



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. CASE NO. 476 OF 2017

(Formerly Nairobi ELC NO. 19 OF 2012)

HELENE MARGARETHA van der ROEST..1ST PLAINTIFF

VERONICA WANJIRU NGIBUINI.....2ND PLAINTIFF

MARY KERU NJEGE.....3RD PLAINTIFF

VERSUS

JAMES MWANGI GACHERU.....1ST DEFENDANT

MARTHA KABURA GACHERU.....2ND DEFENDANT

STARS FOR JESUS MINISTRIES

INTERNATIONAL.....3RD DEFENDANT

JUDGMENT

Introduction:

1. In the 2nd Amended Plaint dated 20th June, 2018, the Plaintiffs averred that the 1st Plaintiff was at all material times a donor to Stars for Jesus Ministries International (*the 3rd Defendant*), a Non Governmental Organization concerned with helping homeless children and the unfortunate in the Society; that the 2nd and 3rd Plaintiffs were the Secretary and Treasury respectively of the 3rd Defendant and that the 1st and 2nd Defendants were the registered proprietors of Land Reference Number 74/83 and 74/85 (*the suit properties*).
2. The Plaintiffs averred in the Plaint that on 30th August, 2006, the 3rd Defendant entered into a contract for the sale of the suit properties with the 1st and 2nd Defendants; that as at the time of signing the Agreement of Sale, the 2nd and 3rd Plaintiffs, alongside Phillip Githaiga were the registered officials of the Stars for Jesus Ministries and that the 2nd and 3rd Plaintiffs do not know how one Reah Marie Githaiga became an official of Stars for Jesus Ministries, and how they were removed as officials of the Organization.
3. It was averred in the Plaint that the 1st Plaintiff was a benefactor of Stars for Jesus Ministries and donated a sum of Kshs. 3,000,000 which was expended in paying for the purchase of the suit properties; that the completion period for the said transaction was 90 days; that the 1st and 2nd Defendants reneged and refused to transfer the suit property and that it is not the 3rd Defendant who paid the purchase price to the 1st and 2nd Defendants.
4. According to the Plaint, Reah Marie Githaiga cannot claim any interest in both the suit properties and the sum of Kshs. 3,000,000; that in June, 2009, the court ordered Reah Marie Githaiga to stop operating the children's home known as Stars for Jesus and Morning Star and that the purpose for which the donation of Kshs. 3,000,000 could not have vested into her.
5. According to the Plaintiff, the 3rd Defendant or Rachel Marie Githaiga have no valid claim to the suit property or the sum of Kshs. 3,000,000 which sums were paid to the 1st and 2nd Defendants by the 1st Plaintiff; that the claim by the 3rd Defendant that it paid Kshs. 3,000,000 for the suit properties is fraudulent and that the 1st and 2nd Defendants unjustly repossessed the suit properties from the Plaintiffs and are at the same time keeping the Kshs. 3,000,000.
6. The Plaintiffs finally averred that at all material time, the Stars for Jesus Ministries was not involved in the running of a children's home

for street boys or engaged in any charitable activities; that the 1st and 2nd Defendants have refused to transfer the suit property to the 1st Plaintiff or her nominee despite receiving the purchase price and that it is the Plaintiffs who are entitled to the suit properties or a refund of Kshs. 3,000,000 plus interest.

7. In the Plaintiff, the Plaintiffs have sought for the following prayers:

a) An order of the court asserting that the 3rd Defendant has no contractual or proprietary rights whatsoever to the suit properties and/or a refund of Kshs. 3,000,000 or any interest accruing upon the purchase sum;

b) An order of the court that the 1st and 2nd Defendants do forthwith refund the sum of Kshs. 3,000,000 plus interest calculated from 30th November, 2006 to the date of payment, based on the current market value of the suit property;

c) In the alternative an order of specific performance directing the 1st and 2nd Defendants and/or compelling them to convey the parcels to the Plaintiffs or the Plaintiffs' nominees;

d) Damages of breach of contract;

e) Any other relief that this Honourable Court may deem fit and just to grant.

8. In the Further Amended Defence, the 1st and 2nd Defendants averred that the Plaintiffs are not and have never expressed themselves in writing to be nominees/assignees of Stars for Jesus Ministries International; that it is not true that the 2nd and 3rd Plaintiffs were the registered officials of Stars for Jesus Ministries and that although they received Kshs. 3,000,000 from Stars for Jesus Ministries, they did not receive any payment from the 1st Plaintiff.

9. The 1st and 2nd Defendants averred that they are ready and willing to transfer the suit property to Stars for Jesus Ministries International, the purchaser, or its lawful assignee; that the Plaintiffs are not parties to the contract of 30th August, 2006 and that in any event, they have never been served with any completion notice in respect of the Sale Agreement dated 30th August, 2006. According to the 1st and 2nd Defendants, the suit does not disclose any cause of action and should be dismissed.

10. In its Defence, the 3rd Defendant averred that the 2nd and 3rd Plaintiffs ceased to be officials of the 3rd Defendant as affirmed in the Annual General Meeting of 7th March, 2009; that the said changes were reflected in the Notification by the Ministry of Gender, Children and Social Development and that Reah Marie Githaiga became an official of the 3rd Defendant on 7th March, 2009 and remains an official to date.

11. The 3rd Defendant averred that the 1st Plaintiff was not the sole benefactor of the 3rd Defendant; that the purchase price of Kshs. 3,000,000 was raised through various donor initiatives and advanced to the 1st Plaintiff in her capacity as the contact person for the 3rd Defendant and that the purchase price of Kshs. 3,000,000 for the suit properties was paid to the 1st and 2nd Defendants by the 3rd Defendant and not the 1st Plaintiff.

12. According to the 3rd Defendant, the suit properties have not been transferred to the 3rd Defendant by the 1st and 2nd Defendants because the Plaintiffs are holding the titles in respect to the suit properties and have refused to surrender the same to the 3rd Defendant and that neither the 1st Plaintiff nor Reah Githaiga were privy to the Sale Agreement of 30th August, 2006.

13. The 3rd Defendant averred that it was formed for the sole purpose of running a children's home and has over the years engaged in rehabilitating street children among other charitable activities and that it remains operational to date and intends to expand its capacity once the suit properties are transferred to it.

14. The 3rd Defendant finally averred that the suit should be dismissed with costs and that the Plaintiffs should be ordered to surrender the original title documents for the suit properties to facilitate their rectification and completion of the transaction contemplated under the Agreement of Sale of 30th August, 2006.

The Plaintiffs' case:

15. The 1st and 2nd Plaintiffs testified in this matter, and were cross-examined by the Defendants' advocates. The Plaintiffs adopted their witness statements as their evidence in chief. The 1st Plaintiff, PW1, informed the court that she is of Dutch nationality; that she came to Kenya in the year 2004 to engage in philanthropic work and that she met Philip Githaiga who touted himself as a pastor and who was involved in working with street children in Njabini area whilst running an entity known as Stars for Jesus Ministries International.

16. PW1 informed the court that she was moved by his passion to help the street boys of Zimmerman and other surrounding slums; that pastor Philip Githaiga's desire was to provide more boys with a good home; that the children's home at that time was partially made of iron sheet structures and one permanent structure and that when she went back in the Netherlands in October, 2004, she engaged an architect to draw up a design for a new home.

17. PW1 testified that Philip Githaiga looked for land and provided her with the details and that in the year 2005, she established (*a foundation*) *Stichting Inter-Act* in the Netherlands to fundraise for projects in Kenya and the construction project of Stars for Jesus Ministries

became one of them. It was the evidence of PW1 that the foundation took one year to fundraise for the project and that they raised about 150,000 Euros to start the construction, which money was in the account by May, 2006.

18. It was the evidence of PW1 that upon her return to Kenya in April, 2005 they started the process of preparing for the construction of the project; that in the first half of 2006, the suit property was identified and that an Agreement for Sale was drawn up.

19. It was the evidence of PW1 that because she wanted to give Stars for Jesus Ministries the opportunity to own the land, they were involved in the Agreement for Sale of the property with the land owners and that Beatrice Kariuki as was the lawyer for both parties. According to PW1, she held a meeting with the Board of Stars for Jesus, which among others, included the 2nd and 3rd Plaintiffs, to draw up a contract between Stars for Jesus Ministries and *Stichting Inter-Act*, with herself as the representative of the latter.

20. According to PW1, the contract between *Stichting Inter-Act* and Stars for Jesus Ministries was meant to regulate the construction so as to make the project a success and that *Stichting Inter-Act* decided that all the money would be paid directly to the suppliers, including the legal fees for the lawyer who was in charge of the conveyance and the contractor who was to be engaged in the construction.

21. PW1 stated that the contract stipulated that in the event of any problem with the project, Philip and the Board of Stars for Jesus would have to refund all the goods and property and that after the signing of the contract by Philip, on behalf of the Stars for Jesus Board, *Stichting Inter-Act* paid Kshs. 3,000,000 for the purchase of the two suit properties on 30th June, 2006.

22. PW1 stated that somewhere around August, 2006, there was a groundbreaking ceremony to signal the commencement of the project; that it was shortly after this period that herself and other donors were informed about sexual abuses in the children's home and the misbehaviour of Philip, the director of the home and that they engaged in discussions with the Board to find a solution to the problem.

23. According to PW1, in January, 2007, *Stichting Inter-Act*, represented by herself, gave the Board of Stars for Jesus Ministries International an ultimatum to sort out the problems that were bedeviling the home and remove the director and that the construction that was to start for the home was put on hold until a satisfactory solution was found.

24. It was the evidence of PW1 that in a discussion that she had with the Board of Stars for Jesus in or around March, 2007, she informed the Board that the contract that was signed between Stars for Jesus and *Stichting Inter-Act* had been terminated and that the purchase price was to be refunded or the land to be handed back to *Stichting Inter-Act*, who would then find another use for the land.

25. According to PW1, Beatrice Kariuki, the advocate handling the transaction, was requested to stop all transactions until further notice; that when *Stichting Inter-Act* took over the matter from Stars for Jesus, it instructed the lawyer to transfer the suit properties to another entity which instructions have never been implemented; that in May/June, 2009, the government officially closed the Stars for Jesus Home because of the sexual abuses that were taking place in the home and that in June, 2009, Philip Githaiga passed on.

26. According to PW1, in the year 2010, through a friend, she got in touch with the sellers (*the 1st and 2nd Defendants*) and requested them to sign the transfer documents in her favour, with the permission and an authorization letter from *Stichting Inter-Act* and that they refused totally to transfer the land. It was the evidence of PW1 that she was later informed that the 1st and 2nd Defendants tried to get new titles for the land from the lands office claiming that their titles were lost, which was not true.

27. PW1 stated that since the year 2010, she has had difficulties in having the suit property transferred to an Organization of her choice, and in particular the *Trustees of Sombe Trust* without success and that the Defendants have also frustrated her efforts to have the money paid to them refunded to her. The 1st Plaintiff relied on numerous documents which I will refer to later.

28. In cross-examination, PW1 informed the court that *Stichting Inter-Act* refers to her because she is a Board member of the Organization; that she was assigned by the foundation to pay the purchase price for the suit property; that the Agency Agreement was signed before the Sale Agreement of 30th August, 2006 and that its *Stichting Inter-Act* which paid Kshs. 3,000,000 for the purchase of the suit property directly to the lawyer.

29. It was the evidence of PW1 that the original title documents are with her advocates, including the unsigned transfer documents; that they fund raised 145,000 Euros for the entire project and that the project was to be implemented in stages; that they stopped the transaction because they could not fund an Organization that was involved in the sexual abuse of children and that the Agency agreement between *Stichting Inter-Act* and Stars for Jesus was terminated in the year 2007.

30. According to PW1, after '*Morning Star Children's Home*' was closed down by the court, they looked for other options to put the funds already transferred to the lawyer; that *Stichting Inter-Act* has five Board Trustees and that she is one of the Trustees of the Organization.

31. PW1 stated that they had proposed that the suit properties be sold and the money be deposited in the account of YAK Foundation; that YAK Foundation supports the education of the children and the training of youth; that her husband, Mr. Musumba, is one of the Trustees of YAK and that it is true that she had agreed to have the land sold at the market value and the money to be split between her and the Defendants in the ratio of 50:50, less the Kshs. 3,000,000 that was to be refunded to her.

32. PW1 maintained that she is entitled to the money that was paid to the 1st and 2nd Defendants together with interest; that her advocate has never received the complete conveyance documents in respect to the two suit properties and that the issue of children being abused in the children's home arose after the money for the land had been paid to the 1st and 2nd Defendants.

33. The land valuer, PW2, informed the court that on instructions of the 1st Plaintiff, he inspected and valued properties known as L.R. No.

74/83 and 74/85 (*the suit properties*) on 3rd June, 2014; that he prepared the valuation report dated 4th June, 2014 which he produced in evidence and that as at 4th June, 2014, the two suit properties were valued at Kshs. 11,000,000. However, as at the time he was testifying, PW2 informed the court that the value of the suit properties had appreciated to Kshs. 25,000,000.

34. According to the testimony of the 2nd Plaintiff, PW3, in the year 2005, she was the Secretary of Stars for Jesus Ministries International, a Society whose objective was to help the less fortunate children in the Society; that in the same year, herself, together Mary Keru Njege, the Treasurer, and seven other Board members of Stars for Jesus Ministries International met the 1st Plaintiff and that in the said meeting, they agreed to get land for the Organization and worked on the quotations for the development of the said land.

35. It was the evidence of PW3 that they identified the land to be purchased in early 2006; that the Sale Agreement was entered into between the sellers and Stars for Jesus Ministries International on 30th August, 2006 and that said Agreement was signed the then Director, Philip Githaiga, a trustee and herself as the Secretary.

36. It was the evidence of PW3 that *Stichting Inter-Act* insisted on sending the money directly to the vendors from its account; that *Stichting Inter-Act* paid to the lawyer handling the transaction Kshs. 3,000,000 and that Stars for Jesus Ministries International entered into another contract with *Stichting Inter-Act*.

37. When the allegations of sexual abuse against Philip Githaiga arose in the year 2006/2007, it was the evidence of PW3 that *Stichting Inter-Act* stopped the construction plans and asked for a refund of its money or get the property in its name; that in the year 2009, the government closed down the home and Stars for Jesus Ministries International and that the money that was paid should either be refunded to *Stichting Inter-Act* or the 1st Plaintiff.

38. In cross-examination, PW3 stated that there was an Organization known as Stars for Jesus Ministries which was registered in the year 2004 as a Society; that a self group known as Stars for Jesus Ministries International was registered in the year 2009 of which she was not an official and that she was an official of the initial Society and not the self help group. According to PW3, she signed the letter consenting the transfer of the suit properties to *Stichting Inter-Act* and that the other officials of Stars of Jesus Ministries did not sign the letter.

The Defence case:

39. The 1st Defendant, DW1, informed the court that on 30th August, 2006, him, together with the 2nd Defendant, entered into a Sale Agreement for the sale of the suit properties with Stars for Jesus Ministries International, a Society registered under the Societies Act; that the purchase price was agreed at Kshs. 3,000,000 and that they were duly paid the said purchase price.

40. According to DW1, at no time did the 1st and 2nd Defendants enter into any agreement with the Plaintiffs; that Stars for Jesus Ministries International did not assign their interest arising from the Sale Agreement and that as at 28th July, 2010, Stars for Jesus Ministries International officials were Leah Marie Githaiga, Francis Nderitu Ndirangu and Sila Anguche Otiato.

41. It was the evidence of DW1 that they are ready and willing to transfer the suit properties to Stars for Jesus Ministries International as the *bona fide* purchasers of the land and that they executed all the transfer documents which they handed over to the advocate of Stars of Jesus Ministries International who later on passed the documents to the Plaintiffs' advocate.

42. DW1 informed the court that he only met the 1st Plaintiff three years after the Sale Agreement was signed; that he has never received any money from the Plaintiffs; that he has never frustrated the Sale Agreement; and that he refused the suggestion by the Plaintiffs' advocate that the suit property should be sold to a third party and have the profit split between him and the Plaintiffs.

43. In cross-examination, DW1 stated that Stars of Jesus Ministries International is the same as Stars for Jesus Ministries; that he signed the transfer documents; that he was not aware about the payments which were made from the Netherlands; that in the year 2010, the 1st Plaintiff represented to him that she is an official of Stars of Jesus Ministries; that he discovered later that the 1st Plaintiff was not an official of Stars for Jesus Ministries and that he agreed to refund the purchase price to Stars for Jesus Ministries and not the 1st Plaintiff.

44. The 3rd Defendant's Secretary, DW2, informed the court that he is the Secretary of Stars for Jesus Ministries International; that sometimes in 2005, they negotiated to buy from the 1st and 2nd Defendants the suit land which is situated in Nairobi, Kasarani; that an Agreement was drawn up by an Advocate, Beatrice Kariuki, who acted for both the Vendors and the Purchaser and that the signed Agreement was left with the Advocate for purposes of preparing the conveyance in favour of the 3rd Defendant.

45. It was the evidence of DW1 that the said Advocate, under unclear circumstances, passed all the conveyance documents to the Plaintiffs who have refused to give them back to date and that the 3rd Defendant did not sign any agency Agreement with the 1st Plaintiff.

46. It was the evidence of DW2 that the 2nd and 3rd Plaintiffs were not officials of Stars for Jesus Ministries International; that at no time did the Board of Stars for Jesus Ministries International assign the land to the Plaintiffs and that instead, the Plaintiffs tried to have the Vendors execute transfer documents in their favour, which they (*Vendors*) refused.

47. In cross-examination, DW1 stated that he is the Secretary of Stars for Jesus Ministries International and not the Treasurer as indicated in his statement; that he has been in the Organization since the year 2004; that in the year 2005, the 1st Plaintiff fundraised for Stars for Jesus Ministries International using their documentary and that the Plaintiffs are not the officials of Stars for Jesus Ministries International.

48. DW2 stated that as per the Minutes number 5/07/03/2009, the 2nd and 3rd Plaintiffs were removed as officials of Stars for Jesus Ministries International; that he became an official of the Organization in the year 2009 and that the Society was registered on 2nd November, 2004.

49. DW2 denied that they used the Minutes of the self help group to become officials of the Society; that he is an official of both the self help group and the Society and that Mary Real Githaiga, who was the wife of the late Reverend Githaiga, is now his wife. It was the evidence of DW2 that he runs other Ministries with Real, including Morning Star Children's Ministry, and that although allegations were raised about abuse of the children in the said home, the home was never closed.

Submissions:

50. The Plaintiffs' advocate submitted that the 1st Defendant cannot extricate himself from the admission he made obligating him to refund the purchase sum plus interest at the contract rate and that Clause 1.1 (c) of the Agreement stipulates the contract interest rate as 3% above the base rate published by Barclays Bank of Kenya or if no interest rate is so published, 3% above the base lending rate as may be published by Standard Chartered Bank of Kenya Limited.

51. The Plaintiffs' counsel submitted that the 1st and 2nd Defendants' admission of failure to complete the contract, and their willingness to refund the Kshs. 3,000,000 plus interest at the contract rate, mandates them to refund the money to Helene der Roest, the 1st Plaintiff; that money cannot be refunded to a party that did not pay it and that the 1st Defendant is estopped from straying from his willful admittance and willingness to repay the Kshs. 3,000,000 plus interest.

52. It was submitted that exhibit "1" of the Plaintiffs' Supplementary bundle dated 19th December, 2016, being the transmission slip, shows that it is the 1st Plaintiff who transmitted the sum of Euros. 34,840 to the parties Advocate, Beatrice Kariuki and that the said Beatrice Kariuki acknowledged that she received the full purchase sum of Kshs. 3,000,000, plus a further sum of Kshs. 164,616.

53. The Plaintiffs' advocate submitted that no evidence was presented to the Court to prove that these amounts of money were collected from other donors or that *Stitching Inter-Act* was not funded by Helene der Roest, the 1st Plaintiff and that the 1st Plaintiff testified that she funded the transaction herself through her organization, *Stitching inter-Act*.

54. It was submitted that although the 3rd Defendant asked for "*the surrender of the original title documents over L.R 74/85 and 74/83 to the 1st and 2nd Plaintiffs to facilitate their rectification and the completion of the transaction as contemplated under the Agreement of Sale dated 30th August 2006*", no evidence was presented in Court to explain or to justify the need for the rectification of the title.

55. Counsel submitted that the idea of rectification of the titles was propounded by the 1st and 2nd Defendants through a letter dated 12th October, 2011 as a ploy to hoodwink the Plaintiffs' advocates to surrender the original titles to them.

56. Counsel submitted that the Agreement for Sale dated 30th August, 2006 cannot be completed as the object for which the donation of the purchase sum was made has been overtaken by events and time and that no evidence was led by the 3rd Defendant to refute the fact that Stars for Jesus Children Home had been closed by virtue of the Magistrate's Court Order in P & C 47 of 2009, dated 3rd June, 2009.

57. It was submitted that no evidence was led to controvert the fact that the Court thwarted the attempt to reopen the homes operating as Stars for Jesus and Morning Star which were being managed by Reah Marie Githaiga and that the Plaint should be allowed.

58. The 1st and 2nd Defendants' advocate submitted that no scintilla of evidence has been produced by the Plaintiffs to demonstrate any breach of contract and that the 1st and 2nd Defendants delivered the original conveyances together with the signed transfers to Beatrice Kariuki Advocate who later transmitted the same to Koki Mbulu Advocate who claimed to be acting for the 1st Plaintiff as a donor.

59. It was submitted that Stars for Jesus Ministries International, the Purchaser in the Sale Agreement dated 30th August, 2006, never assigned its interest under the contract to the 1st Plaintiff and/or *Stitching Inter-Act*; that the 3rd Defendant, Stars for Jesus Ministries International, are currently in occupation of the suit parcels of land and that the 1st and 2nd Defendants have complied with the terms and conditions of the contract.

60. It was submitted by the 1st and 2nd Defendants' advocate that no evidence was tendered in court to prove assignment; that it is the 1st Plaintiff who was dictating in whose name the properties were to be registered; that no particulars of fraud were pleaded and/or strictly proved as required by law and that the 1st and 2nd Defendants performed their obligation under the contract dated 30th August, 2006 and nothing remains on their part.

61. It was submitted that the Court of Appeal had an opportunity to and deliberated on the doctrine of privity and specific performance at length in *Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR* and *Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] eKLR*.

62. It was submitted that the Plaintiffs have completely failed to disclose any cause of action and/or tender any evidence to prove their case on a balance of probabilities and/or at all against the 1st and 2nd Defendants and that the suit therefore should be dismissed with costs to the Defendants.

63. The 3rd Defendant's advocate submitted that the suit arises out of a land transaction and that the applicable law is Section 38 of the Land

Act which is similar to Section 3(a) and (b) of the Law of Contracts Act. Counsel submitted that the 3rd Defendant is the contracting party to the Sale Agreement.

64. It was submitted that although the 1st Plaintiff claims to have paid the purchase price, she did not explain why she only paid the purchase price and ignored the other amounts that would have enabled the completion of the conveyance of the property, particularly the stamp duty and registration fees.

65. It was submitted by the 3rd Defendant's counsel that the Plaintiffs have only succeeded in proving that they contributed absolutely nothing to the purchase price and therefore have absolutely no claim to the amount. It was submitted that the 'Agency Agreement' dated 30th May, 2014 is irrelevant; that it is an Agreement between *Stichting Inter-Act*, Evangelische Oomrep and Stars for Jesus Africa and that none of these are parties to the suit.

66. It was submitted that the Agency Agreement does not concern the 3rd Defendant who is a stranger to the Agreement; that the document was signed on 1st June, 2006, long before the Sale Agreement and makes no reference whatsoever to the suit property and that the Plaintiffs failed to produce the schedule with which the document was to be read.

67. The 3rd Defendant's counsel submitted that the Plaintiffs opportunistically sought to profit unjustly from a transaction which was understood by the parties contracting to be purely charitable; that the conduct of the 1st Plaintiff after the signing of the Sale Agreement was to ruthlessly commercialize the transaction to realize maximum profit as attested by the valuer's report and that as early as 2007, the 1st Plaintiff was attempting to sell the suit land.

68. Counsel submitted that the 3rd Defendant has been in an uninterrupted possession of the land since 2006; that there has never been a demand directed to them either to assign the land to the 1st Plaintiff or to give up possession and that the Plaintiffs have no right whatsoever to the land or the money.

69. Counsel submitted that the 3rd Defendant having raised the funds that bought the suit land and having signed the Agreement has full and proprietary rights to both the land and the money and that the argument by the Plaintiffs that there should have been a counter-claim are unsustainable because the 1st and 2nd Defendants have expressly stated that they are ready to complete the transaction.

Analysis and findings:

70. Having read the pleadings and considered the evidence and the submissions by all the parties, the issues which arise in this matter are as follows:

a) *Whether the Defendants are in breach of the contract of sale dated 30th August, 2006.*

b) *Whether the Defendants were engaged in any fraudulent conduct against the Plaintiffs.*

c) *Whether the Plaintiffs are entitled to the prayers sought in the *Plaint*.*

d) *Who should bear the costs of the suit.*

71. The 1st Plaintiff, PW1, informed the court that she came to Kenya in the year 2004 to engage in philanthropic work and that she met one Rev. Philip Githaiga who touted himself as a pastor and who was involved with working with street children in Njabini area whilst running an entity known as Stars for Jesus Ministries International.

72. PW1 informed the court that she was moved by Rev. Philip Githaiga's passion to help the street boys of Zimmerman and other surrounding slums; that pastor Philip Githaiga's desire was to provide more boys with a good home; that the children's home at that time was partially made of iron sheet structures and one permanent structure and that when she went back to the Netherlands in October, 2004, she engaged an architect to draw up a design for a new home.

73. PW1 testified that Philip Githaiga looked for land and provided her with the details; that in the year 2005, she established (*a foundation*) known as *Stichting Inter-Act* in the Netherlands to fundraise for the construction projects in Kenya and that one of the projects was for Stars for Jesus Ministries.

74. It was the evidence of PW1 that the foundation took one year to fundraise for the project and that they raised about 150,000 Euros (*approximately Kshs. 13,000,000*) to start the construction, which money was in the account of the foundation by May, 2006.

75. According to the 1st Plaintiff, upon her return to Kenya in April, 2005, they started the process of preparing for the construction of the project; that in the first half of 2006, Mr. Githaiga identified two properties for the project and that an Agreement for Sale was drawn up.

76. It was the evidence of PW1 that because she wanted to give Stars for Jesus the opportunity to own the land, they were involved in the Agreement for Sale of the property with the land owners; that Beatrice Kariuki was the lawyer for both parties and that she held a meeting with the Board members of Stars for Jesus, who among others, included the 2nd and 3rd Plaintiffs, to draw up a distinct contract between Stars of Jesus and *Stichting Inter-Act*, with herself as the representative of the latter.

77. According to PW1, the contract between the foundation and Stars of Jesus was meant to regulate the construction so as to make the project a success; that *Stichting Inter-Act* decided that all the money would be paid directly to the suppliers, including the legal fees for the lawyer who was in charge of the conveyance and the contractor who was to be engaged in the construction.

78. PW1 stated that the contract between *Stichting Inter-Act* and Stars for Jesus stipulated that in the event of any problem with the project, Philip and the Board of Stars for Jesus would have to refund all the goods and property to the foundation; that after the signing of the contract by Phillip, on behalf of the Stars for Jesus Board, *Stichting Inter-Act* paid Kshs. 3,000,000 for the purchase of the two suit properties on 30th June, 2006.

79. It is not in dispute that the 1st and 2nd Defendants are the registered proprietors of land reference numbers 74/83 and 74/84 (*the suit properties*). It is also not in dispute that on 30th August, 2006, the 1st and 2nd Defendants, as vendors, entered into a Sale Agreement with “*Stars for Jesus Ministries International*.” In the said Agreement, the purchase price for the two parcels of land was agreed at Kshs. 3,000,000, while the completion date was to be 30 days from the date of the Agreement.

80. The Agreement between the 1st and 2nd Defendants on one part and Stars for Jesus International on the other part, further provided that Beatrice Kariuki was to act as the advocate for both the Sellers and the Purchaser. According to the Agreement of Sale, the Purchaser, “*Stars for Jesus Ministries International*”, was a Society registered under the Societies Act.

81. The Agreement shows that the late Rev. Phillip Wanjohi Githaiga was the Chairman of the Society, while the 2nd and 3rd Plaintiffs were the purchaser’s Secretary and Treasurer respectively. It is the three officials of the Society that signed the Agreement of Sale dated 30th August, 2006.

82. The evidence produced in this court shows that prior to the signing of the Sale Agreement dated 30th August, 2006, “*Stars for Jesus*” had entered into an Agency Agreement dated 1st June, 2006 with an Organization based in the Netherlands known as *Inter-Act Foundation*. In the said Agency Agreement, “*Stars for Jesus*” agreed to be solely responsible to *Inter-Act* for the proper implementation of the project that was covered under the Agency Agreement.

83. The payment of Kshs. 3,164,616 to the advocate who was handling the conveyance was confirmed by the advocate to the sellers vide the email dated 14th September, 2006. In the same email, the advocate informed the sellers that there was a shortfall of Kshs. 34,752 which they required before they could proceed with the transfer.

84. The evidence that was produced in this court by the 1st Plaintiff shows that the amount of Kshs. 3,164,616 was wired to the parties’ advocates account from the *Stitching Inter-Act* account in the Netherlands. This was part of the money that had been raised by the donors to finance the purchase of the land for Stars for Jesus project.

85. From the email dated 25th July, 2007, it would appear that the 1st Plaintiff proposed to the advocate handling the transaction that she wanted to sell the two suit properties even before the transfer of the same to the Vendor, which proposal was rejected by the advocate as follows:

“Thank you for your email.....I am not sure if you can sell the plot since you are not the registered owner. May be we can meet and discuss the way forward at our offices when you are available.”

86. The correspondences that followed after the email of 25th July, 2007 shows that the 1st Plaintiff held a meeting with the advocate who was acting for the Vendors and the Purchaser and agreed on how she (*the 1st Plaintiff*) was going to acquire the two plots after they have been transferred to Stars for Jesus International. In the email of 23rd October, 2007, the said advocate informed the 1st Plaintiff as follows:

“I have thought carefully about the matter which we discussed. My view is that since you have already gone very far with the sale transaction, you cannot turn back. I believe that the best way forward is for me to draw a loan agreement between you and Stars for Jesus. We shall name the two plots as security and the officials of Stars for Jesus shall give you the Powers of Attorney for the said land. After we finish registration process, we shall not release the title documents to the officials, but shall retain them on the strength of the loan agreement until you decide what you want to do with the plots.”

87. The 1st Plaintiff was elated by the suggestion that was made by the advocate. In her email of the same date, the 1st Plaintiff informed the advocate as follows:

“Thanks for your email. That sounds like a good plan. Can you go ahead and do this and can you also tell me how much we need to pay you and to what account so we can wind up fast?”

88. The email of 23rd October, 2007 shows that although the purchase price had been raised by the donors for the purpose of putting up a decent home for the street children at the Stars for Jesus Ministries, the 1st Plaintiff’s intention was to have those properties transferred to herself by claiming that the donation to Stars for Jesus Ministries was not a donation but a loan.

89. Indeed, the ‘*loan documentations*’ documents were ready for signing by November, 2007. In her email dated 20th November, 2007, the conveyancing advocate informed the 1st Plaintiff as follows:

“Hi, it is 104,000 for additional stamp duty to be paid to the government and Kshs. 129,719 for the loan documentation. Please talk to pastor Githaiga and the other signatories so that they can come to my office to sign the papers.”

90. The evidence before me shows that what had been arranged between the conveyancing advocate and the 1st Plaintiff in respect to the suit property as captured in the emails did not materialize because pastor Githaiga, on behalf of Stars for Jesus Ministries, declined to sign the loan documents. In her email dated 9th July, 2008, the conveyancing advocate informed the 1st Plaintiff as follows:

“Thank you for your email. Pastor Githaiga paid us a visit in mid March and I asked him to sign the loan documentation which I had prepared, but he declined to do so.”

91. The emails of 25th July, 2007, 23rd October, 2007, 20th November, 2007 and 9th July, 2008 shows how the 1st Plaintiff, with the connivance of the advocate who was handling the conveyance transaction, plotted on how the 1st Plaintiff could have the two suit properties taken away from the purchasers after the transfers have been registered in its favour, an effort that was thwarted by pastor Githaiga.

92. When the plot by the 1st Plaintiff to have the donation for the purchase of the suit properties converted into a loan failed, the 1st and 2nd Plaintiffs came up with another plan. In her email dated 5th November, 2009, the 1st Plaintiff informed the conveyancing advocate as follows:

“...Veronica (the 2nd Plaintiff) also explained to me that you had given her 2 options: As you are holding the papers for the plot you could give that to the previous owners and they can refund the money. The plot could be in the name of the NGO that has been donating the money or any of their choice. The plot could go to any other NGO of Choice of the funder...”

93. Indeed, before the advocate could respond to the above email, pastor Githaiga died. In an email dated 1st February, 2010, the parties' conveyancing advocate informed the 1st Plaintiff on what should be done so as to have the title documents transferred to Stars for Jesus Ministries, which included having the records of the Stars for Jesus Ministries updated to include the new officials. The advocate suggested to the 1st Plaintiff that she (*the 1st Plaintiff*) should replace pastor Githaiga (*deceased*) as an official of Stars for Jesus Ministries.

94. In response to the email dated 1st February, 2010, the 1st Plaintiff's intention in respect to the entire transaction was apparent. In her letter dated 10th February, 2010, the 1st Plaintiff informed the conveyancing advocate as follows:

“About the issues raised, I wish to note that first and foremost, I have previously indicated that it is no longer in the interest of Inter Act Foundation to have the land transferred to Stars for Jesus. That is indicated to you since 2006. This also obviously means that I would not want to be an official of Stars of Jesus. In any event, I believe the issue of officials is a matter for Stars of Jesus to handle whether or not there is any transaction.”

95. This suit arises out of a land transaction. Section 3(3) (a) and (b) of the Law of Contracts Act provides as follows:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto;

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

96. The Defendants are the contracting parties to the Sale Agreement dated 30th August 2006. The said Agreement is in writing and is for the disposal of an interest in land by the 1st and 2nd Defendants (*Vendors*) to the 3rd Defendant (*Purchaser*). The Agreement is signed by all the parties thereof and in particular by the 2nd and 3rd Plaintiffs on behalf of the 3rd Defendant. The Agreement is also attested to by the Advocate who acted for all the parties.

97. Neither the 1st Plaintiff nor the 2nd and 3rd Plaintiffs in their personal capacities are contracting parties to the Sale Agreement dated 30th August, 2006. The funds for the purchase of the suit property for the 3rd Defendant were raised by the Public in the Netherlands in its name. Indeed, the 1st Plaintiff has described herself in the *Plaint* as a Donor to the 3rd Defendant.

98. In her evidence, the 1st Plaintiff stated that the '*formation*' of *Inter-Act foundation* was out of the 1st Plaintiff's contact with the 3rd Defendant and its work. The 3rd Defendant produced in evidence a documentary, the '*Unheard Cry*', which was aired by *Evangelische Oomrep* a Christian Broadcasting Co-operation in the Netherlands, which was used to raise funds towards the projects of the 3rd Defendant.

99. According to the 1st Plaintiff, this money was in *Inter-Act Stitching Foundation* account by May 2006. Indeed, the purchase price for the suit properties was forwarded from this account, and not the 1st Plaintiff's account, directly to the Vendor's advocate. That being the case, the 1st Plaintiff cannot be a donor of money donated by the public for the purpose of assisting street children in Kenya, through the 3rd Defendant.

100. The basis advanced by the Plaintiffs to take away the 3rd Defendant's proprietary rights in the suit property is the 'Agency Agreement' dated 1st June, 2006. This document is irrelevant in respect to the Sale Agreement dated 30th August, 2006. The Agreement is between *Inter-Act/Evangelische Oomrep* and Stars for Jesus Africa. None of these are parties to the suit.

101. Indeed, the 3rd Defendant's three officials did not sign the 'Agency Agreement'. The 3rd Defendant is therefore a stranger to the Agreement. The document was signed on 1st June, 2006 long before the Sale Agreement of 30th August, 2006 and does not make any reference whatsoever to the suit properties.

102. Furthermore, the 'Agency Agreement' gives the mode of settlement of any disputes by the contracting parties by arbitration and courts in the Netherlands, effectively ousting the Jurisdiction of the Courts in Kenya. More importantly, nowhere does the 'Agency Agreement' remove the proprietary rights of the 3rd Defendant in respect of the suit land.

103. The evidence before this court, which I have summarized above, shows that the Plaintiffs sought to profit unjustly from a transaction which was understood by the parties contracting to be purely charitable. The 1st Defendant testified that he was moved by the work being carried out by the 3rd Defendant. It is for this reason that he charitably offered to sell the land to the 3rd Defendant at less the market price.

104. The 1st Plaintiff successively put forward entities to which she wanted the property transferred to, including "the Sombe Trust" and "YAK" foundation. More seriously the 1st Plaintiff and her husband, Josephat Ngaira Musumba, are trustees in these Organizations.

105. The 3rd Defendant, or Stars for Jesus Ministries, through its officials, entered into a valid Sale Agreement dated 30th August, 2006. There is no evidence to show that there has been a demand directed to the 3rd Defendant, or Stars for Jesus Ministries, either to assign the land to the 1st Plaintiff or to give up possession of the said land.

106. Indeed the Plaintiffs have no right whatsoever to the suit land or the purchase price. The Plaintiffs having not entered into any Sale Agreement with the 1st and 2nd Defendants, the registered proprietors of the suit properties, they have no known legal or beneficial interest in the suit properties. This position is supported by the Court of Appeal decision in the case of **Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR** where the court held as follows:

"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co. Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

107. The 1st Plaintiff was not a party in the contract dated 30th August, 2006. The 2nd and 3rd Plaintiffs signed the Agreement dated 30th August, 2006 not in their individual capacities, but as officials of Stars for Jesus Ministries which was registered as a Society under the Societies Act on 2nd November, 2004. Indeed, there is evidence from the Registrar of Societies showing that as at the time of filing this suit, the 2nd and 3rd Plaintiffs were not officials of the Society.

108. The Stars for Jesus Ministries had officials who were duly recognized by the Registrar of Societies by the time it entered into the Sale Agreement with the 1st and 2nd Defendants. The said officials having signed the Sale Agreement of 30th August, 2006 on behalf of the Society, the said Agreement is valid for all intents and purposes. Any dispute as to the *bona fide* current officials of the Society can be addressed separately, and not in respect to the Sale Agreement of 30th August, 2006.

109. The Plaintiffs did not produce any evidence of fraud on the part of the Defendants in respect to the suit property. To the contrary, it is the Plaintiffs who acted fraudulently by attempting to have the suit properties either registered in favour of the 1st Plaintiff or an Organization in which the 1st Plaintiff has an interest in, contrary to the provisions of Section 3 (3) of the Law of Contract Act.

110. To the extent that Stars for Jesus Ministries has not been deregistered as a Society, and the 1st and 2nd Defendants having not repudiated the Sale Agreement it entered into with the said Society, it follows that the Sale Agreement of 30th August, 2006 should be completed by having L.R. Nos. 74/83 and 74/85 registered in favour of the current officials of the Society, and not any other Organization or person.

111. Indeed, despite the testimony by the 1st Plaintiff that she had raised funds to enable the 3rd Defendant buy land, her letter of 10th February, 2010 shows that she had no such intention from inception. The emails by the 1st Plaintiff subsequent to the Sale Agreement of 30th August, 2006 shows that the 1st Plaintiff's intention all along was to have the suit properties transferred to herself, or an organization associated with her, despite having raised funds from the public for the purpose of buying the land for the 3rd Defendant, for the benefit of the street boys.

112. Consequently, and for the reasons I have given, it is my finding that the Plaintiffs did not prove their case on a balance of probabilities. The Plaintiffs' suit is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 23RD DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE