



**Yunis & 2 others (Suing as trustee of Narok Muslim Welfare Society) v
Yusuf & 2 others (Sued as directors of Bilal School) (Environment & Land
Case 1 of 2019) [2023] KEELC 16719 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 1 OF 2019
A OMBWAYO, J
MARCH 29, 2023**

BETWEEN

**MOHAMMED HASSAN YUNIS 1ST PLAINTIFF
ABDILLAHI MOHAMED HUSSEIN 2ND PLAINTIFF
MOHAMMED DAHIR KAHIR 3RD PLAINTIFF
SUING AS TRUSTEE OF NAROK MUSLIM WELFARE SOCIETY**

AND

**MOHAMMED AHMED 1ST DEFENDANT
ABDI YUSUF 2ND DEFENDANT
FATUMA MOHAMMOUD 3RD DEFENDANT
SUED AS DIRECTORS OF BILAL SCHOOL**

JUDGMENT

1. Mohammed Hassan Yunis, Abdillahi Mohamed Hussein, Mohammed Dahir Kahir sued as trustee of Narok Muslim Welfare Society have sued Abdi Yusuf, Mohammed Ahmed and Fatuma Mohammed being director of Bilal School. The plaintiffs claim that: -

At all material times, the plaintiff, the Narok Muslim Welfare Society was the lawful allottee of the parcel of land known as Plot Number 143 Block 11. The parcel of land was allocated to the plaintiff by the County Government of Narok. The part Development Plan was duly prepared and the process of issuance of all the title documents is underway.



2. The defendant entered upon the land upon and erected structure which they have been using as a school. The basis of the entry was a letter which the defendant claimed to have been authored by office bearers of the plaintiff.
3. The trustees of the plaintiff have never authored any letter creating a disposition over the said parcel of land. Any disposition over the parcel of land ought to have been preceded by a resolution of the members of the plaintiff followed by an instrument of the disposition executed by the trustee of the plaintiff and registered at the land's office. In the absence of any such disposition the entry of the defendant and the construction of structure in the premises constitutes trespass.
4. The defendant has been on occupation of the property since 2009. In the entire period the defendant has never paid any rent to the plaintiff.
5. In September, 2018, the plaintiffs reported the matter to the County Government of Narok and both parties were called for arbitration. The matter could not be resolved since the defendant insisted that it was in occupation on the basis of a conveyance in its favour by the office bearers of the plaintiff.
6. The County Government of Narok issued a notice to the defendant directing it not to open the school in January 2019 until the issue of ownership is resolved. However, the defendant has indicated to the plaintiff that it will open and run the school in spite of the ownership dispute.
7. The continued use and occupation of the land by the defendant without paying rent is prejudicial to the interests of the plaintiff and the plaintiff prays for orders of injunction to restrain the defendant from the continued acts of trespass.
8. This parcel of land, the subject matter of this suit is within the local limits of this court and the court has the jurisdiction to try and dispose of the matter.
9. The plaintiff prays for:-
 1. An order of eviction to remove the defendant together from the parcel of land known as Plot Number 143 Block 11 together with all the structure erected upon the said parcel of land.
 2. An order of injunction restraining the defendant, his agents, servants, employees or anyone acting at their behest from entering or remaining on the parcel of land known as Plot number 143 Block 11.
10. The defendant filed a defence and counter-claim whose gist is that the property belongs to the Narok Muslim Welfare Society and not the plaintiffs. That the trustees of the Narok Muslim Welfare Society are yet to be appointed in accordance with the societies' constitution. The defendant aver that the school is in occupation of the land vide a binding agreement between the society officials and the school. The defendants aver that they executed an agreement with persons who represented to them to be the officials of the society and that they were not expected to know the internal affairs of the society. The defendants claim that it was their efforts to acquire the land for the society but the same had not been developed for 24 months after acquisition hence risked forfeiture. The defendant aver that the plaintiffs are officials through a fraud.
11. The defendant counter claim for the loss of business due to the continued interruption. The defendant claim to have gotten into business through consent of the officials and have appreciated value of the land.



12. The defendant claim that it has spent 17 million Kenya Shillings on the land. The defendant prays for payment of Kshs17,000,000 as compensation, General damages for costs of business cost of the valuation report and costs of the suit and interest.
13. In the reply to defence the plaintiffs reiterates that they are the registered trustees of the society and have the powers to hold the properties in their names and sue or be sued in their names. That the defendant has agreed being a trespasser as he states that he entered into an agreement with people who alleged to be officials.
14. In its defence the counter-claim the plaintiff states that the defendant entry into the parcel of land was illegal and not supported by any disposition and therefore the defendant cannot claim any loss of business based on the act of trespass. The claim and investment was denied. The plaintiff prays that the counter-claim be dismissed with costs. In its reply the defence to counter-claim the defendant reiterates the contention of the counter-claim and states that Abdillahi Mohammed Hussen was one of the officials who consented to the lease and development and still purports to be a trustee and office bearer of the society and therefore estoppel to deny the same. The defendant in reply to defence the counter claim the defendant reiterated the conditions of the counter-claim and states that they were properly allowed to deal with officials of the society. The defendants deny being trespassers and that the society has never elected trustees.
15. When the matter came up for hearing the PW1 Mohammed Dahir Kahim a businessman in Narok relied on the witness statement dated November 6, 2019 and reiterated that they were suing as trustees.
16. According to the witness the defendants are operating a school illegally on the parcel of land known as Plot 143 Block II Narok that belongs to the plaintiffs. The plaintiff denied leasing the land to the defendant. The defendant are not members of Narok Muslim Welfare Society. The persons who allegedly leased the land to the defendant were with officials of the society.
17. On cross- examination he states that the school has been on occupation of the land and has developed the same. He states that the people who signed the agreement in 2009 had no authority to do so.
18. DW1 Ahmed Bashir Gele relied on his witness statement field on January 21, 2020 which was adopted as evidence in chief. He states that he was a founder of Narok Muslim Welfare Association. He registered the society 1979 but it has been engulfed in wrangles. The society acquired plot No 143 in Narok measuring 12.5 acres and allotment was made on May 27, 1996. They found a tender committee that allocated the land to Balel School. He signed the lease agreement on December 9, 2009m but was not a formal lease agreement.
19. DW2 Fatuma Mohammed the manager of the school relied on her statement filed on January 21, 2020 and another filed on November 18, 2019 and the bundle of documents. She states that the plot was allocated for a school and a hospital. They developed the school and were to run the same for 20 years. The agreement was signed by Ali Juma who was the claimant, Beshir the secretary, Abdallia the treasurer, the latter has turned against then. They have heavily invested in the land by constructing the school sinking a borehole.
20. DW3, Ali Juma relied on his statement filed on January 31, 2022 that was adopted as evidence in chief. DW3 has a chairman of the supreme council of Muslims and vice- chair of the inter-regional council Narok County. The witness statement that when he was chair of the society. He led a delegation to the late Hon Ntimama who gave then the land the subject of the dispute when he was official of the Society to society the society back school and authority to build a school on the land. On cross- examination he states that he is the member of the society and was one of the members who sourced the land on behalf of the society. They never agreed that the school pays rent. They allowed the school to occupy



the land and safeguard the same. They were allocated the land in 2001. They were allowed to occupy the school on December 9, 2001.

21. DW4 Emmanuel Karisa Kenga a forensic document examiner of more than 30 years' experience states that he received a letter of instruction from the Director of Balel School Narok in respect of a document for examination. The document that was being questioned was an agreement dated December 9, 2009 allegedly signed by Bashir Gele, Secretary of Narok Muslim Welfare Society. Ali Juma , Chairman and Abdhalii Mohamed , treasurer. In the process of simulation he compared the questioned signature as well as the known signature and reached a conclusion that the signature were by the same person.
22. The plaintiff submit that they have locus standi to institute the suit the members of Narok Muslims Welfare Society . The plaintiff's submits that the defendants are not in lawful occupation of the suit parcel of land as the land is owned by the plaintiffs. There is no lease or conveyance created in favour of the defendants.
23. The plaintiffs submit that the defendants have failed to produce an agreement that complies with the provisions of section 3 of the Law of Contract Act. According to the plaintiffs, the defendants have no authority to e on the suit land. The plaintiff submits that the defendant were offered land by people who had no authority to do so. The plaintiff submits that they are entitled to the prayers sought on the counter- claim. The plaintiff submit that no legal remedy or benefit can come from an illegal Act.
24. On his part, defense council submit that the defendant's entry was consented and was allowed to enter vide the letter dated December 9, 2009 that allowed them to A school. The plaintiffs are not in possession of the land but the defendants are hence there is no trespass. The defendant submit that the letter dated December 9, 2009 created a trust between the parties. According to the defendant the oral agreement created a trust hence section 3(3) of the laws of Contract Act is not applicable. The defendants submit that the defendant should be allowed to utilize the trust as per the letter dated December 9, 2019.
25. The defendants submit that the letters was signed by one of the officials Abdullahi Mohammed and therefore the other witnesses were bound. It was signed by Bashir Gele Ali Juma and Abdullahi Mohammed. The defendant rely on the principle of provision of Estoppel. It is agreed that Abudullahi Mohammed signed the consent letter dated December 9, 2009 which allowed the defendants to enter into the suit property and developed a school. The same plaintiff has sued for recovery. According to the defendants they are protected by the doctrine of pecuniary estoppel. The defendant submitted that the officials who signed the letter dated December 9, 2009 did so in the of trustees of the society. The defendant further argue that the permit for occupation under the con..... was not complied as the construction was concluded in 2015 and therefore 12 years would lapse in 2027.
26. I have considered the pleadings, evidence on record, and do find the following issues ripe for determination.
 1. Whether the plaintiff have locus standi to institute the suit .
 2. Whether the defendant are in lawful occupation of the property
 3. Whether the document dated December 9, 2009 created a trust between the parties
 4. Whether the doctrine of promissory estoppel applies to the defendants favour.
 5. Whether the letter dated December 9, 2009 binds the trustees.
 6. Whether the time for occupation starts running in 2015.



7. Whether the defendant are entitled to the counter-claim.
8. Whether the school should be evicted.

Locus Standi

27. The suit was filed by the plaintiffs as trustees of Narok Muslim Welfare Society. The plaintiffs though they did not produce evidence of being trustees the defendants admitted the averments by the plaintiffs that they are trustees of the Society. The defendant are therefore estopped from denying the averment. Order 13 rule 2 provides:-

"2. Judgment on admissions [Order 13, rule 2.]

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

Whether the Defendant are in Lawful Occupation of the Property

28. This court finds that the plaintiffs allowed the defendants to enter to property and to construction a school that is in operation todate. Section 3 of the trespass Act provides: -

"3. Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him

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The defendants had a written authority to enter the property and therefore it cant be said that they are trespassers."



Whether the Document Dated December 9, 2009 Created a Trust Between the Parties

29. This court finds that though there was no contract between the plaintiffs and the defendants the letter dated December 9, 2009 authorized the defendants to enter the land and construct a school. In the English case of *Yaxley -vs- Gotts* (2000) Ch 162 the court held:

“an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and section 2(5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon..”

30. I do agree with the defendant that the doctrine of constructive trust applies herein. The doctrine of constructive Trust was expounded upon in the case of *Twalib Hatayan & another -vs- Said Saggat Ahmed Al-Heidy & 5 others* (2015) eKLR

“Dealing with the first issue, according to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).” Under the Trustee Act, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property... Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England vol 16 Butterworths 1976 at pars 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.”

In the letter dated December 9, 2009, it was agreed.

Whether the Doctrine Of Promissory Estoppel Applies to the Defendants Favour

31. On the issue of estoppel, I do find that the plaintiff are estopped from relying on the letter dated December 9, 2009 as are of the officials of the plaintiff signed the letter. The doctrine of promissory estoppel stipulates:-

32. In conclusion, this court finds that the plaintiff are bound by the letter dated December 9, 2009. The construction of the school was concluded in 2015. I do find that the defendants are entitled to own the school for 18 years from 2015. The input of the above is that the defendants are entitled to run the school until 2027.



33. The upshot of the above is that the suit is dismissed with no orders as to costs. Parties however being of one religion and involving a second hearing I dismiss the suit and allow the defendant to continue with the business of a school. The counter claim is equally dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAKURU VIA EMAIL THIS 29TH DAY OF MARCH 2023

A O OMBWAYO

JUDGE

