



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 78 OF 2015

IN THE MATTER OF: THE TAWHEED GIRLS SECONDARY SCHOOL TRUST

BETWEEN

ALI ABDALLA SALIM, ALI YISLAM

ALI BASHAMAKH AND MOHAMED

SALIM AHMED (*As Trustees of The Tawheed Girls*

Secondary School Trust).....**PLAINTIFFS**

AND

ABUBAKAR MASOUD.....**1ST DEFENDANT**

MUNIR ABUBAKAR MASOUD.....**2ND DEFENDANT**

JUDGMENT

1. In the Amended Originating Summons dated 12th March, 2014, the Plaintiffs have asked this court to determine the following questions:
 - a. Whether Abubakar Masoud and Munir Abubakar Masoud as members of Tawheed Muslim Association have equitable rights and interest in Tawheed Girls Secondary School Trust.***
 - b. If found to be so, then who are the legitimate trustees of Tawheed Secondary School Trust.***
 - c. If found not to be so, whether Abubakar Masoud and Munir Abubakar Masoud as members of Tawheed Muslim Association should be restrained from interfering, obstructing, impeding, and or otherwise tampering with the running and management of Tawheed Girls Secondary School.***
2. The Amended Originating Summons is supported by the Affidavit of Ali Abdalla Salim who has deponed that the Plaintiffs are the trustees of Tawheed Girls Secondary School Trust; that they are involved in the running and management of the school as the Board of Trustees and that on 24th October, 2011, they were granted by the Government the title document for L.R. No. 8604(*the suit land*).
3. It is the deposition of Mr. Salim that Tawheed Girls Secondary School (*the school*) has been operational since 1998 and that it was built through donations by members of the local community and well wishers, including Tawheed Muslim Association.
4. According to the Plaintiffs, Tawheed Muslim Association is a separate entity distinct from The Tawheed Girls School Trust and that the Association, through its Chairman, Mr. Abubakar Masoud and his son Munir Abubakar Masoud, has been interfering with the management of the school by purporting to dissolve the entire Board of Trustees, the Board of Governors and the teaching staff.
5. In response to the Originating Summons, the 2nd Defendant, Munir Abubakar Masoud, filed a Replying Affidavit and a Counter-Claim.
6. In the Counter-Claim dated 13th July, 2015, the Defendants want the court to determine the question: whether the Plaintiffs, as members of the School's trust, have established the trust by misrepresentation or false pretence; whether the Plaintiffs applied for and obtained a fake or a duplicate re-drawn copy of Deed Plan for L.R. No. 8604 and whether the Director of Surveys and the Commissioner of Lands illegally re-drew the Deed Plan and issued a grant for CR 53762.

7. In a detailed Affidavit, the 2nd Defendant deponed that at all material times, the 1st Defendant was the Chairman, founder, sponsor and patron of Twaheed Muslim Association as well as the school; that the 1st Defendant was previously a member of the Board of Governors of Malindi Township Secondary School and that using the Association, he applied to be allocated the land meant for a Nursery School (*the suit land*).
8. It is the Defendants' case that on 7th July, 1994, the Municipal Council of Malindi approved the Associations' application for allocation of portion number 1935/R which later on changed to L.R. No. 8604; that the Association prepared building plans and applied for approval of the plans for Tawheed Girls Secondary School (*the school*); that building permit No. 78/94 was issued by the council for putting up the school and that the 1st Defendant was issued with a Deed Plan No. 189979 for the suit land which is still in the possession of the 1st Defendant.
9. According to the 2nd Defendant, the 1st Defendant built the school and completed it in 1997 and that the school opened its doors in 1998 with the 1st Defendant being the sponsor and the Plaintiffs as trustees.
10. The 2nd Defendant deponed that later on, the Plaintiffs, without the authority of the Association, constituted themselves into and registered a trust using the name of the school; that a Police Abstract was procured on 12th June, 2009 by Mr. Bakhshuwein in which he purported that he had lost his Deed Plan No. 189979 for L.R. No. 8604 and that a new grant was unlawfully issued to the Plaintiffs.
11. The Defendants' case is that the Plaintiffs, having served as trustees under the umbrella of Tawheed Muslim Association were fully aware that the Association had been allocated the land and had fully developed it and that the Association was awaiting to be issued with the title document for the land.
12. Having joined the Director of Surveys in the Counter-Claim, the Director of Survey's nominee swore a Replying Affidavit in which he deponed that the original parcel of land was portion number 1935 which was sub-divided into several portions in the year 1977; that the land which was surrendered to the government for public utilities was plot number 1935/240; that a portion of land within plot 1935/240 had been earmarked for a nursery school and that the said land was allocated to a private entity known as Lelabei Ventures in 1994.
13. After the survey, the Director of Surveys deponed that Plot No. 8604 (*the suit land*) was created; that in the year 2010, he received an Affidavit from Mr. Bakhshuwein on behalf of the Trustees of the school requesting for a certified copy of the Deed Plan No. 189979 and that when they inquired from the Malindi District Education Board to confirm the status of the school, they received a positive response and thus issued the certified copy of the Deed Plan in favour of the school.
14. The Amended Originating Summons and the Counter-claim to the Amended Originating Summons proceeded by way of oral and Affidavit evidence.
15. The 1st Plaintiff, PW1, informed the court that the 1st Defendant (*deceased*), Salim Ahmed (*deceased*), the 2nd Plaintiff and himself have been long time trustees of the school; that the school is a community based school that was founded and established for the benefit of the girl child and that the trustees, well-wishers and charitable organizations are the ones who financially aided the establishment of the school.
16. It was the evidence of PW1 that from its inception, the school has never been the property of Tawheed Muslim Association (*the Association*).
17. PW1 informed the court that the school has always been under the management of the Board of Governors who are appointed by the Board of Trustees.
18. It was the evidence of PW1 that as one of the school's founders, sponsors and trustees, the 1st Defendant had no capacity to hire or fire a co-trustee, Board of Governors and members of the school staff; that the attempt by the Defendants to retire some co-trustees and members of the Board was a direct interference with the school administration and operations and that the said interference was reported to the Ministry of Education.
19. PW1 informed the court that he is the one who identified the suit land with the aid of the former Town Clerk as suitable land for a community based institution; that when he informed the 1st Defendant about the land, he expressed his willingness to support the venture of ensuring that the project to assist the girl child is realised.
20. PW1 stated that he is the one who engaged Mr. T.S. Tarwadi to draw up the building plans for the school which he lodged with the council for approval; that he deputized Ahmed Sheikh Amin to pursue the letter of allotment with the Ministry of Lands and that because the Deed Plan for the land was still at the Ministry of Lands, Mr. Ahmed was given the letter of allotment together with the Deed Plan No. 189979 which he handed over to him.
21. When the 1st Defendant asked for the original Deed Plan so as to make a follow up on the issue of registration of the land in favour of the school, PW1 stated that he gave the Deed Plan to the 1st Defendant in the presence of Mr. Ahmed; that they agreed to compensate Malindi Central Primary School for the foundation that they had put on the suit land and that the main financiers for the infrastructural development of the school were the Trustees, charitable organizations and well wishers.
22. PW1 stated that later on, the Defendants informed him that they had misplaced the original Deed Plan and after holding Board meetings, they agreed to pursue a duplicate Deed Plan for the suit land.

23. PW1 informed the court that the school is situated on the suit land; that the title document is in the name of the Board of Trustees in trust for the school; that a Trust Deed was incorporated to operate as a platform for registration of the Title Deed and that the Board of Trustees and the Board of Governors were never appointed by the Association as alleged.
24. PW1 stated that the Association has never been issued with a letter of allotment or a title document and that the Originating Summons should be allowed.
25. The 1st Plaintiff produced a bundle of documents as exhibits.
26. PW2 informed the court that he was deputized by the 1st Plaintiff to make a follow up with the Commissioner of Lands for the allocation of Plot No. 1935/R for the purposes of putting up a community based Girls Secondary School; that he established that the land had been allocated to Lelabei Ventures who had only collected the letter of allotment but left behind the Deed Plan No. 189979 and that the Deed Plan was handed over to him.
27. It was the evidence of PW2 that he handed the Deed Plan to PW1, who then handed it over to the 1st Defendant to facilitate for the registration of the land in favour of the school.
28. It was the evidence of PW2 that he is the one who identified the land and informed the 1st Plaintiff, the 1st Defendant and Omar Said and that when he was informed that the Deed Plan had been misplaced, he managed to obtain a replacement of the same.
29. According to PW2, Central Primary School was also claiming the same land and that they were compensated for the foundation that they had already put up on the land.
30. On his part, the 2nd Defendant relied on his Affidavits and documents.
31. It was the evidence of DW1 that the 1st Defendant is his father; that the 1st Defendant was the Chairman, founder, sponsor and patron of Tawheed Muslim Association (*the Association*) and that the Association had several members.
32. According to DW1, using the Association, the 1st Defendant applied and was allocated Plot No. 1935/R by the then Municipal Council of Malindi; that the council allocated the Association the said land together with a building permit and that it is the 1st Defendant who constructed the school and completed it in 1997.
33. When the new Board of Governors of the School was appointed in the year 2008, DW1 informed the court that it engaged a consultant to look into the performance of the school and that that is when things started to go wrong.
34. Although the Deed Plan for the suit land was always in the possession of the 1st Defendant, DW1 stated that a Police Abstract was procured by Mr. Bakshwein indicating that he had lost the said Deed Plan; that an Affidavit was sworn to that effect and that an insertion of the words “*new grant*” and making a re-drawn copy of the Deed Plan by the Director of Surveys in respect of the suit land was unlawful.
35. It was the evidence of DW1 that the Commissioner of Lands did not have the authority to re-allocate the suit land to the Plaintiffs and that the Plaintiffs, having served as trustees under the umbrella of the Association were aware that the land belonged to the Association.
36. DW1 stated that the construction of the school by the Association commenced in 1994 and ended in 1998; that they were compensated for the constructions of the structures that they made on the suit land and that they are still collecting rent from three structures standing on the land.
37. DW1 stated that between the year 1998- 2011, the school had five trustees-his father, the three Plaintiffs and Sheikh Mohamed Ali; that his father, Sheikh Mohamed and the 3rd Plaintiff are now deceased and that his father appointed him as an alternate member.
38. According to DW1, it was his father who appointed the other four trustees and that he asked him to write to them to vacate the offices.
39. The Secretary of the Association, DW1, stated that the 1st Defendant was the Chairman of the Association and that he had the absolute control, power and authority over everything in the Association.
40. DW2 adopted word for word the evidence of DW1 which I have already summarized above.
41. The Director of Surveys’ nominees, DW3, repeated the averments in his Affidavit.
42. According to DW3, Plot No. 1935/240 was surrendered to the Government for public utilities; that a Deed Plan for Plot No. 1935/240 was issued to a private entity known as Lelabei Ventures and that the land changed from Plot No. 1935/240 to 8604.
43. It was the evidence of DW3 that when the school applied to be allocated the land, they gave the school the Deed Plan to enable the school pursue a Title Deed with the Commissioner of Lands.
44. DW3 stated that he never saw an Application by the Association to be allocated the suit land; that the school was issued with a certified copy of the Deed Plan when it reported that the original Deed Plan had been misplaced and that they were satisfied that the land should be

registered in favour of the school.

45. The Plaintiffs and the Defendants filed their respective submissions and authorities which I have considered.

46. Considering that the said submissions are a reproduction of the evidence that was adduced, which I have already summarized, I shall not re-produce them in this Judgment.

47. From the pleadings and the evidence before me, the issues to be determined are as follows:

a. Whether the Plaintiffs are the lawful Trustees of Tawheed Girls Secondary School (the school).

b. Whether the duplicate re-drawn copy of Deed Plan No. 189979 for Plot No. 8604 was fraudulently obtained by the Plaintiffs.

c. Who between Tawheed Girls Secondary School and Tawheed Muslims Association owns Plot No. 8604?

Analysis and findings:

48. Tawheed Girls Secondary School (*the school*) is a Girls Secondary School situated on Plot No. 8604, Malindi.

49. According to the evidence before this court, portion number 1935 was sub-divided into numerous portions by the registered proprietor who surrendered to the then Malindi Municipal Council one portion of land known as Plot No. 1935/240 for public utilities.

50. According to the evidence of PW1, the then Treasury of Malindi Municipal Council informed him that Plot No. 1935/240 would be ideal for the construction of a community based institution considering that the said land had been set aside for public utility. That is when PW1 informed the 1st Defendant about the issue of starting a community based school which was to be put up on the said land.

51. To be able to secure the land and process the title document, PW1 informed the court that they prepared a building plan for the proposed school and had the plan approved by the council.

52. PW1 informed the court that they were advised to have the drawings of the proposed community based school approved so as to convince the Commissioner for Lands to allocate them the land, which had already been surveyed by Lelabei Ventures, a private entity.

53. A copy of the letter of allotment dated 21st March, 1994 in favour of Lelabei Ventures for "*unsurveyed nursery school*" was produced in evidence.

54. The evidence that was produced by the Plaintiffs shows that after the letter of allotment was issued to Lelabei Ventures, the same entity caused a Deed Plan No. 189979 dated 19th September, 1984 to be prepared. However, the original Deed Plan was never collected by Lelabei Ventures from the Director of Surveys office.

55. When the Commissioner of Lands was satisfied with the noble intention of the community, PW1 and PW2 informed the court that he gave them the original Deed Plan for portion No. 8604 which had changed from portion number 1935/240 upon survey.

56. According to PW1 and PW2, they handed to the 1st Defendant the original Deed to enable him pursue the issuance of the title. However, he later on informed them that he had misplaced the Deed Plan.

57. The Plaintiffs produced in evidence a copy of the application that they made to the Municipal Council of Malindi for the approval of the building plan for "*Tawheed Girls Secondary School*". The Application is dated 1st September, 1994.

58. The permit approving the construction of Tawheed Girls Secondary School dated 1st September, 1994 by the council was also exhibited.

59. The Plaintiffs also produced in evidence the Minutes of the Schools meetings that was held by the Board of Governors and the Trustees on 17th May, 2009.

60. In those Minutes, three Trustees were present. However, the 1st Defendant, who was also a trustee, was absent.

61. Minute number 3.05 2990 shows that the members of the Board and the Trustees were informed that 1st Defendant had informed a Mr. Mujahid that the Deed Plan that was in his possession was lost.

62. The Minutes of the Board of Governors and Trustees of 17th January, 2010 shows that the 1st Defendant was present when the Board and the Trustees resolved that the Board should follow up on the issue of the school acquiring a Title Deed "*for the land the school is built on.*"

63. I have gone through the Minutes of the meeting of 17th January, 2010 and I have not come across any minutes showing that the 1st Defendant objected to the acquisition of the Title Deed for the school or an objection to the composition of the Board of Governors and Trustees who were 13 and 3 respectively.

64. Indeed, it was after the meeting of 17th January, 2010 that Mr. Bakshwein, one of the Trustees, swore an Affidavit on 10th December, 2010 deposing that the Deed Plan number 189979 for portion number 8604 “*got lost under circumstances and could not be traced.*”
65. By the time the Board members and Trustees of the school were pursuing the issuance of a duplicate Deed Plan, the school had been registered by the Ministry of Education.
66. According to the exhibited Certificate of Registration, the school was registered as Tawheed Girls Secondary School on 13th January, 2006.
67. In the letter dated 6th August, 2001, the Ministry of Education informed the Chairman of the Board of Governors that he was satisfied that the school should be provisionally registered for a period of eighteen (18) months. The said letter referred to the Application letter dated 14th August, 2000.
68. It is therefore obvious from the letter dated 6th August, 2001 by the Ministry of Education that it is not the 1st Defendant, through Tawheed Muslims Association, who applied for the registration of the school. If that was the position, the Ministry would have addressed the Defendants’ Association directly.
69. Although the 1st Defendant might have expended his money in putting up some structures on the land, the evidence before the court shows that the school was meant for the community and not for an individual or for the Association.
70. Indeed, the evidence before this court shows that the Defendants were compensated by the Trustees, on behalf of the school, for the structures that they had put on the land using their own resources.
71. According to the agreement dated 22nd March, 2013, the Defendants herein were compensated by the Board of Governors of the school by paying them a total of Kshs. 3,000,000.
72. If the suit land belonged to the Association which, according to DW1 and DW2, belonged to the 1st Defendant, why would they agree to be paid Kshs. 3,000,000 for the structures that were on the land?
73. To show that the Association has never owned the suit land or the school, the Plaintiffs produced in evidence the Certificate of Registration of the Association and the Annual returns from the year 1986 until 2012.
74. In the said returns, the Association has not indicated that it owns the suit land.
75. The only asset the Association owns, according to the Annual returns, is “*Plot No. 5050 with buildings.*”
76. A report by the Directorate of Quality Assurance and Standards, Ministry of Education dated 29th June, 2011 shows that the Ministry acknowledged the organizational structure of the school as adopted by the Board of the School in their meeting of 26th October, 2008.
77. In the said meeting of 26th October, 2008, it was agreed that the school was a “*community school where all or any member of the Society*” could contribute money for its development. The meeting further agreed that the school will have Trustees and the Board of Governors in its management structure.
78. The report of the Ministry recognized the fact that the school had a Board of Trustees made of five (5) members, whose work was to raise funds for the expansion of the school and the Board of Governors whose work was to oversee the running and expansion of the school. The Board also dealt with the management and administrative matters, which had been in place since the year 2008.
79. In its recommendation, the Directorate recommended that the school should acquire a title deed in the name of the school and that “*the Board of Governors should take up its mandate of school management seriously outlined in the Education Act.*”
80. It is on the basis of those recommendations that the school obtained Grant number 53762 for portion number 8604 on 24th October, 2011 using a certified true copy of Deed Plan number 189979, the original having been misplaced or withheld by the 1st Defendant.
81. Before being issued with the said Grant, the School had been issued with a letter of allotment dated 4th April, 2001 in its own name, and not in the name of the Association.
82. It is clear from the evidence before me that the 1st Plaintiff and the 1st Defendant were the first Trustees of the school.
83. The Minutes of the Board of Governors of 26th October, 2008 recognized those Trustees and in the subsequent meetings of the Trustees and the Board, the school acquired a Title Deed for its land.
84. There is no evidence before me to show that Tawheed Muslim Association ever owned the suit land or developed the school.
85. Considering that the Plaintiffs are only holding the suit land as Trustees of the school, I did not see why the court should interfere with that arrangement.

86. All that the court see from the correspondences exhibited by the Plaintiffs is the concerted effort by the 2nd Defendant, who is neither a trustee of the school nor a member of the Board of Governors intermeddling with the running and management of the school.

87. It is for the reasons I have given above, that I find and hold that the Plaintiffs are the lawful Trustees of Tawheed Girls Secondary School, and who, on behalf of the School, own Plot No. 8604.

88. In the circumstances, I dismiss the Defendants' Amended Counter -Claim dated 13th July, 2015 with costs and allow the Plaintiffs' Amended Originating Summons dated 12th March, 2014 as follows:

a. The Plaintiffs herein are the legitimate Trustees of Tawheed Girls Secondary School Trust.

b. Abubakar Masoud and Munir Abubakar Masoud, either in their individual capacities or as members of Tawheed Muslim Association, or their agents, servants or nominees be and are hereby restrained from interfering, obstructing, impeding and or otherwise tempering with the running and management of Tawheed Girls Secondary School.

c. The 1st and 2nd Defendant to pay the costs of the Amended Originating Summons and the Counter-Claim to the Amended Originating Summons.

DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 5TH DAY OF OCTOBER, 2017.

J.O. OLOLA

JUDGE