



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL CAUSE NO. 45 of 2014 (O.S)**

**IN THE MATTER OF: THE ESTATE OF KULSUMBAI NAZARELI JIWA (DECEASED)**

**AND**

**IN THE MATTER OF: KULSUMBAI NAZERALI TRUST**

**AND**

**IN THE MATTER OF: TITLE NO.MOMBASA/BLOCK XXVIII/22**

**BETWEEN**

**YUSUF JIWA.....1<sup>ST</sup> PLAINTIFF**

**NAUSHAD JIWA.....2<sup>ND</sup> PLAINTIFF**

**AND**

**HUSSEIN NAZERALI JIWA.....1<sup>ST</sup> DEFENDANT**

**ROSEMIN NAZERALI JIWA.....2<sup>ND</sup> DEFENDANT**

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

**Introduction**

1. The Plaintiff moved this Court by way of an Originating Summons dated the 20<sup>th</sup> September 2012. In the Originating Summons, both parties filed a single statement of agreed issues dated and filed on the 27<sup>th</sup> July 2016 and they have framed the following issues for determination.

*i. Are the Plaintiff' grandchildren of the Settlor*

*ii. Are the plaintiff's entitled to 1/3<sup>rd</sup> of the Kulsumbai Nazerali Trust by virtue of being grandchildren of the settlor.*

*iii. Who were/are the trustees of the Kulsumbai Nazerali Trust and, were they validly appointed.*

*iv. Are the current trustees at fault for failing to sell the property MOMBASA/BLOCKXXVIII/22 and did they mismanage the trust?*

*v. How is the Jiwabai Dahibai Sharifbhai, Hirjibhai and Jerajbhai Memorial Trust Orphanage connected to the Kulsumbai Nazerali Trust, is it still in existence, who are its trustees and should it be wound up?*

*vi. Are the Plaintiffs fit and proper persons to be the trustees of the Jiwabai Dahibai Sharifbhai, Hirjibhai and Jerajbhai Memorial Trust Orphanage?*

2. According to the Plaintiffs' Originating Summons, they are grandchildren of **Kulumbai Nazerali** (herein after referred to as the '**settlor**') and as a result they are beneficiaries of the settlor's estate as provided under a deed of settlement dated 27<sup>th</sup> July 1956.

3. The settlor and two of her daughters **Mariambai** and **Kaniza Fatma** were to benefit from the trust for 21 years and if the settlor died within the 21 years, then the trustee would collect her share and apply the same in their discretion towards the maintenance, advancement and benefit of the sons, daughters, grandsons and grand-daughters of the settlor excluding her two daughters.

4. The settlor died in 1983 and the Plaintiffs contend that the trustees have failed to abide by the explicit instructions and wishes of the settlor and they have failed to keep true, proper and correct account of the trust. On those complaints the Plaintiffs pray that the originating summons be determined in their favour

#### **Defendant's case**

5. The Defendants filed an Affidavit in Reply to the originating summons sworn by Aun Jiwa on the 19<sup>th</sup> November 2015 and filed on the 21<sup>st</sup> January 2016 and deponed that it's true that the plaintiffs are grandchildren of the settlor but they are not beneficiaries of the settlor's estate, a trust was created by the settlor on the 27<sup>th</sup> July 1956 and it was for the benefit of the settlor and her two daughters **Mariambai** and **Kaniza Fatma**. After the demise of the settlor, the Plaintiffs can only become beneficiaries of the settlor's share at the discretion of the trustees upon a condition that they are in absolute need of income in the opinion of the trustees.

6. Pursuant to the directions given by the Court, the matter proceeded for hearing by way of oral submissions even though the Plaintiffs and the Defendants did file written submissions on the 27.6.2017 and 20.9.2017 respectively. Those submissions as expected dwell on what interpretation each side prefers to be given to the terms of the deed of settlement.

7. Having read the affidavits filed by parties, the following facts are not in dispute:-

*i. The plaintiffs are the grandchildren of the settlor.*

*ii. The settlor created a trust in respect of plot no. 22/xxviii/Mombasa on the 27<sup>th</sup> July 1956 and appointed (1) Nazerali Jiwa, (2) Mohamedali Nazerali Jiwa and (3) Hussein Nazerali Jiwa to act as the founding trustees.*

*iii. The trustee was to collect income from plot no. 22/xxviii/Mombasa for 21 years and was to divide the net income in three equal shares between the settlor and her two daughters and on the death of the settlor within the 21 years, the trustees shall apply the settlor's share which was 1/3<sup>rd</sup> of the trust in absolute discretion as may be necessary from time to time for or towards the maintenance advancement and benefit for the sons, daughters, grandsons and grand-daughters of the settlor excluding Mariambai and Kaniza Fatma.*

#### **Submissions**

8. The Plaintiff's Counsel submitted the Plaintiffs and the 1<sup>st</sup> Defendant are grandchildren of the settlor and the property subject to the trust is **plot no. 22/XXVIII/MOMBASA**.

9. The Counsel further submitted that 21 years having lapsed in the year 1977, the trust property was due for sale, and that after that date the trust was being perpetuated contrary to the wishes of the settlor and they proposed that the said property be sold as per the settlor's wishes.

10. The Plaintiff's Counsel submitted that under clause 8(c) of the deed of settlement, if the grandchildren were not in need then a 1/3<sup>rd</sup> (settlor's income) would go to an orphanage to be established. The Plaintiffs were appointed as trustees of the orphanage set up but they lack funds to run it.

11. The Plaintiff's Counsel further submitted that no account has been rendered to the beneficiaries ever since the terms of the trust lapsed as a result they pray that the trust be dissolved, the originating summons be allowed and the trustees be made to account for the proceeds of the trust.

12. The 1st Defendant, **Aun Jiwa**, acting in person, submitted that the orphanage trust was established in 1953 with a capital of Kshs. 400,000/= and in 1967, three trustees sold off one of the orphanage trust properties at a loss of Kshs.40,501/= and the next property was sold in 1991.

13. The 1st Defendant also submitted that the wishes of the settlor cannot be implemented because the settlor changed her wishes during her lifetime and the reversionary interests have been destroyed and they are willing and ready to give gross annual income from the time they took over in the year 2003 which is just under Kshs.2,000,000/=

14. **Mrs. Moolraj** Advocate for the other Defendants submitted that the Plaintiffs are not entitled to 1/3<sup>rd</sup> of the estate income unless they show they are in need of the funds for their advancement and benefit. There is no evidence that they are in need of funds. She further submitted that the three trustees were appointed and registered as proprietors of the subject plot but the Plaintiff's father was retired as a trustee. In addition, it was submitted that the deed of settlement allowed for removal and replacement of trustee and all the deeds of appointment were lodged and registered against the title.

15. **Mrs. Moolraj** submitted that the subject property was not sold due to intermeddling by the Plaintiffs' father who challenged the

ownership of the property by the trust and he filed a suit alleging to be the owner of the subject property but the suit was dismissed in the year 2005 for want of prosecution, He had further lodged a caution over the property alleging purchaser's interests but the persons alleged to have sold to him denounced the sale and the caution was removed by a ruling by the Land Registrar dated 23<sup>rd</sup> January 1985.

16. The Counsel further submitted that the Plaintiffs have sought the 1/3<sup>rd</sup> of the share of the trust be given to them instead of the orphanage and that the Plaintiffs purported to make the subject property part of their father's estate yet their father never bequeathed the subject property to them. In addition it was submitted and contended that the orphanage owns property in Nairobi which the Defendants have no objections to selling but the Plaintiffs are resisting.

17. On submissions that the trustees be removed, **Mrs. Moolraj** submitted that the Plaintiffs did not plead removal of trustees and therefore the same cannot be granted. She relied on the case of **GALAXY PAINTS COMPANY LIMITED vs FALCON GUARDS LIMITED [1999] eKLR** and prayed for the Originating summons to be dismissed with costs.

18. **Mr. Gitonga** counsel for the Plaintiff submitted in response to the Defendants submissions that the duty of this Court is to interpret the wishes of settlor and that the Plaintiffs have not furnished any evidence to show that they deserve a portion 1/3<sup>rd</sup> for their benefit and advancement, all they want is for the trust to be dissolved to the benefit of the beneficiaries and to meet the wishes of the settlor.

## **DETERMINATION**

### **Issues for determination**

*i. Whether the plaintiff's suit is time barred*

*ii. Whether the trustees at fault for failing to sell the property MOMBASA/BLOCKXXXVIII/22 as per the Settlor's wishes.*

*iii. Whether the current Trustees were validly appointed and should accounts of the trust be rendered?*

### **i. Whether the Plaintiff's suit is time barred**

19. Before I go to the merits of the matter, the Defendants have raised an objection on the competence of the suit while contending that the suit when filed was time barred due to statutory limitation period in respect of breach of trust having been brought 30 years after the alleged breach. That submission was never responded to by the Plaintiffs but that alone does not relieve the Court of its duty to determine that matter in accordance with the law. I have taken that mandate and had regard to the provisions of **Section 20(1), Limitation of Actions act, Cap 22, Laws of Kenya** which provides as follows:

*“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under trust, which is an action:-*

*(b) to recover from the trustee property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”*

*Sub-section 2 of the same section reads as follows:-*

*“Subject to Sub-section (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period or limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date of which the right of action occurred Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”.*

20. In **Stephens and six others v. Stephens and another 1987 K.L.R 125**, the Court of Appeal considered such an issue and held that ‘the period of limitation prescribed in the *Limitation of Actions Act Section 20 (1) (b)* does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use’.

21. It is this Court's finding that the issue of limitation does not arise in this case. Having looked at **Section 20 (1) and (2) of the Limitation of Actions Act** as well as the pleadings herein, this suit falls under **Section 20 (1) of the Limitation of Actions Act** for which there is no period of limitation.

### **ii. Whether the trustees at fault for failing to sell the property MOMBASA/BLOCKXXXVIII/22 as per the Settlor's wishes.**

22. In ***Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR***, the Court examined and stated the law on trusts as follows:-

*“According to the Black's Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as*

*“. 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..."*

23. The Plaintiff argued that clause 5 and 7 of the deed of settlement gives the trustees discretion to use the settlor's share of the income of the trust toward their maintenance and advancement if in the opinion of the trustee they are in absolute need of the income and that the trustees have failed in their duty under the deed of settlement since they have not sold the property so as to deal with the proceeds as per the settlor's wishes.

24. The Defendant in reply argued that the Plaintiffs are amongst 42 grandchildren of the settlor and to give priority to the two Plaintiffs would put other beneficiaries to a disadvantage and that would be in breach of the trustees' obligation in the deed of settlement which requires the trustees to exercise their discretion and opinion judicially and failure would be a breach of the fiduciary duties as trustees. I accept the Defendant's position and that argument that the Plaintiff's entitlement to the trust only arises after happening of a specific event. In my finding, clauses 5 & 7 of the Deed of Settlement were only applicable for the period limited by the settlor of 21 years. That period has since long passed and the benefits to be enjoyed during the period must be deemed to have lapsed with the period. For that reason I do find that there are no benefits the plaintiff can pursue and be granted once the period lapsed. In any event any benefits to the beneficiaries under clause 7 were made subject to the sole discretion of the trustees. Here no evidence has been led that the court needs to supplant its discretion for that by the trustees.

25. The only clause the Plaintiffs can seek recourse to is clause 8 c of the deed of settlement which provides that 1/3<sup>rd</sup> of the net sale proceeds and accumulations shall be paid to the sons, daughters, grandchildren excluding **Marimbai** and **Kaniza Fatma**. That clause provides:-

***8 (c) One –third of the net sale proceeds and accumulations shall be paid to the sons, daughters, grandsons and grand-daughters excluding the aforesaid daughters Mariambai and Kaniza Fatma if in the absolute discretion and opinion of the trustees that they are so in need for their advancement and benefit. If the trustees in their discretion are of the opinion that the said sons, daughters, grandsons and grand-daughters are well provided for and it is not essential to apply one- third share in the sale proceeds of the Trust Property for their benefit and advancement then, the said one –third share shall be paid to the Jiwabhai, Dahibai, Sharifbhai, Hirjibhai and Jerajbhai Memorial Trust Orphanage absolutely.***

26. This Court entertains no doubt that the settlor intended in very plain and unambiguous words that the trustees sell the trust property after twenty one years and apply the proceeds thereof in the prescribed manner. As worded the above clause does not envisage a situation where the property is held by the trustees in perpetuity. They must sell and after sale exercise discretion whether any of the grandchildren is in need or well provided for to be undeserving of the provision. There is no hiatus left for any interpretation by the Court. The property, I do find, is due for sale and proceeds applied in accordance with the wishes of the settlor. I therefore do find that the trustees in continuing in office without executing their mandate under clause 8 have not acted in accordance with the wishes of the settlor and must now comply with those wishes.

### **iii. Whether the Plaintiffs have been subjected to high rents.**

27. There are other questions raised by the Plaintiff over their occupation of the trust property which I do consider should not have been a dispute here for I take the view that the property was vested in the hands of the trustees and anybody who opts to stay there must say as a tenant with obligation to pay rent since there was no right under the deed of settlement for any beneficiary to use the property for their accommodation. Once one takes the status of a tenant one must be prepared to negotiate the terms of such tenancy with the trustees. It thus cannot be a valid dispute that the plaintiff say they are subjected to high rents by the trustees when the settlor vested on the trustees to let and determine the rent receivable.

### **iv. How is the Jiwabai Dahibai Sharifbhai, Hirjibhai and Jerajbhai Memorial Trust Orphanage connected to the Kulsumbai Nazerali Trust, is it still in existence, who are its trustees and should it be wound up?**

28. This Court finds that there being an application to wind-up **Jiwabai Dahibai Sharifbhai, Hirjibhai and Jerajbhai Memorial Trust Orphanage** in civil suit no. 71 of 2017 OS. I believe the issues of the said orphanage trust will be best addressed in the said suit.

### **iv. Whether the current Trustees were validly appointed and should accounts of the trust be rendered?**

29. The last issue I think I must deal with is the issue of accounts for the trust property being rental income which has come to the possession and control of the trustees as such trustees. By virtue of their office, and I must say I do consider them validly appointed, the defendant have an overriding duty to render accounts as and when requested. Now that there was no indication that there would be any difficulty in rendering accounts, I do order that such accounts are due. However having said that the property be sold.

30. I do make the following orders:-

**a) In accordance with the wishes of the settlor, let the trust property Known as Mombasa/block/XXVIII/22 be valued and sold at the best available price by way of public auction within 90 days from today.**

**b) Within 45 days from the date hereof, let the trustees file a true and accurate accounts regarding the financial affairs of the trust and to serve copies thereof upon all the parties to this suit.**

**c) Upon sale, let the proceeds of such sale and the accumulations from income in the hands of the trustees be applied by the trustee in terms of clause 8 of the deed of settlement.**

**d) On account of the fact that all the parties are related and connected to the trust, I order that each shall bear own costs**

**DATED and DELIVERED at MOMBASA this 31st day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**