



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 60 OF 2014

CONSTANCE TUNDA VUKO.....PLAINTIFF

VERSUS

THE CHAIRMAN AND SECRETARY, PEACE OF ELSHADAI TEMPLE

P.E.T. alias PEACE OF ELSHADA TEMPLE MINISTRIES

PASTOR DAVID KHAMASI MANIANI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By her Complaint dated and filed herein on 2nd April 2014, Constance Tunda Vuko (the Plaintiff) prays for Judgment against the Defendants for:

a) A declaration that Plot No. Gede/Dabaso/740 is settled property as per the deed of trust dated 2nd October 2006;

b) A declaration that PET child care has failed in its objectives as envisioned by the deed of trust dated 2nd October 2006;

c) A declaration that Plot No. Gede/Dabaso/740 should revert back to the first trustee of the deed of trust dated 2nd October 2006 who is the Plaintiff herein;

d) A permanent injunction restraining the 1st Defendant and its members together with the 2nd Defendant, his heirs, legal representatives, assigns, employees or persons claiming under him from accessing, occupying or interfering with Plot No. Gede/Dabaso/740; and

e) Costs of the suit.

2. Those prayers arise from the Plaintiff's position that she is the trustee of one Roberto Arnoldi pursuant to a deed of trust made on 2nd October 2006 which trust was for the purposes of establishing an orphanage and child rescue centre for the orphaned and under privileged children of Watamu and its environs.

3. The Plaintiff avers that pursuant to another deed of trust made on 2nd October 2013, Plot No. Gede/Dabaso/740 was settled upon the Plaintiff to facilitate the objectives of the deed of trust dated 2nd October 2006. She further avers that subject to the deed of trust dated 2nd October 2006, she elected and appointed the 2nd Defendant being the Chairman of the 1st Defendant to be a trustee as per the deed and went on to form the Peace of Elshadai Temple alias Peace of Elshada Temple (PET) Ministries.

4. The Plaintiff further asserts that by dint of the deed of trust dated 2nd October 2006, the settled property was registered in favour of P.E.T. Children Care on 21st May 2007. She avers that from the year 2009, the 2nd Defendant started abusing his administrative power and allegations were made against the 2nd Defendant of sexually abusing young girls under his charge at the home. As a result, on 11th November 2009, the operations of the children's home set up pursuant to the deed of trust were suspended until January 2010 when the home was permanently closed.

5. The Plaintiff contends that after the closure of the children home, the charitable objects and intents of the deed of trust dated 2nd October 2006 had failed and in accordance with the conditions of the deed of trust, the settled property should revert back to the Plaintiff as the first trustee. Despite demands made to the Defendants however, they have failed or neglected to revert the same to the Plaintiff.

6. In their Joint Statement of Defence dated 21st October 2014, the Chairman and Secretary Peace of Elshadai Temple P.E.T alias Peace of Elshada Temple Ministries (the 1st Defendant) and Pastor David Khamisi Maniani (the 2nd Defendant) deny and refute the Plaintiff's averments as contained in the Plaintiff. The two Defendants assert that it is the 2nd Defendant as a pastor who started helping needy children and that when the numbers grew, he brought on board his wife and children and started an orphanage at their home to help needy children.

7. The 2nd Defendant avers that as a pastor, he was in charge of the church known as Peace of Elshadai Temple (PET) and the Plaintiff was but a member of the flock. The 2nd Defendant further avers that at one point in time, they were visited by an Italian by the name Roberto Arnoldi who on learning about the orphanage where the Plaintiff had been made a treasurer and interpreter, offered his parcel of land being Plot No. Gede/Dabaso/740 as a gift to the children in order that the orphanage could be relocated there.

8. The Defendants assert that the said piece of land was thereafter registered in the name of the PET and that the transfer documents were executed by the 2nd Defendant as Chairman of the P.E.T. and the Plaintiff as its treasurer. The Defendants further deny that the orphanage was set up on the basis of a deed of trust as stated by the Plaintiff. They also deny that the orphanage has been permanently closed and invite the Plaintiff to strict proof.

9. The Defendants aver that the Plaintiff has been filing several suits against them by proxy and assert that the suit herein is fatally defective, bad in law and res judicata ***Malindi ELC Case No. 39 of 2010***, which related to the same parties over the same subject matter.

The Plaintiff's Case

10. At the trial herein the Plaintiff called a total of five witnesses in support of her case.

11. PW1- Constance Tunda Vuko is a business lady in Watamu and the Plaintiff herein. She told the Court she is a trustee of one Roberto Arnoldi pursuant to a deed of trust made on 2nd October 2006. The trust was for the purpose of establishing an orphanage and a child rescue centre for the orphaned and under privileged children of Watamu and its environs.

12. PW1 told the Court that pursuant to the deed of trust Plot No. Gede/Dabaso/740 which was a property of the trust was settled upon herself to facilitate the objectives of the deed of trust. The property was then registered in favour of Pentecostal Evangelism Team (PET) on 21st May 2007. PW1 further

told the Court that she elected David Khamasi Maniani (the 2nd Defendant) as Chairman of the PET as required by the deed of trust.

13. PW1 testified that sometime in June 2008, the 2nd Defendant requested for the original title deed of the suit property claiming that some people wanted to see it. PW1 who was then in Italy instructed one of her workers to give the title to the 2nd Defendant. The 2nd Defendant never brought back the title.

14. PW1 further testified that sometimes in the year 2009, the 2nd Defendant started abusing his administrative powers and that he was also accused of sexually abusing young girls under his charge at the home. On 7th October 2009, the Children's Department Malindi asked that the Children be released from the PET as their security was in jeopardy. On 11th November 2009, the Malindi Area Advisory Council suspended the operations of the home and in January 2010, the home was permanently closed.

15. PW1 told the Court that following the closure, the charitable objects and intents of the deed of trust failed in so far as the related to the PET children home and hence the settled property ought to revert back to herself as the 1st trustee.

16. On cross-examination, PW1 stated that the deed of trust was made on 2nd October 2006 but was only registered on 30th July 2013. She told the Court she is the one who lodged it for registration and not Roberto Arnoldi. She conceded that the title for the suit property is in the name of PET Children Care and that the entity had not been sued in these proceedings. She further told the Court the PET Children Care was formed in February 2005 before the Deed of Trust was drawn.

17. PW1 further told the Court the trust deed neither mentions the PET Children Care nor the Defendants. She conceded there was a suit filed by Roberto Arnoldi in which she was the Defendant. That was ***Malindi HCCC No. 39 of 2010***. She however told the Court she was not served and was unaware of the case until March 2015 when the Defendants filed their documents in this matter.

18. PW2- Naomi Kazungu is the Children's Officer Malindi. She told the Court that on 2nd October 2009, her office received information that the PET Children Home was burning. The Area Advisory Council went there and carried out an inspection which established that the house had been burnt and destroyed by villagers who were protesting the defilement of some of the children in the home by the 2nd Defendant.

19. PW2 told the Court that a sub-committee of the Council deliberated on the allegations and on 7th October 2009, PW2 wrote a letter releasing the children from the home. She did not close it down altogether as the process would have taken a long time.

20. PW3- Edna Furaha Charo is a resident of Watamu and an employee of the Plaintiff. She told the Court that in June 2008 while at work, she received a phone call from the Plaintiff who was then in Italy instructing her to hand over the original title deed for Plot No. Gede/Dabaso/740 to the 2nd Defendant. She did as instructed after retrieving the title from a cabinet in the Plaintiff's house.

21. PW4- Cicilia Katana is a resident of Kizingo village and a standard seven pupil at CRS Primary School. She testified that on 12th September 2009 at about 7.00 p.m she was outside the PET Children house with other children when the 2nd Defendant called her and ordered her to take a jug containing juice from the kitchen and to take the same to his house. She did as instructed but as she left, the 2nd Defendant called her again in his office and upon entering the office, the 2nd Defendant closed the door, switched off the lights and defiled her.

22. PW4 told the Court she left the office and went out to tell some of the workers what had happened. They later reported the matter to the police.

23. PW5- Joyce Katana is a fruit vendor at Watamu Township. She told the Court that on 14th September 2009 she received a phone call informing her that some of their children who were at the PET Children home had gone to Watamu Police Station to make a report following a defilement case. They went to the Police Station the following day and confirmed that a Report had been made. The matter was taken up by the Children's Office and PW5 and other parents later removed their children from the school.

The Defence Case

24. The Defendants called a total of three witnesses in support of their case.

25. DW1- David Khamasi Maniani is a Pastor and the 2nd Defendant herein. He told the Court he had been sued together with the church he started. He further told the Court the Plaintiff used to be a member of the church of which he was the Pastor and Chairman.

26. DW1 testified that the suit property is registered in the name of PET Children Care, a registered entity, which he told the Court had not been sued. He told the Court the title was previously in the name of Roberto Arnoldi who decided to gift them the land after visiting their orphanage.

27. DW1 told the Court that during the time of the transfer of the property from Roberto's name to the PET Children Care, the Plaintiff was their Treasurer. He told the Court there was no trust deed and that they did not recognize the one that had been produced by the Plaintiff in Court as they first saw it in Court.

28. On cross- examination, DW1 testified that the PET Children Care was some sort of orphanage and that the same was registered sometime in the year 2005 with himself, the Plaintiff and others as officials. The orphanage ceased to operate after the initial certificate granted for three years expired and they failed to renew it.

29. DW1 conceded that there was an on-going case before the Magistrates Court in which he has been charged with defiling children at the orphanage. That case contributed to the closure of the orphanage after a number of people were arrested.

30. DW2- Lydia Kafedha Ngumbao is a business woman in Watamu. She told the Court that together with the Plaintiff they used to attend the same church in which the 2nd Defendant was the pastor. She joined the church in 2002 and found the 2nd Defendant already taking care of children. In the year 2003, she was employed at the PET Children Care. At that time the Plaintiff was not known in the church.

31. DW2 testified that in the year 2004, the Plaintiff lost her husband and the 2nd Defendant mobilized members of the church who went and assisted with the burial. Two weeks after the burial, the Plaintiff joined the PET church. In the year 2005, the Church was visited by an Italian by the name Roberto Arnoldi. When he realized that the 2nd Defendant was taking care of children in his rented home, the Italian offered the suit property for use. At that time, the Plaintiff was the interpreter who was helping the 2nd Defendant to communicate with the Italian. That parcel of land was transferred to PET in 2007.

32. On cross-examination, DW2 told the Court he was a witness when the documents transferring the land from Roberto's name were signed. She told the Court it is the 2nd Defendant who signed on behalf of the church.

33. DW3- Loise Kombe Mwarandu is a business lady and a member of the 1st Defendant church. She told the Court she joined the Church in 2003 and that at that time, the Church already had a program of taking care of children who had no parents. The 2nd Defendant and his wife Pamela were taking care of the children at their rented house and DW3 would lend support to enable them feed the children.

34. DW3 told the Court the Plaintiff was not a member of the Church until later on in the year 2004. PET Children Care was later officially registered on 17th February 2005. At some point in time, one Roberto Arnoldi visited the Church. As he could not speak English, the Plaintiff who was conversant with the Italian language was used as an interpreter. Later on the Plaintiff was nominated by the 2nd Defendant to be the Treasurer of the PET Children Care.

35. Roberto later offered his land-the suit property for use as an orphanage when during his visits he realized that the 2nd Defendant was taking care of the Children from his home. The land was given as a gift. The Plaintiff and the 2nd Defendant executed the transfer documents as Chairman and Treasurer respectively on behalf of PET.

Analysis and Determination.

36. I have perused and considered the pleadings, the oral testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

37. Some ten years before this suit was instituted, Constance Tunda Vuko, the Plaintiff and the 2nd Defendant Pastor David Khamasi Maniani were the best of friends. Some two years before the two of them met, the 2nd Defendant had established a church going by the name Peace of El-Shadai Temple alias Peace of Elshada Temple (PET) Ministry (the 2nd Defendant herein).

38. It was apparent from the material placed before me that for a brief period of time, the Plaintiff joined the said Ministry as an ordinary member of the flock with the 2nd Defendant as the Pastor-in-charge. Other than running the church, the PET Ministry was concerned with the plight of the orphaned and needy children, something which also interested the Plaintiff.

39. Arising from their common interests, both the Plaintiff and the two Defendants would play a role in the eventual establishment of what became known as the PET Children Care an institution registered under the Department of Social Services on Thursday 17th February 2005 with its aims and objectives listed as hereunder: -

- i) To take care of the spiritual needs of children;***
- ii) Advocate for Children rights, protection and care;***
- iii) Providing essential needs of children in need;***
- iv) Provide food (and) clothing for orphans infected/affected by HIV/Aids; and***
- v) To build a home for Orphans.***

40. To facilitate the aims and objectives above, the parties herein were gifted a piece of land being Title No. Gede/Dabaso/740 measuring 0.8 Ha situated in Timboni area of Watamu by one Italian benefactor by the name Roberto Arnoldi. Overtime and following a deterioration of their relationship the parties are no longer able to work together and the dispute herein primarily relates to who among them is entitled to retain the ownership of the said parcel of land.

41. According to the Plaintiff, she is the trustee of the said Roberto Arnoldi pursuant to a Deed of Trust executed between herself and the said Roberto Arnoldi on 2nd October 2006. She told the Court that the suit property was part and parcel of the settled property under the said Deed before it was donated and registered in favour of PET Children Care on 21st May 2007.

42. The Plaintiff further told the Court that the operations of the PET Children home were terminated in

November 2009 due to some misconduct attributed to the 2nd Defendant and that hence the charitable objects and intents of the Deed of Trust have failed. She testified that following such failure and by dint of the conditions of the Deed of Trust, the suit property ought to revert to herself as the first trustee thereof.

43. While they acknowledge that the suit property was donated by the said Roberto Arnoldi, the Defendants deny the existence of the Deed of Trust and assert that the donation was a gift to the 1st Defendant Ministry and that the 2nd Defendant and the Plaintiff executed the documents of transfer for the property in their respective capacities as Chairman and Treasurer of the 1st Defendant Ministry.

44. In their Statement of Defence as filed herein, the Defendants asserted first and foremost that the suit as against the 1st Defendant cannot stand as the said Defendant being a registered society had wrongly been sued. From a perusal of the material placed before me, it was apparent that this suit was brought against the two Defendants on the basis that they are the ones who have taken over and are presently in occupation and control of the suit property.

45. The 1st Defendant is described at Paragraph 2 of the Plaint dated 2nd April 2014 as “a Society registered on the 28th November 2008 and is sued through its officials who are all adults of sound mind and disposition and are in charge of the day to day running of the activities of the Society”. Those officials are of course cited as the Chairman and the Secretary of the Ministry.

46. From the testimony of the 2nd Defendant herein, he acknowledged that he was not only the Pastor but Chairman of the 1st Defendant which is essentially a Church registered as such under the Societies Act, Cap 108 of the Laws of Kenya. My reading of the said Act did not reveal any requirement for leave to be sought before such suit was filed. It was also clear to me that the 1st Defendant had been rightfully sued through its registered officials.

47. In his testimony before this Court on behalf of the Church and himself, the 2nd Defendant told the Court that he was in charge of the Church and that the Plaintiff was just but a member of his flock. The 2nd Defendant told the Court that when the said Roberto Arnoldi visited their church before he made the now disputed donation, the Plaintiff who was fluent in Italian was used as the Church’s Interpreter for ease of communication. The 2nd Defendant would later on his own volition appoint the Plaintiff to the Committee of the orphanage as the Treasurer. According to the 2nd Defendant, that was how the Plaintiff and himself came to execute the documents in relation to the transfer of the property from Roberto.

48. My perusal of the correspondence and other material placed before me however appear to suggest that the Plaintiff was more than a mere interpreter -cum -Treasurer in the 1st Defendant Church. It was also evident that there was a thin but clear line between the 1st Defendant and the orphanage. The running of the orphanage was apparently being supported by various donors from Italy with the said Roberto Arnoldi being one of the leading donors.

49. It was further evident that the said donors wanted their say in the running of the orphanage and that perhaps due to her proficiency in the Italian language, they were more comfortable with the Plaintiff playing a leading role in the running of the affairs of the orphanage and as a result, the Plaintiff had been elevated to some role of co-director of the 2nd Defendant.

50. I say so because from the 2nd Defendant’s own list of documents as filed herein on 11th March 2015, it was apparent that his relationships with the Plaintiff had by the year 2009 deteriorated to a great deal but he still needed the Plaintiff for the proper functioning of the orphanage. From the minutes of a Committee Meeting of PET Church held on 26th February 2009 (Dexh 4), the 2nd Defendant’s name is listed in attendance as “the Director” with Agenda No. 3 listed as “Tunda (the Plaintiff herein) still Causing Trouble.”

51. While the said Minutes list the Plaintiff as being absent, Minutes No. 2 and 3 of the Meeting are recorded thus:

“Min 2:02:09 Admission of Children –Stella

We wanted to set the rules and regulations which shall be used when admitting new children to the home. Mama Njeri asked how children were being admitted. Stella walked out saying she was going to interview some pirates. Tunda (the Plaintiff) said we cannot choose our donors. Collins asked whether they were the founder donors of the home. And was told yes he then said they will need to be told. Nelly said this is what chased away donors. Tunda (the Plaintiff) said she had brought Stella so we could hear what she had to say straight from the horse’s mouth. Wafula asked why the notice board did not have all their names written-Stella and Others. Tunda (the Plaintiff) said money of dormitory was given in commemoration of Guzzini. Pastor (the 2nd Defendant) asked how can we know how much money they have in Italy in the name of P.E.T. Guzzini was to give two million every year what happened. Tunda (the Plaintiff) said she wanted a Committee formed in Italy and an account to be opened in the name of PET. And have a website so anyone could give donation. Nelly said we can open an account in Kenya not in Italy eg Mama Anakuja home in Muyeye. Tunda (the Plaintiff) said that we wait for Marco and Giovanna.

Min 3:03:09 Any Other Business

Tunda (the Plaintiff) will pay for the Committee’s sitting allowance as she is the one who called the meeting.”

52. That the Plaintiff had indeed been elevated to the position of a Co-director to the 2nd Defendant and that the two were having a strained relationship is further evident in the Minutes of the meeting of 6th December 2009 attached to the 2nd Defendant’s documents (Dexh 17). Minutes 3 and 4 of the said meeting which started at 3.30 p.m. and is headed Tunda’s Non-Attendance of Meetings reads as follows: -

“He (the 2nd Defendant) thanked everyone for being patient since 1.30 p.m. while he had been trying to be in contact with Tunda (the Plaintiff). He said he had been trying to call her and had even gone to her place but had not found her. David (the 2nd Defendant) asked everyone to contribute and give suggestions on what can be done about Tunda’s refusal to honour invitations to attend Committee Meetings. It was said that we cannot keep postponing these meetings since there were pressing issues to be sorted out. Last time the meeting was postponed because she was not present and we did not want to finalize about the AAC Malindi Meeting without her as she would refuse to accept. Letters had been send out to everyone informing them of the committee meeting this Sunday. Millicent said that we have to render returns and finalize matters of this year. Tunda was to bring the books which she has not done. It was decided that we will prepare letters and send them to her and copy them to Sheria House Nairobi. We will request the government officials to help us deal with this matter.

Min 4:12:09 AAC Malindi Meeting

The Committee made the following decisions regarding the issues raised at the AAC Meeting

1. On the issue of two directors. The Committee decided that from today henceforth they shall work with one Director-Pastor David.

2.”

53. Arising from the foregoing, I was unable to accept the Defendants’ contention that the Plaintiff was an inconsequential person in so far as the running of the Children’s home was concerned. While the Plaintiff was certainly a nobody as far as the affairs of the 1st Defendant was concerned, it was clear to

me that she had a role to play in the P.E.T Children Care Organization which according to the Certificate of Registration produced by the Defendants was an entity registered under the Department of Social Services on 17th February 2015.

54. While the Defendants told the Court that the suit property was donated to and registered in the name of the 1st Defendant Church, a copy of the title deed produced by the Plaintiff herein reveals that the suit property was on 31st May 2007 registered in the name of the entity known as PET Children Care and not the 1st Defendant herein.

55. In my considered view if Roberto Arnoldi had intended to gift the suit property to either the 1st Defendant Ministry or its Pastor, the 2nd Defendant herein, he would have simply caused the same to be registered in the name of either the Church or the 2nd Defendant in person.

56. In explaining how the PET Children Care came to be, the Plaintiff testified that the said Roberto Arnold executed a deed of trust with herself on 2nd October 2006. That document was later registered on 30th July 2013 at the Mombasa Land Registry. The crux of the Plaintiff's case was that by the said Trust Deed, the said Roberto constituted a trust with the suit property for the purposes of establishing an orphanage and child rescue centre for the orphaned and underprivileged children of Watamu and its environs.

57. According to the Plaintiff, the said Roberto then proceeded to alienate the suit property to herself as the 1st trustee for the discharge of the obligations and fulfilment of the objects referred to therein.

58. While the 2nd Defendant denied the existence of the Deed of Trust insisting he only learnt of the same when he was sued herein, it was evident to me that the said Roberto had vide **Malindi HCCC No. 39 of 2010** sued both the Plaintiff and the Defendant herein. At paragraph 4 of their Statement of Defence filed in response to the said suit, the Defendants assert as follows in relation to the Deed of Trust

“4. Without prejudice to the foregoing, the 1st Defendant states that: -

a) One Pastor Daniel Khamani Maniani who founded a church in the name of Peace of Elshadai Temple (PET) in the year 2002 or thereabout was already taking care of destitute children and others in dire need in the year 2003 initially and informally in his residential house.

b) Subsequently and due to increasing numbers of children in need of care, the said Pastor founded and registered PET Children Care in 2005 to be managed by himself with the assistance of a committee duly constituted.

c) The said PET Children Care was always intended to be run as a Project of the Church to be founded by Church members, benevolent donors and well-wishers generally.

d) The said PET Children Care was thus never intended to be founded as a trust and was never founded or registered and has never been managed as a trust.

e) The subject parcel of land was a benevolent donation or contribution to an entity which was already in existence and could never, even remotely, have been intended for an entity or trust to be formed;

f) The one Roberto Arnoldi the supposedly real Plaintiff was just but one of the contributors or donors to an already existing project or program run by an already existing entity; and

g) It would be unjust enrichment to demand back property which was donated as utterly bushy and undeveloped and which has now been fully developed at great cost and value tremendously

enhanced thereby with funds from church members, other donors/contributors and well-wishers.

59. Arising from the foregoing, it was evident that the Defendants did not hear of the existence of the trust for the first time when this suit was filed in the year 2014. I did not think that the mere denial of the existence of the Deed of Trust could invalidate the same. While it is evident that the Plaintiff registered the same belatedly on 30th July 2013 under the Registration of Documents Act at the Mombasa Land Registry, I am of the considered view that the only way the Defendants could challenge the existence of the document was by proving fraud or some irregularity arising therefrom. No such fraud or irregularity in the procurement thereof had either been mentioned or proved.

60. As it were, Clause 4 of the Deed of Trust reads as follows:

“The “First Trustee” shall immediately upon the execution and signing of this trust form, establish and/or create an orphanage or Child Rescue Centre for the purpose and intents of this Trust and further also of her own discretion nominate or ordain an existing orphanage or Child Rescue Centre for the purposes, intents and benefits of this Trust.”

61. The words “First Trustee” as used under this Clause are defined in the preamble to the Deed of Trust to refer to Miss Constance Tunda Vuko, the Plaintiff herein. The Deed refers to the said Roberto Arnoldi as the “Author of the Trust” and states further at the preamble that the said Author of the Trust was desirous to constitute a trust with the property referred to thereunder “for the purpose of establishing an orphanage and Child Rescue Centre for the orphaned and underprivileged children of Watamu and its environs.”. The description of the property is given at the end of the Deed as the said Land Parcel No. Gede/Dabaso/740.

62. That being the case, it was clear to me that in donating the suit property to the PET Children Care, the said Roberto Arnoldi as the Author of the Trust created a Charitable trust for purposes of providing a home to the orphaned and needy children of Watamu and its environs as described in the Deed of Trust. It was clear also to me that contrary to the Defendants assertions that the PET Children Care was a project of the church having absolute proprietorship of the suit property as the registered owner thereof, such registration was as a result of the Trust so created by the said Roberto Arnoldi.

63. While the law indeed protects the rights of a registered proprietor of the land, it was clear to me that such rights are subject to other overriding interests recognized in law. In this respect, Section 25 of the Land Registration Act 2013 provides that: -

“(1). The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to acquire noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

64. Further and in addition to the foregoing, Section 28 of the said Act provides for overriding interests which apply even where they are not noted in the register. Under Section 28 (b) trusts are listed as such overriding interests which apply even when not noted in the register.

65. In the premises, I find and hold that although PET Children Care is registered as the proprietor of the

suit property, it does not hold the suit property absolutely but under a charitable trust. As such a charity, there was a legitimate expectation among the donors of the property that the same would be utilized pursuant to the objects for which the trust was created.

66. From the material placed before me, it was evident that the PET Children Care operated for about three years before it stopped operations due to the wrangles that had rocked its management. Testifying before this Court, the 2nd Defendant conceded that the orphanage is no longer there after the initial Certificate they acquired for its operations expired at the end of three years. It was also evident that following some accusations of defilement made against the 2nd Defendant, the operations of the Children home were indefinitely suspended after some protesters burnt part of the building housing the Children and thereby forcing the Malindi Children's Department to intervene and send away the Children from the home.

67. While the Defendants did not outrightly concede that the Children's project had failed, their own frustrations therewith can be seen from a letter written by the 2nd Defendant then Advocate Messrs Khaminwa & Khaminwa dated 12th April 2010 in which he addresses one of the Project donors Mr. Tristiano Testa in the relevant part as follows: -

“RE: David Khamasi Maniani

Peace of Elshaddai Temple Children Home

We act for David Khamasi Maniani in connection with the matter of Peace of Elshaddai Temple (PET) Children Home. Our client's home has been attacked and vandalized by the local people. Attempts have been made to put the church building on fire. It has become clear to our client Pastor David Khamasi Maniani that he cannot continue to operate matters concerning the church and the home. In the circumstances, our client feels that he should be paid for his expenses and arrange to locate elsewhere. He thinks that a sum of Kshs 6.5 Million would be fair, just and reasonable in the circumstances. We therefore urge you to consider his request and arrange to make payment as quickly as possible. We are sure you appreciate the many hours of hard work that our client put in the project. We are sure you appreciate also the sacrifices our client made to build the project from nothing to a dignified status that it now enjoyed. It is with regret that our client has to abandon the project but he is doing so because it has become clear that his life and the lives of his wife and children are in danger.”

68. Arising from the foregoing, it was clear to me that the situation had deteriorated to the extent that the parties herein could not properly and effectively operate the PET Children Care Project. Where such a situation occurred, the Court is empowered to invoke the *Cy-pres doctrine* in law to apply the assets of the trust to another purposes closest to the original aim of the charitable purpose that has failed. As Munyao J observed in ***William Charles Fryda –vs- Assumption Sisters of Nairobi Registered Trustees & Another (2017) eKRL: -***

“The cy-pres doctrine applies where the purpose for which a charity has been established has failed or can no longer be achieved. If property is given in trust to be applied to a charitable purpose, and it becomes impossible or impracticable or illegal, to carry out the particular purpose, and if the settlor manifested a general charitable intention to devote the property to charitable purposes, the trust will not fail but the Court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.”

69. In the matter before me, the possibility of such failure was envisaged in the Deed of Trust which provides at Clause 21 thereof as follows: -

“In the event of failure of the objects and intents of this “Trust” the trust property shall automatically vest to the First Trustee who shall thereafter convey the same to such other charitable uses as to her exclusive discretion will be deemed reasonable.”

70. Accordingly, and being satisfied that the suit property was donated by Roberto Arnoldi to PET Children Care through the Deed of Trust dated 2nd October 2006 and arising from the fact that it has now become impossible to run the said Children home as originally conceptualized, I find and hold that it is only fair that the suit property be utilized in accordance with the wishes of the donor. Those wishes require that I return the suit property to the Plaintiff herein in order for her to convey the same to other charitable uses as provided.

71. In the premises, I am satisfied that there is merit in the Plaintiff's case and I hereby enter Judgment for the Plaintiff as prayed in the Plaint.

72. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 23rd day of March, 2021.

J.O. OLOLA

JUDGE