



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 320 OF 2009

KENSO ORINA MOCHACHE.....PLAINTIFF

VERSUS

GODFREY MUHENGE KIVANZE.....1ST DEFENDANT

WILFRED KEGONYE BABU.....2ND DEFENDANT

LIBERTY CARE CENTRE CHILDREN'S HOME

THROUGH ITS TRUSTEES, NELSON MUSUNGU,

LYDIA ANGAYA CHIRANDE,

VINCENT LULESA & DICKSON KILONZO.....3RD DEFENDANT

JUDGMENT

1. This suit was initially filed against the 1st and 2nd Defendants. However, vide a Ruling dated 14th November, 2014, the Trustees of Liberty Care Centre Children's Home were enjoined as Defendants in the suit.
2. In his Complaint dated 22nd October, 2009, the Plaintiff averred that at all material time, him, together with the 1st and 2nd Defendants were registered as the joint owners of land known as L.R. No. 13302/43 which was a sub-division of L.R. No. 13302/5; that the three (3) of them were business partners trading under the business name of Mlolongo Care Investment and that the 3rd Defendant invaded the suit land and started putting up structures.
3. The Plaintiff finally averred that L.R. No.1 3302/43 should be sub-divided into three (3) equal portions amongst the three (3) of them.
4. On his part, the 1st Defendant averred in his Statement of Defence that he is the founder member and Chairman of Liberty Children's Home, formerly known as Mlolongo Care Centre Self-Help Group; that his Children's Home was squatting on the land belonging to NSSF which was approximately 200M away from the suit land until the year 2005 when NSSF sold the land to Oil Com (K) Ltd; and that NSSF granted the Children's Home the suit land after selling the other land to Oil Com (K) Ltd.
5. In his Defence, the 2nd Defendant admitted that indeed, the Plaintiff, the 1st Defendant and himself jointly owned L. R. No. 13302/43; that the suit property should be sub-divided amongst the three (3) of them and that he has not encroached on the Plaintiff's portion of land.
6. It is the 1st Defendant's averment that the 1st Defendant's Children's Home was settled on a parcel of land known as 13302/5 measuring 5 acres; that the NSSF demanded for Kshs. 7,000,000 for the land before it could allow the Children's Home to settle on the said land and that he approached several people to contribute towards the purchase of the suit land. According to the 1st Defendant's Defence, 2 acres of the land was reserved for the Children's Home while the remaining portion of the land was sub-divided amongst the people who contributed towards its purchase.
7. The 1st Defendant averred that the Plaintiff got four (4) plots after paying Kshs. 400,000; that the 2nd Defendant acquired two plots after offering legal services for the entire transaction and that later on, and without consulting him, the 2nd Defendant registered a business name known as "Mlolongo Care Investment" with the Plaintiff, himself and the 2nd Defendant as partners.
8. The 1st Defendant finally averred that the Plaintiff and the 2nd Defendant used the fraudulently registered business name to buy shares

from Safaricom; that it is not true that the three of them were business partners and that the suit land is solely owned by the Children's Home and not the three of them as alleged.

9. In its Defence, the 3rd Defendant described itself as a charitable Children's Home duly registered and managed under the Children's Act; that it has always been in occupation of L.R. No. 13320/43 which is a sub-division of Plot No. 13302/5; that it operates a Children's Home on the suit land; that in the year 2006, and with the assistance of well-wishers, including Safaricom Ltd, two dormitories and a dining hall were built on the suit land; that before it moved on the suit land, it used to squat on the land belonging to NSSF and that it is NSSF that offered to the 3rd Defendant the suit land for Kshs. 7,000,000.

10. According to the 3rd Defendant, the purchase price of the suit land was raised from the sale of the sub-divisions of the land that NSSF sold to them; that the Children's Home was to comprise of two (2) acres while the remaining 3 acres was to be sub-divided into 27 equal plots and that the Plaintiff and the 2nd Defendant have declined to transfer the two acres to the 3rd Defendant.

11. The Plaintiff, PW1, adopted his statement filed on 24th May, 2012. PW1 informed the court that in the year 2005, he met the 1st and 2nd Defendants and agreed to register a business name to buy land; that they registered an entity known as Mlolongo Care Investment with equal shareholding and that they agreed that he was to be the Treasurer while the 1st Defendant and the 2nd Defendant were to be the Chairman and Secretary respectively.

12. It was the evidence of PW1 that upon registration of the business name, they entered into a Sale Agreement with the NSSF for the purchase of L.R. No. 13302/5 situated at Mlolongo which was to be shared equally; that to raise the 10% of the purchase price of Kshs. 7,000,000, he paid Kshs. 400,000 while the 2nd Defendant paid Kshs. 300,000 and that the 1st Defendant was unable to raise any amount towards the payable deposit.

13. According to PW1, after signing the Agreement of 23rd January, 2007, they sub-divided the land with a view of selling the sub-divisions to raise the balance of the purchase price; that the land was sub-divided into two portions-one portion measuring 3 acres while the other portion measured 2 acres and that the three acres was further sub-divided into 29 plots and sold to the members of the public.

14. According to PW1, each of them got two plots from the 3 acres with the remaining sub-plots being sold to third parties; that they retained two acres for themselves and that the two acres had a Deed Plan with a title number L.R. No. 13302/43 (*the suit land*) which was registered in their three names.

15. PW1 informed the court that they fenced the two acres in the year 2008 and that in August, 2009, he noticed some developments coming up on suit land. When the 1st and 2nd Defendants became evasive, he filed the current suit.

16. PW1 produced in evidence the Certificate of Registration of a Change of Particulars for "*Mlolongo Care Investment*", the Sale Agreement dated 23rd January, 2007, the original Grant for L.R. No. 13302/5, amongst other documents which I shall refer to later.

17. PW1 finally informed the court that they never purchased the suit land for Liberty Care Children's Home. According to PW1, when they bought the suit land, the same was vacant and that they were buying the land for their organization and not for the 3rd Defendant.

18. PW1 stated that he never met a Mr. Musungu in the year 2006 and that the Minutes showing that he met him were a forgery; that the 1st Defendant had a school which he had started in the year 2004 and that he tricked him into giving him money for the school. According to PW1, that the organization they registered as a vehicle for their business was Mlolongo Care Investment and not Mlolongo Care Centre.

19. The 1st Defendant's brother, DW1, informed the court that his brother, the 1st Defendant, is dead; that he is the administrator of Liberty Care Children's Home; that he joined the organization in the year 2016 and that the Home is developed and it has 55 children. DW1 adopted the averments that had been stated by the 1st Defendant in his Defence and also adopted the 1st Defendant's depositions contained in a Repeating Affidavit sworn on 7th December, 2009.

20. According to the Affidavit of the 1st Defendant (*deceased*), he is the Founder and Chairman of Liberty Children's Home formerly known as Mlolongo Care Centre, a Self Help Group situate on L.R. No. 13302/43 (*the suit land*); that before settling on the land, the Home had been squatting on the land owned by NSSF which was eventually sold to a third party and that NSSF resettled Liberty Children's Home on Plot No. 13302/5 measuring 5 acres.

21. It was the deposition of the 1st Defendant that when the Children's Home was unable to raise the purchase price of Kshs. 7,000,000, he had the land sub-divided and sold to several people; that the Plaintiff and the 2nd Defendant were amongst the people who bought the sub-divided parcels of land and that the Children's Home retained 2 acres of the 5 acres that NSSF sold to it.

22. According to the 1st Defendant, the Plaintiff having made a contribution of Kshs. 400,000 was given four (4) plots –two of which are in the name of his sons; that the 2nd Defendant was offered two (2) plots for having offered free legal services in the transaction and that he later on learnt that the 2nd Defendant had gone ahead to register a strange organization by the name of "*Mlolongo Care Investment*".

23. The 1st Defendant denied that he was in partnership with the Plaintiff and the 2nd Defendant. According to the 1st Defendant, the Plaintiff and the 2nd Defendant colluded to have the land belonging to the Children's Home registered in the joint names of the three of them.

24. In cross-examination, DW1 stated that the Children's Home was established in the year 2003; that it moved to the suit land in the year

2007 and that he did not know what each party contributed to purchase the suit land. It was the evidence of DW1 that the land that NSSF sold is the one that the Children's Home is currently occupying.

25. According to DW1, the Home was all along supported by the Plaintiff and that the 2nd Defendant joined the Plaintiff and the 1st Defendant when they were in the process of sub-dividing the three acres. According to DW1, the 2nd Defendant was given two plots for the work done.

26. The Matron of the School, DW2, informed the court that she was employed by Liberty Care Centre Children's Home in the year 2017; that other than the home, the suit land does not have any other building and that part of the land is used at night for parking purposes.

27. The 2nd Defendant, DW3, informed the court that he is an advocate of the High Court; that L.R. No. 13302/5 was initially the property of NSSF and that when NSSF advertised for the sale of the land, they applied for it.

28. It was the evidence of Dw3 that him, together with the Plaintiff and the 1st Defendant registered a business name known as Mlolongo Care Investment which they used to bid for the NSSF land.

29. It was the evidence of DW1 that they were to pay to NSSF the deposit of 10% of the purchase price, which was Kshs. 7,000,000; that he contributed Kshs. 300,000 while the Plaintiff paid the balance of the deposit and that the 1st Defendant did not make any contribution towards the payment of the purchase price.

30. DW3 informed the court that they sub-divided the land they had purchased from NSSF into two portions of 3 acres and 2 acres; that the three acres was sub-divided into plots which were sold to raise the purchase price and that the 2 acres remained for the three of them. However, without their consent, the Home moved on the 2 acres in the year 2009.

31. In cross-examination, DW3 stated that the 3rd Defendant was established in the year 2008 when they had already bought the suit land; that the 2 acres were never meant for the Children's Home and that he was not opposed to the Plaintiff's claim.

32. DW4 stated that he was one of the Trustees of the 3rd Defendant; that the 3rd Defendant was formally known as Mlolongo Care Centre and that the Children's Home has been in occupation of the suit land since the year 2005.

33. It was the evidence of DW4 that the 1st Defendant, with other people, organized themselves as a Self Help Group under the name and style of Mlolongo Care Centre Self Help Group and started a Children's Home; that the Children's Home was initially on a piece of land belonging to NSSF and that when NSSF sold the said land to Oil Com (K) Ltd, NSSF agreed to move the Home on the suit land.

34. According to DW4, after the Children's Home relocated to L.R. No. 13302/5, they asked NSSF to sell to the Home the said land vide a letter dated 15th December, 2005 and that NSSF offered to sell the land for Kshs. 7,000,000; that the Plaintiff was one of the members of the Children's Home and that the Plaintiff agreed to reserve the 2 acres for the Home and have the remaining 3 acres sub-divided and sold.

35. It was the evidence of DW4 that the members of the Self Help Group agreed to incorporate the 2nd Defendant in the transaction to help them with the legal issues in the purchase of the land; that NSSF informed them that it would only deal with a legal entity and that the 2nd Defendant registered Mlolongo Care Investment.

36. DW4 informed the court that the Plaintiff and the 2nd Defendant knew that all their dealings with NSSF over L.R. No. 13302/5 was for and on behalf of the Children's Home; that the Trustees of the Children's Home approved the allocation of four plots to the Plaintiff which represented the Kshs. 400,000 he had paid while the 2nd Defendant was given two plots to cover for his legal fees.

37. DW4 stated that the 2nd Defendant is guilty of professional negligence and misconduct for the following reasons: forming and registering "*Mlolongo Care Investment*" and substituting it with the 3rd Defendant; creating a conflict of interest; failing to render complete accounts to the 3rd Defendant and failing to transfer and issue a Certificate of Title of the suit property to the 3rd Defendant.

38. The Plaintiff's advocate submitted that the Plaintiff, the 1st and 2nd Defendants registered Mlolongo Care Investment to buy the suit land; that the three of them were partners in the transaction; that the 3rd Defendant never paid any money for the purchase of the suit land and that the suit property was to be shared equally amongst the three partners.

39. The Plaintiff's counsel submitted that the title in respect of L.R. No. 13302/5 which gave rise to L.R. No. 13302/43 after sub-division is held by the Plaintiff, the 1st Defendant and the 2nd Defendant as joint owners in equal shares; that there was no evidence that the 3rd Defendant procured the said title and that the reliefs in the Plaint should be granted.

40. The 1st and 3rd Defendants' advocate submitted that the title in respect of the suit land was registered in the name of the Plaintiff, the 1st and 2nd Defendants in the belief that they were to hold the suit property in trust for the 3rd Defendant; that the 3rd Defendant has been on the suit land since the year 2005 and that the registration of the title in the name of the Plaintiff, the 1st and 2nd Defendants was tainted with illegalities.

41. The 2nd Defendant's advocate submitted that there is no Agreement in existence between the partners of Mlolongo Care Investment and the 3rd Defendant; that the 3rd Defendant was not a party to the purchase of the suit land and that the 3rd Defendant is not entitled to the suit

land. It was the submissions of the advocate that the suit land should be sub-divided equally between the Plaintiff, the 1st Defendant and the 2nd Defendant.

Analysis and findings:

42. The claim by the Plaintiff and the 2nd Defendant in this matter is that having being registered as tenants in common for a property known as L. R. No. 13302/43, with the 1st Defendant, the said land should be sub-divided equally amongst the three of them. The position by the Plaintiff is supported by the 2nd Defendant who is an advocate of this court. However, the 1st and 3rd Defendants are opposed to that proposal.

43. The 1st Defendant and the 3rd Defendant have argued that L.R. No. 13302/43 belongs to the 3rd Defendant; that the Plaintiff and the 2nd Defendant fraudulently registered an entity known as “*Mlolongo Care Investment*” in their name to defraud the 3rd Defendant and that the 3rd Defendant, who is in occupation of the suit land, should be registered as the proprietor of the suit land.

44. Although the Plaintiff and the 2nd Defendant informed the court that the three of them (*the Plaintiff, the 1st Defendant and the 2nd Defendant*) came together and agreed to form a business partnership to buy L.R. No. 13302/5 measuring 5 acres, the 1st and 3rd Defendants denied that position.

45. According to the 1st and 3rd Defendants, L.R. No. 13302/5 was bought from NSSF solely for the benefit of the Children’s Home and that the said land was sub-divided and portions thereof sold for the purpose of raising the purchase price. According to the evidence of DW1 and DW4, the Plaintiff and the 2nd Defendant, just like other third parties, participated in the purchase of the land for the Children’s Home.

46. To prove that it is the Plaintiff, the 1st and 2nd Defendants who purchased L.R. No. 13302/5 which was later sub-divided and some portions thereof sold, the Plaintiff produced in evidence the Sale Agreement of 23rd January, 2007 between the Board of Trustees of NSSF on the one hand and the Plaintiff, the 1st Defendant (*deceased*) and the 2nd Defendant *t/a* Mlolongo Care Investment on the other hand.

47. The Agreement shows that indeed, the three individuals, trading as Mlolongo Care Investment, bought L.R. No. 13302/5 for KShs. 7,000,000. The Agreement provided that 10% of the purchase price was to be paid on the date of execution of the Agreement, and the balance was payable within ninety (90) days. The Agreement shows that the 2nd Defendant was to act as the advocate of the three individuals, trading as Mlolongo Care Investment.

48. The Agreement between NSSF and Mlolongo Care Investment was preceded by negotiations between NSSF and the 1st Defendant. According to the letter dated 15th December, 2005, NSSF advised the 1st Defendant *t/a* as Liberty Care Centre Children’s Home, that the reserve price for L.R. No. 13302/5 was KShs. 7 million.

49. The evidence of DW4 was that the suit land was sold to the Children’s Home, which had occupied another land owned by NSSF in the neighbourhood, for the purpose of re-locating the said Home. It was the evidence of DW4 that the land that the Children’s Home had “*squatted*” on was sold to Oil Com (K) Limited, thus the need to relocate the Children’s Home to the suit land.

50. To enable the Children’s Home relocate to the suit land, DW4 produced in evidence a letter by Oil Com (K) Limited dated 5th November, 2005 in which Oil Com (K) Limited instructed its bank to transfer KShs. 150,000 to the account of Mlolongo Care Centre account.

51. The evidence before this court shows that the 2nd Defendant registered a business name known as Mlolongo Care Investment with the Plaintiff, the 1st Defendant and himself as partners. The said business name was registered on 6th December, 2006. However, before the registration of Mlolongo Care Investment, the Children’s Home was operating under the name of a Self Help Group known as Mlolongo Care Centre Self Help Group which was registered with the Ministry of Gender Sports Culture and Social Services on 17th July, 2003.

52. The Plaintiff informed the court that it was him and the 2nd Defendant who raised the deposit of KShs. 7,000,000. They then raised the balance of the purchase price by sub-dividing the suit land, first into two portions of 2 acres and 3 acres and then sub-dividing the 3 acres further into 29 sub-plots. It is those 29 sub-plots that were sold to third parties to raise the balance of the purchase price.

53. The Plaintiff produced in evidence the original title document for L.R. No. 13302/5 that NSSF transferred to the three of them. The title document shows the sub-divisions that were done in respect of L.R. No. 13302/5. The suit land, L.R. No. 13302/43, is the 2 acres that remained after the other 29 plots were sold out. Indeed, L.R. No. 13302/43 has a Deed Plan and remains in the names of the Plaintiff, the 1st Defendant and 2nd Defendant *t/a* as Mlolongo Care Investment.

54. Although the issue of paying to NSSF the balance of the purchase price by the purchasers by way of selling the sub-plots has not been denied by the parties, the 2nd Defendant, being the advocate for the purchasers, and also as one of the purchasers, did not produce any letter to show how he convinced NSSF to agree on that arrangement. However, the 3rd Defendant produced a copy of the letter authored by the 2nd Defendant dated 29th December, 2005 and addressed to the NSSF.

55. In the said letter, the 2nd Defendant informed NSSF to agree to “*soft terms and conditions of payment and that his client is a charitable Home whose funds are drawn from donors.*” Although the 2nd Defendant denied that he authored the said letter, he neither produced a report of the document examiner to exonerate him from the said letter nor produced the communication he had with NSSF during the transaction.

56. Indeed, if the Plaintiff's and the 2nd Defendant's assertion was that Mlolongo Care Investment was a distinct entity from the Children's Home, and that it was purely a vehicle for the three of them to engage into business, then why did they register a business name that almost resembled the name that was already being used by the Children's Home, that is, Mlolongo Care Centre? Was this meant to confuse NSSF which had offered the Children's Home the land after selling its other land to Oil Com (K) Limited?

57. That must have been the intention of the Plaintiff and the 2nd Defendant. I say so because from the evidence adduced, NSSF sold L.R. No. 13302/5 without advertising the same. Indeed, the said land was sold for the purpose of re-locating the Children's Home from the land that NSSF intended to sell to Oil Com (K) Limited. The said Oil Com (K) Limited even financed the re-location of the Children's Home to a portion of L.R. No. 13302/5.

58. The Application for the sub-division of L.R. No. 13302/5 by the Surveyor, Ndichu & Associates, to the Ministry of Lands, was for "27 Residential Plots and a Children's Home." The approval of the sub-division of L.R. No. 13302/5 by the Ministry of Lands for "27 Residential Plots and a Children's Home" was given on 30th June, 2010. Indeed, all the sub-plots were sold to third parties in the year 2010 leaving out L.R. No. 1330/43 measuring 2 acres.

59. The evidence before this court shows that by the time L.R. No. 13302/5 was transferred to the Plaintiff, the 1st Defendant and the 2nd Defendant on 12th September, 2008, the Children's Home had already taken possession of L.R. No. 13302/43 measuring 2 acres. Indeed, the re-location of the Children's Home to the suit land was facilitated by the Oil Com (K) Limited, amongst other well-wishers.

60. The Plaintiff in this matter knew that the 1st Defendant was running a Children's Home, and so was the 2nd Defendant. Indeed, the Plaintiff admitted in evidence that he had given to the 1st Defendant money in the year 2004 to assist in the running of the Home. The Plaintiff and the 2nd Defendant also knew that the said Children's Home, which was being run by well-wishers under the name Mlolongo Care Centre, had re-located on a portion of L.R. No. 13302/5 prior to the transfer of the said land to them.

61. Having being aware that the sub-division of L.R. No. 13302/5 into two portions was for Residential and a Children's Home purposes, the Plaintiff and the 2nd Defendant cannot now claim that the Children's Home, whose name changed from Mlolongo Care Centre to Liberty Care Centre Children's Home on 19th June, 2008, are not entitled to L.R. No. 13302/43 which the Home has occupied since the year 2006.

62. The conduct of the Plaintiff and the 2nd Defendant all along shows that they knew that they were buying the suit land from NSSF on behalf of the Home. Having sub-divided a portion of L.R. No. 13302/5 and sold portions thereof to raise the balance of the purchase price, and having benefited from the 29 sub-plots without paying for them, the Plaintiff and the 2nd Defendant will be abdicating their fiduciary duty to the Children's Home by claiming that they should have L.R. No. 13302/43 to themselves.

63. The breach of fiduciary duty, especially on the part of the 2nd Defendant, who registered both Mlolongo Care Investment and Liberty Care Centre Children's Home, and who was also an advocate in the transaction, was captured by the Ruling of the Advocates Disciplinary Committee of 7th February, 2011 as follows:

"After reviewing the evidence on record, we are satisfied that the Respondent, a part from being in partnership with Rev. Muhange and Mr. Mochache when they purchased the property also acted as an advocate for Rev. Muhange and Liberty Care Centre Children's Home. He had specific duties towards them as an advocate, which he did not carry out adequately. He also placed himself in a position where there was a conflict between his own interest and that of his client. We therefore find that the professional misconduct has been established against the Respondent on the basis that he failed to inform the complainant of the services he has rendered on its behalf as well as of conflict of interest."

64. I entirely agree with the decision of the Disciplinary Committee. The 2nd Defendant and the Plaintiff were always aware the reason why the suit land was being purchased was for the re-location of the Children's Home to the land, which re-location happened way before the land was transferred into their names. Just like the other purchasers of the sub-plots that were carved from L.R. No. 13302/5, the Plaintiff and the 2nd Defendant raised the requisite purchase price, and in the process obtained plots without paying for them. They cannot now claim the land which they had agreed, by implication, to be reserved for the Children's Home.

65. The analysis of the evidence therefore leads me to only conclusion, that the Plaintiff, the 1st Defendant (*deceased*) and the 2nd Defendant are holding the title and the Deed Plan for L.R. No. 13302/43, which is a sub-division of L.R. No. 13302/5, in trust for Liberty Care Centre Children's Home, and should transfer the said land to the said Home.

66. For those reasons, I dismiss the Plaintiff's Plaint and the 2nd Defendant's Statement of Admission with costs. The 3rd Defendant's Counter-claim is allowed as follows:

a. A declaration be and is hereby issued that the Plaintiff, the 1st Defendant and the 2nd Defendant hold the title document and Deed Plan in respect of L.R. No. 13302/43 in trust for the 3rd Defendant.

b. The Plaintiff, the 1st Defendant's legal representative and the 2nd Defendant do execute a transfer in respect of L.R. No. 13302/43 to the Trustees of the 3rd Defendant to hold the same on behalf and in trust of Liberty Care Centre Children's Home.

c. The 2nd Defendant to surrender the original title document and the Deed Plan for L.R. No. 13302/43 to the 3rd Defendant's Trustees.

d. A permanent injunction be and is hereby issued restraining the Plaintiff and the 2nd Defendant either by themselves jointly or severally, their agents, servants and employees from entering, trespassing, occupying, developing, erecting any structure or otherwise interfering with the 3rd Defendant's peaceful occupation and enjoyment of L.R. No. 13302/43.

e. The Plaintiff and the 2nd Defendant to pay the costs of the suit and the Counter-claim to the 3rd Defendant.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE