



REPUBLIC OF KENYA



**Heike & 4 others v Maunga & 8 others (Environment & Land Case
137 of 2021) [2024] KEELC 5182 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 137 OF 2021**

**AE DENA, J
JUNE 24, 2024**

BETWEEN

**ISBRECHT GEB. DEDEN HEIKE 1ST PLAINTIFF
MAREN ALFKE 2ND PLAINTIFF
ANKE WINDELER 3RD PLAINTIFF
HEIDE LINDER 4TH PLAINTIFF
MANFRED LINDER 5TH PLAINTIFF**

AND

**EDWARD KAUNDA MAUNGA 1ST DEFENDANT
PETER ADAMS LUDAAVA 2ND DEFENDANT
ARVINDER SINGH JANDU 3RD DEFENDANT
PETER MWAURA KUNGU 4TH DEFENDANT
LAND REGISTRAR, KWALE 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT
SAMUEL MUTUGI 7TH DEFENDANT
ANTHONY MWITI KAUNDA 8TH DEFENDANT
JOSHUA MUTHUI KITHENDU 9TH DEFENDANT**



JUDGMENT

Plaint

1. The amended plaint dated 1/2/2021 instituted this suit. The same was filed before court on 8/2/2021. The 1st Plaintiff refers to herself a registered trustee of the Kid Kindergarten in Diani e.V, a trust registered in Germany herein Parent Trust. The rest of the Plaintiffs are registered trustees of the Kid Kindergarten in Diani Trust and Kid Kindergarten in Diani and Academy herein Kenyan trust. It is the Plaintiffs case that sometime in the year 2006 the Parent Trust resolved to acquire land for purposes of setting up structures for basic education within Diani area. By agreements dated 16/2/2010 and 31/3/2012 it was agreed that property be acquired and registered jointly in the names of the 1st Plaintiff and the 1st Defendant to hold in trust pending the registration of the Kenyan Trust and to later transfer the properties to the Kenyan Trusts which were formed for the purposes of obtaining funds from Germany for the charitable activities.
2. That the Parent Trust fully paid for the purchase of the land Kwale/Diani Complex/201, 26 and 203 all on freehold interest and later Kwale/Diani Complex/195 under the leasehold tenure (hereinafter the suit properties). They were registered in the names of the Plaintiffs and the 1st Defendant holding the same in trust for the Parent Trust. It is averred that Parent Trust then constructed on Kwale/Diani Complex/26 a kindergarten, a full primary school, staff quarters and offices (Schools) which were then operated by funds from the Parent Trust in Germany. Meanwhile the Kenyan Trusts were registered by trust deeds dated 24/12/2014 when it was expected the properties would be transferred to the 2nd, 3rd, 4th and 5th Plaintiffs as trustees of the Kenyan Trust as per the agreements. However, the 1st Defendant refused to execute the requisite transfer documents. In 2016 disputes arose between the Parent Trust and the school management leading to termination of sponsorship for the school.
3. That following the 1st Defendants action the Plaintiffs sought legal counsel and it emerged that being controlled transactions under the Land Control Act the Land Control Board had wrongly issued consent to transfer the freehold properties to a non-citizen (the 1st Plaintiff). It is averred that since the consents were invalid the sale and registration of the freehold properties in the 1st Plaintiff's and 1st Defendant's names are illegal, null and void. It is pleaded that this registration was as a result of illegalities, irregularities, misrepresentation and or mistakes. The Particulars are listed under paragraph 18 of the Plaint.
4. The Plaintiffs state that it was their legitimate expectation that upon registration of the suit properties and transfer to the Kenyan Trusts, the later would enjoy quiet possession of the suit properties and which would facilitate smooth operations of the Kenyan Trusts' charitable activities. That efforts to get a way forward from the Defendants including regularization in view of the irregularities affecting the titles were unsuccessful.
5. The Plaintiffs state they are aggrieved as the 1st Defendant is in breach of his trust obligations and has refused to execute the necessary transfer documents for the leasehold properties as per the agreements. The Plaintiffs are further aggrieved since as long as the titles to the Agricultural properties are invalid, they are incapable of being transferred to the Kenyan Trust yet the 1st Defendant has refused all efforts towards regularization to enable the 1st Plaintiff acquire the properties in accordance to the law.
6. In addition to the above claims the Plaintiffs further state that sometime in the year 2020 they discovered the 7th Defendant had trespassed upon Kwale/Diani Complex/201 and the 8th Defendant was mining coral blocks on Kwale/Diani Complex/203 while the 9th Defendant in conjunction with



the 1st Defendant and without the consent of the 1st Plaintiff the joint owner, was renting out the classrooms on Kwale/Diani Complex/26 to residential tenants. That the said actions were unlawful as the said Defendants have no legal interest on the suit properties.

7. The Plaintiffs pray for the following orders;
- a. A declaration that the 1st Defendant and the 1st Plaintiff are holding title number Kwale/Diani Complex/195 [the leasehold property] in trust for and on behalf of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.
 - b. An order to be issued directing the 5th Defendant to lift and/or cancel any encumbrances placed by the 1st Defendant on the green card of title number Kwale/Diani Complex/195 [the leasehold property] to facilitate the transfer of this property to the 2nd, 3rd, 4th and 5th Defendants as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.
 - c. An order be issued compelling the 1st Defendant to sign all documents necessary to transfer the title deed number Kwale/Diani complex/195 [leasehold property] to Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts within 14 days of this order.
 - d. In default of compliance of Order [c] above the Deputy Registrar of this Honourable court be directed to execute the documents of transfer and all other necessary documents required to give effect to order [c] above on behalf of the 1st Defendant under seal of this Honourable court
 - e. A declaration that the titles to all those properties known as title numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 And Kwale/Diani Complex/203 [the agricultural properties] are null and void for want of a lawful land control board consent
 - f. An order directing the 5th Defendant to cancel the tiles to all those properties known as the title numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 And Kwale/Diani Complex/203 [the agricultural properties] forthwith upon presentation of the titles thereto at the Kwale Land Registry.
 - g. An order directed to the 5th Defendant to delete and/or cancel all entries on the green cards relating to the transfer of Title No numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 and Kwale/Diani Complex/203 [the agricultural properties] to the 1st Plaintiff and 1st Defendant jointly.
 - h. An order directed to the 5th Defendant to reissue certificates of title in respect to the title numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 and Kwale/Diani Complex/203 [the agricultural properties] to the 2nd, 3rd and 4th Defendants respectively so as to reflect the ownership of each title ante the transfer to the 1st Plaintiff and 1st Defendant jointly.
 - i. An order be directed to the 3rd Defendant to refund to the Plaintiffs the sum of Kshs 3,500,000/ = paid as purchase price for Kwale/Diani Complex/201.
 - j. An order be directed to the 3rd Defendant to refund the Plaintiffs the sum of Kshs 1,500,000/ = paid as purchase price for Kwale/Diani Complex/26 as well as the costs and/or expenses for construction of the buildings, structures and/or all developments of whatever nature erected thereon.



- k. An order directed to the 4th Defendant to refund to the Plaintiffs the sum of Kshs 3,400,000/= paid as purchase price for Kwale/Diani Complex/203 as well as the costs and/or expenses for construction of the buildings structures and /or all developments of whatever nature erected thereon.
- l. Interest on the amounts referred to at orders [e], [i], [j] and [k] above at commercial rates from the date when the purchase price was paid to the 2nd, 3rd and 4th Defendants respectively until the same is refunded in full.
- m. In the alternative and without prejudice to prayers [e], [f], [g], [h] [i], [j], [k] and (i) above and only in the event that the court determines that the said titles are validly registered in the name of the 1st Plaintiff and the 1st Defendant then jointly, then;
- i. A declaration be made that the 7th, 8th and 9th Defendants have no right to enter upon, stay on, carry on any activities of whatsoever nature, carry away from or otherwise deal in any manner whatsoever with the properties known as Kwale/Diani Complex/26, Kwale/Diani complex/201 and Kwale/Diani Complex/203 without the consent of both the 1st Plaintiff and the 1st Defendant for as long as they remain the joint owners of the said properties.
 - ii. A Permanent injunction restraining the 1st Defendant by himself or through his servants or agents or through any one deriving title through him from alienating, selling, transferring, leasing and/or charging, digging, mining, taking anything out of or away from or from in any other manner whatsoever from having any dealings with all those parcels of land known as Kwale/Diani Complex/201, Kwale/Diani Complex/26, Kwale/Diani Complex/195 and Kwale/Diani Complex/203 without the consent of the 1st Plaintiff for as long as the 1st Plaintiff and the 1st Defendant remain the joint owners of the said properties.
 - iii. A permanent injunction restraining the 7th, 8th and 9th Defendants by themselves or through their servants or agents or through anyone deriving title through them jointly and severally from entering onto or trespassing upon or Occupying or using or remaining thereon or continuing to trespass or from taking possession of or damaging, wasting, developing, selling. Leasing, alienating. transferring, charging, mortgaging, digging, mining, taking anything out of or away from or in any way from dealing howsoever with all those parcels of land known as Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani Complex/26 without the consent of both the 1st Plaintiff and the 1st Defendant for as long as they remain the joint owners of the said properties.
 - iv. A declaration be made that the 1st Defendant and the 1st Plaintiff are holding Title Numbers (Kwale/Diani Complex/26 Kwale/Diani complex/201 and Kwale/Diani Complex/203 in trust for and on behalf of the 2nd, 3rd, 4th and 5th Plaintiffs as trustees of Kid- Kindergarten in Diani and Kid Kindergarten in Diani & Academy Trusts.
 - v. An order be issued directing the 5th Defendant to lift and/or cancel any encumbrances placed by the 1st Defendant on Title Numbers Kwale/Diani Complex/26, Kwale/Diani complex/201 and Kwale/Diani Complex/203 to facilitate the transfer of these properties to the 2nd, 3rd, 4th and 5th Plaintiffs as trustees of Kid kindergarten in Diani and Kid Kindergarten in Diani Academy & Trusts within 14 days of this order.



- vi. An order be issued compelling the 1st Defendant to sign all documents necessary to transfer the title numbers (Kwale/Diani Complex/26 Kwale/Diani complex/201 and Kwale/Diani Complex/203 to the 2nd, 3rd, 4th and 5th Plaintiffs as trustees of kid kindergarten in Diani and kid kindergarten in Diani & academy trusts within 14 days of this order.
- vii. In default of compliance with order m [iii] above the deputy registrar of this honourable court be directed to execute the documents of transfer and all other necessary documents required to give effect to the order m [iii] above on behalf of the 1st Defendant under seal of this honourable court.

Defence

8. The 1st Defendant responded by Statement of Defence filed on 1/3/2021. It is averred a trust does not exist between him and the 1st Plaintiff. That the agreement was to have the land purchased in their joint names for purposes of developing a school. That the suit properties as listed by the Plaintiffs were bought by donor funds and sponsorships. The 1st Defendant states that he is willing to transfer the properties to the school known as kindergarten in Diani and not to the alleged trustees. The 1st Defendant prays that the suit is dismissed with costs.
9. The 2nd Defendant's defence is dated 5/11/2018. The 2nd Defendant admits to selling the suit property Kwale/Diani Complex/201 to the 1st Plaintiff and the 1st Defendant jointly and admits to the transfer thereof. The Defendant states that he agreed to the said process with the knowledge that the two were legally allowed to own agricultural land jointly pursuant to the advice of Mr. Magolo advocate. That he is not opposed to the transfer of the property to the Plaintiffs with the courts sanction.
10. The 3rd Defendant never entered appearance and neither did he file any defence.
11. The 4th Defendant in his defence filed on 21/11/2018 admits to selling and transferring parcel Kwale/Diani Complex/203 to the 1st Plaintiff and the 1st Defendant jointly for a sum of Kshs 2,000,000/=. That he agreed to the said process with the knowledge that the two were legally allowed to own agricultural land jointly and the said belief was as per the advice of Magolo Advocate. The 4th Defendant states that he is not opposed to the transfer of the property to the plaintiffs with the courts sanction.
12. The 5th and 6th Defendants defence was filed before court on 3/6/2021. It is averred that the 5th Defendant being the legal custodian of land records under Section 14 of the Land Registration Act cannot be condemned for carrying out his statutory duties. That the Plaintiffs have failed to prove how the 5th and 6th Defendants have conspired with the rest of the Defendants to issue title deeds without due regard of the law. That the titles issued to the 1st to 4th Defendants were procedural and the plaintiff should therefore be dismissed.
13. The 7th to 9th Defendants never entered appearance neither did they file a defence.

Evidence

14. The suit was heard on 3/11/2022, 4/11/2022, 8/3/2023, 30/5/2023 and 31/10/2023.
15. The 1st Plaintiff Isbrecht Geb Deden Heike testified as PW1 and adopted her two witness statements dated 27/7/2018 and 4/4/2022 translated from English in Germany. The witness produced the bundle of documents in the Plaintiffs List of Documents dated 23/7/2018, 15/11/2019 as PEX "1-13" and PEX 14 and 14b". dated 3/2/2022 PEX "15-19" respectively. PW1 asked the court to transfer the property to Kids' kindergarten to Diani Trust as per the amended plaint herein.



16. On cross-examination by Ms. Okumu the witness testified that the Parent Trust was founded in 2003 and it resolved to build schools in Kenya in meetings held in Germany. The trust in Kenya was founded in 2014. It didn't exist in 2004. The witness confirmed that it is the Parent Trust that demanded any property to be bought were to be registered in her names and that of the 1st Defendant. The witness admitted that she had no document to show that the properties were to be held in trust, but relied on the agreements dated 16th February 2010 and 31st March 2012 (see page 28) showing once the properties were to be registered in the two names they were to be registered or transferred to the Kenyan trust. She conceded the titles did not show the joint ownership is held on behalf of the Kindergarten. She agreed the Kenyan trust was registered after the titles issued. That while the Parent Trust and Kenyan trust were different their connection is the Parent Trust. That she had built a kindergarten and school on the property and she had no idea it was agricultural land. She conceded to seeking advice from Sachdeva advocate on the title issued in 2005 but was not conversant with the issue of Agricultural land.
17. The witness denied that that she wanted to sell the properties and relocate to Indonesia. That it was because the law doesn't recognise any foreigner to own property. That the Kenyan trust had made the decision to do away with the 1st Defendant and the meetings were held in Germany though she did not have the minutes thereto. That no lawyer informed her a foreigner could not own land. That she had not received any communication from the Land Registrar stating the titles were not valid.
18. On cross – examination by Mrs. Waswa the witness stated that the reason she sued the Land Registrar because the title between herself and Edward is null and void and further the transfer from the owners of the plot to the 1st Plaintiff and 1st Defendant. She stated that she wanted the title cancelled as the same was null and void from the word go but was not sure of the powers of the Land registrar in this regard but she always relied on the advice from her lawyers.
19. Upon re-examination PW1 clarified that the 1st Defendant did not make any contribution towards the purchase of the suit properties. That the Kenyan trust and the German trust are both registered and are valid as per the documents produced before the court. That the agreements dated 16th February 2010 bear titles 26 and 203 and as which date there existed no other Trust except the Parent Trust and that could be the only trust being referred to therein. Upon being shown letter dated 21/02/2011 (see page 147 plaintiffs bundle and 100 1st Defendant bundle) and clause 1.1 b and page 6 of the Trust Deed the witness confirmed Kindergarten Diani existed in Kenya where it was indicated the principal office would be in Kenya. That since the Kindergarten in Diani exists the 1st Defendant should transfer properties to it as indicated in the letter dated 21/02/2011 written by him. That at page 81 was a letter signed by Edward using Kid Kindergarten stamp. That the letter dated 9/9/2008 (see page 84) is equally stamped meaning there was only one Kindergarten in Kenya being run by people connected to the Germany office. The witness indicated she was not disputing the names in the title but the allegation that the 1st Defendant provided the purchase money.
20. PW 2 Heinz Isbrecht informed the court he was the 1st Plaintiff's husband. The witness adopted his witness statement dated 23/7/2018 as part of his evidence in chief. He referred to several transactions of money made towards the purchase of the suit properties remitted to J.O Magolo and Company Advocate. That the money for the said purchase came from Kids Kindergarten in Diani EV.
21. Cross-examination by Ms. Okumu the witness confirmed that the funds came from Kids Kindergarten in Diani EV. He stated the trustees inclusive of himself and PW1 and that the trust is official. That there was nothing barring a direct transfer of funds by the Parent Trust to J.O Magolo. That he had no evidence that all decisions were by a committee.



22. On re-examination the witness referred to the several transactions made over the purchase of the suit property and confirmed that the money was sent from Germany to Kenya. On being shown the agreement dated 16/2/2010 (see page 50 of 1st Defendant's bundle) the witness clarified that the same was signed by the 1st Defendant and 1st Plaintiff and which states the parties were buying on behalf of Kindergarten in Diani and was recording an understanding or intention/wish. That two years latter another property was purchased and it was found necessary to record the intention (see page 51 agreement dated 31/05/2012.) Therefore it was wrong to state there was no record to show the intentions of the parties. On being referred to the Power of Attorney (page 51 of the Plaintiffs bundle) the witness confirmed it was on the letterhead of the Parent Trust and that his wife did not use her personal letter head since the same was official. The witness referred the court to (page 48 and 55 to 57 of the Plaintiffs bundle, which both referred to the Committee demonstrating that Kenya was reporting to the committee in Germany from time to time and reiterated the money was sent from Germany to Kenya.
23. PW3 Hussein Mwadzaya Mvurya adopted his witness statement dated 28/01/2022 as evidence in chief. He stated that he was a private investigator and had received a call from Mr. Heinz ISBRECHT PW2 who requested him to do some investigations on Kwale/Diani complex 201 & 203. That he undertook the investigations and also investigated Kwale Diani/complex No. 26. That he prepared a report for the investigations dated 5/10/2022 for plot Kwale Diani complex 201 and 203. And another 24/10/2020 is for BLK 26. The witness produced the PEX "1-4" (items 1, 2 and 3 of Plaintiffs' supplementary list of documents.
24. On cross-examination by Ms. Okumu he stated that there is a semi permit house on plot number 201. That plot 26 was occupied by Mr Kaunda but he could not confirm the occupation of the 2nd house. That he could not confirm who constructed the house. He agreed Mr. Mutugi did not confirm the owner of the plot. The Plaintiffs case was marked as closed. That he did not see Anthony Kaunda mining coral stones though he was introduced as the in charge.
25. There being no re-examination the Plaintiffs case was closed.
26. DW 1 Jared Onsongo Magolo an advocate this court practising in Mombasa at electrically house Nkrumah road testified that the 1st Defendant was known to him for over 10 years and had been introduced to him by an agent Hamisi Mwadaga now deceased. The witness adopted his statement dated 1/2/2022 and produced the same as part of his evidence. He stated that he carried out conveyance on Kwale Diani complex 201 and 203. That he was instructed by 1st Plaintiff and 1st Defendant to act for both of them to undertake the conveyance.
27. That he was instructed by the 2 individuals and not a Parent Trust. They told him they were Germany and the land was for the sole purpose of starting a school. That he did obtain LCB consent it was an agricultural land and LCB consent was necessary. He denied the allegation that the consents of the LCB were irregularly obtained. He stated that according to him the transactions were legal and could not be rescinded unless there was fraud and which was not there.
28. On cross-examination by Mr. Karega he testified that he was only dealing with the 1st Plaintiff and in his opinion the money came from her. That the information he got from the parties was they were entering into partnership but he was never instructed to prepare a partnership deed.
29. Cross-examined by Mrs. Waswa he testified that he presented all the documents for the Land Registrar for registration. On re-examination DW1 testified that he presented the documents to the land registrar and who proceeded to register the transfer without any quarries.



30. DW 2 Edward Kaunda Maunga the 1st Defendant adopted his witness statement filed on 27/10/2018 as his evidence in chief. He produced the documents in the 1st Defendants list of documents dated 27/11/2018, 10/09/2023 as DEX it contains DEXH “1-19” and “20-22” respectively. It was his testimony that he got to know the 1st Plaintiff in 1993 as tourists and also as worshippers who had visited their church and found that the Defendants had a project for needy children requiring sponsors. That they expressed desire to help. They then started with a school project and bought plot 26 Diani complex in 2006, Kwale Diani Complex 201, 203 and 195. That plot 195 is a lease and the other two freehold titles. The funds we obtained from donors in Germany, Switzerland and England.
31. DW2 testified that the conveyance for plot 26 was done by Magnan Advocates and the rest by Jared Magolo Advocate. The lawyer applied for LCB consent. That they did apply for change of user but from Agriculture to school project. At the application the 1st Plaintiff didn't participate directly but was aware and never raised any objection. At inception they were buying specifically for purposes of the school. The school was first registered under Social Services when it was kindergarten and on becoming a preschool under the Ministry of Education and operated during and before registration. DW2 stated that he was involved in sourcing for the donors as he used to send exhibition photos. That he draws at Southern Palms. That he also travelled to Germany in 2008 where he met the president of the New Apostolic Church and sourced for funding, he also visited schools and other NGOs. That in 2014 he went to pick the 1st and 2nd Plaintiffs from the airport and they informed him that the donors were not comfortable with having a black person registered as an owner on the titles.
32. That he was given an option that all the names be removed and the land be transferred to Kindergarten in Diani EV. They later said they had registered another trust where DW2 and other locals involved in the running didn't feature. That he refused to transfer the land. He confirmed that by the time of registration of both trusts the parcels had already been bought/purchased. By 2006 he wasn't aware of the Parent Trust. The reason the parcels were registered in his name and the 1st Plaintiff is because the schools had not yet been registered.
33. The witness stated that they had agreed for their names to be removed in favour of the schools once registered. The Parent Trust didn't help in constructing the school and the money used to come directly to Kenya from the sponsors and was used for construction. He was never informed of any accountability issues on his part. That the titles had no endorsement that they were held on trust for either the Parent Trust or Kenya Trust. That he refused to sign the transfer forms to the suit properties and his reasons/objections were contained in the letter 21/02/2011 addressed to the Plaintiff.
34. He stated that the LCB consents were legal as they were upon the advice of advocates. DW2 prayed the suit is dismissed the suit.
35. Cross-examined by Mr. Karega the witness testified that he didn't pay money during purchase of the properties but he had gone to Germany to source for the said funds. All the Plaintiffs are committee members of Kindergarten in Diani EV. The ticket to Germany was paid by the school from the sponsor remittances. The people he met in Germany gave money to Kindergarten in Diani EV who sent it to the school. That he authorised the mining of coral stones whose proceeds were used to help the children. The 1st Plaintiff didn't give him authority for this. About the LCB he testified that everything was done by the lawyer and consent was issued. That he didn't attend LCB neither did the 1st Plaintiff. He admitted that he did not attach the application for the LCB consent.
36. Upon cross-examination by Mrs. Waswa DW2 stated that he had placed a caution against the title through the lawyer. He clarified in re-examination that while in Germany he stayed at a hotel but the meetings were held at home.



37. DW3 Joshua Mutini that he had known the 1st Plaintiff and her husband from the year 1997. He came to know the rest of the Plaintiffs when he was Manager at Kid – Kindergarten. He stated that the 1st Defendant is known to him as they used to work together at the church and he was chairman of Kid – Kindergarten Diani. That he worked on the agreements between DW1 and PW1 on purchase of the land on behalf of Kindergarten in Diani. That Kindergarten EV which was in Germany.
38. On cross-examination he testified that he went to Germany and the plaintiffs were all members of the Kindergarten EV committee in Germany. During preparation of the agreement Kindergarten in Diani EV was in existence. The funds for the purchase of the land came from different sponsors into the school account Barclays Bank Kindergarten in Diani. Kindergarten in Diani EV didn't exist at the purchase of the 1st plot. He agreed there is no reference to school in the agreements. That he was aware there was mining of coral though he came to know about it later. The defence case was marked as closed.

Submissions

39. From the record, only two parties filed submissions before court. The same are the Plaintiffs and the 1st Defendant. The 5th and 6th Defendants through state counsel Mrs. Waswa communicated that they would not file any submissions.

The Plaintiffs' submissions

40. The Plaintiffs' submissions were filed on 30/11/2023. The following issues for determination were highlighted;
1. Whether the Land Control Board consent authorising transfers of the agricultural properties [plots 26,201 and 203] were valid and whether the transfers of the agricultural properties jointly to the 1st plaintiff and 1st defendant were null and void.
 2. Whether in respect to the leasehold property [plot 195] the evidence of its acquisition and registration can warrant the declaration of a trust by this honourable court as set out in prayers b, c and d should be granted.
 3. Whether the declarations and injunctions under prayers m [i], m [ii], m [iii] and m [iv] in so far as they relate to the actions of the 1st, 7th, 8th and 9th Defendants should be granted.
41. On the first issue for determination, it was submitted that under section 9 [1] and [c] of the Land Control Act, transfer of land to a non-citizen is not allowed. That the transaction herein is therefore void as opposed to being voidable. That it is not in dispute that the 1st Plaintiff is not a Kenyan citizen and hence the consents issued by the land control board were not lawful. The whole transaction is termed void and a nullity.
42. The Plaintiffs submitted that all the transactions made towards the purchase of the suit properties were by PW1 and PW2. That the allegations by DW2 and DW3 that the funds from the school account purchased some of the suit properties were not backed by any evidence and should therefore be disregarded. Further that the construction of the school came much later after some of the transactions had been made.
43. On who owns the kindergarten in Diani EV it was submitted that the Plaintiffs are the trustees of the same even as per the evidence of DW2. That in the event that the court finds the transactions over the suit properties are void, then it should allow the refund of the purchase price and undo the transactions.



44. The Plaintiffs further submit that a resulting trust arises in favour of the person who advances purchase money. That from the evidence on record, the intention of the 1st Plaintiff and 1st Defendant was to hold the properties purchased in trust pending the formation of the kindergarten in Diani. That the refusal by the 1st Defendant to transfer the suit properties to the Plaintiffs and who are the Kenyan Trust shows a deep entitlement over the properties and which do not belong to him legally. That from the evidence there exists a constructive trust from the intentions of the parties as per the advancement of the money to purchase the properties coming from the Kid Kindergarten in Diani. That the alleged contribution made by the 1st Defendant was his visit to Germany at the cost of the Plaintiffs and his role has not been justified. The court is urged to declare the existence of a trust in relation to plot 195 and for orders of specific performance for transfer of the same to the Plaintiffs.
45. The court is further urged to allow the declarations and prayers for injunction as sought and for costs of the suit.

1st Defendants Submissions

- 46 The 1st Defendants submissions were filed on 1/2/2024. The following issues for determination are identified;
1. Whether the Plaintiffs and 1st Defendant personally contributed funds to purchase the suit properties.
 2. Whether the 1st Defendant and the 1st Plaintiff are lawfully registered as proprietors of the suit properties.
 3. Whether there is an implied or explicit constructive trust in favour of the 2nd to 5th Plaintiffs.
 4. Whether there was misrepresentation.
 5. Whether the suit properties should be transferred to the 1st to 5th Plaintiffs.
 6. Who will bear costs of this suit.
47. It is submitted that the Plaintiffs have failed to prove their personal contributions towards the purchase of the suit properties. That it has been stated in testimony by DW2 and DW3 that they were present at fundraisings for funds to purchase the properties. That the trusts allegedly in Kenya and Germany have not been proved.
48. The 1st Defendant submits that he owns the suit property jointly with the 1st Plaintiff and that they hold valid title deeds to the same. That a title deed is conclusive proof of ownership of land. The 1st Defendant places reliance on the holding in *Charles Karathe Kiarie & 2 Others V Administrators of the Estate of John Wallace Mathare [Deceased] & 5 Others [2013] eKLR* where it was held that a title for a bonafide purchaser for value cannot be impeached without notice of fraud. At paragraph 56 of his submissions, the 1st Defendant states that controlled transactions are void in law for all purposes unless a consent by the Land Control Board of a certain area within which the land falls has been granted. That in the instant case, the Land Control Board gave consent to the 1st Plaintiff and the 1st Defendant and the same cannot be void under section 6 [1] of the Land Control Act. The 1st Defendant insists that there was change of user of the suit property from agricultural land to educational use and the prayer to have the same registered in the Plaintiffs names is overtaken by events.
49. On whether there exists an implied or explicit trust in favour of the 2nd to 5th Plaintiffs, it is submitted that it is never the duty of the court to infer trust. The 1st Defendant disputes the importation of a constructive trust and maintains that the parties had a common intention and which was to acquire



the properties to establish a school. Reliance is placed in the holdings in *Jutelabi Adventure Limited & Another Versus Christopher Michael Lockley* [2017] eKLR and *Peter Ndun’gu Njenga Versus Sophia Watiri Ndung’u* [2000] eKLR.

50. The 1st Defendant further denies any misrepresentation as alluded to by the Plaintiffs and submits that the properties were acquired jointly as per the agreements on record. That it is therefore not the duty of the court to rewrite the contract between the parties. On whether the suit properties should be transferred to the 1st to 5th Plaintiffs it is submitted that a company with foreign shareholders cannot own freehold land. That the prayer is therefore an illegality and the same should not be allowed by the court. The 1st Defendant lastly seeks for costs of the suit.

Analysis and Determination

51. The court has considered the pleadings, the evidence led and presented before court and the submissions of the parties the following issues commend determination.
1. Whether the title numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 and Kwale/Diani Complex/203 [the agricultural properties] are null and void for want of a lawful Land Control Board consent.
 2. Whether the Plaintiffs has made a case for existence of a trust over the suit properties.
 3. Whether the orders sought by the Plaintiff should issue.
 4. Who should bear the cost of the suit?

Whether the tiles numbers Kwale/Diani Complex/26, Kwale/Diani Complex/201 and Kwale/Diani Complex/203 [the agricultural properties) are null and void for want of a lawful Land Control Board consent

52. From the proceedings it is not in dispute that the sale and purchase transaction involving the suit properties except Kwale/Diani Complex/195 constituted a controlled transaction within the meaning of section 6(1) of the Land Control Act Cap 302 Laws of Kenya (herein the Act). The consent of the relevant Land Control Board was therefore a precondition. Indeed, DW1 who is the lawyer who undertook the conveyance confirmed in his evidence in chief that the properties were agricultural land and Land Control Board consent was necessary.
53. It is also not in dispute that indeed the consent was issued by the Land Control Board. What appears to be in issue is the validity of the consent to transfer and its import to the sale and purchase transaction of the said properties that were agricultural lands culminating to the transfer and registration of the 1st Plaintiff and 1st Defendants as proprietors. The validity is impugned on the basis of section 9 of the Act which provides as follows: -
9. Granting or refusal of consent
 - (1) In deciding whether to grant or refuse consent in respect of a controlled transaction, a land control board shall—

.....
 - (c) Refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not—
 - i. A citizen of Kenya; or



- ii. A private company or co-operative society all of whose members are citizens of Kenya; or
- iii. Group representatives incorporated under the Land (Group Representatives) Act, 1968 (Cap. 287); or
- iv. A state corporation within the meaning of the State Corporation Act, 1986 (Cap. 446).

54. The Plaintiff avers at paragraph 18 of the amended Plaintiff that the registration of the suit properties in the names of the 1st Plaintiff and the 1st Defendant was as a result of illegalities, irregularities, misrepresentation and/or a mistake and offers the following particulars: -
- a. The 1st Plaintiff avers that being a foreigner with no knowledge of Kenyan law, relied on the 1st Defendant's representations and the legal advice provided by the Advocates who had been appointed by the 1st Defendant to advise the Plaintiffs at the time of entering into the sale transactions for the Agricultural Properties did not reveal the legal hurdle to the 1st Plaintiff's registration as co-proprietor of the Agricultural Properties.
 - b. The 1st Plaintiff further avers that the Land Control Board failed to take note at the material time, that no consent to a controlled land dealing can be given to persons who are not Kenyan citizens under the provisions of the Land Control Act and that the issuance of a Land Control Board consent to the transactions in respect to the Agricultural Properties was a mistake and/or irregular and/or illegal.
 - c. The 1st Plaintiff further avers that the registration of each of the transfers in the joint names of the 1st Plaintiff and the 1st Defendant was for the aforesaid reasons, a mistake and/or irregular and/or illegal.
55. I have pondered over the above particulars which revolve around alleged misrepresentation on the part of the 1st Defendant and the lawyer who undertook the conveyancing, mistake on the part of the Board who allegedly failed to consider that one of the purchasers was not a Kenyan citizen. The Plaintiffs case is that she is not a citizen of Kenya but a Germany. The fact that the 1st Plaintiff is German citizen is not in dispute.
56. Having stated the above I reverted to the circumstances under which the purchase of the suit properties were undertaken and specifically the purpose for the purchase which was for putting up infrastructure for learning for needy students around the Diani area. I noted from the proceedings and evidence that at the time of the transactions there appeared to be no concerns at all over the consent and everything was being done with the focus of meeting the objectives for which the land was being acquired. I say so because the purchases were made not at one go but at different intervals of about 5 years. No issue arose with any of the transactions. PW1 testified in cross examination by Ms. Okumu that she had built a kindergarten and school on the property and she had no idea it was agricultural land neither was she conversant with the issue of Agricultural land. In this regard having the benefit of listening and seeing the witness she appeared to be honest to this extend. I also did not come across anything peculiar indicating any malafides or bad intention on the part of the 1st Defendant during the purchase of the properties. DW1 the lawyer who undertook the conveyancing testified that the Plaintiff used to attend his office at the time of transaction. This means she was never left out.
57. I also perused applications for the Land Control Board. The application for the consent in respect of plot 201 was presented in evidence (see page 27 of the 1st Defendants bundle) and indeed both names of



the purchasers were disclosed as Edward Kaunda Maunga & ISBRECHT GEB. Deden Heike. While the space for Nationality was left blank I had difficulty attributing this to any mischief on the part of the 1st Defendant considering the 1st Plaintiff name was duly disclosed and clearly on the face of it no one would attribute it to a Kenyan. Further the application for consent for plot 203 was produced (see page 20 of the 1st Defendants Bundle). My review of this application revealed that the purchasers are disclosed as in the previous transaction in fact in this one the 1st Plaintiffs names are given together with her address in Germany.

58. With the material and evidence led before this court this court was not persuaded that the Plaintiffs proved misrepresentation on the part of the 1st Defendant in obtaining the Land Control Board consent to the transaction.
59. Having made the above finding the court has noted that the Board is being faulted for failing to consider the presence of the foreigner. However, no fraud is specifically pleaded and proved against them. The facts and evidence before me are that the consent was issued and the transfer effected in favor of the 1st Plaintiff and 1st Defendant. No issue was raised. No appeal was filed against the decision to issue the consent as envisaged under the Land Control Act. The alleged illegalities are discovered later in the year 2016 after relationships had soured. I wondered what would have happened had this not occurred. Most probably the same would have been rectified quietly by the parties. Indeed it is pleaded that the Plaintiffs tried to regularize the transfers and this is corroborated by the letter dated 3/10/2016 from Anjarwalla & Khanna proposing reversal of the initial transfer (page 150 of the Plaintiffs bundle). Consequently, in the absence of any fraud against board, I would treat the board's action as a unintentional mistake that should not impeach the title issued. Consequently, I decline to nullify the transactions and ensuing titles.
60. In further support of the above position I found persuasion in the court's dictum in case of *In re Kims Poultry Farm Ltd* [2020] eKLR where it was stated thus;
- “7.....I do not think that in the absence of proof of fraud a letter of consent issued by the land control board can be impugned.
8. Under the provisions of the Land Control Act there is no provision under which a consent issued by the board at its sittings can be queried. The Act only provides for appeals against refusal to grant consent to the provincial land control appeals board in the first instance and in the second instance to the central land control appeals board. Section 13(2) provides that the decision of the central land control appeals board is final and conclusive and not subject to be questioned by the court.”
61. My next task is to determine what should happen to the titles that have been issued to the 1st Plaintiff and the 1st Defendant. I will start with the titles which are in respect of the agricultural properties. Since I have declined to invalidate the purchase and sell transactions related thereto, I do not find it necessary to deal with the invitation to refund the purchase price paid to the vendors. The court will instead shift its attention on the creation of a trust herein.



Whether the Plaintiffs have made a case for existence of a trust over the suit properties.

62. I find it necessary to recall the legal perspectives of the concept of trusts and how trusts may arise. The Court of Appeal in the case of James Archer & Another Vs. Inger Christine Archer & 2 Others Civil Appeal No. 39 of 2020 in its judgement delivered on 17/3/2023 discussed this at length as follows:-

23. Black's Law Dictionary, 9th Edition; defines a trust as "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)." There are three types of trusts that can arise with respect to land, as explained in Elements of Land Law, 5th Edition by Kevin Gray and Susan Francis Gray at page 824 paragraph 7.1.11:

"Trusts relating to land can be classified as either express trusts or implied trusts, the latter category subdividing into further categories of resulting and constructive trusts ... Consistently with the characteristic preoccupation of equity, the primacy of intention is exemplified in each of these three cases of trust. The trust is the express very embodiment of an intention explicitly formulated by a legal owner regarding the beneficial ownership of his land. Implied trusts arise by operation of law, but do so against a background of actual or presumed beneficial intentions as to beneficial title. Yet, although premised alike upon intended beneficial ownership, the resulting trust and the constructive trust have traditionally enjoyed distinct spheres of operation."

24. This position was confirmed by this Court (Makhandia, Ouko & M'inoti, JJ.A.) in Twalib Hatayan & Another vs. Said Saggat Ahmed Al-Heidy & 5 Others [2015] eKLR as follows: -

Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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..."

25. It is not contested that there was no express trust created with respect to the suit properties in this appeal, and no evidence of such an express trust was provided by the Appellants. The Appellants' case therefore turns on whether a trust can be implied from the facts of the appeal. The authors of Elements of Land Law (supra) explain when a resulting trust arises as follows at page 825 in paragraphs 7.1.12:

"Resulting trusts are intrinsically concerned with the money contributions laid out in the purchase of an estate in land. The



beneficial ownership implied under a resulting trust gives effect to the intention presumptively disclosed by the pattern of money purchase. Thus, in the absence of any evidence of countervailing intention, a financial contribution towards the acquisition of a legal estate in the name of another normally generates a resulting trust in favour of the contributor, the latter's beneficial entitlement being directly proportional to his or her cash contribution.”

26. The two main requirements for a resulting trust to arise are firstly, the intention and contribution to the purchase of the property must be contemporaneous with the taking of legal title, as was held in *Pettit vs Pettit* (1970) AC 777 and in *Gissing vs Gissing* (1971) AC 886. The relevant time frame for the existence of the required intention and contribution is therefore at the point of purchase of the land, which is the time the beneficial entitlement crystallises, and resulting trusts cannot in principle be founded on intentions, events or circumstances which arise after the date of purchase. Secondly, the clearest instances of resulting trust emerge from direct cash or other forms of financial contributions to the purchase of property at the point of purchase.
 27. This Court has also held in *Twalib Hatayan & Another vs. Said Saggah Ahmed Al-Heidy & 5 Others* (supra) and in *Juletabi African Adventure Limited & another vs. Christopher Michael Lockley* [2017] eKLR that 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 or her name.....
 28. On the other hand, there has been a pragmatic shift in English law towards recognizing constructive trusts as the primary phenomenon in the area of implied trusts, as illustrated by the decisions in *Lloyds Bank Plc. vs Rosset* (supra), *Stokes vs Anderson* (supra), *Oxley v Hiscock* (supra) and *Stack vs Dowden* (supra) which were relied on by the Appellants. There may however be instances when the two forms of implied trusts overlap arising from their common feature of the existence of demonstrated intention as regards the beneficial ownership of property which may exist from the time of purchase and thereafter, and as a result both forms of implied trusts are often simultaneously pleaded for this reason.’
63. Applying the various principles above I will proceed to discuss the Plaintiffs’ case that there exists a constructive trust as well as a resulting trust. The Plaintiff pleads the agricultural properties registered in the names of the 1st Plaintiff and 1st Defendant were held in trust pending the registration of the Kenyan trusts. PW1 presented two agreements dated 16/02/2010 and 31/03/2012. It was her testimony that upon registration of the Kenyan Trusts the 1st Defendant reneged on the agreements and refused to sign transfer documents. DW2 admitted during his oral testimony that he indeed refused to sign the transfer. My perusal of the agreements reveal that the one dated 16/2/2010 relates to plots 26 and 203 herein and is to the effect that the 1st Plaintiff and 1st Defendant have agreed to buy the land ‘.on behalf of Kindergarten in Diani’. It is handwritten signed by the two and witnessed by Heinz Isbrecht (PW2) and Joshua Kithendu (DW3). The agreement dated 31/03/2012 relates to plot 201 and replicates the former agreement.



64. It is not in contest that these agreements existed, however the 1st Defendants case is that the properties were for Kindergarten in Diani and not Kid Kindergarten in Diani and Kind- Kindergarten in Diani & Academy Trusts. To me it is evident the agricultural properties are registered in the names of the 1st Plaintiff and 1st Defendant as absolute proprietors. It is also evident that the intentions of the two registered owners is to hold the property for the benefit of a 3rd party Kindergarten in Diani. DW2 alluded to the fact that the agreements were signed post the purchasing of the properties. I noted with regard to plot 203 and the agreement dated 16/02/2010 the purchase price payments made to J.O Magolo Advocate was not post the purchasing of this property. However I noted that the said agreement included plot 26 whose purchase was made in 2005. However there was produced by PW1 Contract Agreement signed on 6/6/06 between KID EV of Bremen Germany and Japhet Musili Musunza for materials and labour of Kshs. 3,100,000/-. It is witnessed by both DW2 and DW3. For me none of the signatories who have signed this agreement and who were witnesses during these proceedings plead that they were coerced to sign the same. The 1st Defendant was obligated to fulfil his part of the bargain placed on him when the time was ripe to do so by signing the transfers.
65. Again, who advanced the money at the point of purchasing the properties. The Plaintiffs testified that the purchase price was paid by the 1st Plaintiff from funds provided by the Parent Trust that is KID Kindergarten in Diani EV. In respect of Kwale/Diani Complex/26 PW1 tabled receipt dated 20/01/05 issued to herself by Sachdeva & Company Advocates for Kshs. 1,500,000/= in respect of Kwale/Diani Complex/26; a Bank Statement issued on 25/04/2005 showing a bankers cheque from the 1st Plaintiff account at Barclays Bank for a corresponding debit amount and two receipts for Kshs 54,585 and Kshs.3000/- issued by the said firm of Sachdeva (see pages 75-79). In respect of Kwale/Diani Complex/203 a bank statement for PW2 and who is not disputed is the 1st Plaintiffs husband from Barclays Bank showing a credit entry made on 21/01/2010 for Kshs 4,680,000/= by Kid Kindargarten and a debit on 12/02/2010 to J.O. Magolo and Co. for Kshs. 3,365,725/=, a request for RTGs transfer dated 11/2/2010 for the said amount to the said firm disclosing it was for purchase of plot 203 was also produced.
66. As to plot Kwale/Diani Complex/201 PW1 tendered in evidence receipts dated 14/4/2011 issued by J.O. Magolo & Company Advocates to Kindergarten in Diani for Kshs. 2,458,932/= and Kshs. 1,000,000/=, Request for RTGS dated 13/4/2011 for Kshs. 2,458,932/=. At page 57 is an email dated 7/04/2011 from PW2 informing the 1st Defendant and DW3 that the 1st Plaintiff had sent 35 Euros for the new plot and at the bottom shows the email emanates from KID-Kindergarten in Diani e.V Bremen.
67. In respect of Kwale/Diani Complex/195 PW1 produced RTGs request Barclays Bank dated 29/8/2013 to J.O Magolo for Kshs 9,000,000/= together with the Swift Code. Bank Statement for PW2 for the period 29/6/2013 to 31/12/2013 which shows an outward remittance on 29/08/2013 for Kshs. 9,100,000/= and it also shows two inward remittances of Kshs. 5,700,000/= of 29/7/2013 and 23/08/2013.
68. The 1st Defendant's testimony is that the funds came from various donors and that he also participated in the sourcing of these donors. However during cross-examination DW2 conceded he never paid any money towards the purchase price. Mr. Magolo who did the conveyance stated in cross-examination that he dealt mostly with the 1st Plaintiff whom he remembered had to travel back to Germany to go and make arrangements for the payments. I had no proof before me of funds from the school account remitting money for the purchase price to Mr. Magolo. The Contract Agreement signed on 6/6/06 between KID EV of Bremen Germany and Japhet Musili for me further corroborates the acknowledgement by the Defendants the existence of the Parent Trust and the fact that they were



remitting the money. The Plaintiff further submitted correspondence from NAK-Kariative e.V dated 8/10/2019 confirming they made a donation of 40.000 Euro in the year 2011 to KiD-Kindergarten in Diani e.V for the purchase of land. That the said NAK -Kariative e.V is independent from the new Apostolic church. This evidence was not controverted by the 1st Defendant.

69. This court is of the view that the Plaintiffs have proved on a balance of probabilities they did on behalf of the Parent Trust meet the financial obligations arising from the purchase of the suit properties. Consequently, in view of the above this court makes a finding of both a resulting and constructive trust in this regard.
70. What is next after the above finding in my view would be to determine what should happen to the titles. In determining this essentially, I must address the prayers sought by the Plaintiffs in the amended plaint herein.

Whether the Plaintiff is entitled to the orders sought?

71. It is not in dispute that all the four titles herein are registered in the names of both the 1st Plaintiff and the 1st Defendant as absolute proprietors except plot No. 195 which is on leasehold. I agree with DW2 evidence that the titles have no endorsement that they were held on trust for either the Parent Trust or Kenya Trust. However, I must at the earliest opportunity bring this to rest as it is trite a constructive trust is an overriding interest. This is grounded on the provisions of section 28 (b) as read together with section 25 of the Land Registration Act. In *Mutsonga –vs- Nyati* (1984) KLR 425 and *Kanyi – vs- Muthiora* (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.
72. The court has already made a finding for a resulting and constructive trust. The agricultural properties in my view are not held by the 1st Plaintiff and the 1st Defendant as absolute proprietors but under a charitable trust. This also applies to the leasehold property.
73. The trusts to which the properties are proposed to be transferred to be produced by the Plaintiffs at page 5 – 27 of the Plaintiffs bundle. They were registered on 19/01/2015 and are dated 24/12/2014 and are charitable trusts. The trusts are known as the KID-Kindergarten in Diani & Academy and KID-Kindergarten in Diani. In the case of *William Charles Fryda v Assumption Sisters of Nairobi registered Trustees & another* [2017] eKLR____ Munyao J highlighted as follows;
125. The definition of "charity" was ably given by Lord MacNaghten in the case of *IRC vs Pemsel* (1891) AC 531 where he stated that:
- "Charity in its legal sense comprises four principal divisions: Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community".
74. I have seen the objectives set out in the trust deeds and they reflect the intention to assist needy children in Diani for their education among others and are in tandem with the above definition.
75. Having listened to the parties and their cases before court the biggest contestation on the part of the 1st Defendant and his allies is why the suit properties cannot be transferred as per the agreements produced in court that is to Kindergarten in Diani. The Plaintiffs desire that the titles be transferred to KID-Kindergarten in Diani & Academy and KID-Kindergarten in Diani. From the pleadings and the evidence in the entire proceedings there is no doubt that the initiative herein was intended for the benefit of the education of needy children in Diani and the catchment area on charitable basis. The



Parent trust gave the money to ensure the project came into fruition and entrusted the money to the Plaintiffs who it was admitted by both DW2 and DW3 in cross examination sat in the Committee in Germany. They were to ensure the money bought land and put up a school for the less privileged children in Diani.

76. The 1st Defendant pleads that the land was to be transferred to the school upon registration and according to his testimony this is the school as registered by himself - Kindergarten in Diani. DW3 agreed in cross examination that there is no reference to school in the agreements. Indeed, in the letter dated 21/02/2014 produced as evidence the 1st Defendant states: -

QUOTE

.....But now the Germany Committee came with a decision which I'm against it that we change the names which are in title deeds from Edward and Heike to only Heike or Heike and another partner from Germany and not from Kenya. So because the plots are belongs to Kindergarten in Diani and not one or two persons, I will not sign land transfer or land consent to anybody but I will sign if we are changing names from Edward and Heike to Kindergarten in Diani only.

DW2 reiterated the above during cross examination that if his name were to be included as trustee in the Kenyan Trust he would not have a problem to transfer because he is one of those who started the school and they must be involved.

77. I must set the record straight that as seen from the above definition a trust is not set up for the benefit of an individual. None of the parties can benefit as individuals. The next question that arises is can the properties be transferred to the KID-Kindergarten in Diani & Academy and KID-Kindergarten in Diani trusts as constituted? The 1st Defendant urges that it will be illegal to transfer the land to the Plaintiffs who are citizens of the Republic of Germany and therefore foreigners as they cannot own freehold land. That any property held in trust shall be regarded as being held by a Kenyan Citizen only if all the beneficial interests of the trust are held by persons who are Kenyan Citizens.

78. I have already shown that the beneficiaries of the trust are the needy children who are targeted and not the individual trustees. Indeed, it is trite that it is a duty imposed on trustees that they should not derive a personal benefit from the management of the trust. It behoves this court to harness this noble initiative as I see an opportunity for its revival for the benefit of the children. This is a public good. The Plaintiffs who are part of the Committee in German on behalf of the Parent Trust in my understanding are still desirous of sponsoring the children.

79. Equity suffers no wrong without a remedy. I see no impediment to this court making an order in favor of the transfer of the properties in favor of the charitable trust herein since the beneficiaries are the needy children and not the individual trustees. The issue of the school being stolen by the Plaintiff should not be entertained in the circumstances. The trust is duly registered in Kenya. PW1 testified that under clause 1.1 b and page 6 of the Trust Deed Kindergarten Diani existed in Kenya where it was indicated the principal office would be in Kenya. I must choose substantive justice and not technical justice. In this regard I'm emboldened by the dictum of the Court of Appeal in *Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri Civil Appeal No. 26 & 27 of 2011 [2014] eKLR* where the court espoused that; -

25. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as



he then was) in Chase International Investment Corporation and Another vs. Laxman Keshra and Others, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

(Emphasis is mine)

80. There is an additional limb to this discourse and which is on the occupation and activities by Samuel Mutugi, Anthony Mwitika Kaunda the 7th and 8th Defendant respectively. It also relates to the prayers for permanent injunction sought in the amended Plaintiff. These parties were joined latter with leave of the court. The Plaintiffs called PW3 Hussein Mwandzaya Mvurya who produced in court investigation reports dated 5/10/2022 and 24/10/2020 for plot Kwale Diani complex 201 & 203 and 26 respectively which were prepared on the instructions of the 1st Plaintiff's husband. The witness also swore an affidavit reiterating his findings and which to me laid credence to admissibility of his evidence. While PW3 testified in cross examination that he did not see Anthony Kaunda and who is the son of the 1st Defendant mining coral stones, the 1st Defendant admitted during cross examination by Mr. Karega that he authorised the mining of coral stones whose proceeds were used to help the children. Firstly no evidence was placed before the court of the proceeds received therefrom and even if the same were produced the consent of the 1st Plaintiff was necessary the property having been in the names of both parties. In any event DW2 admitted in cross examination that he did not procure the authority of the 1st Plaintiff.
81. It was PW3 evidence that Samuel Mutugi was a tenant in respect of the classrooms in plot 26. It is in this block that the school and other auxiliary facilities are constructed. Upon cross examination the witness confirmed that plot 26 was occupied by Mr. Kaunda but he could not confirm the occupation of the 2nd house. Be that as it may this court reiterates that the 1st Defendant and 9th Defendant could not do anything on the property without the consent of the 1st Plaintiff who was also a registered proprietor.
82. It is this court's finding therefore the 1st Defendant could not deal with the property without the consent of the Plaintiff and therefore he had no right to authorise the 7th, 8th and 9th Defendants to deal with suit properties.
83. As against the vendors of the properties being the 2nd, 3rd and 4th Defendant I find that the Plaintiffs failed to prove any wrong doing on their part. They innocently sold property and moved on. There was also no evidence placed before court on wrong doing on the part of the Land Registrar. PW1 indicated in cross – examination by Mrs. Waswa the reason she sued the Land Registrar was because the title between herself and Edward is null and void.
84. Before I pen off it is only appropriate that I explain the delay in delivery of this judgement. The court had spent quite some time preparing the judgement when just before delivery of the same I lost on 13/6/24 my laptop containing all the data. Consequently, I had to re-write the judgement among other rulings I had also prepared and at the same time catch up with other scheduled rulings and judgements. My gratitude to Counsels in this matter for their indulgence.
85. The court finds that the plaintiffs have proved their case against the 1st, 7th, 8th and 9th defendants on a balance of probabilities and enters judgement for the Plaintiffs in the following terms:-
 - i. A declaration that the 1st Defendant and the 1st Plaintiff are holding parcels Kwale/Diani Complex/26, Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani



Complex/195 in trust for and on behalf of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.

- ii. The 1st Defendant to sign all documents necessary to transfer the title deed number Kwale/Diani Complex/26, Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani complex/195 to the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kid Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts within 60 days of this judgement.
- iii. In default of compliance of Order [ii] above the Deputy Registrar of this Honourable court be directed to execute the documents of transfer and all other necessary documents required to give effect to order [ii] above on behalf of the 1st Defendant under seal of this Honourable court.
- iv. An order be issued directing the 5th Defendant to lift and/or cancel any encumbrances placed by the 1st Defendant on the titles number Kwale/Diani Complex/195, Kwale/Diani Complex/26, Kwale/Diani complex/201 and Kwale/Diani Complex/203 and facilitate the implementation of the orders of this court.
- v. A permanent injunction restraining the 1st, 7th, 8th and 9th Defendants by themselves or through their servants or agents or through anyone deriving title through them jointly and severally from entering onto or trespassing upon or occupying or using or remaining thereon or continuing to trespass or from damaging, wasting, developing, selling, leasing, alienating, transferring, digging, mining, taking anything out of or away from or dealing howsoever with all those parcels of land known as Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani Complex/26 without the consent of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.
- vi. Each party shall bear their own costs in view of the charity herein.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 24TH DAY OF JUNE 2024.

.....

A.E DENA

JUDGE.

Mr. Kings holding brief for Mr. Karega for the Plaintiffs

Ms. Okumu for the 1st Defendant

Ms. Okumu holding brief for Mr. Asige for the 2nd Defendant

Mrs. Waswa for the 5th and 6th Defendants

Mr. Mwakina – Court Assistant

