



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CIVIL APPEAL NO. 83 OF 2017**

**BETWEEN**

**HEARTBEAT LIMITED.....APPELLANT**

**AND**

**NG'AMBWA HEARTBEAT COMMUNITY**

**CHILDREN'S HOME & RESCUE CENTER.....RESPONDENT**

***(An appeal from the judgment of the Environment and Land Court***

***at Mombasa (Omollo, J.) dated 25<sup>th</sup> May, 2017***

***in E.L.C No. 111 of 2013.)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] The appeal before us principally turns on the issue of whether there was an implied trust, more specifically, a resulting trust in favour of the respondent over parcels described as **Bura/Nyolo/886** and **Bura/Nyolo/887** (suit parcels), registered in the appellant's favour. Times without number, this Court has outlined the circumstances under which a Court would be prepared to imply a trust. One such case is ***Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR*** wherein the Court succinctly observed:

***“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”***  
*Emphasis added.*

[2] With the foregoing in mind a synopsis of the relevant facts will put the appeal in context. Dickson O. Ochuto (PW1) who described himself as the founder of the Ng'ambwa Heartbeat Community Children's Home & Rescue Centre, (respondent) told the court the Centre was established on 12<sup>th</sup> April, 2000 and it began operating a children's home for destitute and orphaned children from his own compound in Taita Taveta with the approval of the necessary authorities. As time went by the number of children grew to the extent that there was dire need for expansion of the home's accommodation which could not be achieved due to the size of Dickson's land and lack of finances.

[3] As a result, and with the backing of members of his local community, Dickson looked for sponsors who would provide funds to not only purchase the requisite parcel of land and put up structures, but also fund the day to day running of the home. By a stroke of good luck, Dickson came into contact with a Canadian organization by the name of **Heartbeat Ministries** whose representatives visited the home in the year 2005. Following negotiations between the Canadian organization and respondent's representatives, at least as per the respondent, it was agreed that the appellant would be formed for purposes of raising funds to purchase land for the respondent's benefit. After the successful purchase of the land, the appellant would transfer the land to the respondent and then cease operating. Towards that end, the appellant was incorporated on 15<sup>th</sup> May, 2009 as a limited liability company.

[4] In furtherance to the agreement, Dickson identified the suit parcels which were adjacent to his home where he was operating the Centre. He negotiated the sale of the parcel with the then registered owner David Muturi Kimana who agreed to sell the same on the ground that it would be used for the benefit of the children. On the other hand, the appellant raised funds from the Canadian public and purchased the suit

parcels at a consideration of Kshs.4,000,000. The parcels were transferred in the appellant's favour in the year 2010.

[5] Initially, the appellant's directorship was comprised of Canadian nationals but subsequently, the said Canadians transferred their shares and directorship to Edward Khasakhala James (PW2) and his wife, Jane Nanzala Amanya. Apparently, Edward was Dickson's brother and had even resided on the suit parcels from the year 2009 to 2011. It was Edward and his wife who had executed the transfer documents on behalf of the appellant.

[6] Later on the respondent's directorship was fraudulently changed without Edward or his wife's knowledge. The two learnt of the change on 2<sup>nd</sup> September, 2011 after conducting a search at the company's registry. The change was effected on the basis of minutes of a meeting purported to have been held by the appellant on 12<sup>th</sup> October, 2010 coupled with affidavits sworn by Edward and his wife to the effect that they had voluntarily transferred their shareholding at a fee of Kshs.3,000 each.

[7] According to Edward, neither he nor his wife had transferred their shareholding nor was such a meeting held. Aggrieved by that state of affairs, Edward and his wife lodged complaints with the police and the Registrar of companies. It seems that a settlement agreement dated 22<sup>nd</sup> March, 2012 was concluded between the appellant, on one part and Edward and his wife, on the other part. Basically, Edward and his wife were paid Kshs.300,000 for the shares they held, to withdraw the aforementioned complaints and to also release the provisional title they had taken out.

[8] As per the respondent, the change of directorship was a calculated move on the appellant's part not to honour the parties' agreement. The appellant had rejected the respondent's requests to honour their agreement and had instead commenced construction and farming on the said parcels for its own benefit. Convinced that appellant was acting contrary to the intention of the Canadians who contributed the funds in issue and in violation of the trust which had been created, the respondent filed suit at the Environment and Land Court (ELC). By its further amended plaint, the respondent sought *inter alia*:

***aa) A declaration that the defendant (appellant herein) purchased the suit parcels on behalf and in trust of the plaintiff.***

***bb) An order directing the defendant to unconditionally effect transfer of the suit parcels to the plaintiff failure to which the registrar of lands to execute the necessary instruments of transfer to the plaintiff.***

[9] In its statement of defence, the appellant denied the respondent's allegations. It averred that pursuant to its main objective as set out in its Memorandum and Articles of Association, *to wit*, acquisition and development of land to support and facilitate charitable projects, it purchased the suit parcels and is utilizing the same for organic farming to produce sufficient food to feed orphans and destitute children within the area. There was no evidence that it had been incorporated for the purpose alluded by the appellant. The respondent paid the entire purchase price and was entitled to the suit parcels. The appellant also challenged the respondent's capacity to institute the suit on the ground that it did not have a valid registration certificate when the same was filed.

[10] Upon weighing the evidence tendered and the arguments put forth on behalf of the parties, the learned Judge (**Omollo, J.**) in a judgment dated 25<sup>th</sup> May, 2017 allowed the respondent's suit. In her own words she expressed:

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

...

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

[11] It is that decision that has provoked this appeal which is predicated on the grounds that the learned Judge erred in fact and law by: finding a resulting trust had been established in favour of the respondent; finding that the issue regarding the respondent's capacity was a mere technicality; awarding property to an entity which under the law was incapable of acquiring proprietary interest; taking into account extraneous parole evidence to vary clear express terms in the sale agreement.

[12] The appeal was disposed by way of written submissions as well as oral highlights by counsel for the respective parties.

[13] Attacking the learned Judge's finding on a resulting trust, Mr. Mbaluto, learned counsel for the appellant, argued that to begin with the parties had not pleaded the issue of a resulting trust let alone led any evidence to that effect. Therefore, there was no basis for such a finding. Buttressing that line of argument, we were referred to this Court's sentiments in ***Anthony Francis Wareham t/a AF Wareham & 2 others vs. Kenya Post Office Savings Bank [2004] eKLR:***

***"... cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings..."***

[14] In any event, the learned Judge had misapprehended the meaning and nature of a resulting trust. Elaborating further, Mr. Mbaluto relied

on *Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 48 at paragraph 597* where the learned authors state:

***“A resulting trust is a trust arising by operation of law:***

***i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or***

***ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or***

***iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”***

As far as he was concerned, the circumstances of this case did not fall under any of the above mentioned illustrations which give rise to a resulting trust.

[15] Even assuming there was a resulting trust, which was not the case, Mr. Mbaluto posited that the learned Judge fell into error by not directing the suit parcels to revert back to the purchaser, that is, the Canadian donors. It was common ground that the respondent never contributed towards the purchase price hence, was not entitled the suit parcels. In the alternative, Mr. Mbaluto submitted that the nature of the trust pleaded, if any, was an express trust and not a resulting trust. Even so, the totality of the evidence did not establish an express trust.

[16] Reiterating that the respondent lacked capacity to institute this suit on 29<sup>th</sup> May, 2013, counsel submitted that the Dickson did admit that the certificate of registration had expired in June, 2011 and was only renewed on 27<sup>th</sup> March, 2014. In his view, it was wrong for the learned Judge to sweep this fundamental issue under the carpet by simply stating that it was a technical issue capable of being disregarded. The respondent's incapacity went to the root of the suit and rendered the same incompetent and unsustainable. In regard to that proposition, reliance was placed on the case of *The Fort Hall Bakery Supply Co. vs. Fredrick Muigai Wangoe [1959] E.A. 474*, wherein it was held:

***“A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.”***

Mr. Mbaluto added that **Article 159(2)** of the **Constitution** could not come to the aid of the respondent. As it stood, the judgment was legally incapable of enforcement since the order to transfer the suit parcels was in favour of a non-existent entity.

[17] In conclusion, counsel argued that the sale agreement dated 30<sup>th</sup> November, 2009 and the appellant's Memorandum and Articles of Association were clear on the terms upon which the suit parcels were purchased. The parcels were not purchased for the benefit of the respondent. Thus, the learned Judge was wrong to admit extrinsic evidence to impute an intention which was contrary to the express and unambiguous terms in the aforementioned documents. All in all, the learned Judge's decision was manifestly wrong and should be set aside.

[18] Conversely, Ms. Kieti, who held brief for Mr. Oluoch, learned counsel for the respondent, argued that the evidence on record established that the appellant purchased and held the suit parcels in favour of the respondent. This was evidenced from the witnesses' testimonies, correspondences between the parties and the sale agreement which clearly stated that the purchase of the suit properties was for assisting the respondent. On the respondent's capacity, counsel's position was that by a letter dated 31<sup>st</sup> July, 2013 the then Ministry of Labour Social Security and Services confirmed the respondent's status as a legal entity and even went further to state that its certificate was in the process of being renewed. The letter in question was produced as evidence at the trial court.

[19] In her opinion, the learned Judge did not err in directing the transfer of the suit properties to the respondent since the evidence indicated that the purchase of the suit properties was for the benefit of the respondent. In the circumstances, it was just for the same to be transferred to the respondent. Furthermore, there was nothing barring the learned Judge from relying on the sale agreement and the correspondences between the parties to establish the parties' intention. In the end, there was no reason for this Court to interfere with the learned Judge's decision

[20] We have considered the record, submissions by counsel and the law. This being a first appeal we are enjoined by law to proceed by way of re-appraising all the evidence and re-examining the same in a fresh and exhaustive way before arriving at our own independent conclusions. See **Rule 29** of the **Court of Appeal Rules**.

[21] It is imperative to first deal with the issue of the respondent's standing which has far-reaching implication on the determination of the appeal herein. It is basically the determination of whether the respondent had the requisite legal capacity to institute the suit in the ELC. *Locus standi* is defined in the **Black's Law Dictionary, 9<sup>th</sup> Edition** at page 1026 as-

***“The right to bring an action or to be heard in a given forum.”***

It is not in dispute that the respondent is registered under **Regulation (3)(1)** of the **Children (Charitable Children's Institutions) Regulations, 2005** (the Children Regulation) as a charitable children's institution. Under **Regulation 3A** such registration is for a period of three years and subject to renewal upon application for a further similar period. It is common ground that prior to renewal of the respondent's registration in March, 2014, the last registration took effect in the year 2008 and expired in June, 2011. It is equally not in doubt that the suit herein was filed on 29<sup>th</sup> May, 2013. It is on that basis that the appellant alleges that the respondent had no legal capacity to file the same.

[22] On its part, the respondent's stand was that it had applied for renewal of the registration as required under **Regulation 3A (2)** but the process usually took time. On perusal of the letter dated 31<sup>st</sup> July, 2013 authored by the Taita Taveta County Coordinator, Children Services who was under the then Ministry of Labour Social Security and Services, we give the respondent the benefit of doubt that by the time the suit was being filed the renewal of its registration was still being processed. The letter in question reads in part as follows:

**“TO WHOM IT MAY CONCERN**

**RE: NG'AMBWA HEARTBEAT COMMUNITY CHILDREN'S HOME AND RESCUE CENTRE**

***The above said home is a recognized Charitable Children Institution in Mwatate Sub County, Taita Taveta County. It was registered as a Charitable Children Institution under the Ministry of Gender, Children and Social Development by a copy of registration certificate No. CS No.000383. The said home is in the process of renewing its registration which expired in June, 2011.” [Emphasis added]***

[23] Furthermore, there was no evidence that the respondent ceased to exist by virtue of cancellation of its registration under **Regulation 3B** of the Children Regulation. Our position is further fortified by a subsequent letter dated 30<sup>th</sup> September, 2013 under the hand of the same County Coordinator, Children Services which recognized the respondent as one of the Charitable Institutions in Taita Taveta. For the foregoing reasons, we are satisfied that the respondent had the requisite standing to institute the suit at the ELC.

[24] It goes without saying that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. Similarly, a Court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. See ***Gandy vs. Caspair [1956] EACA 139*** and ***Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd [2000] 2 EA 385***. In our view, contrary to the appellant's allegations, our perusal of the pleadings and the evidence tendered reveals that the respondent's claim was based on an implied trust and specifically a resulting trust. This is the reason why the respondent sought in one of its prayer for a declaration that the suit parcels were held in trust. Consequently, we see no reason to fault the learned Judge for considering whether such a trust had been created between the parties.

[25] Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See ***Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley – Civil Appeal No. 75 of 2016 (unreported)***. It was upon the respondent to establish that it was the parties' intention that the appellant would purchase and hold the suit parcels in trust for it. Did it do so?

[26] This Court considered the law on trust in detail in ***Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others [2015] eKLR***, and outlined the basic tenets as follows:

**“According to the Black's Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as**

**“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”**

***Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”***

***In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...***

***A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29<sup>th</sup> Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).” [Emphasis added]***

[27] Applying the aforementioned principles to the case at hand, we find that the respondent did not establish a clear intention had existed between the parties that the appellant would hold the suit parcels in trust for the respondent. Firstly, it is clear from the record that Dickson had contact with Heartbeat Ministries, a Canadian organization whose representative visited the respondent. It also appears that Dickson and the said organization embarked on discussions regarding the home. However, there was nothing to show that the said negotiations materialized into an agreement capable of being enforced. More so, with regard to raising funds to purchase the suit parcels for the respondent's benefit.

[28] Secondly, it is common ground that the respondent never contributed any amount towards the purchase of the said parcels. Thirdly, contrary to the respondent's contention, the sale agreement dated 30<sup>th</sup> November, 2009 does not in any way make reference that the parcels were being purchased for the benefit of the respondent. Equally, the appellant's Memorandum and Articles of Association does not indicate that it was formed for purposes of purchasing the parcels on behalf of the respondent. Thirdly, our reading of the settlement agreement dated 22<sup>nd</sup> March, 2012 between the appellant and Edward and his wife does not refer to such an intention. It relates to the complaints about change of directorship which is not an issue in this suit.

[29] Looking at the evidence on record, all there was is the respondent's word against the appellant's. More was needed to establish the clear intention to establish a trust. Accordingly, we find that there was no basis for the learned Judge to find that a resulting trust had arisen in favour of the respondent.

[30] The upshot of the foregoing is that we find the appeal has merit and is hereby allowed. We hereby set aside the judgment dated 25<sup>th</sup> May, 2017 in its entirety and substitute it with an order dismissing the respondent's suit. However, taking into account that both parties concede that the children's home in question occupies part of the suit parcels, and that the land was bought entirely for the benefit of the children, we direct that the occupation of the suit premises by children should not be interrupted. This is in line with the provisions of **Section 4 (2)** of the Children's Act that enjoin courts of law to always bring to bear the best interest of the child when making a decision that affects them. Accordingly we order each party to bear its own costs both at the ELC and in this appeal due to the nature of this matter.

Dated and delivered at Mombasa this 12<sup>th</sup> day of July, 2018

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**