



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT CASE NO. 149 OF 2016 (O.S)**

**FARAJALLAH MABYALE MURENGA**

*(suing on behalf of the estate of AROSE AKHUMASA KASSIM*

*pursuant to the letter of Ad-Litem dated 25<sup>th</sup> October, 2016*

*Succession Cause No. 43 of 2016) ..... APPLICANT*

**= VERSUS =**

**HAMSA BASHIR TOLOI**

**PHYLIS AKUMU TOLOI .....RESPONDENTS**

**ASMA MATSUKHU TOLOI**

**HAJI OCHIENG' TOLOI**

**AND**

**RAMADHAN MABIALE KASSIM**

**HASSAN MURENGA KASSIM .....INTERESTED PARTIES**

**BAKHARI WEKHOBBA KASSIM**

**J U D G E M E N T**

The Applicants commenced these proceedings vide the amended Originating Summons dated 8<sup>th</sup> November, 2016 and filed on the 9<sup>th</sup> of November, 2019, against the Respondents. The Summons were later amended on the 24<sup>th</sup> of October, 2019. The Applicant claims that he is the heir and legal representative of the estate of AROSE AKHUSAMA KASSIM and poses the following questions for determination:

a) Who are entitled to the following properties;

i) Busia Municipality Plot No. 7983/127;

ii) Busia Municipality Plot No. 7983/7;

iii) Town Council of Nambale Plot No. 7983/18;

iv) Koyonzo Plot No. 3;

v) Mayoni Plot No. 7; and

vi) Plot No. 10 formerly Land Parcel No. S. Wanga/Lureko/1481.

b) Whether vesting orders can be issued in respect of persons declared as entitled to the following properties:

- i) Busia Municipality Plot No. 7983/127;
- ii) Busia Municipality Plot No. 7983/7;
- iii) Town Council of Nambale Plot No. 7983/18;
- iv) Koyonzo Plot No. 3;
- v) Mayoni Plot No. 7; and
- vi) Plot No. 10 formerly Land Parcel No. S. Wanga/Lureko/1481.

c) Who should pay the costs of the proceedings?

1) The applicant through the amended Originating Summons sought to be awarded the following prayers:

**a) Busia Municipality Plot No. 7983/127 and Busia Municipality Plot No. 7983/7 are an entitlement of Arose Akhusama Kassim (now deceased) and proprietary interests thereof vests in his estate;**

**b) Town Council of Nambale Plot No. 7983/18, Plot No. 10 (previously Land Parcel No. S. Wanga/Lureko/1481), Koyonzo Plot No. 3 are an entitlement of Mohamud Tolo Kassim (now deceased) and proprietary interest thereof vests in his estate; and**

**c) Mayoni Plot No. 7 is an entitlement of Mohamud Tolo Kassim (now deceased) and Hassan Murenga Kassim and proprietary interest thereof vests in the estate of the late Mohamud Tolo Kassim and Hassan Murenga Kassim with each entitled to ½ share thereof.**

2) The Originating Summons was supported by the affidavit sworn on 8<sup>th</sup> November, 2016 and annexed thereto was a copy of the Grant Ad Litem, a copy of the certificate of registration of Mohammed Tolo Kassimu & Brothers and evidence affidavit from all the Interested parties. In the Supporting Affidavit, the Applicant swore in brief:

a) That his father Arose Akhusama Kassim died on the 16<sup>th</sup> of December, 1989 and at the time of his death he was a co-proprietor in a business enterprise by the name Mohammed Tolo Kassim & Brothers. That the other co-proprietors in the business were: Ramadhan Mabiale Kassim, Hassan Murenga Kassim, Bakari Wekhoba Kassim and Mohamud Tolo Kassim (deceased);

b) That all these co-proprietors were brothers and sons of Kassim Kulubi (deceased); and

c) That several real assets and properties were acquired under business enterprise including:

- i) Busia Municipality Plot No. 7983/127;
- ii) Busia Municipality Plot No. 7983/7;
- iii) Town Council of Nambale Plot No. 7983/18;
- iv) Koyonzo Plot No. 3;
- v) Mayoni Plot No. 7; and
- vi) Plot No. 10 formerly Land Parcel No. S. Wanga/Lureko/1481.

3) The Respondents filed a Replying Affidavit on the 13<sup>th</sup> February, 2017 sworn by Asman Machukhu Tolo on behalf of the 1<sup>st</sup> and 4<sup>th</sup> respondents and the family of the late Mohamud Tolo Kassim which affidavit swears:

a) That the summons and the prayers sought therein and the contents of the supporting affidavit attached are all sub judice or res judicata as the issues raised are the same issues that have been exhaustively raised by the Applicant on his own behalf and in behalf of their objectors in their objection proceedings in Busia High Court P&A 148 of 2008 which was consolidated with Kakamega High Court P&A 206 of 2011 which was heard and pending final ruling then;

b) That he has been issued with a grant of letters of administration to administer the estate of the Mohamud Tolo Kassim (deceased) who was also his father;

c) That the applicant has been fully represented by the objectors or the Interested Parties by the 1<sup>st</sup> Objector, who is the 3<sup>rd</sup> Interested Party here;

d) That the Mohamud Tolo Kassim (deceased) at the time of his demise left behind several properties which he personally acquired

with the efforts of his wives/widows among them plots mentioned by the Applicant herein;

e) That the identification and shares of all persons entitled to benefit and receive the said parcels and property had been proposed and agreed upon at the time I was intending to confirm the grant which was later objected to by the applicant and the interested parties;

f) That his deceased father constantly paid the rates and rents of properties before his demise and the Respondents kept on paying those liabilities after the demise of the deceased;

g) That the deceased's properties which include two parcels of land are subject to transfer by transmission in aforesaid succession cause are also registered on free hold basis and the acquisition and registration of the said properties was done individually by the deceased and the Applicant and the Interested Parties were all aware of this fact;

h) That Mohamud Tolo Kassim and Brothers was a mere trade name and it was not to the effect and extent that the Applicants father and the Interested Parties who were his brothers had beneficial interest to what he owed during his life as the applicant;

i) That if the said property and especially the plots mentioned in the summons were for the said joint venture as the interested parties may like the court to believe, then the said property would have been registered in the joint names of the deceased and the rest of the proprietors as indicated in the said joint venture ship;

j) That the Applicant's father and his interested parties have their own properties including land and they cannot purport to benefit thrice from their own property as well as his deceased's property;

k) That it is true that the Applicant's father and the Interested Parties have been peacefully using the plots herein but if they are occupying any plot currently then they are doing so forcefully without consent of my family members; and

l) That the Applicants are using their land and farms for growing crops ad sugarcane which sustains their livelihoods.

4) The Respondents filed a Further Affidavit on the 8<sup>th</sup> of October, 2019 in which he swore that the partnership was solely for carrying out specific businesses and where there was any intention to have any property or business to belong to partnership there is documentation to that effect as follows:

a) Supermarket Business in Mumias Sugar Company;

b) Tractor KCY 606;

c) Koyonzo Jaggery;

d) Nissan Junior; and

e) Bedford Lorry KKT 747.

5) During the hearing which began on the 11<sup>th</sup> of March, 2020, the Applicant, **FARAJALLAH MABYALE MURENGA** testified as **PW1**. He stated that he brought the suit on behalf of his father, Hamisi Akhusama Kassim's estate. He adopted his statement made through the Supporting Affidavit dated 8<sup>th</sup> November, 2016. He continued in evidence that he has a clan relationship with the Respondents: the 1<sup>st</sup> Respondent is his cousin, the 2<sup>nd</sup> Respondent his wife and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are his cousin being sons to his uncle Tolo Kassim while the Interested Parties are brothers of his father. That the joint business venture was what was used to sustain them and that when his father died **PW1** inherited his place of doing business.

6) **PW1** stated further that the property acquired by the business venture was registered under the name of Mohamud Tolo Kassim and brothers and these include: Plots No. 7983/127, Busia Municipality 7983/7; Nambale County Council Plot No. 7983/18, Plot No. 3 Koyonzo; Plot 7 Mayoni and Plot 10 S. Wanga/Lureko/1481. That all these plots were purchased jointly. He produced copies of bank cheques, rate receipts and a receipt paid to the Registrar all in the name of Mohamud Tolo Kassim & Brothers and demand notes for rates all addressed to the business. That together with his brothers from Akhusama Kassim, they live on plots 7983/127 and 7983/7 which he says his father has stake in. He stated further that Mohammed Tolo has a plot whose children are living on while Mabyale Kassim, Hassam and Bakari all have their portions. He concluded by requesting this Court to grant him the prayers in the amended Originating Summons dated 24<sup>th</sup> October, 2019.

7) Upon cross examination by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, **PW1** stated that although he did not know whether the business was registered as a company or not but all he knows was that it belonged to brothers. That although in paragraph 12 of the Supporting Affidavit he swore that the business could not acquire properties in its name, it was possible that each of the brothers could acquire the properties in their personal names. He stated further that Mohamud Kassim Tolo died in 1998 and some receipts had been issued in his name but after he died, they were issued in the business name. That in 1998 they could apply for lease in the joint names hence the reason the letters were done to give the correct names to be indicated on the lease.

8) **PW1** further stated that he claims Plots 127 and 7 because they were the plots that his father was using. That the business' properties have not been shared. He concluded by stating that before 1998 they were the ones who were paying rates and further that if there is any property not in the name of the business then it does not belong to the business.

9) The 2<sup>nd</sup> Respondent cross-examined **PW1** and he reiterated that Mohamud Toloï has never lived on plot no. 127 and they are the ones who have been living on the said land.

10) **PW2** was **GABRIEL**, the Land Rates Officer at the County Government of Busia. He confirmed that he has record of L.R No. 7983/127, 7983/07 and 7983/18 all within Busia Municipality which are within his jurisdiction. He stated that according to all the registers for plot no. 7983/7(2014-2017, 2011-2013, 2007-2012 and 2005-2009) the owner of the parcel is Toloï Kassim & Brothers. With regards to Plot No. 7983/127, **PW2** stated that according to the registers for the plot (2005-2009, 2007-2010, 2011-2014, 2014 to date) it belongs to Toloï Kassim & Brothers. **PW2** continued in evidence that the 1987 register for Plot No. 7983/18 the plot was registered in the name of Toloï Kassim & Brothers.

11) **PW2** stated further that Plot No. 7983/127 was captured in the valuation roll in the name of Toloï Kassim and brothers was added. He observed that there were several alterations on page 4 of the valuation roll. He explained that alterations can be done if after the valuation is done it is altered before it is entered into the register and sometimes an officer has to visit the ground to cross check to determine the rightful owner. He concluded by stating that although he could not tell the reason for the alterations as he was not in the registry at that time, what is entered in the valuation roll should tally with what is in the register.

12) Upon cross-examination by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, **PW2** elaborated that between a valuation roll and rates register, the valuation roll is prepared first because rates cannot be changed before valuation. That once the roll is prepared one can make alterations with a pen and the alterations done on the valuation roll were done by the people in that office by then by counter signing. He stated that he did not know whether there were rates paid before 2005. He also mentioned that plots no. 306-311, which are also in the register, are under investigation by the EACC. He concluded that the County issues letters of acceptance which plot owners receive. **PW2**'s evidence marked the close of the Plaintiff's case.

13) The Defence hearing commenced on the 7<sup>th</sup> of April, 2021 with **PHYLIS AKUMU TOLOI** testifying as **DW1**. She stated that she was 80 years old and was the wife to Mohamud Toloï who in turn had 5 brothers: Aloice Kassim, Mohamud Toloï, Oliare, Mrenga and Bakari. That they were all doing business as brothers and she heard that they had businesses in Busia as well. That her husband showed her 5 acres of land where she has stayed for long in peace and harmony and that the land does not belong to her brothers in law.

14) **DW1** proceeded to adopt her witness statement dated 8<sup>th</sup> November, 2016 where she stated that:

15) Upon cross-examination by the Applicant, **DW1** reiterated that they have lived in harmony even when her husband died and the burial was peaceful. That it was only after the burial of her husband died that dispute arose yet he had already demarcated the land he gave her. She stated that she was the first wife and she knew Asam Toloï who was a son to her co-wife. She stated that she was the only one who lived on the land which her husband demarcated and none other.

16) **ASMAN MACHUKU TOLOI** testified as **DW2**. He stated that the Applicant was a son of his father. That plots no. 7983/127 and 7983/7 belonged to his father Kassim Toloï whose estate he is a co-administrator. That Arose Toloï could not developed the two plots as he died in 1989 and the properties were developed in 1999. He confirmed the existence of a business between the brothers but that they all registered property in their individual names. With regards to the valuation roll, he stated that the "and brothers" was added in 1999 during the extension of the lease. He produced an allotment letter, an extension of lease, valuation roll 1994 and 1986 for both properties, a lease agreement and demand notices for rates issued to Toloï in 1984 all which he stated was evidence that the two plots belonged to his father

17) Upon cross-examination by the Plaintiff, **DW2** stated that his father died in 1989 and that **DW1** was his step mother. He confirmed that Salim Toloï was his step brother and that the allegations in paragraph 4 of his affidavit are denied. He reiterated that he was aware that a business venture existed between the brothers. He stated that the letters dated 26<sup>th</sup> June, 2018 and that dated 22<sup>nd</sup> November, 2000 produced by the Applicant are all fraudulent as they were drawn after the death of his father. With regards to the extension of the lease, **DW2** stated the certificate of lease was issued on the 16<sup>th</sup> of May, 2011 by which time Toloï Kassim had already died. He stated that his uncles were tenants on the suit land although he could not state how much rent they were paying. That **DW1** was given 3 acres of land, he was given land number 969 Nambale and Plot Number 7 and parcel Number 127 was given to Kassim after the death of their father. He concluded by stating that as the family of Mohamud in regard to sharing the properties.

18) The 2<sup>nd</sup> Defendant also cross-examined **DW2**. He stated that his father had more than four brothers who had a joint business venture in the name of Mohamud Toloï & Brothers.

19) On cross-examination by the Interested Parties, **DW2** reiterated that his father did joint business together and the property acquired jointly was 1208. That Hassan is occupying plot No. 7 in Mayoni while Plot No. 3 was occupied by Hassan's daughter. That Bakari was living in his land in Namutungu, Arose lived on his land in Mumias while Arose's sons are occupying the suits plots 7983/127 and 7983/7 and Rashid and Ibrahim lived at the back of the plots. That there was no dispute between his father and his uncles. On re-examination, **DW2** stated that a business name cannot own property and as such the business could not have bought the plots.

20) **DW3** was **HASSAN MURENGA KASSIM** who testified on behalf of the Interested Parties. He testified that he is 88 years old and that together with his brothers: Hamisi, Arose, Mohamud, Bakari, Ramadhan and Hassan started a business Mohamud Toloï Kassim & Brothers and jointly bought one 5-acre plot in Koyonzo where they put up a jaggery. That the suit plots and the plot in Nambale were also purchased jointly and he urged the Court to find that the suit plots belong to 5 people.

21) Upon cross-examination by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, **DW3** stated that although they registered a joint business name in the name of Mohamud Toloï & Brothers and the certificate had 5 (fives) names. He reiterated that the business name bought land in Koyonzo and put up a jaggery there but it was registered in the one of the proprietor's names. He confirmed that in his statement he said that Mohamud was registered as the manager of the jaggery. He concluded by stating that they did not have any properties bearing the name of the five brothers as all the properties only had one Title. **DW3**'s evidence was applied as the evidence of all the Interested Parties.

22) The 3<sup>rd</sup> Respondent filed his submissions on the 3<sup>rd</sup> June, 2021. He submitted on the following issues: whether the 3<sup>rd</sup> Respondent's father the late Mohamud Tolo Kassim alias Kassim is both legal and the registered owner of the properties in issue; whether parties are bound by their own pleadings; whether a registered business name can own a property; whether a deceased person can back to life to purchase, own or develop a property; whether the applicant bought land and or presented before this Honourable Court any documents to prove ownership of the listed; whether the occupation of a property amounts to ownership; and whether a resulting trust or a constructive trust would arise in this particular suit.

23) He submitted that the Applicant has not provided this Court with evidence any documents to prove that the suit properties belonged to his father and that no one can acquire ownership of property by simply occupying the same. He submitted further that a business name cannot own property and all the properties were owned by Mohamud Kassim Tolo alias Kassim Tolo. With regards to the issue of trust, the 3<sup>rd</sup> Respondent submitted that a constructive trust cannot be said to have arisen in this case as the Applicant has not presented the Court with documents to prove that Mohamud Tolo Kassim acquired property illegally. He relied on the following cases: **Kiplangat Shelisheli Mutarakwa vs. Joseph Rotich Kones (2014) eKLR**, **Alloys Moseti Mataya T/A Diplo General Enterprises vs. Kisii Hotel Limited & the Land Registrar Kisii Central (2011) eKLR**, **Maurice Ooko Otieno vs. Mater Misericordiae Hospital (1999) eKLR**, **Daniel Ooko Otieno vs. South Nyanza Sugar Co. Ltd (2017) eKLR**, **Propwa Company Limited vs. Justus Nyamo Gatondo (2017) eKLR**, and **Margaret Njeri Wachira vs. Eliud Waweru Njenga (2017)**.

24) The Applicant filed their submissions on 15<sup>th</sup> September, 2021. He submitted that it is not disputed by the parties that his late father and the late Mohamud Tolo Kassim were brothers and they operated a business under the name Mohamud Tolo Kassim & Brothers in the early 1960s. He responded to the issues raised by the 3<sup>rd</sup> Respondent and in particular that the profits of the business were used to purchase the properties and that there are no documents to confirm how the said properties were acquired and neither did the 3<sup>rd</sup> Respondent adduce any to prove ownership. With regards to the issue of trust he submitted that the entity and the persons were one and the same thing and as such the issue of a resulting trust cannot be said to have arisen. He relied on the cases of; **the Malawi Supreme Court of Appeal, Malawi Railway Ltd vs. Nyasule (1998) MWSC 3** and **Daudi Kiptugen vs. Commissioner of Land and 4 Others (2015) eKLR**.

25) I have considered the parties' pleadings, submissions and the applicable law. The issues, which in my opinion arise for the Court's determination are:

*a) Whether or not the suit properties were acquired by Mohamud Tolo Kassim & Brothers?*

*b) Whether Mohamud Tolo Kassim & Brothers was holding the property in trust for the beneficiaries of the proprietors?*

*c) Who bears the costs of this suit?*

26) All the witnesses have confirmed that the Mohamud Tolo Kassim & Brothers was a business whose proprietors were 5 brothers. The business was registered on the 11<sup>th</sup> of December, 1962 under the provisions of the Registration of Business Names Ordinance, 1951, to carry out business at Koyonzo Market and a branch at Plot No. 26 and 11 at Busia Market. The proprietors of the business as per the certificate were ***Mohamud Tolo Kassim Kulubi, Hamis Arosi, Bakari Wekhoba Wesonga, Ramadhani Mapyale and Hassani Musenga***.

27) On the first issue of whether or not the business acquired the suit properties, PW1 and the interested party giving evidence as DW3 testified to the fact that the business acquired the suit properties and had them registered in the name of Mohamud Tolo Kassim on behalf of Mohamud Tolo Kassim & Brothers. In his Further Affidavit the 3<sup>rd</sup> Respondent at paragraph 10(i) lists the properties which in his opinion were acquired by the business but not the plots in dispute.

28) Several documents were produced in evidence and which the court has had occasion to analyse. The copies of receipts filed in court by the Plaintiff and the interested parties spanning the period from the year 2004 to 2011 for payments made to Busia County Council in respect the suit properties; L.R 7983/7, 7983/127 and 7983/18, were issued in the names of Tolo Kassim & brothers except for the site value receipts dated 19<sup>th</sup> April 1999 and 8<sup>th</sup> May 2000 issued to Tolo Kassim for plot number 127. The plaintiff also produced an undated application for a plot dated made by Tolo Kassim and Bros to the District Commissioner, Busia and stated that they were all registered in the name of Tolo Kassim & Brothers.

29) Further to the receipts, the demand notes for rates from plot 127 and No. 7 dated 31<sup>st</sup> March 2009 & 21.01.2013 respectively are addressed to Tolo Kassim & Brothers. Warning notice from the Water Development Department dated 27<sup>th</sup> June 1972 addressed Tolo Kassim & brothers. The letter dated 12<sup>th</sup> Sept 1996 from Busia Municipal Council giving consent for extension of lease for plot 7983/127 and 7983/7 was addressed to Mohamud Tolo Kassim & Brothers. The flow of documents clearly brought out the intention of the parties that the two properties were owned by the partnership Tolo Kassim & brothers.

30) The Respondent annexed a copy of lease issued to Tolo Kassim for Busia Municipality/ parcel 7 presented for registration on 16<sup>th</sup> May 2011. Included in the document annexed to the replying affidavit was a receipt for payment of site value rates for plot no 7 issued to Tolo Kassim and Brothers; demand note for rates dated 5<sup>th</sup> Jan 2009; a letter dated 17<sup>th</sup> October 2000 addressed to Tolo Kassim confirming that the application for extension of lease had been approved. The Respondents further produced a valuation roll which showed Plot no 7 in the name of Tolo Kassim only while plot no. 127 as Tolo Kassim & brothers.

31) The Respondents further annexed letter of allotment for parcel no 7 dated 1<sup>st</sup> August 1965 issued in the name of Tolo Kassim only. The plaintiff also called an officer from the County Government of Busia who produced valuation rolls for the two plots that showed the ownership according to their records of the two plots no 7 & 127 as Tolo Kassim and brothers. The Respondents were under a duty to show by way of evidence if the allotment in respect of plot number 7 was issued to their father in 1965 then why were records held with the municipal council and receipts issued by the same body bore the names Tolo Kassim & Brothers. In my view the burden shifted to him once the Plaintiff had demonstrated that indeed the two plots were for Tolo Kassim & Brothers.

32) PW1 stated that the properties registered in the name of Mohammed Toloï Kassim were bought using the business' monies hence making the properties business properties. He stated that their family had been living on the suit properties since before the death of his father. DW2 also confirmed that the Applicant was indeed living on the land but as tenants.

33) Section 7 of the Partnerships Act provides thus:

**“Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner”**

34) The Respondents have submitted that the business name in itself could not purchase any property and as such the suit properties could not belong to Mohammed Toloï & Brothers. The parties are all in agreement that the business owned only one parcel of land in Koyonzo. From the Defendant's list of documents, the title of the property is attached and it is in the name of Mohamud Toloï Kassim and not the business name. Admitting to one parcel being held in trust and the rest not is farfetched. The valuation rolls produced by PW2 confirm that the suit parcels were recorded in the valuation rolls as belonging to the business name. PW2 also confirmed that the rates and rents were paid by the business name and this was proved by the various receipts from as early as 19<sup>th</sup> April, 1988 to the 4<sup>th</sup> of May 2016. There were cheques also issued by the partnership towards payment made to the municipality. The Respondents did not refer this court to a provision of the law that barred a partnership from owning a property. The Respondents underlined a statement in the case of **Alloys Moseti Mataya T/A Diplo General Enterprises vs Kisii Hotel Ltd & Ano. ELC Cause 149 of 2020**; *“I am in agreement with the 1<sup>st</sup> defendant that Diplo General could not hold property in its own name and more so before it was registered”*. In this case, Toloï Kassim & Brothers was already registered.

35) With regards to the second issue, on whether Mohamud Toloï Kassim & Brothers was holding the property in trust for the beneficiaries of the proprietors, all the parties have submitted on the question of trust. The 3<sup>rd</sup> Respondent submitted that a resultant trust can not be said to have occurred as it would only arise in the circumstances that the transferor did not intend to confer any beneficial interests to the transferee but in this case the transferor was the County Government. He submitted further that a constructive trust on the other hand could not be said to have arisen as it is only a remedy when a party acquires property illegally.

36) *Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 48 at paragraph 597* defines a resulting trust as:

*“A resulting trust is a trust arising by operation of law:*

- i) where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or*
- ii) Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or*
- iii) Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”*

37) While discussing the burden of proving trust, the Court of Appeal while in the case of **Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Centre [2018] eKLR** stated that:

*“Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley – Civil Appeal No. 75 of 2016 (unreported). It was upon the respondent to establish that it was the parties' intention that the appellants would purchase and hold the suit parcels in trust for it. Did it do so?”*

38) Further the Court of Appeal in the case of **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others [2015] eKLR**, while dealing with the issue of trust stated as follows:

*A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. 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. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury's Laws of England supra at para1453*). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...*

39) The doctrine of trust though not a new concept cannot be imposed on parties. However, a party has to produce sufficient evidence to enable the Court imply a trust. The Applicant has produced rates and rents receipts that show that the business name paid the rates and rents for the suit properties. PW2 confirmed that in the valuation roll the properties were registered in the business name. This in my opinion implied that the lease issued in the sole name of Mohamud Toloï Kassim does not take away the responsibility that he holds the properties in trust for all the partners in the business. As stated earlier, the one property that all parties agree was owned by the business has its title registered in the name of Mohamud Toloï Kassim and not the business name.

40) This admission excludes the Defendants from denying the possibility that the suit properties could have been registered in the name of Mohamud but he was holding them in trust for all the business partners as per the provisions of section 7 of the Partnerships Act. All the witnesses confirmed that the Applicant's family have been residing on some of the suit properties without paying rent thus corroborating the averment on a trust relationship.

41) In upshot of the foregoing evidence and analysis I am convinced that the Applicant and the Interested Parties proved their case beyond the balance of probabilities and that the suit properties though registered in the name of Mohamud Tolo Kassim are being held in trust for the business name and as such all the partners in equal shares. I do not agree with the Applicant's claim that they are exclusively entitled to L.R nos Busia Municipality 7983/127 and 7983/7. Further, the claim before the court was not for distribution and or sharing of the assets of the business.

42) Consequently, I enter judgement for the Applicant only on the first prayer of the amended Originating Summons that:

**a. That the estate of Arose Akhusama Kassim (now deceased) has a share in Busia Municipality Plot No. 7983/127 and Busia Municipality Plot No. 7983/7**

**b. Each party to meet their respective costs of the suit.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 19TH DAY OF OCTOBER, 2021.**

**A. OMOLLO**

**JUDGE**