



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL SUSIT NO. 111 OF 2013

NG'AMBWA HEARTBEAT COMMUNITY

CHILDREN'S HOME & RESCUE CENTER.....PLAINTIFF

-VERSUS-

HEARTBEAT LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff, Ng'ambwa Heartbeat Community Children's Home and Rescue Center brought this suit against the defendant Heartbeat Limited vide her amended plaint dated 2nd December 2014 seeking the following reliefs:

a. The Declaration that the defendant purchased title number BURA/NYOLO/886 and URA/NYONDO/887 on behalf and in trust of the plaintiff.

b. An order directing the defendant to unconditionally effect transfer to title number BURA/NYOLO 886 and BURA/NYOLO 887 to the plaintiff failure to which the Registrar of Lands to execute the necessary instruments of transfer to the plaintiff.

2. The suit is defended through a statement of defence filed on 16th November 2013 denying the entire claim. The defendant pleaded that Ng'ambwa does not exist in law therefore the suit property cannot be transferred to her. But more importantly that the defendant is the registered proprietor and is hereby entitled to enjoy its proprietary rights. The defendant sought to have the plaintiff's suit dismissed with costs and interest.

3. After the pleadings closed parties adduced oral evidence supported by documents produced. The plaintiff called a total of 4 witnesses and the defendant called one witness. **Dickson Ochuto** testified as **PW1**. He is the director of the plaintiff. PW 1 states that the plaintiff was registered to operate from June 2008 – June 2011. He produced the certificate as the documents filed in his bundle. PW1 continued that the plaintiff's certificate was again renewed for the period March 2014 to March 2017.

4. It is the plaintiff's evidence that PW1 invited whites (wazungu) from Canada when he started the organization. PW1 could not tell when the defendant was formed stating he was not a director but that he learnt of the existence of the defendant when they were buying the suit properties. That the initial directors of the defendant were all Canadians as it was intended to enable them sell the idea of raising funds Canada easy which funds were to help the orphans in Taita Taveta. That they held a meeting in

which they agreed that the name of a Kenyan be added among the directors and Edward Khasakhala's name was added. PW 1 stated that the Canadians later resigned and left the company to Mr Edward and his wife. He produced a bundle of documents to show this change of directorship.

5. PW1 continued that the land was sold to them by David Muturi Kimani. That the land was bought to help the orphans. Currently the land is in the name of the defendant but the land is now being retained by a few directors to the exclusion of the children. He wants the Court to order the land be transferred to the plaintiff. PW 1 stated further that he was directly involved when the land was being bought.

6. In cross – examination by Mr Owiti advocate for the defendant, PW1 said the plaintiff was initially licensed for the period 2008 – 2011. That between the periods 2011 – 2014, he was working on the renewal of the licence. That his email dated April 2010 invited his friends/donors from Canada and a letter dated 12.4.09 showed the deliberations between him and the donors. That the minutes of 15.3.05 show the land was to be transferred to the children's home.

7. PW1 denied these minutes were fabricated. He admitted not participating in the formation of the defendant although he was included as a 3rd director. That the plaintiff is not mentioned in the sale agreement. Further clause 3.2 of the agreement showed the defendant paid the purchase price in full. He admitted the defendant obtained all the transfer documents by itself and the vendor confirmed it is the defendant who paid the purchase price.

8. **PW 2 is Edward Khasakahla** living in Taita Taveta County. Previously he was a farm manager but currently is a businessman. PW 1 is his brother. He said that the plaintiff was started in the year 2000 and he was engaged in the start-up where he was employed as a farm manager. PW 2 stated that the defendant was formed by Heartbeat Ministries Canada. He & his wife were also directors of the defendant. PW 2's evidence is that the defendant was formed to purchase land on behalf of the plaintiff from Mr David Kimani.

9. PW 2 continued that the purchase price of Kshs 4 million was paid by the donors through Heartbeat Limited based in Canada and monies sent through Oraro & Co Advocates. That he knew the monies were sent because he was copied through the emails e.g. the email of 21.8.2008. He states that he was involved in the transfer of the land process with him and his wife signing the transfer documents. PW2 continued that the land was later to be transferred to the plaintiff for the benefit of the children. That he made efforts to conduct this transfer but it was not possible as the lawyers had changed the directors of the company. That he was not aware of the addition of the directors shown in the search dated 2nd Sept 2011.

10. PW 2 continued further that he handed the original title deed to Mr Mwisakhaka advocate but the same was never returned to him. He wrote a letter to him and later lodged a complaint with the police. He was thereafter issued with an abstract stating loss of the title. The loss was published vide gazette notices Nos. 13531 and 13532. Subsequently PW 2 was issued with a duplicate title in 2012. PW 2 stated further that they entered into a settlement agreement with the defendant in 2012 and he was paid some money so that he does not pursue his complaint with the C.I.D. That he has never met Alphone Maduma Oloo and that there is only one children's home in Bura. He would like the Court to revert back the land to the children's home.

11. During cross – examination, PW 2 said that both PW 1 and he were the founders of the plaintiff organization. That the defendant was formed to purchase land for the benefit of the plaintiff although no such provision was stated in the Memorandum of Association of the defendant. That the email of 21.8.2008 does not indicate the money was sent to Oraro & Co advocates but the email of 26.9.2009 indicated so. PW 2 said he was involved in the land transaction which was to be transferred although such intention was not recorded in the transfer documents. That he did not transfer the land to the plaintiff because of change of directorship. He denied he was testifying because he had a vendetta with the defendant. In re – examination he said the plaintiff is a community thing. That paragraph 3 of the sale agreement expressed the interest of the plaintiff. That the sole purpose of forming the defendant was to buy land on behalf of the plaintiff.

12. **MAGDALINE M. KICHINDA** testified as **PW 3**. She said that she is an ECD teacher. That she has taught children from the plaintiff home. PW 3 does not know the defendant. She identified the children at page 48 of the documents as some of the plaintiff's children attending her school. She was surprised that the defendant is claiming the children belong to it.

13. In cross – examination, she said the children on the web page of the defendant attend a school she owns. Her school is called Talo Academy and though it is not registered the education officers are aware of it. That it would not be true to say the children do not come to her school.

14. **PW 4 is Samwel Mutito Mwamburi** who lives in Ngambwa in Taita Taveta. He is a pastor and a mason. He knows the plaintiff was begun in 2000. That PW 1 had an idea of starting the project and told him about it. They held a meeting with the community and passed a resolution to start the project. That the project was started in the home of PW 1 and as the numbers of the children were increasing they agreed to find them an alternative place. PW4 continued that they decided to look for friends to assist. PW1 was therefore authorized to look for the guests who were found from Canada. The Canadians came and a name of Heartbeat Limited was taken as a vehicle to raise funds. Subsequently the land was purchased which the defendant is now clinging to. He urged the Court to order the land be returned to assist the children. In cross – examination PW 4 said he never saw the sale agreement. That the meeting was held on 15.3.2005. The plaintiff at this point closed his case.

15. The defendant testified through Alphonse Mwiduma Oloo. He said he became a director of the defendant on 12th October 2010. He adopted his statement dated 14th September 2015 as his evidence. He said the defendant was incorporated on 15th May 2009 with main objective in the M.A being acquisition of land in order to facilitate various charitable projects including running of orphanages & schools. That upon purchase of the suit properties, transfers were done and title issued to the defendant.

16. DW 1 stated further that the purchased properties are currently being used for the purposes of organic farming in a food program whose aim is to provide food to feed the orphans & destitute children. The defendant said he was perturbed by the plaintiff's allegation claiming an interest in the land because:

(i) The defendant executed the agreement.

(ii) The defendant paid a consideration for Kshs 4,000,000.

17. DW 1 continued that at the commencement of the suit, the plaintiff's certificate of registration had expired therefore it had no capacity to institute this suit. DW states further that it was not expressed anywhere in the memo of association that the property was purchased for the plaintiff. Therefore it would be a great injustice to nullify the transfer to Heartbeat. That the plaintiff is undeserving of any remedy as he has failed to make full & frank disclosure concerning all matters pertaining to the suit properties. The defendant asked this suit be dismissed with costs. In support of the defendant's evidence he relied on the documents attached to DW 1's statement and therefore closed its case.

18. The defendant filed his submissions on 19th January 2017 while I did not find the plaintiff's submissions on record. The lawyer was contacted but they did not make any copies available in time. From the pleadings and documents on record, it is not in dispute that the two titles are registered in the name of the defendant. The process of registration is not questioned. The only issue in dispute which therefore forms my question for determination is whether the **land though registered in the name of the defendant was purchased for the purposes of and on behalf of the plaintiff. For this reason, was a trust created and consequently the transfer should be made to the plaintiff as prayed in the plaint?**

19. From the documents produced by the defendant, the certificate of incorporation shows the defendant was incorporated on 15th May 2009. The subscribers to the M.A & A.A dated 31.12.08 are seven (7) and they are all foreigners. The search from the companies registrar dated 26.6.2013 indicate the directors and shareholders as at this date are Margaret Oloo Adongo, Alphonse Midwuma Oloo (holding 7 shares) and Dickson Opiayo Ochuto (holding zero shares). DW 1 admitted in his evidence that he did not participate during the purchase of the land for the obvious reason that he was not then a director of the

defendant. The sale agreement dated 30.11.2009 was signed on behalf of the defendant by Edward Khasakhala (PW 2) and Jane Nanzala both described as directors. The first title deed was issued on 9th February 2010.

20. PW 2 narrated to Court that him and his wife were included in the initial directorship of the defendant. This evidence is corroborated by the sale agreement. PW 2 also said that the initial directors were all Canadians thus the need to include which again is corroborated by the M.A & A.A of the defendant produced and the search dated 8th Feb 2010 & 2nd Sept 2011. PW 2's evidence was that the defendant was formed to purchase land on behalf of the plaintiff which purchase was actually done. But before he could transfer the land to the plaintiff the directorship changed.

21. He was unaware of how this change took place and registered a complaint both with the C.I.D and the Companies Registrar. This is confirmed by the correspondence contained in the plaintiff's supplementary bundle vide letters dated:

(1) 28.11.2011 from the Advocates Complaints commission

(2) 29.8.2011 from Kituo Cha Sheria

(3) 16.11.2010 & 20.4.2011 made by Edward Khasakhala

Pursuant to these complaints a settlement agreement was drawn by the advocate for the defendant on record Ms Oraro & Co Advocates and dated 22nd March 2012. Clause 1 of this agreement described PW2 and his wife held the shares in the company (defendant) as trustees. They were being compensated for being illegally exited from the company's shareholding and directorship as well as services they offered to the company.

22. The plaintiff also produced a bundle of emails corresponding on the fundraising for monies stated to have been for the purchase of the suit properties. It is indicated the monies were directly released to Oraro & Co Advocates who was and still is acting for the defendant. It is the plaintiff's evidence that the purchase price was raised purely from the donors and the defendant was the channel they used. This is the evidence put forth by PW 1, 2 and 4. Although DW1 contested this but he did not show the funds were directly sourced from the defendant's account. He only questioned by way of cross examination the authenticity of some of the emails exchanged between PW 1, the donors and Oraro & Co advocates. However there is no communication in writing from Oraro & Co advocates denied receipt of the money from the Canadian donors. I am satisfied that indeed the plaintiff's evidence was corroborated both factually and by the documents. This explains why DW1 admits that one of the objectives of the defendant was to take care of the orphans. The defendant does operate a children's home.

23. On whether the defendant was capable of holding the land in trust for the plaintiff, clause 3.12 & 3.15 of the M.A provided thus, ***"To make advances upon, hold in trust, issue on commission, sell or dispose of any of the investments aforesaid and to act as agents for any of the above or the like purposes."*** (Underline mine for emphasis). The objects provided for holding in trust although the plaintiff's name was not specifically mentioned. The defendant submitted and rightly so that existence of a trust is a question of evidence. The evidence in this case is that the defendant came into existence on the initiative of PW 1 & PW 2. The monies were raised not by the defendant but through efforts of PW1 and its purpose clearly stated. The plaintiff was already engaged in the purpose of taking care of the orphans as early as 2000 and therefore required land for expansion when the number of the children increased.

24. While I do agree that the sanctity of title is paramount and must be protected as to ownership as per the provisions of article 40 of the Constitution, the sanctity is not absolute and the law grants provisions when a different position can be taken. For instance; section 28 of the Registered Land Act (repealed) while giving rights to a proprietor had a proviso stating thus, ***"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."*** The above proviso has been expanded in section 28 of the Land Registration Act 2012 which provides thus:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may from time to time subsist and affect the same, without being noted in the register:

(b) Trusts including customary trusts.”

And in case law, the Court of Appeal in a recent decision in the case of Stephen Mkare Mulewa vs Linda Newman (2015) KLR paragraph 18 stated thus:

“In the circumstances we come to the conclusion that the appellant bought the suit property from the monies remitted to him by the respondent. Although he registered the suit property in his own; the beneficial owner was actually the respondent who not advanced the money for purchasing the suit property but also developing the same. In Halsbury’s Laws in England 5th Edition Volume 72 at paragraph 282 it is stated:

“Subject to any express declaration of trust where property is purchased in one party’s name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his contribution to the purchase price.” The Court of appeal continued, “In this Case, the Respondent solely contributed the money for purchasing the suit property. Therefore the registration of the suit property in the appellant’s gave rise to a resulting trust in favour of the respondent.”

25. Further the case of **Mbothu & 8 others versus Waitimu & 11 others** (1986) KLR 171 cited by the defendant expressed the same position that **Courts will not imply a trust save in order to give effect to the intentions of the parties and such intention must clearly be determined beforehand.** In the Mbothu case trust was not pleaded neither did the evidence show the parties intention to create a trust which is a different scenario from the present case. I do not find the rest of the authorities cited by the defendant to refer to similar circumstances as in this case.

26. In light of the provisions of the law above stated and based on the evidence adduced on record, I am satisfied that a resulting trust was created in favour of the plaintiff. The submission that the defendant is a juristic person does not erase that trust. Accordingly it is my finding that the pray (aa) of the further amended plaint dated 2.12.13 has been proved and is hereby granted.

27. The defendant raised the issue of capacity of the plaintiff as at the time of filing his suit. The plaintiff through PW 1 explained that it obtained a certificate of registration for the period 2008 – 2011 and that when the certificate expired it applied for its renewal. PW 1 explained that the renewal takes a process after a letter is done to the respective ministry. Subsequently they were issued with a new certificate on 27th March valid from 2014 to March 2017. This objection is thus a technical one which article 159 (2) (d) of the Constitution requires this Court not to give due regard to. The said objection is hereby dismissed.

28. In conclusion, I reach a finding that the plaintiff has proved its case within the required standards of the law in civil cases. Having granted prayer (aa) of the further amended plaint, I do also grant prayer (bb) in terms that an order be and is hereby issued directing the defendant to unconditionally effect transfer of title Nos. Bura/Nyolo 886 and 887 to the plaintiff forthwith. If the defendant fails to so do, the deputy registrar of this Court be and is hereby directed to execute all the necessary documents to ensure the transfer is effected in favour of the plaintiff. Costs of this suit is awarded to the plaintiff.

Dated, signed & delivered at Mombasa this 25th day of May, 2017

A. OMOLLO

JUDGE