



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 151 OF 2018

VICTOR KOGO (Suing as an agent of **GEOFFREY MICHAEL TRIMBY**

and **MARGARET LESLEY TRIMBY** being the registered Trustees of

NEEMA SCHOOL KENYA TRUST.....PLAINTIFF

VERSUS

WALTER CHIPA MKINDO.....DEFENDANT

RULING

1. I have before me a Notice of Motion application dated and filed on 30th July 2018. The Plaintiff/Applicant prays for an order of temporary injunction to restrain the Defendant from entering, trespassing into, alienating or in any way interfering with all that parcel of land formerly known as Kilifi/Kijipwa/128 but now sub-divided and known as Plot No. Kilifi/Kijipwa/1394, 1395, 1396, 1397, 1399 and 1401 pending the hearing and determination of this suit.

2. The application is supported by an Affidavit sworn by Victor Giri Kogo, an agent of the Plaintiff and is premised inter alia, on the grounds:-

a) That on 26th May 2010 the Defendant donated the suit property to the Plaintiff who are Trustees of Neema School Kenya Trust to hold the same in trust for a school known as Neema School for the Needy;

b) Subsequently the Defendant has now illegally and without notice to the Plaintiff sub-divided the property and sold some portions of it to third parties in breach of the agreement;

c) The Defendant is now threatening to demolish the school structures and is unlawfully demanding compensation from the Plaintiff;

d) The Defendant has been visiting the school with potential buyers and harassing the students thereat and disrupting the peaceful learning therein; and

e) The charitable objective for which the suit property was donated shall be subjected to irreparable loss and/or damage unless the Honourable Court intervenes.

3. In a Replying Affidavit sworn and filed herein on 31st October 2018, Walter Chipa Mkindo (the Defendant/Respondent) avers that he is the registered owner of all the suit plots enumerated in the Plaintiff's application, all of them being sub-divisions of the parcel of land known as Kilifi/Kijipwa/28

4. The Defendant asserts that the Applicant herein is a stranger to him and avers that the Applicant has no locus standi to prosecute the suit without the leave of the Court and urges the Court to strike out the suit.

5. Further and in addition to the foregoing, the Defendant avers that he does not recognise the purported agreement dated 26th May 2010 since the trustees of Neema School (Kenya) Trust have breached the express provisions thereof. He avers that it was an express term and condition thereof that after constituting the School's Board of Governors, he was to be incorporated as one of the Board Members and be actively involved in the School's Management but the Plaintiffs have failed to do so.

6. The Defendant further avers that his consent was obtained by fraud, misrepresentation and deception. Infact, he avers that the objective of the trustees was to dispossess him of his parcel of land. Consequently he gave the trustees notice from the year 2010 that the agreement was voidable and it remains so to-date.

7. The Defendant states that if he is paid Kshs 18 Million as compensation for the land, he will gladly transfer the ownership of the land to the Applicant. He urges the Court to compel the Applicant to vacate the suit property or pay the said amount to acquire the same.

8. I have considered the Plaintiff's application and the response thereto. I have equally perused and considered the Written Submissions by the Learned Advocates for the parties as well as the authorities to which they referred me.

9. It is not in dispute that the suit property is registered in the name of the Defendant/Respondent. By an Agreement in writing executed between the Defendant(as the Donor), and Neema School (Kenya) Trust a registered charitable organization (as Donee) on 26th May 2010, the parties agreed in the relevant part as follows:-

“WHEREAS the Donor is the legal and/or registered owner of AL THAT PARCEL OF LAND, being Plot No. Kilifi/Kijipwa/28 measuring 1.034 Hectares approximately or thereabout, AND WHEREAS the Donor, out of love and affection for the welfare of students, is desirous of donating and/or offering the entire parcel of land to the Donee, who is equally desirous of receiving the said donation and/or offer, from the Donor for the benefit of students.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS

1.

2.

3. That the Donee shall put up building and/or structures on the said Plot for purposes of Education and/or learning and/or School for the Children to get quality Education.

4. That the entire Parcel of land, though donated to the Donee shall not be transferred to the Donee, until a Board of Governors is constituted from persons within the neighbourhood, where the Donor herein shall be a member of the board and more so without the consent of the Donor, which said consent should also not be withheld, unreasonably to the detriment of the Trust and should there be any issues or disputes arising from such withholding, then the parties herein can refer the matter to their Advocates for a resolution or determination of the issues and which said resolution shall be binding on both parties herein or any other party bound by this Trust.

10. It is apparent from the material placed before me that the Plaintiff/Donee proceeded on account of the Agreement to put up structures and buildings which now house a School known as Neema School for the Needy. It is equally apparent that the parties have disagreed and the Defendant/Donor feels excluded from the Management of the School and is no longer content on transferring the property to the Plaintiff as per the Agreement.

11. According to the Plaintiffs, the Defendant donated the suit property to the Trustees of the School for love and affection and his continued interference with the suit property, threats to demolish the school and demands for compensation are illegal and unwarranted. The Plaintiff accordingly craves an injunction to stop the Defendant from among other things entering or trespassing into the property.

12. From a perusal of the Agreement herein however, it is apparent that the Defendant retained a measure of control of the suit property. That was the reason the Agreement states at paragraph 4 thereof that the suit property shall not be transferred to the Plaintiff without the consent of the Defendant and until a Board of Governors is constituted in the manner provided under the Agreement.

13. As it were, the Plaintiff has not placed before me anything to demonstrate that a Board of Governors has since been constituted including the Defendant and his neighbours in the manner stipulated under the Agreement. It is also rather apparent that the Defendant has since not given any consent to the transfer and hence the stalemate herein.

14. In the circumstances of this case, I did not think that the Plaintiff is entitled to an injunction in the manner sought herein. This Court however takes into cognizance the fact that the Plaintiff has put up a school and that there are Children attending classes in the said school. That being the case, it would not be desirous to have the suit property disposed off to third parties pending the resolution of the dispute.

15. Accordingly and as the Defendant denies that he has disposed of any part of the suit premises to third parties, I hereby direct that the status quo be maintained pending the hearing and disposal of this suit.

16. In the circumstances of this case, I make no orders as to costs.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE