



REPUBLIC OF KENYA

ENVIRONMENT AND LAND DIVISION

LAND CASE NO. 79 OF 2014

C A A.....PLAINTIFF

=VERSUS=

R P.....1ST DEFENDANT

P V.....2ND DEFENDANT

R U L I N G

Introduction:

1. Although this matter was consolidated with Malindi HCCC NO. 80 of 2014, the parties agreed that the Preliminary Objection filed by the Defendants in this matter should only apply to this suit. This Ruling is therefore in respect to the Preliminary Objection that was filed by the Defendants in respect to this suit.
2. The Defendants, in their Preliminary Objection dated 5th May, 2014, have raised the following issues for determination:
 - a. **THAT the Application and the suit filed by the Plaintiff cannot be sustained and is bad in law and fatally defective as it offends the law of trusts.**
 - b. **THAT the Plaintiff is in breach of trust as she has declined to surrender the original title for the suit property plot No. 2090 Malindi and has withheld the proceeds of rent since the year 2005 to date.**
 - c. **The Notice of Motion dated 28th April 2014 is frivolous, vexatious and an abuse of the Court process.**

Submissions:

2. Ms. Otieno, counsel for the Defendants/Applicants submitted that the Indenture annexed on the Plaintiff's Application states that the 1st Defendant was a minor whose trustees were V P (deceased) and the Plaintiff. The two signed the Indenture as the trustees of the 1st Applicant/Defendant.
3. Counsel submitted that the Plaintiff/Respondent and the late V P held the suit property as trustees for the 1st Defendant, who was a minor then, until she becomes of age.
4. According to counsel, Section 2 of the Age of Majority Act provides that the age of majority shall be

18 years. Counsel submitted that the Indenture is very clear that the Plaintiff was to relinquish the suit property once the 1st Defendant/Applicant reaches the age of Majority and that the Plaintiff has now refused to surrender the suit property even after the 1st Defendant attained the age of majority.

5. The Applicant's counsel finally submitted that the suit property cannot be categorised as a matrimonial property as claimed in the Plaintiff's pleadings. Consequently, it was submitted, the Application for injunction and the entire suit is bad in law and should be dismissed.

6. Mr. Michira, counsel for the Plaintiff/Respondent submitted that the pleadings filed by the Plaintiff shows how the suit property was handed over to the 1st Defendant/Applicant, a fact which can only be dealt with conclusively after the full hearing of the case.

7. According to counsel, the words "to hold in trust in life" used in the Indenture are misleading. Counsel submitted that the Plaintiff/Respondent is currently living in the suit property and the misleading wording in the Indenture should not be used to deny the Plaintiff/Respondent the suit property.

8. The Plaintiff's advocate finally submitted that the Plaintiff/Respondent should be allowed to live in the premises until her lifetime and that this court should rectify the Indenture in respect to the suit property to state as much.

Analysis and findings:

9. According to the Plaintiff, the Plaintiff picked the 1st Defendant while she was a baby having been abandoned in a bush and eventually raised her as her foster mother. It is the Plaintiff's claim that out of love and affection, her, together with her late husband, V P, registered their matrimonial property in favour of the 1st Defendant and that the intention was that the Plaintiff should hold the matrimonial property "in trust in life" for the 1st Defendant.

10. The Plaintiff has pleaded that after the death of her husband, the 1st Defendant attempted to sell the suit property and that she has no other place she can call her home other than the suit property.

11. The Plaintiff is seeking for an order of rectification of the Indenture in respect to the suit property by adding the words "*that the Plaintiff to hold the suit premises in trust in life for the 1st Defendant*" and for a permanent injunction restraining the Defendants from disposing of or interfering in any manner with land portion number 2090 (original number 422/16) during the life time of the Plaintiff.

12. The Indenture which gave rise to the present suit and the 1st Defendant's Preliminary Objection is annexed on the Plaintiff's Application dated 28th April 2014. The said Application is seeking for temporary injunctive orders of injunction as against the Defendants.

13. The Indenture which was entered into in August 2002 was between R A P on the one part and R P (a minor) on the other part whose trustees for the purpose of the Indenture were the Plaintiff and her late husband V P. The Indenture was in respect to the suit property.

14. The simple and clear reading of that Indenture is that R A P, who is not a party to this case, transferred the suit property to the 1st Defendant who was a minor then. However, the suit property was to be held by the Plaintiff and V P in trust for the 1st Defendant/ Applicant and the Plaintiff and her late husband signed the Indenture "as trustees" for the 1st Defendant/Applicant.

15. The Plaintiff also annexed on his affidavit the permit of burial showing that one of the trustees, V P, died on 24th January, 2005.

16. The 1st Defendant/Applicant has annexed on her Replying Affidavit a copy of her passport. The said passport shows that the 1st Defendant was born on 2nd August 1995, meaning that she turned 18 years on

2nd August 2013. This fact has not been denied by the Plaintiff.

17. The Plaintiff's only claim is that she should be allowed to stay or use the suit property during her lifetime and that this court should rectify the Indenture to read as such.

18. In a common law system like ours, a trust is a relationship whereby a property is held by one party for the benefit of another. The trust is created by a settlor, who transfers some or all of his or her property to a trustee. The trustee then holds that property for the trust's beneficiaries.

19. The transferor in the Indenture, R A P, transferred her bundle of rights in the suit property in consideration of natural love and affection to the Plaintiff and the late V P in trust for the 1st Defendant.

20. It is trite law that a trustee is given the legal title to the trust property, but is obliged to act for the good of the beneficiary.

21. The common law of trusts provides that a trustee may be compensated and have the expenses she or he has incurred reimbursed, but otherwise he or she must turn over all profits from the trust properties. A trustee who violates this fiduciary duty may be compelled to turn over any profits that he makes from the trust.

22. According to clause 3 of the Indenture, the Transferor agreed with the *“Trustees of the transferee (the 1st Defendant) to transfer the above parcel of land (the suit property) for an estate in fee simple”*

23. It is therefore obvious that in the said transaction, the suit property was transferred to the 1st Defendant by the transferor and the Plaintiff together with her late husband only held the property in trust for the 1st Defendant because she was a minor. Now that the 1st Defendant has attained the age of majority as defined by section 2 of the Age of Majority Act, the trustees and their successors must relinquish the suit property to her. That is what the law of trusts provides.

24. Indeed, a trust is automatically terminated when its purpose is fulfilled or when the purpose becomes illegal, impossible, impractical or contrary to public policy. In fact, the beneficiary of a trust on his/her own behalf can terminate a trust by “forcing” the trustee to convey the trust property to him/her provided that the termination does not defeat the purpose of the trust irrespective of the wishes of the trustee.

25. It is therefore legally unacceptable to convert a trust that was created in this matter by the transferor into a “living trust” as claimed by the Plaintiff. If the trust was supposed to end upon the demise of the Plaintiff, the transferor would have stated as much. This court cannot step into the shoes of the transferor and order that the trust in respect to the suit property should subsist during the Plaintiff's lifetime. In any event, the transferor was not the Plaintiff's husband and the issue of the suit property being matrimonial property does not arise.

26. For the reasons I have given above, I find that the Plaintiff's suit offends the law of trusts and is fatally defective. The Plaintiff's suit is hereby dismissed with costs.

DATED AND DELIVERED IN MALINDI THIS 11th DAY OF July, 2014.

O. A. ANGOTE

JUDGE