



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 1 OF 2017**

**DEBORAH ANN KLING ROONEY.....1<sup>ST</sup> PLAINTIFF**

**BOARD OF MANAGEMENT OF TEMBEA ACADEMY.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RUKIA NJERI KADIDI.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 17<sup>th</sup> January, 2017, the Plaintiffs pray for judgement against the Defendant for:

- a. A declaration that the Defendant's actions in retaining the suit properties is unfair, illegal and unlawful.
- b. A declaration that the Defendant is not the absolute and indefeasible proprietor of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- c. A declaration that the 2<sup>nd</sup> Plaintiff is the rightful and lawful owner of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- d. An order directing the cancellation of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082 held in the name of the Defendant and further directing the District Land Registrar, Kajiado District Land Registry to register the transfer in favour of the 2<sup>nd</sup> Plaintiff school.
- e. A permanent injunction to restrain the Defendant from entering into, fencing, building, selling, transferring and or in any way interfering with the Plaintiffs' lawful use of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- f. General Damages on fraud and misrepresentation.
- g. Costs of this suit together with the interest thereon at Court rates.
- h. Any other further relief this Honourable Court may deem fit and proper to grant.

The Defendant though duly served via substituted service through the Daily Nation Newspaper dated the 12<sup>th</sup> May, 2017 failed to enter appearance and defend the suit. The matter hence proceeded undefended.

**Evidence of the Plaintiff**

PW1 DEBORAH ANN KLING ROONEY who is the 1<sup>st</sup> Plaintiff herein testified that she is the co - founder of BEADS for Education Inc. She avers that she met the Defendant in 1993 through her mother who at that time worked as a housekeeper for a close friend and when the Defendant was 18years, she offered to sponsor her after she has finished her secondary education and they commenced working together developing the BEADS for Education sponsorship program in Kenya from 1998 until 2016. She states that through BEADs for Education sponsorship program, she sent the Defendant to Tangaza University in 2002 where she obtained a diploma and in 2011 they decided to open the 2<sup>nd</sup> Plaintiff. She claims that she wanted to purchase land for building the 2<sup>nd</sup> Plaintiff but the Defendant advised her that since she was not a Kenyan Citizen she could not own land designated as agricultural. She confirms that she later purchased the suit lands for value through the Defendant on the understanding and trust that the said land would revert to the 2<sup>nd</sup> Plaintiff once it was duly registered. She contends that

the 2<sup>nd</sup> Plaintiff now sits on the suit lands which are registered in the Defendant's name and ID Number [...]. She affirms that the Defendant is holding the title in trust for the 2<sup>nd</sup> Plaintiff as the suit lands were purchased before it was duly registered and the Defendant was at that time the manager running the affairs of the 2<sup>nd</sup> Plaintiff as she was one of the pioneer girls who had completed her education through the BEADS Education sponsorship program.

She further states that on 25<sup>th</sup> June, 2016 the 2<sup>nd</sup> Plaintiff was fully registered as a secondary school in Isinya, Kajiado County. She further claims that when they began planning for building the high school, the Defendant's work became suspicious as she would not provide proper documentation among other issues. Further, on a few occasions when she inquired about the Certificates of Title to the suit lands, the Defendant informed her that the same were stolen but never issued her with a police report. It was her further testimony that the Defendant has retained the 2<sup>nd</sup> Plaintiff's original registration certificate which she does not want to produce and misappropriated food supplies and school items. Further, she has been unable to get the Defendant since her emails and calls go unanswered. She reiterates that she has suffered loss and damage by Defendant's acts of misappropriation and the 2<sup>nd</sup> Plaintiff is being denied the use of the suit lands as its rightful owners. Further that the Defendant has no right to continue enjoying rights in the suit lands as she did not acquire it for her individual benefits but the same was purchased through the Defendant in the hope and understanding that it was for the benefit of the BEADS for Education Inc. She reaffirms that the Certificate of Titles to the suit lands should revert to the name of the 2<sup>nd</sup> Plaintiff.

The Plaintiffs' produced the following documents as exhibits: Copy of 1<sup>st</sup> Plaintiff's Passport No. [...]; Schedule of Payment for the Defendant at Tangaza University; Copy of Certificate of Title for KJD/ KAPUTIEI NORTH/ 40782; Schedule of Payment to the Defendant for purchase of KJD/ KAJIADO NORTH/ 40782; Schedule of Payment to the Defendant as wages, 2<sup>nd</sup> Plaintiff's expenses and other disbursements; Copy of Registration Certificate for the 2<sup>nd</sup> Plaintiff School; Schedule of Costs for quoted school items vis a vis Overstated spent budget; Copy of Title for KJD/ KAPUTIEI NORTH / 21082; Email Correspondences; and Specific Power of Attorney dated 20<sup>th</sup> May, 2019 and Registered on 5<sup>th</sup> July, 2019.

The Plaintiffs' thereafter filed their submissions.

### **Analysis and Determination**

Upon consideration of the Plaintiffs' submissions, Exhibits, Witness testimony and Submissions, the following are the issues for determination:

- Whether there was a trust between the 1<sup>st</sup> Plaintiff and the Defendant in the acquisition of the suit lands.
- Whether there was intent of trust between the 1<sup>st</sup> Plaintiff and the Defendant to register the suit lands in the name of the 2<sup>nd</sup> Plaintiff.
- Whether the Court can direct for rectification of the register and cancellation of titles to the suit lands from the Defendant to the 2<sup>nd</sup> Plaintiff.
- Who should bear the costs of the suit?

As to whether there was a trust between the 1<sup>st</sup> Plaintiff and the Defendant in the acquisition of the suit lands.

It was PW1's testimony that she met the Defendant in 1993, educated her upto University and thereafter they set up the 2<sup>nd</sup> Plaintiff. She explained that the Defendant advised her that since she was a foreigner, she could not purchase the suit lands which were agricultural land in her name. This culminated in her sending monies as evident in the statement of accounts tendered as evidence and the suit lands were eventually purchased in the Defendant's name. As per the email correspondence dated the 24<sup>th</sup> July, 2011 which was sent by the Defendant to the 1<sup>st</sup> Plaintiff, in regard to putting up the 2<sup>nd</sup> Plaintiff, she wrote as follows: **' I had sent something but since I do not see any comment from you I assume you did not get it. Land is secured and titles in my name in trust for Tembea Academy. Wish it could have been in your name but only Kenyans can own land designated as agriculture. '** From this excerpt, it is clear the intention of the parties herein was to acquire the suit lands which were to eventually be registered in the name of the 2<sup>nd</sup> Plaintiff. From the evidence tendered in court, it emerged that the Defendant declined to transfer the suit lands to the 2<sup>nd</sup> Plaintiff which culminated in the institution of this suit. Despite being served, the Defendant failed to defend the suit hence the evidence of the Plaintiffs remain uncontroverted.

**Black's Law Dictionary 10<sup>th</sup> Edition** defines a Trust to be: **' 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 (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose'.**

**Snell's Equity** at Page 177 states as follows: **' With resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial.'**

In the case of **Peter Ndungu Njenga Vs Sophia Watiri Ndungu (2000) eKLR**, the Court held that: **' The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.**

In the current scenario, it emerged in evidence including documents presented that the 1<sup>st</sup> Plaintiff was the main sponsor of the 2<sup>nd</sup> Plaintiff. Further, that she had engaged with the Defendant over a long period of time and they commenced setting up the 2<sup>nd</sup> Plaintiff but since she

was a US Citizen there were challenges in the acquisition of the land as well as setting up the 2<sup>nd</sup> Plaintiff. The Defendant who had engaged with the 1<sup>st</sup> Plaintiff over a long period of time and was a beneficiary of the 1<sup>st</sup> Plaintiff's generosity agreed to have the suit lands registered in her name and even became an employee of the 2<sup>nd</sup> Plaintiff. From the accounts presented, it is clear that the 1<sup>st</sup> Plaintiff paid all the monies for the purchase as well as registration of the suit lands including running of the 2<sup>nd</sup> Plaintiff. The Defendant had land parcel number Kajiado / Kaputiei North/ 40782 registered in her name on 11<sup>th</sup> August, 2011 while Kajiado/ Kaputiei North/ 21082 was registered in her name on 19<sup>th</sup> February, 2007. Further, after registering the suit lands in her name and despite having accepted to have the same transferred to the 2<sup>nd</sup> Plaintiff upon its registration, she declined to do so. In the case of **Twalib Hatayan Twalib & Another Vs Said Saggah Ahmed Al – Heidy & Others (2015) eKLR**, the Court of Appeal held while dealing with issues of trust held that: ' In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (*Supra*). 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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (*supra*). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29<sup>th</sup> Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (*supra*). '

In associating myself with the decisions cited above and applying them to the circumstances at hand, insofar as there was no express trust between the Plaintiffs and Defendant in respect to transfer of the suit lands to the 2<sup>nd</sup> Plaintiff, I find that there was a resulting trust that arose in favour of the 1<sup>st</sup> Plaintiff who had advanced all the monies in the acquisition of the suit lands and setting up of the 2<sup>nd</sup> Plaintiff. To my mind, it is immaterial whether the suit lands were registered in the name of the Defendant or not. From the foregoing, I further find that there was intent of trust between the 1<sup>st</sup> Plaintiff and the Defendant to register the suit lands in the name of the 2<sup>nd</sup> Plaintiff.

As to whether the Court can direct for rectification of the register and cancellation of titles to the suit lands from the Defendant to the 2<sup>nd</sup> Plaintiff. The Plaintiffs sought for the cancellation of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082 held in the name of the Defendant and further that the District Land Registrar, Kajiado District Land Registry to register the transfer in favour of the 2<sup>nd</sup> Plaintiff school. I wish to make reference to the legal provisions on ownership as well as cancellation of title which were in place when the Defendant registered the suit lands in her name.

Section 28 of the Registered Land Act (repealed) provided that: ' **The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.**'

While Section 143 of the Registered Land Act (repealed) stipulated thus: ' **(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.**'

The provision in section 143 are similar to section 80 of the Land Registration Act which provides that: '**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**'

In the case of **Mary Ruguru Njoroge V John Samuel Gachuma Mbugua & 4 others (2014) eKLR**, the Court held that: ' **It is upto the party seeking rectification, whether under the relevant statutory provisions or the equitable principles to satisfy the court or the Registrar, for that matter, that their intervention is justified. The evidence must in my view be convincing. Even though the ordinary standard of proof on a balance of probabilities applies the evidence ought to be sufficient to overcome the inherent probability that what is sought to be rectified was what was intended all along.**'

Based on the facts as presented and in associating myself with the decisions cited above, while relying on the quoted laws and in line with the equitable principles which are Constitutional principles, I am convinced that the Plaintiffs have indeed satisfied the court on the need to cancel the titles held by the Defendant in respect to the suit lands as the same indeed belong to the 2<sup>nd</sup> Plaintiff. In the circumstances and based on my findings above, I will direct the District Land Registrar, Kajiado to proceed to do so.

Who should bear the costs of the suit?

Since the Plaintiffs are the inconvenienced parties, I find that they are indeed entitled to the costs of the suit which should be borne by the Defendant.

It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that the Defendant's actions in retaining the suit properties is unfair, illegal and unlawful.
- ii. A declaration be and is hereby issued that the Defendant is not the absolute and indefeasible proprietor of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- iii. A declaration be and is hereby issued that the 2<sup>nd</sup> Plaintiff is the rightful and lawful owner of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- iv. The District Land Registrar, Kajiado be and is hereby directed to rectify the register, cancel the titles for KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082 held in the name of the Defendant and register the transfer in favour of the 2<sup>nd</sup> Plaintiff **BOARD OF MANAGEMENT OF TEMBEA ACADEMY** and issue it with Certificates of Title to that effect.
- v. A permanent injunction be and is hereby issued restraining the Defendant from entering into, fencing, building, selling, transferring and or in any way interfering with the Plaintiffs' lawful use of KJD/ KAPUTIEI NORTH/ 40782 and KJD/ KAPUTIEI NORTH/ 21082.
- vi. Costs of the suit is awarded to the Plaintiffs.

**Dated Signed and Delivered at Kajiado this 22<sup>nd</sup> Day of October, 2020**

**CHRISTINE OCHIENG**

**JUDGE**