



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, ASIKE-MAKHANDIA & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 15 OF 2018

BETWEEN

MUNIR ABUBAKAR MASOUD.....APPELLANT

AND

ALI ABDALLA SALIM.....1ST RESPONDENT

ALI YISLAM ALI BASHAMKH.....2ND RESPONDENT

MOHAMED SALIM AHMED.....3RD RESPONDENT

(As Trustees of the Tawheed Girls Secondary School Trust)

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Malindi (Angote. J.) dated 18th September 2017 and delivered on 5th October, 2017

in

Environment & Land Case No. 78 of 2015)

JUDGMENT OF THE COURT

[1] This appeal arises from a dispute pitting the trustees of Tawheed Girls Secondary School Trust (**school trust**) and Tawheed Muslim Association (**Association**). The dispute concerns the management and ownership of Tawheed Girls Secondary school (**the school**) and LR. No. 8604 (**the suit property**), on which the school is situated. The proceedings were initiated by Ali Abdalla Salim, Ali Yislam Ali Bashamkh (the 1st and 2nd respondents), and Mohamed Salim Ahmed, as trustees of the school trust against Abubakar Masoud (now deceased), and Munir Abubakar Masoud (the appellant). Abubakar Masoud who is father to the appellant was the chairman, founder, sponsor and patron of the Association. [2] The proceedings were commenced through an amended originating summons dated 12th March, 2014, in which the 1st and 2nd respondents, together with Mohamed Salim Ahmed, moved the Environment and Land Court at Malindi for determination of the following questions.

“(i) Whether Abubakar Masoud and Munir Abubakar Masoud as members of Tawheed Muslim Association have equitable right and interest in Tawheed Secondary School trust.

(ii) If found to be so, then who are the legitimate trustees of Tawheed Secondary School trust?

(iii) 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 learning and management of Tawheed Girls Secondary School.”

[3] In response to the originating summons, the appellant filed a replying affidavit and also filed a counterclaim by way of originating summons in which he sought determination of six questions, which the trial Judge aptly summarised in his judgment as follows: whether the respondents as members of the school’s trust have established the trust by misrepresentation or false pretence; whether the respondents

applied for and obtained a fake or a duplicate redrawn copy of deed plan for L.R. No.8604; and whether the Director of Surveys and the Commissioner of Lands illegally withdrew the deed plan and issued a grant for CR 53762.

[4] During the trial, the court had the benefit of affidavit evidence sworn by the respective parties, in support of the originating summons and the counter claim. The court also had the benefit of the oral evidence of the 1st respondent and one Ahmed Sheikh Amin who testified in support of the respondents' case, and the oral evidence of the appellant and one Abdulkarim Abubakar Masoud, who testified in support of the defence, as well as the oral evidence of Nathan Chivatsi, a Senior Assistant Director of Surveys who testified on behalf of the Director of Surveys who was joined in the proceedings during the trial as a third party.

[5] According to the evidence of the respondents and their witnesses, the school is a community school and the respondents are the registered trustees of the school trust which was registered in 2011. The suit property upon which the school stands is registered in the names of the respondents as trustees of the school. The suit property had originally been allotted to Lelabei Ventures, but the entity failed to pay the allotment fees within the required time. The respondents as trustees of the school then applied for allotment, and the suit property was allotted to the school. The original deed plan No. 189979 was handed over to one Ahmed Sheikh Amin Msellem, who handed it over to the appellant's father, Abubakar Masoud, to facilitate registration of the title in favour of the school trust but Mr. Abubakar misplaced the original deed plan.

[6] The respondents applied for a certified copy of the deed plan, and proceeded to have the title to the suit property registered in the name of the school trust. It was after allotment of the suit property that the school buildings were put up in accordance with plans approved by the Council and that the school was built by funds contributed to by the community, including the respondents. The respondents deny that the suit property belonged to the Association, but conceded that Abubakar Masoud was paid compensation for some buildings which he had constructed on the suit property.

[7] The appellant's position as per his evidence and that of his witness was that the Association was the rightful owner of the School and the suit property, which were private property; that the respondents created an illegal trust over the school, with the intention to defraud the Association of the school; that the Association was the one that applied to the District Commissioner Kilifi, who on behalf of the Commissioner of Lands, allocated the suit property to the Association; that as the School's Manager/Sponsor, the Association prepared building plans of the school that were approved by the Physical Planning Department; that the claim by the respondents that they are the registered owners of the suit property was untrue; and that the Association is the legitimate owner of the school and the suit property.

[8] The trial Judge upon considering the oral and affidavit evidence, delivered a judgment in which it found, *inter alia*, that there was no evidence that the Association ever owned the suit property or developed the school; that the respondents were only holding the suit property as trustees of the school; and that the respondents were the lawful trustees of school trust who owned the suit property on behalf of the school. The trial Judge therefore dismissed the appellant's amended counterclaim and allowed the respondents' amended originating summons.

[9] The trial Judge answered the questions that had been posed by the respondents as follows:

“(i) That the plaintiffs (the respondents in the appeal) are the legitimate trustees of Tawheed Girls Secondary School trust,

(ii) That the appellant and his father (1st and 2nd respondents in the OS) either in their individual capacities or as members of Tawheed Muslim Association or their agents are restrained from interfering, obstructing, impeding and or otherwise tampering with the learning and the management of the school.”

[10] The appellant who is aggrieved by the judgment has now lodged an appeal, in which he has raised 41 grounds. The grounds can be summarised into six main grounds, that is, that the trial Judge erred: in writing a judgment contrary to the provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules; in finding that the Commissioner of Lands could grant the suit property to the School Trust, which was a contravention of the provisions of Article 62 of the Constitution; in failing to find that School Trust's title to the suit property was unlawfully and illegally acquired; in failing to find that the trustees of the school trust created a competing trust and acted in breach of the trust bestowed upon them; in failing to find the trustees of the school trust in breach of their trust as they failed to give the letter of allotment to the Association; and in failing to allow the appellant's counterclaim in the originating summons, when the respondents acted in contravention of the school trust, the land laws, the education laws; Articles 40(1) & (6), and Article 62(2) of the Constitution.

[11] In support of the appeal, the appellant who was in person relied on his written submissions which he duly highlighted orally. He submitted that contrary to the finding of the trial Judge that the suit property never belonged to the Association, the evidence showed that the suit property was allocated to the Association after the Association applied to be the registered owner; that the school trust in which the respondents were purportedly trustees was unlawful as it was not registered and was formed fraudulently; that there were no minutes or resolution for the creation of the school trust; that the title deed secured by the respondents as trustees of the school trust, was fraudulently acquired; and that the Association was the one allocated the suit property. He urged the Court to allow the appeal.

[12] Learned counsel **Mr. Mogaka** and **Mr. Ali** who appeared for the respondents relied on their written submissions, which they also briefly highlighted during the hearing of the appeal. It was submitted by counsel that contrary to the principle that allegations of fraud must be pleaded and specifically proved, the evidence presented showed that the respondents as trustees of the school were the ones who were issued with the letter of allotment with respect to the suit property, and had therefore a lawful leasehold title to the suit property; that the original deed plan was not used to process the leasehold title, since the deed plan was misplaced; and that the deed plan was issued to the respondents as trustees and not the Association.

[13] Counsel also pointed out that the school was a community school and the board of governors and trustees met and mandated the board to follow up the issue of the school acquiring a title deed for the suit property. As regards the registration of the school trust, the evidence

adduced before the trial court showed that the matter was discussed severally by the school board and that the trust was officially registered. The Court was therefore urged to dismiss the appeal.

[14] This being a first appeal, this Court is enjoined to re-analyse and re-evaluate the evidence afresh and arrive at its own conclusions and findings. This has been stated by the Court many times including in **Kenya Ports Authority vs. Kustron (Kenya) Limited (2009) 2EA 212** wherein this Court stated:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

[15] We discern the following issues for our consideration and determination: whether the respondents were lawful trustees of the school trust; if so, whether the respondents as such trustees owned the suit property; whether the respondents fraudulently and falsely represented themselves as registered trustees of the school trust; and whether the appellant and Association have any equitable right in the school or the suit property.

[16] The respondents attached in evidence a trust deed executed on 7th March 2011 and registered on 23rd March 2011, in which the respondents and Mohamed Salim Ahmed were listed as the trustees of the school trust. It was apparent from the evidence that the 1st respondent and Mr. Abubakar Masoud were the first trustees of the School. However, that appears to have been an informal arrangement as no deed was produced and it is clear that by 23rd March 2011, the trustees of the school trust were as indicated in the trust deed. There is no evidence that the trust created was illegal.

[17] The appellant alleged that the title deed acquired by the school trust was acquired fraudulently or by misrepresentation. As **Tunoi, JA**, (as he then was) stated in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

[18] The appellant claimed that the title deed to the suit property was obtained fraudulently or by false pretences through the use of a fake/redrawn/duplicate copy of a deed plan. The particulars of the fraud were neither specifically pleaded nor was evidence tendered in support thereof. It was not enough for the appellant to throw allegations without evidence. As stated in **Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR**:

“... it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.”

[19] Therefore, as the appellant and his father were claiming fraud on the part of the respondents, the burden was upon them to establish the fraud, and the standard of proof was higher than in an ordinary suit. Apart from mere allegations, no evidence was adduced by the appellant in this regard. To the contrary, the evidence on record shows in detail how the school trust came to own the School.

[20] It is evident that the suit property was part of a portion of land known as Plot No. 1935/R. that was initially allocated to Lelabei Ventures. The respondents as trustees of the school applied for and were allotted the suit property after the allotment to Lelabei Ventures failed. The portion of the land allotted to the school was Plot No. 8604 and Deed Plan No. 189979 was issued in that regard. Although the original deed plan was misplaced while in the hands of the appellant's father, the respondents as trustees of the school trust applied for a certified copy of the deed plan, and this enabled them to have the title issued in their favour. There is no evidence of the deed plan used by the respondents having been fake or fraudulent. Nathan Chivatsi, a Senior Assistant Director of Survey, explained in detail how the deed plan was drawn and how a certified copy deed plan was re-issued to the school. The deed plan used by the respondent was therefore neither fake nor fraudulent.

[21] One of the functions of the trustees included being custodians of the school property. Although it was common ground that the Association helped in the mobilization of funds, establishment and construction of the school, this did not give the Association nor the appellant and his father any equitable right in the suit property. The trial Judge appropriately addressed the issue of ownership by the association by stating as follows:

“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.

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.

84. There is no evidence before me to show that Tawheed Muslim Association ever owned the suit land or developed the school.”

[22] The Association was a separate entity from the school and neither the school nor the suit property belonged to the Association. Although the association was instrumental in acquiring the suit property, the suit property was not owned by the Association. This is confirmed by the fact that the annual returns filed by the Association for the years 1986, 1991- 2012 did not mention the suit property or the school as properties it owned. The evidence adduced before the trial court is clear that the trustees of the school trust applied for and were issued with a letter of allotment for the suit property. The letter of allotment was specifically addressed to the trustees of the school trust. The appellant not being one of the trustees, he cannot claim ownership of the suit property or the school. The two respondents and Mohamed Salim Ahmed were therefore the lawful trustees of the school trust and in such capacity were in charge of the school property and therefore the title to the suit property was properly secured. We come to the conclusion that Abubakar Masoud and the appellant as members of the Association did not have any equitable right or interest in the school or the suit property. The Association had no right to intermeddle with the suit property or the management of the school.

[23] In his memorandum of appeal, the appellant raised grounds questioning the propriety of the allotment of the suit property to the school trust including the fact that the allotment was in contravention of the land laws, the education laws; Articles 40(1) & (6), and Article 62(2) of the Constitution. These were not grounds that were raised or argued before the trial court. It is not therefore open to this Court to address them at this stage.

[24] We have perused the judgment of the trial court and we are satisfied that the learned Judge properly identified and addressed the issues for determination and gave reasons for his decision. In our view, the learned Judge properly addressed and answered the questions raised in the amended summons and the appellant’s counter claim. For this reason, we find no merit in the appeal. It is dismissed with costs.

Dated and delivered at Nairobi this 29th day January, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR