



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO.53 OF 2012**

**THE INTERNATIONAL CHILD CARE TRUST(K) ..... PLAINTIFF**

**VERSUS**

**DAVID JAMES MBOGO..... DEFENDANT**

**J U D G M E N T**

1. The plaintiff is a non Governmental Organization registered under the Non Governmental Organizations Co-ordination Act, which I shall hereinafter refer to as “**ICCTK**”. The defendant is a Kenyan citizen and is the registered owner of **LR.No. Trans-Nzoia/Liyavo/212** (suit land). The **ICCTK** brought this suit against the defendant seeking a declaration that the defendant holds the suit land in trust for the **ICCTK**. The defendant filed a defence to the **ICCTK's** claim and raised a counter-claim in which he seeks orders of eviction against **ICCTK** from the suit land.

2. The **ICCTK** extends assistance to needy and vulnerable children in Kenya. It was formally registered in Kenya on 15.9.1994. Prior to its formal registration in Kenya, its activities were being funded and co-ordinated by the International Childcare Trust of United Kingdom through a community based organization known as Misemwa village project.

***PLAINTIFF'S CASE***

3. The International Child Care Trust UK (**ICCT**) was operating in other countries around the world. In early 1992 the country Director of **ICCT** David Lamont who is now deceased was in Kenya. He came face to face with the suffering of a number of Kenyans following the tribal skirmishes of 1991 / 1992. David Lamont decided to assist. He met local people including the defendant who was an experienced community worker. The idea of starting Misemwa village project was conceived to help the suffering people.

4. An application was made to the ministry of Culture and Social Services, Department of Social Services for registration of Misemwa Village Project. The officials were the defendant as Chairman, David Lamont as Secretary and Margaret Wangare Njenga as Treasurer. Misemwa village project was registered on 20.2.1992. An account was opened at Barclays bank of Kenya Kitale branch and the names of the three officials were forwarded to the bank. David Lamont then started mobilizing for funds. It was felt that the project needed land where to settle. Kshs.250,000/= was withdrawn from the account of Misemwa village project and was used to purchase a five acre piece of land.

5. Since the land could not be registered in the name of Misemwa village project, David Lamont authorized the defendant to have the land registered in his name in trust for Misemwa Village Project.

Instead of the defendant registering the land as advised, he had it registered in his own name without indicating that he was doing so as trustee of Misemwa Village Project. As David Lamont was regularly in and out of Kenya, he got concerned with the manner in which the defendant was applying the funds of Misemwa Village Project. David Lamont sent Joseph Alison to Kenya to come and investigate the affairs of Misemwa Village Project.

It is during this investigation that it was discovered that the defendant had actually registered the land in his name without indicating that he was holding it in trust for Misemwa Village Project. The defendant was then removed from the running of Misemwa Village Project. He was subsequently charged in Kitale with the offence of stealing by servant. He was convicted and given a suspended sentence. He appealed to the High Court against the conviction. The conviction and sentence were quashed by the High Court.

6. The members of the public were subsequently warned in a press advert not to deal with the defendant as he was no longer associated with Misemwa Village Project. **ICCTK** through Oliver Lynton testified that they have set up Liyavo Children's Centre which has a children's home, community clinic, community hall and vocational training unit. The project caters for needy children and the members of the community who use the hall for free and receive affordable treatment at the clinic. Children who benefit from the institution are referral there by courts and the rest are identified through home visits.

7. Oliver Lynton stated that the suit land should not have been registered in the defendant's name and that the court should order that he is holding title in trust for the **ICCTK**. He prayed for dismissal of the defendant's counter-claim with costs.

### ***DEFENDANT'S CASE***

8 The defendant testified that he used to work as a social worker at Kitale District Hospital. He worked in the Ministry of Health until 1992. He first met David Lamont in 1988 when David made a stop over in Kenya on his way to Zambia. He met David Lamont through a friend. David told him that he was assisting the needy in society. The defendant then asked him if he could partner with him to help needy children in Kenya. There had been several displacements of children whom he wanted to assist. David Lamont told him that he had many friends who were willing to assist. It is at this moment that Misemwa Village Project was registered with him as Chairman, David Lamont as Secretary and Margaret Njenga as Treasurer. The members of Misemwa Project were people who had been displaced following tribal clashes. The defendant contends that David Lamont did not tell him that he was coming to work with him on behalf of the **ICCTK**.

9. Funding of the project was through donations from his friends as well as friends of David Lamont. The defendant testified that he had friends from USA, Germany, Britain and Austria. He approached Mr. Koskei, on whose land the Project was operating on rental basis. Mr. Koskei agreed to sell to him the land with developments on it. This cost Kshs.250,000/=. Since the land could not be registered in the name of Misemwa Village Project, he consulted David Lamont who advised him that he may go ahead to register the land in his name. He contends that any money which was sent to the project was meant for project activities and that Misemwa Village Project had no connection with **ICCTK**.

10. The old buildings were renovated and they started doing some farming. One thousand sterling pounds was donated to the project by David Lamont and that the money never came from the **ICCTK**. In 1993 he was charged with a criminal offence of stealing by servant. He was convicted and sentenced to seven days suspended sentence. The criminal court ordered that the land which was in his name should be registered in any other person or alternatively be registered in his name with an addition that he was being registered as trustee of **ICCT**. The criminal court ordered that **ICCT** was to be put in possession of the suit land.

11. The defendant was dissatisfied with the judgement in the criminal case. He preferred an appeal to the High Court. The appeal was heard and the judgment of the lower court was set aside as well as the conviction. He filed an application seeking stay orders against the execution of the orders arising from

the lower court orders. He obtained stay but notwithstanding the stay, some individuals went ahead to have the land registered in their names as trustees of **ICCTK**.

12. The defendant filed a civil case against four individuals in Eldoret High Court. This was Eldoret HCCC. No.200 of 1994. He was seeking to have the land which had been registered in the names of people who were acting as trustees of **ICCTK**. This case was transferred to Nakuru, Kakamega, Bungoma before it finally came to Kitale as Kitale HCCC No.121 of 2007. The case was heard and a judgment delivered on 12.11.2010. The defendants in that case were ordered to move out of the suit land. The title in their name was ordered cancelled and the same registered in the defendant's name. The defendant went ahead to process title in his name on 6.7.2012.

13. The defendant contends that he is not holding the land in trust of ICCTK. The suit land was registered in his name with the permission of Misemwa Village Project. He therefore contends that the continued stay of **ICCTK** on this suit land is unjustified and that the **ICCTK** should be evicted from the suit land and their case dismissed. He says that he could not challenge the press advert which linked him to **ICCT** because there was an ongoing case in court.

### ***ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION***

14. The **ICCTK** is contending that the defendant is holding the suit land in trust for itself. On the other hand the defendant contends that the suit land belongs to him and it has nothing to do with the **ICCTK**.

#### ***Whether the funds for purchase of the suit land came from ICCT and whether Misemwa Village Project was a forerunner of ICCTK.***

In order to find out whose position is the correct position, an analysis of the facts leading to the establishment of Misemwa Village Project is necessary. Misemwa Village Project was a brain child of David Lamont who was a director of **ICCT (UK)**. He is the one who came up with the idea of registration of Misemwa Village Project upon seeing the suffering of children and persons displaced by the tribal clashes of 1991 / 1992. David Lamont brought on board the defendant who had a background in community work. This is confirmed by the documents produced in evidence by the **ICCTK** and confirmed by the defendant himself in his testimony in this suit when he stated that he was working as a social worker in the Ministry of Health.

15. It was felt necessary that the Project had to have a place where to operate from. The place was found on the suit land which was initially acquired on lease basis because it had existing structures. The suit land was later on purchased through funds from the account of Misemwa Village Project held at Barclays bank of Kenya Kitale branch. The suit land cost kshs.250,000/=. Kshs.90,000/= was for the land and Kshs.160,000/= for the buildings thereon. The proceedings in criminal case No.1063 of 1993 are clear on this. The complainant was **ICCT** who lodged a complaint after they discovered that the defendant had registered himself as owner of the suit land without disclosing that he was a trustee of Misemwa Village Project. **ICCT (UK)** was behind this project otherwise they would have had no reason to complain if they had nothing to do with Misemwa Village Project. The advocate for the defendant in the criminal case submitted that the defendant had the suit land registered in his name with authority of David Lamont because the land could not be registered in the name of Misemwa Village Project which was not a legal entity and **ICCT** was an NGO which was not registered in Kenya.

16. The defendant himself in the criminal proceedings stated that he registered the suit land under his name with authority of David Lamont because Misemwa Village Project could not own land. It was appreciated even in the judgement in the criminal case both in the Lower Court and High Court, that the defendant's only mistake was to register the land in his name without disclosing that he was doing so as trustee of Misemwa Village Project. It is important to note that as at this time, **ICCTK** had not been registered. It was registered on 15.9.1994 and its business was continued by the same officials of **ICCT**. These officials included Joseph Alison and David Lamont. Oliver Lynton (PW1) came in as Country Director of **ICCTK** after its registration. It is therefore clear that Misemwa Village Project was a fore runner of the current **ICCTK**. The link between Misemwa Village Project and **ICCTK** is unbroken.

It will be unfair for one to hold that since **ICCTK** had not been registered in Kenya when Misemwa Village Project was registered it cannot sustain this case against the defendant.

***Whether the defendant was an Employee of ICCT***

17. The defendant was an employee of Misemwa Village Project. He was the chairman, the secretary was David Lamont and the Treasurer was Margaret Njenga. During the hearing of the case against the defendant in the criminal court, Margaret Njenga was one of the witnesses and she testified that she was an employee of Misemwa Village Project. She was a Secretary and a signatory to the account of Misemwa Village Project. The defendant who was a chairman was equally an employee of Misemwa Village Project and therefore **ICCT** as the main operator of Misemwa Village Project had the authority to warn the members of the public through advertisement in the press that the defendant had no authority to transact any business on behalf of Misemwa Village Project.

18. The evidence adduced in this case is clear that the funds which purchased the suit land came from account of Misemwa Village Project. These funds were channelled to that account through **ICCT** who were the sponsors and the operators of Misemwa Village Project. There is no basis upon which the defendant can claim that the suit land is his personal property. He has already admitted in previous legal proceedings that indeed the Kshs.250,000/= used to purchase the suit land came from **ICCT**. It is the **ICCTK** which is now running a Project called **Liyavo** Children's Centre on the suit land.

19. The defendant produced documents to show that some donors wrote to him directly and that therefore it is not the ICCT which was the sole donor of funds. The issue here is not on who brought in funds for the project. The issue is on how the land was purchased. After the land was purchased and the project kicked off, any person including the defendant was free to donate money to the project. If the friends of the defendant donated money, that is a different issue all together and it does not affect the issue of how the land was acquired and the intention of the acquisition of that land. In the criminal case before the lower court, it was submitted on behalf of the defendant that the land and the 250,000/= which was used to purchase it was not for the personal benefit of the defendant. It is therefore ironical for him to turn round and seek to evict the **ICCTK** from the suit land.

20. The defendant submitted that what the **ICCK** is seeking is declaration of trust in respect of Agricultural Land. He submitted that since this is the case this suit cannot be sustained as consent of the Land Control Board was not obtained. In support of this submission, the case of **Mucheru vs Mucheru 2000 EA 455** was cited. In this case the respondent filed an originating summons seeking an order to allow her to bury her deceased husband on the property which was the subject of the appeal, which property was in control of the appellant who was the widow of the registered proprietor. It was argued on the respondent's behalf that her deceased husband was entitled to a portion of the property under Kikuyu customary law, and that the same devolved to the respondent on the demise of the deceased. The trial judge held that a trust under Kikuyu customary law had been proved and ordered that the deceased be buried on a portion of the subject property.

On appeal it was held that a declaration of a trust in agricultural land is a dealing in the land requiring land control board consent, following the statute law (**Repeal & Miscellaneous Amendments**) Act 1980. Hence any such trust declared without the relevant consent is void for all purposes.

21. The submissions by the defendant cannot apply to this case and the authority cited is distinguishable. Section 6(2) of the Land Control act provides as follows:-

***“ For avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for purposes of subsection (1).”***

Section 6(1) referred to in sub-section (2) provides as follows:-

***“Each of the following transactions that is to say-***

a) *The sale, transfer, lease, mortgage, exchange, Petition or other disposal of or dealing with any agricultural land which is situated within a land control area ;*

b) *the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and use of Land (Planning) Regulations, 1961 for the time being apply .*

c) .....

*is void for all purposes unless the land control board for the area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act".* In the case cited by the defendant, the declaration of the trust was going to affect the land in that it was going to be divided into two portions which would have resulted in two separate titles. This is not the case with the present suit where the **ICCTK** is seeking a declaration that the defendant is holding title in trust for it. If that were to be the case, I do not understand how a party would be expected to apply for consent of the Land Control Board before his rights in a suit have been determined. The dealing referred in the Land Control Act has already happened in that consent to transfer the land from its previous owner into the name of the defendant has already been given and the property registered in the name of the defendant. The **ICCTK** is only seeking orders that the said title is held in trust for it by the defendant.

### **DECISION**

The **ICCTK** has proved its case against the defendant on a balance of probabilities. The suit land was bought through funds provided by the **ICCT** which was operating under Misemwa Village Project before **ICCTK** was formally registered. The defendant's claim to the suit land is baseless. I therefore allow the **ICCTK's** claim with the result that a declaration is hereby given that the defendant is holding title to Trans – Nzoia / Liyavo/212 in trust for the **ICCTK** (Plaintiff). The trust is hereby ordered terminated and the suit land ordered transferred to the Plaintiff to be registered in its name. Should the defendant fail to transfer the suit land to the plaintiff, the Deputy Registrar of the court is hereby authorized to sign all documents to facilitate the transfer into the plaintiff's name.

The defendant's counter-claim is hereby dismissed with costs to the plaintiff. The defendant shall also pay costs of the suit to the plaintiff.

Dated , signed and delivered at Kitale on this 15th day of July, 2015.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Barongo for Mr. Onyancha for Plaintiff and Mr. Kiarie for defendant. Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**15.7.2015**