



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 624 OF 2011

FR. SANJEY KIZHAKKINEDATH PLAINTIFF

- VERSUS-

- 1. KHADHIJA ARUBAINI.....1ST DEFENDANT**
- 2. HALIMA ARUBAINI 2ND DEFENDANT**
- 3. JOHN MAHONZA3RD DEFENDANT**
- 4. SAMUEL NGUMBAO 4TH DEFENDANT**
- 5. MICHAEL SAID JUMA 5TH DEFENDANT**
- 6. ROSE ANDREW SAID6TH DEFENDANT**
- 7. WILLIAM KAMITHI GATHENJI7TH DEFENDANT**

JUDGEMENT

[1] The plaintiff in this case Leopoldine Kannenberg gave evidence through the interpreter Stephen Onyango. She said she comes from Austria and that she had instructed father Sanjey Kizhakkinedath through a power of attorney to file this suit. She produced the Power of Attorney and said that this suit was filed on her behalf. She stated that she met the 3rd,4th and 6th defendants on the beach of African Safari Club Mombasa and Serena Beach. She said the 3rd defendant approached her. He said he had 200 children without parents and no food and that he was pleading for help for those children. This was in March, 2006. That the 3rd defendant took her to school called Cooper School. The school was approximately 200 meters from the African Beach Club. She said the school was not next to the disputed plot. When she went to the school, she found children together with Madam Rose and who introduced herself as the Director of the school. She said Rose was the 6th defendant. She said she took clothes, sunglasses and sweets for the children. She said that at the material time, the 3rd and 6th defendants never made any requests but the witness was touched and said she must help the children. She learnt that 5th defendant was the brother of the 6th defendant.

[2] She said that in the year 2007 she returned to Kenya. She had 963 Euros and with this money she bought desks and made black walls for the children and bought 720 exercise books. At that time the 6th defendant said that they were leaving that place because they had not paid rent. That they did not know where they were going. She said she went back to her country and advertised in the press that there were poor children in Africa and anyone wishing to help could send the money through her. In September,

2007 she came back with 9000 Euros so that she could buy a place for the children. She said she gave the money to the 6th defendant who was the director of the school. The witness said the money was for purchasing a place where the children would go and have a school built for them where they would learn. She produced a breakdown as follows:

1. Plot -	Ksh. 500,000	=	5555.6Euros
2. Legal fees	Ksh. 68,000	=	755.6Euros
3. Subdivision fees	Ksh. 50,000	=	555.6Euros
4. Taxes	Ksh. 27,000	=	300Euros
5. Transport	Ksh. 15,000	=	166.7Euros
6. Well	Ksh. 80000	=	888.9Euros
7. Fencing	Ksh. 10000	=	111.1Euros
8. Agent fees	Ksh. 50000	=	555.6Euros
9. Food	<u>Ksh. 10000</u>	=	<u>111.1Euros</u>
TOTAL	<u>Ksh. 810,000</u>	=	<u>9,000.2Euros</u>

[3] She said the 3rd, 4th and 6th defendant took her to a lady and her son who were selling the land and who had been identified by them. She identified them from the transfer forms. She said that, that very day they made an agreement for sale. The agreement was signed by 3rd, 4th and 5th defendants. She said that she was to finance that agreement through the money collected in Austria by people who trusted her. She stated that the 3rd defendant asked her and her husband whether she wanted her name on the title, she said no because the money was donated by people in Austria not to them but to the school. She produced a copy of that agreement. She denied that the 3rd defendant has one acre on the land. She produced 18 Western Union receipts for sending money in Euros to John Mahonza the 3rd defendant herein and the 6th defendant. All money sent were in the documents produced as PExh. 4. She said that she had paid other money to the extent of Kshs. 20000 to the 4th and 6th defendants. She produced their various communications by e-mail as PExh.5. She said the aim was to help and build a house for the boys and a house for the girls and build class rooms and have water for the school. She stated that she has gone to the school and that the land and classrooms are done and the teachers never stay in the school because they are never paid. She produced photographs showing the 1st building, the house for the girls and toilets. The photographs were produced as PExh.6. She said the problem was the payment of teachers. That the school does not now belong to the orphans.

[3] She said that the 3rd defendant called her and said she wanted to sell the school. That this came as a shock and disappointment to her because of all the people who had contributed money towards its building. She therefore tried to get an organization to transfer the school to. In desperation she went to Vienna Austria and found an organization called Don Bosco who have their headquarters in Vienna Austria who called their Nairobi Don Bosco office. The Nairobi Don Bosco is headed by Father Sanjey and that is how Father Sanjey got involved in this case. She said she wished to thank Don Bosco and Father Sanjey for retaining donor confidence. She thereafter instructed Omondi Waweru Advocates to write a letter to the 3rd, 4th and 6th defendants to keep off the premises. She produced the receipt of money paid to Omondi Waweru and assorted receipts for paying for various purchases of hardware for the school. She said she later bought a water pump for the school at Kshs. 207,000 and its receipt was produced as PExh.9. A photograph was produced showing her and her husband and the shop keepers on the inauguration of the well. She averred that it is the money she collected that bought the land and built the school. She said she would like to give the land and buildings to any organization that can keep it for the children as earlier intended. She said that her husband and her group would like to move out of the

project provided it goes to the benefit of the orphans. She said she would like the 7th defendant to whom this property has been transferred to re-transfer the property back to her or an organization that will be responsible for the children.

[4] Father Sanjey Kizhakkinedath gave evidence that he belongs to an organization called Salesyang Don Bosco. He said that he is the executive director of planning and development with Don Bosco. He said that they have one of the offices in Austria. He said that his Austrian organization called Nairobi office to help Mrs. Kannenberg as she had some problems in Mombasa. He said he came to Mombasa to meet Mrs. Kannenberg as she had a problem with her project - a school. He said he asked her to show him a title deed for the property and she did not have one. She showed him an agreement for sale. He told her she must have a title if she wanted to be an owner. That they went at once to a lawyer Omondi Waweru who advised her that she must follow her title. That the said advocate wrote a letter to the defendants on Mrs. Kannenberg's behalf. He said he later tried to get in touch with Omondi Waweru without success. He felt suspicious of the advocates. He therefore went to lands office and found the whole land was transferred to William Githinji the 7th defendant. He produced a search as PExh. 11. He said that the agreement was of 2007 and that the whole land was transferred in 2008 to another person by Omondi Waweru & Co Advocates, and that the same Omondi Waweru & Co took money from Kannenburg. Mrs. Kannenburg gave him the Power of Attorney and he filed this suit through another firm of advocates. He said Mrs. Kannenburg gave him all her documents. He said they want the 7th defendant to re-transfer the land. On re-examination by the court he said, that their organization policy is to run young people under the age of 18. That they have secondary schools, technical schools and never run primary school. He said the only help they could offer was managerial.

[5] The third defendant John Mahonza Mwapapheu said he was a tour guide of his company called North Coast Tours and Safaris Ltd. He said that he met Mrs. Kannenberg at Serena Beach. That he saw her distributing pencils and sweets to beach operators. That is how he explained to her of the needy school children. He explained how he took Mrs. Kannenberg to the school. She gave sweat shirts, pencils and 40 Euros to Madam Rose the 6th defendant. That after 5 months she came back and she called him and told him where she was staying. He took the 4th, 5th and 6th defendants. They met and she said she has come back with help. She said she will buy a place where the children can stay and they will not pay rent. That she gave 8,500 Euros and that he gave the money to 6th defendant. That they purchased 1 acre plot from a bigger piece of 5 ½ acres. That the transaction was through Muchiri Munga & Kibanga Advocates. That Mrs. Kannenberg was with her husband Hans. That the lawyer asked them whether their names could be put in the documents but they declined. The purchasers became 3rd, 4th, 5th and 6th defendants. That they agreed with Mr. Kibaga, that he would do everything and that they paid to his firm Kshs. 80,000. He said that he was not aware that the property was transferred to the 7th defendant. He said that after 3 months of the sale agreement, he went to the said advocate who said that there were some problems since 4 acres was being sold to the 7th defendant and that they should wait until the lawyer called them. That he never called them. That in the meantime Mrs. Kannenberg went back to Europe after giving them Kshs. 8,500 Euros. That she asked them to give the sale agreements to her tourist neighbours who were to come to Shanzu.

[6] Mr. Mwapapheu gave evidence that they had Kshs. 300,000 of their own and that they started building on their plot. That they told Mrs. Kannenberg and she said she will send the money. That she would send 2,000, 1,000 Euros and sometimes 500 Euros. That after 6 months Mrs. Kannenberg came and gave 2,000 Euros in which they finished 8 classrooms, 3 toilets and a bore hole and the school was complete. He stated that they have never refused to transfer the interests of the school or property into Madam Kannenbergs' name alongside theirs.

[8] On cross-examination by Learned Counsel Mr. Achoki, the 3rd defendant admitted that he was the translator of Mrs. Kannenberg in all communications between the school and the lawyer. That Mrs. Kannenberg does not understand English or Kiswahili. He said the Kshs. 300,000 they paid was not in the bank but in cash. That he had no prove that they donated Kshs. 300,000/- He admitted that Mrs. Kannenberg bought the water pump but stated that they dug the well to 30' but that Mrs. Kannenberg gave Kshs. 80,000 to complete it to 85'. He further admitted that the school was not registered with the Ministry of Education. He also admitted that Mrs. Kannenberg was not helping the 3rd - 7th defendants

personally, that she was helping the children. That she stopped giving the money in 2010. He admitted he sent the e-mail saying he was going to sell the school.

[8] In this case it is only the 3rd defendant that gave evidence. The 1st, 2nd, 4th, 5th, 6th and 7th defendants never participated in these proceedings. Before determining any other issue, I would have to satisfy myself whether they were aware of these proceedings or whether they were served. This case came up before Justice Tuiyott on 19th March, 2012. Mrs. Umara appeared for plaintiff/applicant while Mr. Tarus held brief for Mr. Okanga for 3rd, 4th, 5th and 6th defendants. The court ordered 1st, 2nd and 7th to be served by way of registered post. The application dated 15th December, 2011 was fixed for hearing on 25th April 2012. There was no hearing on that date. On 25th October, 2012 M/s. Munyithia & Co advocates fixed the case down for hearing ex parte for 18th December, 2012 with notice to issue. An affidavit of service sworn by Erick Achoki swore how the 1st, 2nd and 3rd defendants were served by the firm of Joseph Munyithia & Co. Advocates. Annexed to the affidavit was a hearing notice dated 26th October, 2012 signed by Munyithya & Co. Advocates and certificates of posting for 1st and 3rd defendants. On 18th December, 2012 Mr. Achoki for the plaintiff requested the case to be mentioned on 12th February, 2013 to see if the parties were served. On 12th February, 2013 Mr. Achoki said that the firm of Shariff was on record for 4th, 5th and 6th respondent and Mr. Masila held brief for Mr. Okanga for the 3rd defendant and that the first defendant was served by registered post. Mr. Achoki said, that despite such service, they found the office of Shariff closed, but they served him when he opened his office, For that reason he asked for another date for hearing the case. Mr. Masila agreed and the case was fixed for hearing on 12th March, 2013. On that day he Mr. Achoki filed a return of service and he swore that on 27th February, 2013 he served the hearing notice to the offices of Sheriff and Company for 4th, 5th and 6th defendants who accepted service. He further swore, that he served the 7th defendant at Shanzu with the hearing notice, all court papers including complaint, application and witness statements and documents filed in this case. He accepted them and refused to sign saying he will hand them over to his lawyers. He said that he did not know the 7th defendant but the 7th defendant was identified to him by the 6th defendant. Further that he then proceeded to the post office and sent the hearing notice to the 1st and 2nd defendants by registered post. He annexed the certificate of posting dated 28th February, 2013 for 1st and 2nd defendants. Indeed, on the hearing notice for 12th March, 2013 to Okanga & Co. Advocates, Sheriff & Co. advocates, Khadija Arubaini, Halima Arubaini Abdalla and John Mahonza Mwangapeu, M/s. Sheriff & Company have stamped receipt of the same and wrote received under protest. On 12th March, 2013 this case was called out in the morning but was slated to be heard at 2.30 p.m. The case proceeded at 2.30 p.m.

[9] From the history I have given of service in this case, all the parties were properly served with the hearing notice and were aware not only about the case but were also aware of the hearing date of 12th March, 2013. They chose not to come and participate in the hearing of of this suit.

[10] Mrs. Kannenberg the donor in this case explained in detail how the 3rd defendant approached him at Serena Beach. How she was taken to the school. She explained how she had compassion for the orphaned children. How she went back home in Austria and raised money from well wishers to assist the orphans by buying them land, to move the school to, how she paid for the construction of the classrooms. And how she bought a water pump and used her money to have the school well dug. She kept her receipts well. All the payments done through Western Union Money Transfer and sent through the 3rd defendant. She explained how she gave cash money to the 6th defendant who was the school manager. She explained how she was taken to a firm of lawyers to write an agreement for the purchase of land for the school and how she left the agreement to be completed by the 3rd - 6th defendants. She produced various photographs, showing her commissioning the well and handing over the water pump. She explained how she learnt from the 3rd defendant that the school was going to be sold. She then got in touch with Don Bosco of Vienna Austria to assist. Whereupon the Don Bosco Austria got in touch with Don Bosco Nairobi and that is how Father Sanjey Kishakkiredath was given a Power of Attorney to conduct this case on behalf of Mrs. Kannenberg the donor. She wanted Don Bosco Nairobi to run the school on behalf of the orphaned children. Father Sanjey explained in detail his role in this case. This was just to manage the school.

[11] Mr. John Mahonza Mwangapeu the 3rd defendant herein confirmed what Mrs. Kannenberg had

stated. He confirmed that he is the one who approached her to help the school. He admitted that initially the donor besides giving goodies had given 40 Euros. That when Mrs. Kannenberg came for a second time, he took the 4th, 5th and 6th defendants to her in a hotel at Shanzu at African Beach Safari Club. The donor gave 8,500 Euros. He said they purchased the plot, and paid the lawyers fees. That Mrs. Kannenberg went to Europe and sent various amounts in 2000, 1000 and 500 batches in Euros. That after 6 months Mrs. Kannenberg came back and gave 2000 Euros which finished the construction of 8 classrooms, dormitories and 3 toilets and the school was complete.

Mr. Mwangapheu the 3rd defendant however said they had their own Kshs. 300,000 which they used for classrooms. However, when asked by Counsel for the plaintiff whether it came from a bank he said no. He said he had no prove that they 3rd - 6th defendants paid Kshs. 300,000/-. he admitted that the school had no bank account. He admitted that Mrs. Kannenberg did not take the sale agreement. That the school is not registered with the Ministry of Education. That whatever Mrs. Kannenberg was donating was helping the kids and was not for helping the 3rd-6th defendants personally. He admitted that he sent an e-mail to Mrs. Kannenberg to say he was selling the school. He further admitted that Mrs. Kannenberg does not understand English or Swahili. That he was the interpreter to her in the office of the lawyer. He finally said that he is not opposed to the transfer of the property to Mrs. Kannenberg alongside their names.

[12] As far as I can see, there is really no dispute here. It is quite apparent that all the money to purchase land for which to move the school from its original place, for the construction of the buildings, toilets, water pump and for digging the well come from Mrs. Kannenberg and her Austrian well wishers. I am not convinced that the 3rd to 6th defendants had any money of their own that they used in the school. The Kshs. 300,000 they allege they had was a hoax. They were never able to prove its existence. This was a project to help needy and orphaned children. The defendants abused the generosity of a kind woman and turned it into their own enrichment. The property on which the school stands and all improvements thereon were sold to the 7th defendant without the knowledge and consent of the donor. This was a fraud. I am pleased that the 3rd defendant who is the only person who found it fit to come and participate in these proceedings admits that the same should be re transferred to Mrs. Kannenberg. This is the right thing to do. However Mrs. Kannenburg is not a Kenyan. She does not wish the school and the property it stands on and all developments therein to be in her name. She made that clear from the time of the purchases of the land and when she gave evidence in court. She wants it go to the rightful intended beneficiaries. The disadvantaged orphaned children. She has asked Don Bosco to be the Trustees and manage the school on behalf of the beneficiaries the children. As Don Bosco can only be managerial, a Trust shall be formed to run the school. That is where the school shall go. The 3rd to 6th defendants shall be among the members of that Trust if they wish. They shall be without any control. This shall be for a period of five years when other trustees may be appointed to fill in their place as circumstances then shall dictate. Management of the school shall be by Don Bosco Nairobi.

[13] The end result of this litigation is that the property known as MN/Section 11/405 and all structures and improvement thereon are held by the current registered proprietor the 7th defendant in trust for Mrs. Kannenberg the donor and all beneficial interest held by the 7th defendant are held exclusively for the donor Mrs. Kannenberg. The 7th defendant shall execute a transfer in favour of the donor for the entire interest registered in his names in Plot no. MN/11/404. if he does not do so, in 30 days from this judgment the executive officer of this court shall sign the same on his behalf. A permanent injunction is hereby issued to prevent the 7th defendant from selling, transferring, alienating or otherwise parting with possession of the said land until such transfer to Mrs. Kannenberg the donor. Mrs. Kannenberg shall thereafter transfer the school to the Trust to be formed, managed by Don Bosco Nairobi to run the school on behalf of the disadvantaged children and orphans aforesaid. There shall be no orders as to costs.

Dated and delivered in open court at Mombasa this 19th day of June, 2014.

S. MUKUNYA

JUDGE

19.6.2014

In the presence of:

Mr. Achoki Advocate for the plaintiff.

