



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Environmental & Land Case 25 of 2012

REV. JERAD ALVAN PLAINTIFF/APPLICANT

V E R S U S

N. MBUGUA

1. JAMES

2. JOHN

KARUMBA CHEGE(Sued as Officials of the Gospel

Disciples Society).....

DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiff in this action has by way of Originating Summons asked the court to settle the following questions-

“(i) Whether on the basis of the express declarations by the entity known as Evangelische Zentralstelle for Entwicklungshilfe e.v (“EZE”) there exists a trust in favour of the institution known as Iyale Academy in respect of the premises on Plot No. GK/1551/Mikindani/Chaani held by the defendant society.

(ii) Whether the defendant society can in the circumstances terminate the occupancy of the above premises by the said Iyale Academy forcibly and/or without an order of court and/or without the consent of EZE as donor.”

2. Simultaneously with filing these proceedings the Plaintiff has, by application dated 15th February 2012, sought an order of temporary injunction, mainly, restraining the Defendants from taking over and/or interfering with the institution known as Iyale Academy operating on Plot No. 1551/Mikindani/Chaani (the suitland) pending the hearing and determination of the suit. This is the application I am asked to determine.

3. The Defendants are said to have been sued in their capacity as officials of Gospels Disciples Society (GDS). Although the first Defendant says that the correct officials are-

(a) Chairman Bishop James Njenga Mbugua

(b) Secretary – Elder Peter Mwakupha Kandongo

(c) Treasurer – Joseph Kimani Wachira

4. A brief background to the Dispute. Twenty six (26 years ago) Evangelische ZentralStelle Fur Entwicklungshilfe E.V(EZE) partnered with GDS for development of a multipurpose centre on the suitland owned by GDS. Upon completion EZE was desirous that the building be used as a secondary school called Iyale Academy.

5. That at the time this was happening the Plaintiff was an official of GDS. In fact he styles himself as a founder member.

6. Iyale Academy took possession of the building on a 20 year lease which was for a term of 20 years from 1st January 1992 and so would expire on or about 1st January 2012. That Tenancy has not been without difficulty and has been the subject of at least two court actions; being **Mbsa CMCC Civil Suit No. 2215 of 2005 Benson Mwaliwa & 2 Others Trading as Iyale Academy –Vs- Rev. James Mbugua** (sued as a Trustee of Gospel Disciples Church) and **Mbsa KCC No. 250 of 2008 Iyale Academy -Vs- Jim Mugambi & 2 Others.**

7. It would seem that GDS also had its share of wrangles. The Plaintiff was removed from the leadership and although the Defendant say that he was excommunicated in 1995 he vigorously refused this. The Plaintiff says that his interest in the matter is to see that the intent of EZE is given effect. That this is expected of him as a founder member of GDS.

8. The Plaintiff contends that by a letter of 10th May 1993 EZE created a trust in favour of Iyale Academy in respect of the suitland. It is his argument that the lease agreement entered between Iyale Academy and GDS cannot derogate the Trust created. For this reason, it is submitted, GDS cannot evict Iyale Academy from the suitland.

9. The Defendants do not think that this cause is serious and have argued that-

(a)The Plaintiff is not a member of GDS and lacks any locus to institute these proceedings.

(b) The Plaintiff cannot bring these proceedings on behalf of EZE or Iyale Academy without demonstrating that he has their authority or consent.

(c) No express or implied trust has been shown to exist.

(d) That the issues in this action are not simple issues of law and facts which can be disposed of summarily by way of Originating Summons.

10. The central question to be determined by the trial court is whether on the basis of the document dated 10th May 1993 and the conduct of the players herein an express or implied trust can be construed.

11. This star document is a letter from EZE to GDS and copied to CORAT AFRICA and the Directors of Iyale Academy. Two paragraphs are of importance-

“(i) EZE provisionally agrees that the building in Mikindani that was constructed with major assistance of EZE is used for running a Secondary School (“Iyale Academy”) under the Directors Messrs. Paul Msabaa, Benson Mwaliwa, James Mwamboje and Ayub Mundu until further notice.

(ii) Gospel Disciples Society and EZE have agreed that Gospel Disciples Society shall not interfere with the running of the a.m. Secondary School (“Iyale Academy”) in the said building until a new agreement between Gospel Disciples Society and EZE has been reached on the final utilization of the said building.” (my emphasis)

12. The Plaintiff reads this as creating a trust. For some reason, an agreement to formalize this arrangement was drafted but never executed. There is, however, a lease that pre-existed the document of 10th May 1993 entered between the Iyale Academy and GDS. The highlights being-

(i) GDS is the lessor while P. Msabaa, A. Munda, J. Mwamboje and B. Mwaliwa are the lessees.

(ii) The permitted user is a private Secondary School or educational purposes.

(iii) The term is for twenty (20) years from 1st January 1992.

(iv) The rent is Kshs. 12,500/- per month.

13. It seems agreed between the parties that on the basis of the lease agreement Iyale Academy has for the last 20 years occupied the building on suitland at the pain of paying a monthly rent. Iyale Academy treated themselves as tenants and explicitly held themselves out as such in Civil Suit No. 2215 of 2005.

14. The Plaintiff’s argument is that these “landlord-tenant” relationship cannot debunk the Trust that was created by EZE in favour of GDS.

15. I gather, on reading the document of 10th May 2003, that EZE intended to create a Trust in favour of Iyale Academy. That Trust was to be formalized by a tripartite agreement between EZE, GDS & Iyale Academy. The Agreement as I earlier noted was not executed by any of the parties. Had that agreement been signed then there would be no argument as to who owns the premises on the suit land. See the following unequivocal provisions of the unexecuted agreement.

“(i) The building that was erected by GDS with major assistance of EZE on the premises allocated to GDS in Mikindani/Mombasa for purposes of a vocational training centre is leased to Iyale Academy with immediate effect after this agreement has been signed by all three a.m. parties.

(3) Iyale Academy shall not pay any rent, lease or any other charges to GDS for utilizing the building.

(7) After Iyale Academy has become the legal owner of the building as mentioned in Clause 1 of this agreement, the lease as agreed in Clause 1 will cease automatically.”

16. In addition there may have been a change of heart by EZE. In a letter dated 27th May 1994 to Iyale Academy, EZE said as follows-

“It is necessary, however, to keep in mind that the Gospel Disciples (sic) Society is still the official counterpart to EZE with regard to that project. Therefore, on the long run it is EZE’s interest that the building is used by the official project holder.” (emphasis mine)

Was EZE not recalling the intention to Gift Iyale Academy?

17. From the evidence at hand this Gift from EZE to Iyale Academy was not perfected. The Gift appears to have failed and Iyale Academy became a tenant and not the owner of the premises. In the circumstances of this case, as presented by the evidence so far, I am unable to draw an inference that the imperfect Gift gave rise to a Trust.

18. In reaching this conclusion I have given regard to the following proposition quoted by Scarman L.J. in **Paul –Vs- Constance Court of Appeal [1977]W.L.R 527-**

“In Milroy V. Lord Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: ‘The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.’ It appears to me that that sentence contains the whole law on the subject.”

19. It is therefore may be respectful view that the Plaintiffs have failed to make out a prima facie case and is not deserving of the orders sought.

20. As I close I venture to make some short comments on other issues raised by the Defendants.

21. The Defendants doubt that the Plaintiff has any locus to bring these proceedings. That even if this court was to find a Trust, the Plaintiff is not

a settler to it, the beneficiary or a Trustee. It is the Plaintiff’s case, as I understand it, that EZE created a charitable Trust for the benefit of the

public. Under common law the enforcer of such a Trust is the Attorney General. In Kenya this would be in line with the Attorney General’s

Constitutional duty to promote, protect and uphold the public interest.

(Article 156(6) of the Constitution). But I cannot see any bar to a public-spirited person seeking to enforce a charitable Trust which is intended to benefit the public where the Attorney General is slow, reluctant or unwilling to take up that responsibility. These however are my tentative views. This issue may come up for full argument at a later stage of the proceedings.

22. Secondly, the Defendants took the position that this action should have been brought by way of a plaint and not Originating Summons as it involves matters of law and evidence which are not straightforward. This, however, should not present any difficulty. The court has powers under Order 37 Rule 19 of the Civil Procedure Rules 2010 to order, at any stage, that proceedings commenced by Originating Summons continue as if the cause had been begun by filing a plaint.

23. Back to my answer to the application for injunction. I wish to emphasise that the findings I have made in respect to the strength of the Plaintiffs suit are made on the courts assessment of the affidavit evidence presented to it at this interlocutory stage. There will be opportunity for parties to present further evidence and to interrogate it by way of cross-examination. Only then can a final determination be made.

24. The upshot is that the application of 15th February 2012 is dismissed with costs.

Dated and delivered at Mombasa this 4th day of June, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Mwakireti for Plaintiff - absent

Mogaka holding brief for Njoroge for the Defendant

Court clerk - Moriasi

F. TUIYOTT
JUDGE