



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 350 OF 2017**

**CHARLES RAY COULSTON.....1<sup>ST</sup> PLAINTIFF**

**DARLENE ANN COULSTON.....2<sup>ND</sup> PLAINTIFF**

**FRANCIS MBUVI MAITHIA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**HENRY KIARIE WAWERU.....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs brought this suit as trustees of Made in the Street Children Centre, which is registered as the proprietor of L.R. No. 36/880/1 situated in Nairobi (“the Suit Property”). They claim to have owned the Suit Property from 1999 and that they have developed a fully operational rehabilitation centre for street children on the land including a vocational training centre and a playground for street children.
2. The Plaintiffs averred that they discovered on 22/5/2017 that the original title to the Suit Property was missing from their records. This prompted them to conduct a search at the lands office from which they learned that a transfer in favour of the 1<sup>st</sup> Defendant was effected under unclear circumstances. They reported the matter to Pangani Police Station under OB No. 17/25/5/2017.
3. The Plaintiffs averred that the title deed issued to the 1<sup>st</sup> Defendant was acquired fraudulently and illegally contrary to the law since they have been in possession of the original title over the Suit Property without which the 1<sup>st</sup> Defendant could not have affected the transfer to his name. The Plaintiffs contended that the 1<sup>st</sup> Defendant must have colluded with the 2<sup>nd</sup> Defendant to have the Suit Property transferred to his name yet the Plaintiff was in possession of the original title.
4. The Plaintiffs faulted the 2<sup>nd</sup> Defendant for allowing, approving, permitting and consenting to the transfer of Suit Property without exercising due diligence of the whereabouts of the original title.
5. In the plaint filed in court on 26/5/2017, the Plaintiff sought a declaration that they were the legal owners of the Suit Property. They sought an order for revocation of the title over the Suit Property held by the 1<sup>st</sup> Defendant and rectification of the records held at the lands office by cancellation of the 1<sup>st</sup> Defendant as the owner of the suit Property and his substitution by the Plaintiffs. The Plaintiffs also sought costs of the suit.
6. The Plaintiffs could not trace the 1<sup>st</sup> Defendant for service and they made an application on 9/6/2017 to effect service on the 1<sup>st</sup> Defendant by way of advertisement in the daily newspaper. The court granted that order and the 1<sup>st</sup> Defendant was served through an advertisement which was published in the *Daily Nation* on 26/2/2021. The 2<sup>nd</sup> Defendant only entered appearance on the suit but did not file a defence.
7. From the court record, the firm of Were and Oonge Advocates wrote to the court on 15/3/2018 seeking to be supplied with the pleadings in the case to enable them file an application for Fredrick Kimemia Kimani to be joined as a party to the suit. They claimed in the letter that Fredrick Kimani had a proprietary interest in the Suit Property having entered into an agreement of sale with the 1<sup>st</sup> Defendant and having paid nearly the entire purchase price. This firm did not file any other documents in the suit.
8. Francis Mbuvi Maithia gave evidence on behalf of the Plaintiffs. He stated that he was one of the trustees of “Made in the Streets”, a registered society and a charitable children institution who he stated were the registered owners of the Suit Property. The Plaintiffs acquired the Suit Property from Mahmud Ega Musa on 19/4/1999 pursuant to which a transfer was effected on 23/4/1999. He stated that they had been in possession of the Suit Property since 1999 and that they also had in their possession the original title documents over the suit land. He emphasized that the Plaintiffs had never sold the Suit Property nor had they given consent for its transfer. He urged the court to revoke

and cancel the title held by the 1<sup>st</sup> Defendant over the Suit Property.

9. He produced a copy of the registration certificate dated 5/12/2017 for Made in the Streets showing that it was registered as a charitable children's institution. He also produced a copy of the title over the Suit Property in which entry number 19 is indicated to be a transfer to the Plaintiffs as trustees of Made in the Streets Trust. Entry number 20 reads transfer to Henry Kiarie Waweru for Kshs. 25,000,000/=. He also produced a copy of the sale agreement dated 19/4/1999 entered into by Mahmud Ega Musa and the Plaintiffs together with the transfer dated 23/4/1999.

10. Mr. Maithia produced a copy of the valuation report dated 13/5/2019 prepared by Prime Land Limited, which gives an overview of the developments on the Suit Property. The report described the property as constituting a single storey building block which has a dormitory furnished with double decker beds for boys and girls, two kitchens, two toilets, bathrooms and several other amenities. He attached photographs taken of the developments on the Suit Property.

11. The Plaintiffs filed submissions on 11/3/2021. They relied on Section 3(3) of the Law of Contract Act on the point that any agreement in relation to land must be in writing and it must be executed by the parties before witnesses. They maintained that they never engaged in any transaction with the 1<sup>st</sup> Defendant regarding the Suit Property and that the transfer was therefore undertaken in a clandestine manner without their knowledge. They urged the court to grant the orders sought and relied on the decisions in **Daudi Ledama Morintat v Mary Christine Kiarie and 2 others [2017] eKLR** and **Kibiro Wagoro Makumi v Francis Nduati Macharia and Another [2018] eKLR**.

12. The issue for determination is whether the court should grant the orders sought in the plaint. The Plaintiffs tendered evidence to show how they acquired the Suit Property and were categorical that they had never transferred the Suit Property to the 1<sup>st</sup> Defendant. They stated that they still hold the original title deed over the Suit Property which raises doubt as to the propriety of the manner in which the 1<sup>st</sup> Defendant got himself registered as the proprietor of the Suit Property.

13. The court is satisfied that the Plaintiffs did not transfer the Suit Property to the 1<sup>st</sup> Defendant. The Plaintiffs run a rehabilitation Centre for street children on the suit land. The Defendant did not tender any evidence to show how the land was transferred to him. The court is satisfied that the Suit Property was unlawfully transferred to the 1<sup>st</sup> Defendant.

14. The court grants prayers (a), (b), (c) and (d) of the plaint dated 25/5/2017. The Plaintiffs are granted the costs of the suit to be borne by the 1<sup>st</sup> Defendant

**DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. S. Nyaribo holding brief for Mr. A. Nyakundi for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendants