



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 34 OF 2014

(formally CMCC No. 364 of 2010)

1. FRANCIS K.

BAYA

2. JOSEPH KIRINGI

3. CLEMENTINA MAPENZI (suing on their behalf as Chairman, Secretary and Treasurer respectively as officials and on behalf of members of Rainbow Community Care

Kibokoni.....PL

PLAINTIFFS

=VERSUS=

1. SAMMY MUTILE

2. DENISE KNOTTE

MUTILE.....DEFENDANTS

J U D G M E N T

Introduction:

1. This matter commenced in the Chief Magistrate's Court by way of a Plaintiff dated 17th November 2010. The matter was transferred to this court on 4th March 2014 by consent of the Plaintiff and the 1st Defendant.
2. Although the suit was initially filed against the two Defendants, the record shows that the 2nd Defendant filed an Application dated 9th June, 2011 in which she applied to be struck out of the suit as a Defendant, which application was allowed by the court.
3. The Plaintiffs have averred in the Plaintiff that they, on behalf of the Rainbow Community Care, Kibokoni, are the owners of parcel of land known as Kilifi/Kibokoni/Block M 13D/113 and Kilifi/Kibokoni/Block M 13D/114 with all the improvements thereon.
4. According to the Plaintiff, the Plaintiffs are the ones who have been running an orphanage home and a school for the community; that in the year 2000, the Plaintiffs realised that the Defendants had the suit properties registered in their personal names and that after several meetings, the Defendants agreed to have the properties transferred to the Community which they later refused to do.
5. The Plaintiffs are seeking for an order compelling the Defendants to transfer the suit properties to

- the Plaintiffs.
6. In their Defence, the Defendants averred that they are the founders of the Rainbow Community Care, also known as Rainbow Project Care.
 7. According to the Defence, the suit properties are personal properties purchased by the Defendants and that they only allowed the developments of the Community to be erected on the two plots because they are the founders of the said organisation.
 8. It is the Defendants' case that the terms and conditions in respect to the said properties are contained in the letter dated 21st October 2010.

The Plaintiff's case:

9. The 1st Plaintiff, PW1, informed the court that he is the chairman of Rainbow Community Care-Kibokoni. It was his evidence that the organisation takes care of orphans and has a primary school and a clinic.
10. PW1 informed the court that in the year 2000, the Defendants, who were by then a husband and wife, informed the Community in a public baraza that there were donors who were willing to buy a plot and have the then existing nursery school expanded into a primary school. It was the evidence of PW1 that the members of the Community were further informed that the same donors were willing to build an orphanage home.
11. It was the evidence of PW1 that in the year 2001, the Defendants commenced the construction of classrooms while the orphanage home was built in the year 2004. According to PW1, he was employed by the 1st Defendant in May 2005 as an accountant in the institution and in the same year, the orphanage home was opened by the District Officer of Malindi.
12. After the opening of the orphanage home, PW1 informed the court that the same donors who had contributed towards the setting up of the orphanage home started putting up a clinic and the same was opened for the usage of the community in the year 2008.
13. The evidence of PW1 was that it is the donors who sent to the Defendants the money that was used to buy the two suit properties through Standard Chartered bank.
14. PW1 informed the court that in the year 2010, the donors agreed with the 1st Defendant to allow him to run the primary school while they were to run the orphanage home and the clinic and that when they demanded for the title deeds on which the clinic and the orphanage home stands, they realised that both title deeds were registered in the names of the 1st and 2nd Defendants.
15. The evidence of PW1 was that the clinic is situated on plot number 113 while the orphanage home is on plot number 114.
16. Although the Defendants agreed to transfer the two plots to the Plaintiffs, it was the evidence of PW1 that they went back on their word. That is when this suit was filed and the court allowed the Plaintiffs, on an interim basis, to run the orphanage home and the clinic while the Defendants were allowed to run the primary school.
17. The evidence of PW1 was that Rainbow Community Care-Kibokoni started in the year 2000 and was registered in the year 2004.
18. PW1 stated that the Defendants were not in any gainful employment and that it is the donors who initiated the three projects. According to PW1, the two main donors whom he interacted with were Mr. Michele Cunio and Dr. Henrico.
19. PW1 was categorical that although the Defendants are the founders of Rainbow Community, plot numbers 113 and 114 were purchased by donors and well wishers and not the Defendants.
20. As the accountant employed by the Defendants until 2010, PW1 informed the court that plot number 113 was bought on 8th April 2004 while plot number 114 was purchased on 27th March 2005.
21. According to PW1, the Defendants informed him that the two plots belonged to the Community and that the project was started by the Italian Donors for the benefit of the Community.
22. The 2nd Defendant was struck out of the suit and testified in the matter as PW2.
23. PW2 informed the court that she swore an affidavit on 9th July 2011 in which she stated the reasons as to why she wanted to be struck out of the suit as a Defendant.
24. The evidence of PW2 was that it is the Plaintiffs who bought the suit property. It was her evidence that the title deeds were erroneously issued in her name and that of the 1st Defendant

- instead of being issued in the name of the Plaintiffs.
25. PW2 informed the court that she was a co-owner of the "Rainbow Community Care" and that she came to Kenya to do charitable work. It was for that reason that she built a clinic called "Rainbow Clinic" so as to help the poor people.
 26. According to PW2, Dr. Eunico Ferari from Italy donated equipment and medication to the clinic and that indeed, it is Dr. Eunico and Michele Cunio who purchased the land for that purpose.
 27. The evidence of PW2 was that Dr. Eunico and Michele Cunio built the primary school on land belonging to the 1st Defendant, which is plot number 118.
 28. According to PW2, the money that was used to purchase plot numbers 113 and 114 was sent to her by Mr. Michele from Italy. It was her evidence that both plots were purchased using the money sent by the sponsors from Italy, and that the two plots should have been registered in the name of "Rainbow Community".
 29. According to PW2, when it was realised that the two plots had been registered in their names, it was agreed that the same be transferred to the "Rainbow Community". That agreement, according to PW2, was in writing. However, the 1st Defendant reneged on the agreement.
 30. PW2 informed the court that the 1st Defendant can keep the school which was built on his plot being plot number 118, although the school was also built using funds from the donors. However, it was her evidence that the title deeds in respect of plot numbers 113 and 114 should revert to the "Rainbow Community" because it is the donors who bought the said properties.
 31. In cross-examination, PW2 stated that she started "Rainbow Community Care" in 1997 and that when he met the 1st Defendant, he did not have any money and that he was a waiter at Shelly Beach Hotel.
 32. It was the evidence of PW2, that when she met the 1st Defendant, he stopped working as a waiter in 1996 and did not take up any other job.
 33. Mr. Michele Aimone Cuneo, PW3, informed the court that he is Italian.
 34. According to the statement by PW3, he was the vice chairman of "Rainbow Community Care Association" which is a charitable organization registered in Italy. That is the organization that has been sponsoring "Rainbow Community Care, Kenya" since October 2004.
 35. It was the evidence of PW3 that he met the 2nd Defendant in Kenya in 2001 and started sending money to develop Rainbow Community in Kibokoni using humanitarian funds from Italy. It was his evidence that in the year 2004, him, together with his friends, constituted "Rainbow Community Care onlus Association" in Italy to continue with the humanitarian work in Kenya.
 36. It was the evidence of PW3 that they used to send money directly from Italy to Standard Chartered Bank and Fidelity Community Bank.
 37. According to PW3, before they started the project, the Defendants had a small nursery school and a clinic for children. However, money was later sent to the Defendants to buy plot numbers 113 and 114 for the purpose of putting up a clinic and an orphanage home.
 38. The funds to purchase the said plots, according to PW3, were sent to the Defendants by "Rainbow Community Care Onlus Italy" and were channeled through the bank accounts of Rainbow Community Kibokoni.
 39. It was the evidence of PW3 that when the sponsors realised in the year 2010 that the two parcels of land were in the name of the Defendants, they stopped sponsoring the Plaintiffs' organization.
 40. In cross-examination, PW3 stated that he made personal contribution to the running of the Plaintiff's organization between the year 2001 until 2004.
 41. The Manager of the Rainbow Community Care, PW4, informed the court that he manages the Rescue Center and the hospital while the 1st Defendant manages the school.
 42. According to PW4, the two institutions which he manages are situated on plot numbers 113 and 114.
 43. It was the evidence of PW4 that on 6th October 2010, he attended a meeting in which meeting the Defendants voluntarily agreed to transfer the two plots to the Rainbow Community Centre, Kibokoni.
 44. The Plaintiff's accountant and auditor, PW5, informed the court that he is the one who audits the financial statements of Rainbow Community Care.
 45. The evidence of PW5 was that when he prepared the Plaintiff's financial statements for the year ending 2004, he indicated plot number 113 as one of the assets of the organization.

46. It was his evidence that while preparing the said financial statements, he was given the sale agreement in respect of plot number 113. It was his evidence that on the basis of the documents he was given, it showed that the Plaintiff acquired plot no. 113 for Kshs.450,000 by paying the said amount in two installments of Kshs.300,000 and 150,000. PW5 informed the court that his statement shows that the purchase of plot no. 113 cost the Plaintiff's organization Kshs.475,000 inclusive of the incidentals.
47. PW5 stated that the Plaintiff's organization purchased plot no. 114 in the year 2005 for Kshs.415,200 all inclusive.
48. Other than the financial statements for the year 2004 and 2005, PW5 also produced in evidence the bank statements for Rainbow Community Care for the year 2004 and 2005. The said statements shows that Kshs.315,000 and Kshs.160,000 was withdrawn from the organization's account for the purchase of plot number 113 while Kshs.360,000 was withdrawn from the same account on 30th March, 2005 for the purchase of plot no. 114.
49. It was the evidence of PW5 that all the money that was deposited in the Plaintiffs' organization's account was by the donors and that the Defendants were the signatories to the said accounts.

The 1st Defendant's case:

50. The 1st Defendant, DW1, informed the court that he is a businessman. It was his evidence that he runs a school, a hospital and a shop.
51. DW1 informed the court that Rainbow Care Community is a charitable organization which he established with his wife, the 2nd Defendant, in the year 2000.
52. DW1 testified that when they started the charitable organization, they had two donors who were the patrons. It was his evidence that the said donors helped them to start a school and a hospital. Upon registration of the organization, they managed to get more donors from Italy.
53. DW1 informed the court that the said donors used to take the pictures of the children in his school and then sent to him money to help in the payment of school fees, uniforms and desks.
54. According to DW1, the dispute herein arose in the year 2010 when one Mr. Bruno came to Kenya and started causing problems.
55. According to DW1, he used the money which used to be sent by the donors for the payment of the fees of the children in his school to buy the two suit properties.
56. In his written submissions, DW1 stated that on 31st January 2004, he was issued with a Certificate of Registration for Rainbow Community Care Kibokoni although it was first registered in the year 2000.
57. It was the evidence of DW1 that on 3rd November 2010, a Committee comprising seven members was selected and during that meeting, the name of the organisation changed from "Rainbow Community Care Kibokoni" to Rainbow Project Care Kibokoni.
58. It was the evidence of DW1 that the suit properties were purchased using his money and not the donors; that him and his wife allowed the projects of the organization on the suit properties because they are the founders of the organization and that they should remain as trustees of the Plaintiffs' organization.

Submissions:

59. The Plaintiff's advocate submitted that the evidence of PW5 which showed that the suit properties were purchased using funds from the Plaintiffs' account was not challenged at all.
60. Counsel submitted that the 1st Defendant admitted that the suit properties were purchased using monies donated by the donors; that the 1st Defendant never demanded school fees from the donors as alleged and that the 1st Defendant did not show an independent source of income apart from the funds received from donors.
61. Counsel submitted that although the suit properties are registered in the names of the Defendants, the same were acquired for and on behalf of the Plaintiff's organization.
62. The Plaintiff's counsel submitted that the Defendants having purchased the suit property using the Plaintiffs' organization's funds, the Defendants hold the same in trust for the said organization.
63. The 1st Defendant's counsel submitted that the Plaintiffs have no locus standi to file the suit; that

- no evidence was produced in court to show that the Plaintiffs are the registered officials of Rainbow Community Care and that the 1st Plaintiff was employed as a worker by the Defendants and resigned in the year 2010.
64. Counsel submitted that the suit properties belong to the 1st Defendant having been bought before the Rainbow Community Care was registered in the year 2004.
65. The Defendants' advocate submitted that Rainbow Community Care is not a Non Governmental Organization and cannot therefore receive funds from donors.
66. Counsel submitted that the District Officer for Malindi coerced the Defendants into executing agreements and transfers in respect to the suit property to the Plaintiffs' organization. According to counsel the funds from the donors in respect to the projects on the suit property were remitted as from the year 2005.
67. Counsel submitted that although the Defendants allowed the school, the orphanage home and the hospital to be constructed on their plots, they did not allow the Plaintiffs to disinherit them.

Analysis and findings:

68. The issues that arises from the pleadings and the evidence for determination are as follows:

(a) Whether the Plaintiffs have the locus standi to file this suit.

(b) Whether the suit properties were acquired using donor funds sent to the Plaintiffs' organization or individual income of the Defendants

(c) Whether the Defendants should be compelled to transfer the suit properties to the Plaintiffs' organization

69. The evidence before this court shows that "Rainbow Community Care Kibokoni" was registered as a self help group, otherwise known as a Community Based Organization (CBO) by the Ministry of Gender, Children and Social Development on 13th January 2004. Prior to that, and according to the documents that the Defendants used to open a bank account with Standard Bank, "Rainbow Community Care" was issued with a Certificate of Registration Number 226/2000 on 26th October 2000 by the Ministry of Home Affairs, Culture and Sports. Being a community based organization, or a self help group, it can only sue or be sued through its officials.
70. In the Plaintiff, the Plaintiffs have described themselves at paragraph 1 as Chairman, Secretary and Treasurer of Rainbow Community Care Kibokoni respectively.
71. In their Defence, the Defendants admitted the averments of the Plaintiff as stated in paragraphs 1, 2 and 3, which is descriptive of the parties to the suit.
72. Order 2 Rule 11(1) of the Civil Procedure Rules provides that any allegations of facts made by a party in his pleadings shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleadings.
73. Having admitted in his Defence that indeed the Plaintiffs are the officials of Rainbow Community Care Kibokoni, the 1st Defendant cannot raise the issue of the Plaintiffs not being officials of Rainbow Community Care Kibokoni in his submissions. Consequently, the 1st Defendant's submissions that the Plaintiffs do not have the requisite locus standi has no basis.
74. PW1 informed the court that he was employed by the 1st Defendant as an accountant of Rainbow Community Care Kibokoni in the year 2005. It was his evidence that as an accountant, he became aware of the Primary School and the orphanage home that the 1st Defendant, together with his wife, the 2nd Defendant, were running was wholly supported by the donors.
75. Through the said donor funding, PW1 stated that the 1st Defendant managed to put up classrooms for the Primary School on his piece of land in the year 2001 while the orphanage home was set up in the year 2004.
76. It was the evidence of PW1 that a clinic was also put up using the donor funds that were received by the Defendants in the year 2005 and that the said clinic was officially opened for the benefit of the community in the year 2008.
77. PW1 informed the court that the money that was used to purchase parcels of land number

Kilifi/Kibokoni Block M 13D/113 and 114 was sent to the account of the Plaintiff's organization and the Defendants were merely signatories to the said accounts.

78. One of the founder members of the Plaintiffs' organization is the wife of the 1st Defendant.
79. Although she had initially been sued as the 2nd Defendant, she applied and had her name struck out as a Defendant and testified on behalf of the Plaintiffs' organization as PW2.
80. PW2 informed the court that she established a charitable organization known as Rainbow Community Care in 1997 when she came to Kenya to assist the sick and those in need of education.
81. It was the evidence of PW2 that when she met the 1st Defendant in 1994, he was working as a waiter at Shelly Beach Hotel and resigned in 1996.
82. It was the evidence of PW2 that it is the Plaintiff's organization that purchased plot numbers 113 and 114 through the help of donors and in particular Dr. Eunic Ferari and Mr. Michele Cuneo from Italy. PW2 informed the court as follows;

“We decided to do more for the surrounding community. We were to build a home for children who were HIV+ and a hospital. Dr. Eunico built a clinic. Dr. Eunico and Michele (sic) Cuneo decided to purchase land for that purpose. They also decided to build a school for children. It began on Sammy Mutile's plot.....All those land should have been in the name of Rainbow Community Care.”

83. PW2, being the founder of Rainbow Community Care which was registered in the year 2000 was categorical that the two plots on which an orphanage home for HIV+ children and the clinic stands on were purchased by well wishers. It was her evidence that the primary school was also built by the donors but on a plot which was registered in the name of the 1st Defendant, which is plot number 118.
84. The evidence of PW2 that the orphanage home and the clinic are on plot numbers 114 and 113 respectively was corroborated by PW1, PW3, PW5 and the 1st Defendant himself.
85. One of the first donors to the Plaintiffs' organization, Michele Cunio, PW3, informed the court that he made a personal contribution to the purchase of the two plots and the running of the orphanage home and the clinic from the year 2001 before the Rainbow Community Care Onlus Association in Italy, where he was the vice-chair, took over in the year 2004.
86. PW3 informed the court that when the Association in Italy learnt that the suit properties were in the names of the Defendants in the year 2010, they stopped funding the orphanage home and the clinic.
87. It would appear that the concern that the Rainbow Community Care Onlus Association in Italy raised in 2010 about the proprietorship of the suit property led to the signing of agreement dated 8th May, 2010 between the 1st Defendant and PW2, who, according to her, had all along believed that the two suit properties were registered in the name of Rainbow Community Care Kibokoni and not in their joint names.
88. In the said “Memorandum”, the 1st Defendant agreed with the 2nd Defendant (PW2) that they shall surrender and transfer their rights and interests in land parcel numbers 113 and 114 to Rainbow Community Care. The 1st Defendant was to retain plot number 117 on which the school stands.
89. The “Memorandum” was signed by the Defendants in the presence of Richard Otara Advocate.
90. It would appear that the 1st Defendant did not transfer the two parcels of land as agreed. Him, together with the 2nd Defendant (PW2) however entered into another agreement dated 6th October 2010 in which they stated as follows:

“We admit that the plots were acquired through donor support to the community. We promise to transfer the plots by 13th October 2010 without fail”.

91. According to DW1, he signed the said agreement under duress. DW1 informed the court that indeed, he rescinded the agreement through his advocate.
92. The “agreement” that was drawn by the 1st Defendant's advocate rescinding the promise by the

Defendants to transfer the suit property to the Plaintiffs' organization is dated 21st October 2010. The same was signed by the Defendants in the presence of Mr. Muranje Advocate. The said "agreement" states that the Defendants are the founders of Rainbow Community Care being a children home and hospital with the aim of assisting the needy in the community by provision of basic needs like education, shelter, food etc."

93.Paragraph 1 of the "agreement" states as follows:

"That the 1st-2nd party herein declares the agreement of 6th October 2010 signed before the provincial administration null and void without any legal consideration as the same was signed under undue influence and replaces the same by this agreement."

94.Paragraph 3 states as follows:

"That the plots that the said organization stands, were purchased by the 1st and 2nd party with the help of well-wishers being plot number Kilifi/Kibokoni/M13D/113 and Kilifi/Kibokoni/M13D/114"

95.Paragraph 4 states as follows:

"That the 1st-2nd party shall only transfer the above plots to the said organization as the founders and are the Director and the Treasurer respectively forever and have powers to manage the organization as before".

96.The document dated 21st October 2010 and signed by the Defendants confirms that indeed the suit properties were bought by well-wishers. The said documents further shows that the Defendants were only willing to transfer the suit property to the Plaintiffs' organization if they are made Director and Treasurer respectively.

97.Having read the "agreements" of 8th May 2010, 6th October 2010 and 21st October 2010 all signed by the Defendants, I am convinced that the Defendants acknowledged the fact that the suit properties were bought by donors for the Rainbow Community Care Kibokoni.

98.In fact, the brain child of the organization, PW2, confirmed that position in her evidence.

99.According to the Sale Agreement in respect to the suit property, plot number 113 was bought on 8th March, 2004 while plot number 114 was bought on 27th March 2005.

100.The Agreement dated 8th March 2004 was entered into between the two Defendants as purchasers and Saad Awadh Omar who was the vendor for plot number 113. The consideration for the said plot was Kshs.450,000 which was to be paid in two installments.

101.The first installment of Kshs.300,000 was paid on the day the agreement was executed while the balance of Kshs.150,000 was to be paid on 15th April 2004.

102.PW5 produced the financial statement and accounts of Rainbow Community Care for the year ended 31st December 2004 which shows that the organization had a piece of land as a fixed asset valued at Kshs.495,000 which according to PW5, was the amount the organization spent to acquire plot number 113.

103.The Agreement in respect to plot number 114 is dated 27th March 2005 and was entered into between the two Defendants and Pual Mwaura.

104.The consideration for the said plot is indicated as Kshs.360,000 which was paid on the day the agreement was signed.

105.PW5 produced the financial statements of Rainbow Community Care for the year ending 31st December 2015. The said statement shows that the Community did acquire land at a cost of Kshs.415,200 in the said year.

106.According to PW5, the cost of plot no.114 is indicated as Ksh.415,200 in the financial statements because other than the actual purchase price, there were other incidentals that the organization paid to acquire the land.

107.The title deed for plot number 113 was issued in the names of the 1st Defendant and PW2 on 8th April 2004 while that of plot number 114 was issued on 4th February 2002.

108. It is not clear why the Defendants were issued with the title deed for plot number 114 on 4th February 2002 when the Agreement for sale is dated 27th March 2005. The date of issue on the Title Deed must have been back dated or was erroneously indicated as 4th February, 2002.
109. Other than the financial statements of the Plaintiffs' organization, PW5 also produced documents showing that Rainbow Community Care opened an account with Standard Bank on 26th October 2000. The signatories to the said account were the 1st Defendant and PW2.
110. To support the opening of the said account, the 1st Defendant and PW2 presented to the bank the certificate of registration for Rainbow Community Care. According to the said certificate, Rainbow Community Care was first registered by the Ministry of Home Affairs, Culture and Sports on 26th October 2000. The organization was therefore legally in existence by the time the title deeds for the suit properties were issued to the 1st Defendant and PW2.
111. To prove that the money for the purchase of the two suit properties was withdrawn from the bank accounts of Rainbow Community Care, PW5 produced the bank statements of Rainbow Community Care.
112. The statements from Standard Chartered Bank in the name of Rainbow Community Care shows that on 10th March 2004, cheque number 206054 for Kshs.315000 which was issued by the organization cleared. This, according to PW5, was the cheque that was issued to the vendor for the purchase of plot number 113 being the first installment.
113. The second installment was paid to the vendor by the organization vide cheque number 200072 which cleared on 16th April 2004. That transaction is also reflected in the organization's bank statement.
114. The bank statements further shows that after the Agreement of sale for plot number 114 was signed on 27th March, 2005, the Plaintiffs' organization issued to the vendor cheque number 200234 for the full purchase price of Ksh.360,000. The said cheque cleared on 30th March 2005.
115. The financial statements produced by PW5 shows that since the year 2004, Rainbow Community Care Kibokoni was fully funded by donors.
116. Indeed, the 1st Defendant did not adduce any evidence to show that the purchase price of the suit properties was as a result of his personal income.
117. The contention by the 1st Defendant that he purchased the suit properties using money that was sent to him by donors for the purpose of the school fees of the children in his school cannot be true. If that were the case, the 1st Defendant was under an obligation to register a private school and issue to the said donors or students the requisite fee structures which he never did.
118. Having registered the Plaintiffs' organization as a Community Based Organization, the 1st Defendant cannot convert the assets purchased by the said organization into his own.
119. It is common knowledge that Community Based Organizations can either be independent primary associations which are managed by the local community and members using their own resources or those created by external agencies, or with their influence as vehicles for delivery of community development in a particular community. The Plaintiffs' organization falls in the latter group, considering that the Rainbow Community Onlus Italy has been funding it wholly since the year 2004. Before the year 2004, the organization was wholly funded by individual donors from Italy.
120. How then can the 1st Defendant, who has been unemployed since the year 1996, when he resigned as a waiter at Shelly Beach Hotel, claim that the parcels of land that were purchased using the money from the Rainbow Community Care Kibokoni account are his? Can this court, at the behest of the 1st Defendant, allow the donors to withdraw the funding of an orphanage home and the clinic meant to assist the poor people of Kibokoni by allowing the 1st Defendant to keep the land which he never paid for? I don't think so.
121. The law in this country is clear, where a party shows that he contributed in the purchase of land, such a party shall be entitled to the share of the property which is equivalent to the share of his contribution notwithstanding the fact that the land is not registered in his name.
122. In the case of **Hussey Vs Palmer (1972) ALLER, Lord Denning MR**, held as follows:

“Thus we have repeatedly held that, when one person contributes towards the purchase

price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.”

123. In the case of *Stephene Mkare Mulewa Vs Linda Newman*, Malindi Civil Appeal No. 32 of 2013, the Court of Appeal quoted with approval the holding in *Gissing Vs Gissing (1970) 2ALLER 780* where it was held as follows:

“Where a beneficial interest in land is claimed by a person, whether spouse or stranger, in whom the land is not vested a common intention has to be inferred from the parties conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties’ words or conduct. The court must determine what inferences can reasonably be drawn in each case.”

124. The evidence before this court and particularly by PW2, PW3 and PW5 shows that the donors, and specifically the Rainbow Community Care onlus Italy, contributed money to Rainbow Community Care Kibokoni for the purpose of purchasing the suit property to construct an orphanage home and a clinic.

125. After the suit properties were acquired, the said donors painstakingly raised funds and constructed an orphanage home and a clinic on the said two parcels of land. Indeed, the same donors also put up a school on plot number 117 which the 1st Defendant had long acquired.

126. There was no evidence before this court to show that the said donors had any intention of enriching the 1st Defendant. Indeed, the said donors had no reason to shower the 1st Defendant with gifts in the form of land and buildings considering that the money was never paid in the 1st Defendant’s personal account.

127. As was stated by Ojwang J, as he was then in the case of *Hamm Helmut Vs Farida Riziki (2011) e KLR*, the money that the donors sent to the Plaintiffs’ organization was *“such sums of money which is not a freely available resource and must be recognized to be hard earned”*.

128. Considering that the 1st Defendant did not prove that he contributed any money towards the purchase and development of plot numbers 113 and 114, I find and hold that the 1st Defendant purchased the suit properties from monies remitted by the donors to the Plaintiffs’ organization. Although he registered them in his name, he is not entitled to those properties at all.

129. The above holding is supported by the Court of Appeal decision in the Stephen Mkare’s case (*supra*) where it was held as follows:

“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 name, the beneficial owner of the suit property was actually the respondent who not only advanced money for purchasing the suit property but also the money for developing the property.....therefore the suit property in the appellant’s name gave rise to a resulting trust in favour of the respondent....”

130. The registration of plot number 113 and 114 in the name of the 1st Defendant and PW2 gives rise to a resulting trust in favour of the Plaintiffs’ organization, the Defendants having not contributed any money to the purchase of the same.

131. Indeed, Section 28 of the Registered Land Act, under which the two parcels of land are registered, recognizes the fact that an individual can be registered as a proprietor of land as a trustee, without that fact being noted on the register. That is what happened in this case.

132. Consequently, the 1st Defendant and PW2, being trustees should transfer the suit properties to the Plaintiffs who shall be registered as the proprietors of the land on behalf of Rainbow Community Care Kibokoni.

133. For those reasons, I allow the Plaintiffs’ Plaint dated 17th November 2010 in the following terms:

(a) The 1st Defendant and Denise Knot Mtile be and are hereby ordered to sign the transfer documents within seven (7) days transferring land known as Kilifi/Kibokoni/Block M

13D/113 and Kilifi/Kibokoni/Block M/13D/114 to the Plaintiffs.

(b) The Deputy Registrar of this court to sign the Transfer documents in respect of Kilifi/Kibokoni/Block M 13D/113 and 114 in favour of the Plaintiffs in the event the Defendant and Denise Knot Mutile decline to do so and the District Land Registrar to effect the said transfer and issue the Title Deeds to the Plaintiffs.

(c) An order of permanent injunction be and is hereby issued restraining the 1st Defendant, his agents, servants or nominees from trespassing or interfering with the day to day running of the institutions standing on land known as Kilifi/Kibokoni/BM/13D/113 and 114.

(d) The 1st Defendant to pay to the Plaintiffs the costs of the suit.

Dated and delivered in Malindi this 12th day of **June** 2015.

O.A.ANGOTE

JUDGE