



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CIVIL SUIT 75 OF 2013

RASHID MUTUA 1st PLAINTIFF

MUKAI MBAI MUVUNGA 2nd PLAINTIFF

ANGELINA MUTILE MUTHOKA 3rd PLAINTIFF

KYALO NYUMBU KYAKA 4th PLAINTIFF

VERSUS

PETER KYALO MUTUA 1st DEFENDANT

NZIOKI WILSON NDUTU 2nd DEFENDANT

DANIEL MULANDI KIKUNZE 3rd DEFENDANT

ROSEMARY K. MUTUNGA 4th DEFENDANT

JULIUS KIOKO.....5th DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 16th September, 2013 seeking the following reliefs against the Defendants jointly and/or severally:

a) An injunction restraining the Defendants by themselves, servants and or agents from entering, sub-dividing, transferring, encroaching, selling, excavating, constructing on, building, fencing, wasting or in any other way dealing with and interfering with the property known as Mavoko Town Block 3/2347 until the entire loan to Muungano Wa Wanavijiji Akiba Mashinani Trust is fully paid and until all the beneficiaries have agreed on the mode of sub-division and on a surveyor who is selected and agreed upon by all the beneficiaries.

b) Costs of the suit.

2. It is the Plaintiffs' case that they, together with the Defendants, are members of a group known as Athi River Slum Dwellers (*hereinafter the group*) comprised of members of informal settlements and slum dwellers who have been pooling resources to assist each other access reasonable housing.

3. The Plaintiffs averred that that they approached Muungano Wa Wanavijiji Akiba Mashinani Trust (*hereinafter the Trust*), a trust whose activities revolve around assisting residents of informal settlements access safe and reasonable housing to finance the purchase of land on which to put up decent housing; that the Trust gave them a loan of Kshs 3,000,000 while the members contributed the sum of Kshs 1,000,000 and that they used the aforesaid sums to purchase a property known as Mavoko Town Block 3/2347 (*hereinafter the suit property*) for Kshs 4,000,000.

4. According to the Plaintiffs, it was a term of the loan that after its repayment, the suit property would be sub-divided and shared equally among all the beneficiaries; that there were initially 384 beneficiaries but more came on board and the total number stands at 563 members, each of whom was to re-pay the sum of Kshs 11,333 to the Trust and that it was further agreed that the Trust would finance the construction of individual houses for the slum dwellers.

5. The Plaintiffs averred in the Plaint that the suit property was registered in the names of the Defendants who held the property in trust for themselves and other beneficiaries of the group; that the Defendants have without any right and knowledge and/or consent of the beneficiaries embarked on fraudulent sub-division of the land and set exorbitant survey fees while the loan granted by the trust is still outstanding and that the Defendants are further threatening to sell the shares of the beneficiaries who refuse to pay the said survey fees, jeopardizing the interests of hundreds of beneficiaries.

6. Vide their Defence filed on the 17th October, 2013, the Defendants denied the allegations as set out in the Plaint. They put the Plaintiffs to strict proof over the allegations that they instituted the suit on behalf of other beneficiaries contending that the suit was instituted by the Plaintiffs on their own behalf and that they are strangers to Muungano Wa Wanavijiji Akiba Mashinani Trust because the loan of Kshs 3,000,000 was issued by Akiba Mashinani Trust.

7. According to the Defendants, there are 400 members as per the group's Trust Deed, which deed has never been amended and subsequently the said extra 163 members are ghost members fronted by the Plaintiff; that each member was to repay the sum of Kshs 11,333; that 384 members have completed payments to Akiba Mashinani Trust; that there was no agreement for construction of houses for members by the Trust and that the obligation of the Defendants was to sub-divide the land and hand over title deeds to each beneficiary.

8. The Defendants contend that the survey fees was Kshs 400,000 and each member was asked to pay Kshs 10,000 to cover the survey, mutation, registration fees and issuance of title deeds and is not in any way exorbitant; that there is no outstanding loan to Akiba Mashinani Trust, the same having been fully repaid and the Trust has connived with the Plaintiffs to hold on to the title deed; that no demand had been made by Akiba Mashinani Trust with relation to the loan and that under Clause 5 of the Declaration of Trust, the Defendants as trustees are mandated to sell the plots of defaulting members to repay the loan, interests and other charges.

9. The Defendants urged that the orders of injunction cannot lie against them because as joint proprietors and registered trustees of the suit property for and on behalf of over 395 beneficiaries of Athi River Slum dwellers, they cannot be prevented from entering onto the land and sub-dividing the same as this would defeat the objective of the trust deed and that the suit offends the provisions of **Order 1 Rule 8(2)** of the **Civil Procedure Rules**, is speculative, full of conjecture, discloses no reasonable cause of action, and ought to be dismissed.

The Plaintiffs' case

10. The matter proceeded for hearing on the 8th October, 2018. PW1 informed the court that he is one of the registered Trustees of

Muungano Wa Wanavijiji Akiba Mashinani Trust, a trust that assists members of informal settlements access finances to buy land and upgrade their settlements and/or houses; that sometime in 2006, they assisted members of Athi River Slum Dwellers group to purchase the suit property for the sum of Kshs 4,000,000; that they gave the group a loan of Kshs 3,000,000 while the members contributed the balance of Kshs 1,000,000 and that the loan was to be repaid by all the members after which the suit property would be sub-divided.

11. According to PW1, the Defendants herein are trustees of Athi River Slum Dwellers; that the title to the suit property is in their names as trustees for themselves and other members; that the group initially consisted of 384 members although the current membership is unknown and that the Defendants have embarked on sub-divisions of the property without verification and before repayment of the loan, which actions are un-procedural and should be stopped.

12. In cross-examination, PW1 testified that he is one of the slum dwellers residing in Athi River; that he does not have the Trust Deed for Muungano Wa Wanavijiji Akiba Mashinani Trust; that he does not have the loan agreement between the Trust and the Group; that the trustees of the organization are Jane Were who is the director, Anastasia Wairimu, Mary Adhiambo and himself and that the other trustees gave him permission to testify.

13. According to PW1, although the Declaration of Trust shows that there are 395 members plus four trustees, he is only aware of 384 members; that the Athi River Slum Dwellers have not finished re-paying the loan and have refused to render accounts and that the Defendants have further sub-divided the property contrary to the agreement they had with the Trust.

14. PW1 stated that although the Trust has no interest in the property, they were holding onto the title deed until the advanced loan is fully repaid. PW1 denied having seen a letter indicating that the Trust had severed the relationship with Athi River Slum Dwellers and a letter dated 24th January, 2013; that they are not Muungano Support Trust, which is a different organization; that he is not aware of the approved settlement scheme of the suit property and that the slum dwellers should show that they have repaid the loan.

15. PW2 state that she is a chairlady of one of the 10 groups that make up Athi River Slum Dwellers; that they approached Muungano Wa Wanavijiji Akiba Mashinani Trust who loaned them money to purchase the suit property; that each of the beneficiaries was supposed to pay the sum of Kshs 11,333 to the Trust; that they started making payments in the year 2006 and that whereas some members have completed making the payments, others have not.

16. According to PW2, it had been agreed that once the loan was repaid, the land would be sub-divided; that the Trust was to secure a surveyor to sub divide the land; that the Defendants have however started sub-dividing the land; that when she and the other Plaintiffs complained about the said sub division, they were arrested and charged in court; that there were initially 384 members but she is unaware of the current number of members because they no longer hold meetings and that their account was frozen due to the wrangles they were having with the Defendants. According to PW2, the Trustees have not followed the members' instructions and should be stopped from sub-dividing the land.

17. During cross-examination, PW2 stated that she is an original member of Athi River Slum Dwellers, being part of Bondeni B sub group; that the group elected the Defendants as Trustees and their names are in the Trust Deed; that the membership was originally 384 members with four (4) trustees and that the 16 extra members are unknown to them.

18. According to PW2, she is one of the members who have re-paid the loan; that the monies were to be paid into Akiba Mashinani Trust Account by members and that the paid-up members have pay-slips showing the said payments.

19. It was PW2's further testimony that the sub-division of the property was done without consultation; that she was not aware that a surveyor had been appointed; that although the Trust wrote a letter seeking to develop the land for members, the same was optional; that the Defendants sub-divided the land fraudulently as the members needed to ballot for the plots and that although members have been paying, they have not been given plots but instead they have only been issued with membership certificates. On cross examination by the court, PW 2 stated that each group had its own register.

20. PW3 stated that he is a member of the Athi River Slum Dwellers and one of the beneficiaries of the suit property; that an audit was to be done before distribution of the suit property, which audit was never undertaken; that the group has not finished re-paying the loan and that the beneficiaries have not been allocated their shares.

21. On cross-examination, PW3 stated that the group was given Kshs 3,000,000 and the members were to add Kshs 1,000,000; that it was agreed that after re-payment of the loan, the Trust would construct houses for the slum dwellers who were willing; that the membership of the group was 384 and not 400; that he has only paid the sum of Kshs 9000 and that him, together with other members, are still making their payments.

22. PW4 adopted his witness statement dated 16th September, 2013, as his evidence in chief. In cross-examination, it was his evidence that he is a member of one of the sub-groups that make up Athi River Slum Dwellers consisting of more than 50 members; that they have not finished re-paying the loan; that they used to deposit the money directly into Akiba Mashinani Trust; that they are not aware of the exact amount that has been paid and that he is not aware of the sub-divisions neither is he aware that the members have been given plots

The Defendants' case

23. The Defendants closed their case on the 6th July, 2021 without having called any witness.

Submissions

24. The Plaintiffs, through their counsel, submitted that the conditions of the agreement between Athi River Slum Dwellers and Muungano Wa Wanavijiji Akiba Mashinani Trust was, *inter alia*, that the suit property belonged to each member in equal shares; that each member was to contribute Kshs 11,333 comprised of Kshs 315 per month with effect from 11th November, 2006; that subdivision and issuance of titles was to take place after repayment of the loan and that the slum dwellers had agreed with the Trust that the Trust will finance construction of individual houses and provide a surveyor for the sub-division of the land.

25. It was counsel's submission that the role of a trustee is to manage assets set aside in trust for the benefit of others and as such any decisions by a trustee must be for the benefit of the beneficiaries and devoid of any personal interests; that in breach of their trust duty, the Defendants illegally engaged a surveyor and commenced sub-division of the suit property and that as a result of the illegal sub-division of the suit property, the Defendants allocated plots to themselves and other non-members who have begun constructing houses thereon.

26. Counsel urged that the Defendants should be found to have been in breach of the trust deed and that all their actions should be declared null and illegal *ab initio*.

27. The Defendants' counsel submitted that despite the Plaintiffs alleging that they instituted the suit on their own behalf and on behalf of other slum dwellers, no such authority was annexed; that the suit offends the provisions of **Order 1 Rule 13 (2)** of the **Civil Procedure Rules** and ought to be dismissed and further that the main prayer sought in the suit is vague and omnibus in nature.

28. Counsel submitted that the Plaintiffs not being officials of Muungano Wa Wanavijiji Akiba Mashinani Trust cannot purport to seek an injunction pending repayment of the loan to the trust and neither can they seek to enforce payment of the loan which is a distinct transaction.

29. It was submitted that the Plaintiffs did not table financial statements of account showing the loan balance if any, and that the Plaintiffs did not respond to the Defendants assertions that the loan granted by Akiba Mashinani Trust was fully repaid.

30. According to counsel, the question of whether the loan was fully repaid was ventilated in *Machakos Civil Case No 1151 of 2013* where the Defendants sought for the release of the title deed; that the said suit was dismissed and an Appeal has been filed being ELCA 14 of 2018, which appeal is pending in court; that the basis for the registration of the Defendants as proprietors of the suit property is the Trust Deed; that the total number of members as per the Trust Deed is 400 and not 563 as alleged by the Plaintiffs and that contrary to the Plaintiffs assertions, there was no agreement between the slum dwellers and the trust to construct for them.

31. Counsel further submitted that although the Trustees are empowered to sell any shares of a defaulting member, there is no evidence showing that any members' share has been sold in default as alleged by the Plaintiffs; that the Defendants entered into a survey agreement with one Titus Kavoi, which engagement was approved in the meetings of 19th February, 2013, 3rd April, 2013 and 17th August, 2013 and that the contract for survey indicates that the land is to be sub-divided into 400 plots as per the number of members in the trust deed. Counsel submitted that the Plaintiffs have not proved that the sub-division of the suit property is illegal and that their interests cannot override the interests of the other 396 members.

32. It was submitted for the Defendants that injunctive orders cannot be sought in isolation; that the Plaintiffs have not sought for declaratory orders and that the mere fact that the Defendants did not tender evidence does not mean that the Plaintiffs' evidence should be taken at face value.

Analysis & Determination

33. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;

- i. Whether failure to comply with Order 1 Rule 8(2) and Order 1 Rule 13(2) of Civil Procedure Rules, 2010 is fatal to this case.
- ii. Whether the Defendants are in breach of the terms of the Trust Deed?
- iii. What are the appropriate orders to issue?

34. At the outset, the Defendants contend that the present suit is fatally defective. The basis for this contention is two pronged; first, that the suit offends the provisions of **Order 1 Rule 8 (2)** of the **Civil Procedure Rules** and second, that the Plaintiffs did not annex a written authority from the members of Athi River Slum Dwellers whom they allege to represent contrary to **Order 1 Rule 13 (2)** of the **Civil Procedure Rules, 2010**.

35. **Order 1 Rule 8 (1)** and **(2)** of the **Civil Procedure Rules** provides as follows:

“8(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”

36. **Order 1 Rule 8(1)** of the **Civil Procedure Rules** allows any party to bring a representative suit on behalf of others. Indeed, the Plaintiffs in paragraph 10 of the Plaint aver that they have instituted the suit on their own behalf and on behalf of the other dwellers of Athi River Slum Dwellers group.

37. **Order 1 Rule 8 (2)** of the **Civil Procedure Rules** provides for the giving of notice to all persons on whose behalf the suit is brought in the most practical manner or as the court may direct to enable such persons decide whether or not they wish to be enjoined as parties to the suit. Having perused the file, the court notes that indeed other than service of summons to the Defendants, there is no evidence of any notice as set out under **Order 1 Rule 8(2)** of the **Civil Procedure Rules**.

38. In discussing the importance of the notice pursuant to **Order 1 Rule 8** of the **Civil Procedure Rules**, the Court of Appeal in *Yiapas Ole Seese & 4 others vs Sakita Ole Narok & 2 others [2008] eKLR* stated thus:

“The whole purpose of the provisions of Order 1 Rule 8 is to ensure that all persons with un-litigated similar cause of action who are desirous of having their cause determined are included in the suit for their own convenience and to obviate a multiplicity of suits. Hence the need to notify them of the institution of the suit so that in case any of them wishes to take part he is given the opportunity to do so...”

39. This position was reiterated in the case of *Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR* where the Court of Appeal stated as follows:

“In our view, the importance of service/notice in a representative suit cannot be disregarded. It serves among other things, to protect potential plaintiffs. It informs all affected members of the class of the presence of the suit, alerts them of the nature of the suit, and enables them to know their representative and to have an opportunity to object to those representing them or opt out of the suit.

Compliance with Order 1 Rule 8(2) of the Civil Procedure Rules therefore goes to the substance of any representative suit.”

40. Guided by the foregoing decisions and considering the stage of this matter, it follows that the failure to serve a notice pursuant to **Order 1 Rule 8(2)** of the **Civil Procedure Rules** renders the suit as brought in a representative capacity fatally defective. With regards to **Order 1 Rule 13** of the **Civil Procedure Rules**, the same provides as follows:

“(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

41. A plain reading of the above provision shows that the requirement for authority is mandatory and whereas no time limit has been

attributed to the filing of the authority, it is reasonable to infer that it ought to be filed at the time of filing suit. This is fortified by the provisions of **Order 4 Rule 1(3)** of the **Civil Procedure Rules** that provides that:-

“Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”

42. In the instant case, whereas the Plaintiffs aver that they have instituted this suit on behalf of the members of Athi River Slum

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff’s witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

43. To the extent that the four Plaintiffs have pleaded that the suit is brought on their own behalf and have all sworn the verifying affidavit, this suit is sustainable, but only in respect to the four Plaintiffs, and not any other member of Athi River Slum dwellers group. Consequently, the court will determine this suit with respect to the four Plaintiffs.

44. The Plaintiffs herein have sought for injunctive orders against the Defendants seeking to stop them from any dealings with the suit property until the entire loan to Muungano Wa Wanavijiji Akiba Mashinani Trust is fully paid and until all the beneficiaries have agreed on a surveyor and on the mode of sub-division of the suit property.

45. It is the Plaintiffs’ case that as members of Athi River Slum Dwellers, they sought and were granted a loan of Kshs 3,000,000 by Muungano Wa Wanavijiji Akiba Mashinani Trust, which loan was used to purchase the suit property herein; that the property was registered in the names of the Defendants as trustees and that it was a term of the loan that after its repayment, the trustees would sub divide the property and share it equally among all the beneficiaries.

46. The Plaintiffs further contend that despite the loan not having been fully repaid, the Defendants have illegally embarked on sub division of the property in breach of the terms of the Trust Deed and that their actions should be declared null and void *ab initio*.

47. The Plaintiffs produced in evidence a copy of the Title Deed for the suit property, the Certificate of Registration for Muungano Wa Wanavijiji Akiba Mashinani Trust, Athi River Slum Dwellers Trust Deed, list of bona-fide beneficiaries of the suit property and a demand letter to Muungano Wa Wanavijiji Akiba Mashinani Trust dated 27th August 2013. The Plaintiffs also produced in evidence various payment schedules by several sub-groups and receipts for deposits by members into Akiba Mashinani Trust Account held at Co-operative Bank.

48. On their part, the Defendants averred that they are strangers to the entity known Muungano Wa Wanavijiji Akiba Trust and that they have been dealing with Akiba Mashinani Trust; that the loan granted to them by the said Akiba Mashinani Trust has been fully repaid and that no demand has been made by the Trust in relation to the loan. It was averred by the Defendants that as Trustees, they are obligated to sub-divide the property and give the plots to the beneficiaries.

49. The Defendants urged that the orders of injunction cannot lie against them because as joint proprietors and registered trustees of the suit property for and on behalf of over 395 beneficiaries of Athi River Slum dwellers, they cannot be prevented from entering onto the land and sub-dividing the same as this would defeat the objective of the Trust Deed.

50. Before determining this issue, the court will first set out the uncontested facts. There is no dispute that the Plaintiffs and Defendants are all members of Athi River Slum Dwellers group; that the group was granted a loan of Kshs 3,000,000, which monies were used to purchase the suit property and that the Defendants were appointed as trustees to hold the suit property on behalf of the members of Athi River Slum Dwellers, including themselves, pursuant to which the suit property was registered in their names.

51. With respect to the Defendants allegations that they are strangers to an entity known as Muungano Wa Wanavijiji Akiba Mashinani Trust, the court notes that whereas indeed the Trust Deed and the bank slips produced in evidence refer to Akiba Mashinani Trust, the demand letter dated 27th August 2013 is addressed to Muungano Wa Wanavijiji Akiba Mashinani Trust.

52. The court also notes that the received stamp on the aforesaid letter reads Akiba Mashinani Trust. Further, correspondence to Muungano Wa Wanavijiji Akiba Mashinani Trust as well as to Akiba Mashinani Trust reveals the same address. All this points to the fact that the two names, Muungano Wa Wanavijiji Akiba Mashinani Trust and Akiba Mashinani Trust refer to one and the same body.

53. The dispute herein revolves around the terms of the Trust Deed and whether or not the Defendants are in breach of the same. The trust relationship, including the Defendants proprietorship with the suit property pursuant to the trust, has not been impeached. Consequently, the court will interrogate the duties and powers of the Trustees as per the Trust Deed and the law generally *vis a vis* the evidence produced in court.

54. It is trite law that a Trustee owes a duty and an obligation towards the beneficiaries of the Trust. The overriding obligation being the duty to comply with the terms of the Trust and, subject thereto, to act honestly, diligently and in the best interests of the beneficiaries. In *Armitage vs Nurse [1997] 3 WLR 1046*, the English Court of Appeal made the following observations:

“... that there is an irreducible core of obligations owed by the Trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a Trust. If the beneficiaries have no rights enforceable against the Trustees, there are no Trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the Trustees to perform the Trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the Trusts.”

55. The court has perused the Trust Deed dated 5th June 2006. The relevant clauses thereof state as follows:

“(1) The Trustees are registered or shall be registered as proprietors of Land Parcel Number Mavoko Town Block 3/2347 as trustees holding in trust for themselves and three hundred and ninety-five (395) other members of the scheme.

(2) The Trustees shall hold the said property as trustees until the sub-division and issuance of titles to members.

(3) The sub-division of the land and issuance of titles to members shall take place only upon repayment by members to AMT of the loan of Kshs 3,000,000/= together with interest thereon advanced to members of the scheme by AMT for purposes of purchasing the land.”

(4) The Trustees shall only sub-divide and transfer parcels of land to those members who will have paid in full the amount loaned to each individual member from the scheme plus interest thereon as agreed between the scheme and AMT.

(8) Upon full payment and/or recovery of the total amount plus interest advanced by AMT to the scheme, the Trustees shall execute all documents and do all things necessary for sub-division and transfer of separate parcels of land to members and issuance of titles in respect of the sub-divisions.”

56. It is indeed a term of the trust that the suit property is to be sub-divided upon completion of payment of the loan granted by Akiba Mashinani Trust. Has the loan been repaid? The Plaintiffs submit in the negative. It is their contention that the loan is still outstanding. They have in this regard produced into evidence various payment schedules, receipts and bank slips.

57. The court has keenly analyzed the evidence. Whereas there is evidence showing some payments have been made to Akiba Mashinani Trust Account, there is little else the court can infer from the evidence. No indication has been given as to the total amount of the loan (principal sum plus interest if any) that was payable, the amount that has been paid, and the outstanding amount. There is equally no evidence of any demand from the Trust which would have been anticipated.

58. PW1, a Trustee of Akiba Mashinani Trust, was unable to give cogent evidence of the terms of the loan and the alleged outstanding amounts. Consequently, the Plaintiffs have failed to prove that there is an outstanding loan that would stop the Defendants from sub dividing the land pursuant to the terms of the Trust Deed.

59. With respect to the question of engaging the surveyor, the Trust Deed does not indicate that the engagement of a surveyor was distinct from the sub-division of the suit property and required the input of all the members. Further, there is no evidence to show that Akiba Mashinani Trust had agreed to engage a surveyor on behalf of the group.

60. Pursuant to the terms of the Trust Deed, the role of sub-dividing the property was left to the Trustees and this of necessity requires a surveyor. That being so, the Trustees were under a duty to engage the surveyor for purposing of sub dividing the land. Furthermore, there is no evidence to show that the beneficiaries of the trust were to agree on the mode of distribution. The only caveat placed on the Trustees' role of sub-dividing the property was that the loan ought to have been repaid before the said sub division could be undertaken.

61. There is equally no evidence with regards to the Plaintiffs' contention that the Defendants have sub-divided the property, and allocated it to themselves and other non-members of the group who have begun developing the land.

62. The Plaintiffs singular substantive prayer is that of an injunction pending the full repayment of the loan and agreement on the mode of sub-division of the suit property and appointment of a surveyor. This is in itself a curious prayer as generally, injunctive reliefs in the main suit are sought in addition to other remedies.

63. In any event, from the foregoing determinations, it follows that the Plaintiffs have failed to prove their case to the required standards against the Defendants. Having found that the Plaintiffs have failed to discharge their burden and prove their case on a balance of probabilities, it follows that the orders sought herein cannot lie.

64. Consequently, the Plaintiffs suit is hereby dismissed with costs to the Defendants.

Dated, signed and delivered virtually in Machakos this 3rd day of February, 2022.

O. A. Angote

Judge

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant: Okumu