



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 123 OF 2011**

**TWALIB HATAYAN ..... 1ST PLAINTIFF**

**ABDULWAHID HAJI YERROW ..... 2ND PLAINTIFF**

**- VERSUS-**

**SAID SAGGAR AHMED AL HEIDY .....1ST DEFENDANT**

**MUNIRA SAI SAGGAR ..... 2ND DEFENDANT**

**HANIA SAID SAGGAR AL HEIDY ..... 3RD DEFENDANT**

**FAHMY SAID SAGGAR AL HEIDY ..... 4TH DEFENDANT**

**ABOUD ROGO MOHAMED ..... 5TH DEFENDANT**

**FATMA SAID SAGGAR ..... 5TH DEFENDANT**

**JUDGEMENT**

[1] Twalib Hatayan and Abdulwahid Haji Yerrow the plaintiffs herein are business personalities and well known philanthropists who are involved in numerous charitable endeavors which include universal Educational Trust Fund. The plaintiff avers that sometime in the year 2003 they were approached by 1st to 6th defendant who held themselves out as Madhanhirul Ulum (Muslim Women Centre) Trust for funding to purchase Mombasa/Mainland South Block/215 to build a mosque and madrassa and a social hall for the local community.

The plaintiff released to the defendants Kshs. 2,080,000/- for that purpose and the property was registered in the name of Madhanhirul Ulum (Muslim Women Center) Trust on 6th June 2013.

[2] The plaintiffs aver that this trust Madhanhirul Ulum (Muslim Women Centre) Trust was not registered by then and that the defendants through M/s. Swaleh & Company Advocates purported to register the said Trust on 12th July, 2005. That M/s. Swaleh & Company Advocates who acted for the plaintiffs and defendants in the purchase of the suit land failed to advise the plaintiffs then its clients that the defendants were not operating as a registered trust and that action was a fraud on the part of Swaleh & Co. Advocates and the sale was null and void and ineffectual and incapable of conferring proper title as the Trust did not exist at the time of registration.

The plaintiffs aver that the 1st to 6th defendant have now purported to sell the same property to Base

Titanium for Kshs. 35 million. They aver that the property now registered in the name of Madhanhirul Ulum (Muslim Women Centre) Trust is held by 1st to 6th defendant in trust for them by virtue of a resulting trust created when the donation of Kshs. 2,080,000/- was made. The plaintiffs pray for recovery of Mombasa/Mainland South/Block 215 and a declaration that the registration of the property in the name Madhanhirul Ulum (Muslim Women Centre )Trust is illegal and an order restraining the defendants from selling, transferring and/or otherwise disposing the suit property pending this suit.

[3] The defendants filed their defence in which they admit being trustees of Madhanhirul Ulum (Muslim Women Centre) Trust but deny ever having represented themselves to the plaintiffs. They claim to have set a mosque and a madrassa for girls on plot no. Mombasa/Mainland South Block 1/7 in the year 1988 under the name Masjid Madhanhirul Ulum and that on 22nd March 2002 the 1st,2nd,3rd and 4th defendant executed a Trust Deed for Madhanhirul Ulum (Muslim Women Centre) Trust which was registered on 25th March, 2002 for managing the mosque and madrassa put up in plot Mombasa/Mainland South Block 1/7.

[4] The defendants aver that they identified an adjacent Plot Mombasa/Mainland South Block 1/215 for expansion of the madrassa and entered into negotiations with the owner Kenya Red Cross Society which negotiation yielded into an offer for sale of the same in July, 2002. The defendants aver that since they were short of funds they approached various personalities for funds to purchase Mombasa Mainland South Block 1/215. That the 1st plaintiffs' wife and her friends offered to contribute to Madhanhirul Ulum (Muslim Women Centre) Trust and her contributions were forwarded to M/s. Swaleh & Co. Advocates. The defendants deny ever discussing or reaching any compromise in regard to any terms of ownership and use with of the plot under reference with the plaintiffs. They aver that the transfer of the plot to them had no involvement of the plaintiffs. They aver that Madhanhirul Ulum (Muslim Women Centre) Trust was in legal existence at the time of purchase and registration of Mombasa/Mainland South Block 1/125 in his favour and that the transfer were lawful and indefeasible. They state that a fresh Trust Deed was executed to provide for management dealings for the Centre and to provide additional trustees being 5th and 6th defendants.

[5] The defendants said they offered the sale of the plot for raising funds to purchase a parcel of land in an alternative and more conducive area to retain the balance of proceeds of sale to put up a more modern and more equipped madrassa. The defendants state that by contributing to the purchase the plaintiff did not become or acquire any proprietary interest in the plot and/or have any beneficial or fiduciary interest in their favour in respect of the suit property. They aver that the plaintiffs are not beneficiaries of the Centre and have no conceivable legitimate claim in the manner the Trust is run or the way the Trust manages its properties and that this suit is incompetent, frivolous and vexatious.

[6] In his evidence Abdulwahid Haji Yerrow the 2nd plaintiff testified that he is a businessman. That he has not met the defendants. That the contact was made through the first plaintiffs wife. He said they financed the purchase of land. That the intention was purely charity. That they do many charitable programmes. He said that the land they (plaintiffs) financed is being sold to Base Titanium and that he wants to stop the defendants from selling.

[7] On cross-examination he admitted that he never met the defendants directly. That he was not involved in the negotiations. That the Kshs. 2 million did not come to him as an individual. That the property was next to an existing institution and he was not aware whether there was an existing Trust.

[8] The first plaintiff told the court that they have a Universal Educational Fund founded in 1999 and they have over 12000 students in both secondary and university. That it is for the less fortunate members of society. He said they also help in building madrassa. He said that his wife was involved in muslim women madrassa. That she identified some one to help and their Trust agreed in principle to help. He said he did not know those people very well so they instructed A.M. Swaleh & Co. their lawyer and paid a cheque for Kshs. 2,080,000 to him. He said his understanding was that the money was for the plot and development of a mosque and boarding facility for the madrassa. He found out later that the defendants were selling the plot. He said he needed the plot to go for the purpose it was bought.

[9] On cross-examination, he admitted the message was brought to him by his wife. He never dealt with anybody. He has not been to that place and was not involved in the negotiations of the plot but he is aware that a madrassa runs the property. That this is after 10 years since the property was purchased and he has not been there. He admitted that he had no problem with the property and the title. The objection is the principle of selling this land which should not be for sale.

[10] Said Sagger Ahmed Al heidy the first defendant said they live at Likoni. He had worked with Posta. That he is an administrator of madrassa at Likoni that started in 1970 as Madhanhirul Ulum (Muslim Women Centre) Trust. He relied on his statement filed in this case. He produced his documents as Exh. 1-11. He produced the documents for two plots. One on inheritance and another one he bought from Red Cross. He said his daughter was going around to muslim women to look for money to buy the plot. He does not know where the money came from. He heard the money came from the wife of Twalib Hatayam. The property was brought in the name of madrassa. He said they wanted to sell it to Base Titanium because it is near their harbour and the minerals being shipped therefrom by Base Titanium shall be harmful to the people. He said the Trust Deed allows them to do so and invest the money. He said the plaintiffs do not know their plans.

[10] On cross-examination he admitted that the children in the Trust are his own children. He also admitted the money to purchase the suit from Red Cross plot came from the plaintiffs. He said it was important for them to expand the madrassa. That it was equally important to move out of the place because Titanium was going to be dangerous to them. He said that they shall buy a plot from his daughter Hania Said Suggar Al Heidy. The plot is at Kanamai and it is for Kshs. 500,000/-.

[11] After the close of the case, elaborate submissions were made by the plaintiffs and defendants and various authorities were filed herein which authorities I have read. The parties to this case have no disagreement that Kshs. 2,080,000/- was made by the plaintiffs to purchase Mombasa/Mainland South Block/251. That the same was purchased by the defendants from Kenya Red Cross. It was also not in dispute that the plaintiffs were not involved in that purchase at all. Further it is not indispute that the said property was registered in the name of Madhanhirul Ulum (Muslim Women Centre) Trust. Further it is conceded that the plaintiffs since giving the said Kshs. 2,080,000/- on 4th October, 2002 never involved themselves with the suit property or Madhanhirul Ulum (Muslim Women Centre) Trust until the filing of this suit.

[12] The issue for determination is whether Kshs. 2,080.00/- made to Madhanhirul (Muslim Women Centre) Trust by the plaintiffs was a donation/gift to the Centre or whether the paying of that amount to the said Trust created a resulting trust in the plaintiffs favour of the interest bought by the defendants Trustees of said Trust.

[13] The plaintiffs said they had Universal Educational Trust founded in 1999. They have sponsored over 12000 students. They said they also help madrassa and teaching projects. They told the court they had spent Kshs. 700 million todate. Mr Twalib Ali Barack Hatyan said that this donation was not an investment for him but was for the public. He said he went to Starehe Boys Centre and was giving back to the community. He said he was aware a madarassa runs the property and he was aware a Trust runs the property. The Trust was dated 12th June 2005 and covered the two properties. He said he heard the plaintiffs were selling the property that is why they came to court because the purpose of paying for the purchase of the suit plot was for public good.

The plaintiffs plaint para 5 stated;

*"Some time in the year 2003 the 1st to 6th defendants approached the plaintiffs claiming to be the registered Trustees of the Trust and petitioned the plaintiffs for funding and the plaintiffs agreed to donate and finance the purchase of the property known as Mombasa/Mainland South/Block1/215 (hereinafter referred to as the property) for purposes of using the said property to build a Mosque and Madrassa and social hall for the local community."*

[14] There is no doubt that the Kshs. 2,080,000/- was a donation by the plaintiffs to the defendants

Trust aforesaid. When a person donates to any person any gift to perform a public spirited function, what is the position of the donor as against the donation and as against the donee in law? This issue was clearly dealt with in **Church Commissioners of Kenya Mbeere Diocese v The Rev. David Waweru Njoroge Civil Appeal No. 108 of 2002**. The Court of Appeal quoting in **Mascall vs Mascall 50 P & CR 119** quoted Brown Wilkinson L.J. who held at page 126

*"The basic principle underlying all the cases is that equity will not come to the aid of a volunteers. Therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle which is laid down in (Rose vs. Inland Revenue Comrs [1952] Ch 499) that in equity it is held that a gift is complete as soon as the settler or donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, the donee to complete his title."*

The Court of Appeal also quoted **SNELL'S EQUITY 29th Edition** where the authors state at page 122 para (3)

*... where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus, in Re Rose, Midland Bank Executor & Trustee Co. Ltd vs Rose [1949] Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate on the donee who died before it has been registered. Although the donee's legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, It was held that the gift was good because the donor had done all that was necessary on his part. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor."(Emphasis ours).*

[15] The plaintiffs (donor) in this case have done all in their power to vest the legal interest in the property to the defendants (donees). There were no conditionalities proved to the court that were not met. The property was registered in the name of that Trust as was the intention. Infact, the plaintiffs had no problems with the defendants trustees for the last 10 years. The problem started when they heard the Trustees were selling their property. The gift herein was complete when money was donated. There was no trust created on donation at all. The Trustees of Madhhanhirul Ulum (Muslim Women Centre) Trust are well within their mandate under the Trust to make decisions of their properties which includes the suit land.

[16] It is my finding that once the donation was given by the plaintiffs and Plot No. Mombasa/Mainland South/Block 215 registered in the name of Madhanhirul Ulum(Muslim Women Centre) Trust the transfer cannot be recalled thereafter. Having reached that conclusion I need not dwell on all the other issues raised by learned counsel for the parties. This suit is dismissed. I order that each party bear its own costs.

**Dated and delivered in open court at Mombasa this 4th day of September, 2014.**

**S. MUKUNYA**

**JUDGE**

**4.9.2014**

In the presence of:

Nyongesa Advocate for the plaintiff

Abedi Advocate for the defendant