees. A permit was obtained from the Provincial Administration in Nairobi for the meeting (exhibit 1(b)).

The only agenda given on that Permit was the election of trustees.

The meeting was held under the chairmanship of Chief S.N. Kimita of Kawangware Location. As a result thereof, plaintiffs, namely, Shaban Salim, Juma Yusuf; Athman Bakari, Hassan Kariuki and Abdul-Aziz Juma, were elected trustees with 89, votes, 84 votes, 83 votes, 82 votes and 69 votes respectively.

After the election things did not seem to go on well as some elders wrote letters to the Provision Administration contesting the validity of the election and Chief Land Registrar's registration of the trustees elected on 28<sup>th</sup> April 1991, requesting that such registration be cancelled.

As a result of these complaints, there emerged two groups in the Community, one comprising of Sunnis and the other Shias. Those elected as trustees on 28th April 1991 were all branded Shias and were not supposed to take over or Manager the Community property which were alleged to belong to the Sunnis.

More prominently was the use of a mosque built in the village where Sunnis did not want Shias to conduct any activities, and, more so, prayers.

As a result of this confrontation and the chaotic situation which developed, this Suit was filed in Court by the Plaintiffs on 12th August 1992 to pray for, amongst others,

(a) (a) A declaration that the defendant's actions were unlawful;

(b) A perpetual Order of injunction restraining the defendants, by themselves, their agents, servants and/or agents from interfering in any manner with the administration management and preservation of the properties known as DAGORRETTI/RIRUTA/908, DAGORRETTI/RIRUTA/909 and DAGORETTI/RIRUTA/901

(c) General damages,

(d) Costs of this suit and interest thereon at court rates;

(e) Any other relief this Honourable Court may deem just to grant.

In a defence filed in Court on 14th November 1994 the defendants denied allegations levelled against them in the Plaint and averred that in fact it was the Plaintiffs who had usurped, the legal functions of the office of the Trustee and resorted to hooliganism, acts of violence, vandalism, picketing, spreading a state of insecurity, chaos lawlessness and terror in the community in order to protect their illegally acquired positions.

They prayed for the dismissal of the suit with costs.

Since this suit was filed in Court on 14th August 1992, there have been intervening applications and attempts at an out of court settlement of the dispute between the parties herein which never yielded any fruitful results.

In fact when the defence closed its case on 4th July 1996, both parties still sought some time to try and amicably resolve the dispute through the Supreme Council of Kenya

ms but up to 24th September 1996 they had not resolved the matter. This is why Counsels were given leave to put in written submissions, which they did, hence this judgment.

During the hearing of this case, the Court was told that an association known as Riruta Muslim Community was formed sometime before Kenya's independence in 1963.

A document produced before the Court as exhibit 1(a), hereinafter called the "Trust Deed", confirmed that such an association had been formed but it did not show when. The Trust Deed contains the rules and regulations of the association.

At inception, the Community had 5 trustees; namely,

(1) Ali Hamisi

(2) Salim Ng'ang'a

(3) Abdalla Muiruri

(4) Abdul Baru Mutonga and

(5) Ali Chege

The membership of the association was open to "all persons of the Islamic faith who are resident in Riruta Muslim Village--- "(See article 2 of the Trust deed).

And by paragraph 5 thereof

" If any vacancy occurs in the offices of the trustees--

or a number of them falls below 4, the existing trustees may appoint a member of the association to be one of them, either to fill the vacant office of a trustee or to bring the number of them to 4". However, from the evidence adduced herein all the trustees named in paragraph 3 of the Trust Deed died without a replacement and it is not known how the association was conducted, nevertheless its affairs seem to have continued to run until 28th April 1991 when Kawangware Chief purported to hold elections to fill vacant post for all the trustees.

Though the defendants in this Court said that either no elections were held or that if they were, it was to elect members of a welfare committee, I am satisfied from the Plaintiff's evidence in exhibits 1(b) and (c) such elections were purportedly held and that they were intended to replace the trustees of the Riruta Muslim Community.

Exhibit (b) is a copy of a licence to convene and hold such a meeting which was issued by the Provincial Commissioner's office on 3rd April 1991, One Ramadhan Juma, said to have been a Secretary to the deceased Trustees, is the person issued with this permit.

Even the first defendant Ali Abdalla (DW1) admitted in his testimony that it was Mohamed Swaleh (6th defendant) who teamed up with him to go for the permit for the elections.

This defence witness even admitted that he stood in these elections but was not successful; though he alleged that he so stood as a member of the welfare organisation.

I do not believe the meeting of 28th April 1991 was for electing representatives of a welfare organization.

The permit produced as exhibit 1(b) shows clearly that there was only one item of the agenda, namely, "ELECTION OF TRUSTEES".

This view is also, supported by plaintiff's exhibit 1(c) dated 28th April 1991 headed "ELECTIONS OF TRUSTEES OF THE RIRUTA MUSLIM COMMUNITY".

This exhibit outlines the proceedings of the meeting held on 28th April 1991 presided over by one S.N. Kimita, Chief Kawangware Location.

According to clauses 3 of the minutes, there were two organisations or associations with two different constitutions, namely Riruta Muslim Community and Riruta Muslim Welfare Association.

A discussion ensued at the meeting as to which constitution should be applied there at and clause 4 of the minutes indicates that the Riruta Muslim Community Constitution was applied during this particular meeting. Clauses 5 and 6 of the minutes indicate rules and regulations of Riruta Muslim Community were read to all present and it was agreed that only 114 plot owners should vote (see clause 9 of the minutes).

However, when names of candidates were proposed and elections held through que-voting; results were as follows:-

- (i) Shaban Salim - 89 votes
- (ii) Juma Yusuf - 84 votes
- (iii) Athman Bakari - 83 votes
- (iv) Hassan Kariuki - 82 votes
- (v) Abdul Aziz Juma - 69 votes

(vi) Mubarak Athman - 68 votes

(vii) Abdallah Kasigara - 56 votes

(viii) Ahmed Njoroge - 31 votes

(ix) Ali A. Atanasi - 27 votes

At this point - a glaring lapse would have been spotted, in that though only 114 plot owners or their representatives were supposed to have voted, we have 589 people voting which was contrary to the wishes of the majority of the genuine members.

This then meant that clause 10 of the minutes did not reflect what actually happened because if Ramadhan Juma called out names of plot owners or their representatives to gather in a reserved area, then only 114 members should have gathered there and voted for their favourite candidates, not 589 voters as shown in the result.

Nevertheless, and inspite of this flaw in the election process, the said election is alleged to have been conducted and the minutes thereafter show that these elections were described as having been conducted fairly, democratically and openly, (Clause 18 of the minutes).

Following this exercise the Chief wrote a letter to the Minister for Lands and Housing through the Provincial Commissioner Nairobi, Dagoretti Division, forwarding the plaintiff's names for Registration by the Registrar of Documents. Consequent upon this presentation, the 5 plaintiffs were registered as Trustees of Riruta Muslim Community on 11th November, 1991 - {see plaintiff's exhibit 1(a)}.

In the meantime, immediately, after the elections of 28th

April, 1991 - four elders wrote a complaint letter dated 29th April, 1991 contesting the validity of these elections. Another of such complaint letters is dated 1/12/91 - (Exh. 1(e)).

Inspite of these protest, the Registrar of Documents went ahead to register the new trustees as herein before stated.

From the evidence adduced in this case differences surfaced within the community as a result of the emergent of two factions within Muslims, namely Sunnis and Shias.

The defendants witnesses testified that after the plaintiffs were registered as Trustees of Riruta Muslim Community they invited a preacher from Tanzania, one Muyonga, who, during his surmons, started abusing the followers of the Prophet Mohamed, and it is then that the defendants and their supporters realized the plaintiffs were not Sunnis, the original founders of the Riruta Muslim village, hence the dispute which culminated in the present suit being filed in court.

At the insepction of Riruta Muslim Village there appear not to have been any differences between the residents.

This is shown by the description of "members" in the Trust Deed (exhibit 1(a) as:

"All persons of the Islamic faith who are resident in the Riruta Muslim village- -".

This description did not discriminate against any of the factions, be they Sunnis, Shias, Khojas, Ismailias or Bohras. I was even told during the evidence that even those professing the Christian faith were amongst plot owners.

But, this notwithstanding, the crux of the problem here is the manner in which the elections of 28th April, 1991 were conducted.

If 5 Trustees were supposed to remain as such for life and/or that whenever one died those remaining were to replace him and that they were not supposed to remain less than 4 at any one time, there being no provision for the replacement of such Trustees in the event they remained less than 4 when in this case all 5 trustees died without a replacement, a huge problem arose.

In the case subject to the present dispute all the Trustees died and that they had to be replaced afresh. There was no provision in the Trust Deed for this situation.

If Trustees had been constantly and properly replaced, there would have been no problem with the administration and/or management of the property known as Riruta/Dagoretti/901, 908 and 909 as this is adequately catered for under clause 7 of the Trust Deed.

Evidence was adduced that in this case 5 trustees had been appointed at the inception of the Riruta Muslim Community by 5 Elders of Riruta Muslim Association but there is no provision in the Trust Deed that this is what should happen in the event of the death of all of them.

The deed does not appear to have anticipated that any of these trustees would vacate the trusteeship or die without being replaced.

However, we have a situation here where all the trustees died without being replaced. Where is the mandate for the election of fresh Trustees?

Section 37(1) of The Trustee Act - Chapter 167 Laws of Kenya, provides a clue, though not a cure to the present dispute:-

It states as follows:-37(1)

Where a trustee, either original or substituted and whether appointed by a court or otherwise, is dead then, subject to the restriction 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 place of the trustee so deceased - -

The Trust Deed here,(exhibit 1(a))does not provide for the nomination of a person or persons for the purpose of appointing new trustees in substitution of deceased trustees.

No evidence was led as to which order the deceased trustees died or who was the last surviving trustee and/or whether any person has taken out letters of administration in respect to the last surviving trustee's estate to perform the function bestowed upon him by section 37(1)(b) of the Act.

If such evidence were adduced the matter would have been solved at that stage but that it was not so, the dispute lingers on.

On the other hand section 42 of the Act provides that 42(1)

"The court may whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do 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". This provision does not give the basis upon which the court may make such an order to appoint a trustee or trustees or how to assess the right person or persons to be appointed as trustee or trustees.

And this being a religious dispute and the court not being seized of the tradition or norms to be followed in the appointment of such trustees, some form of assistance would be required from those with the know-how.

In search of such assistance Rule 4 of the Trustee Rules provides as follows:-

"An order under the Act for the appointment of a new trustee or concerning any interest in land, stock or thing in action subject to a trustee may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof". The mode of the lodgement of the application for such appointment in court is provided for in clause 5 of the rules.

In this respect it does seem that for the court to apply the provision of this rule there should be an application by a person beneficially interested in the land, stock or thing in action. But who is the person "beneficially interested" in this matter if not the parties to this case whose impartiality is in doubt, there being no trustee in existence?

In my view the elections held on 28th April 1991 were not valid as they never took into account that at that time only 114 plot owners were the only recognized members and therefore entitled to vote for the trustees as agreed by members as reflected in clauses 7 and 11 of the minutes.

Even during the hearing of this dispute before me both parties agreed that there are only 114 members. (see evidence of the plaintiff in cross examination and DW1 and DW2 in examination in chief).

From evidence it was clear all these members or their representatives have lived in the village in peace even after the death of all the trustees, and that the dispute only surfaced after the elections were conducted, albeit, irregularly and the plaintiffs elected on 28th April 1991.

In fact it was generally agreed that since the plaintiffs were elected they had never carried out any functions peacefully and had not even managed to make regular returns. And in view of their irregular elections, they could not have carried out valid functions for the community and would not be entitled to the prayers sought in the plaint filed herein on 14th August 1992.

Many attempts have been made for an out-of-court settlement of this dispute to no avail and even during the hearing of the case and before I set out to write this judgment both parties sought leave to make last minute attempt at a settlement but this did not materialize, either.

Only one option then remains, and that is for the court to make a decision on the dispute as nearly as possible, according to Section 42 of the Trustee Act.

I opine that if elections are held fairly, and in an acceptable manner to the community, then all other issues will be easy to resolve as elected trustees will be charged with the duties of managing the community property in the manner authorized by the Trust Deed(exhibit 1(a)) Therefore, and while dismissing this suit with no order as to costs, I would make the following further orders:

- (1) The appointment of the Chief Kadhi to supervise elections of the 5 trustees of Riruta Muslim Community, he having a beneficial interest therein, by virtue of his position in Islam, within 45 days of service of this order upon him;
- (2) That candidates for the position of trustee to be proposed from among 114 members of the community who are plot owners or their representatives (one each).
- (3) That only the 114 members of the Community or their representatives (one each) to take part in this exercise.
- (4) That on these elections being concluded, the elected trustee's names be registered with the Registrar

of Documents forthwith.

(5) That the management of the property, namely Riruta/Dagoretti/901, 908 and 909 be vested in the trustees who will manage them in the best interest and wishes of all the members of Riruta Muslim Community as provided by Clauses 6 & 7 of the Trust Deed exhibit 1(a).

(6) That on the election and registration of the trustees, they, as a matter of expedience do look at the Trust Deed a fresh with a view of streamlining

it in line with the views and changing circumstances of the village community, particular attention being paid to the membership clause.

(8) Liberty to apply.

Each party to bear their own costs of these proceedings.

**Delivered this 22nd day of November 1996.**

***D.K.S. AGANYANYA, J.,***