



**Kihiu & 3 others v Muungano wa Wanavijiji Akiba Mashinani Trust;
Waweru & 4 others (Interested Parties) (Environment & Land Case
1112 of 2013) [2022] KEELC 2416 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1112 OF 2013**

OA ANGOTE, J

MAY 5, 2022

BETWEEN

**MARY NDUTA KIHU 1ST PLAINTIFF
KATHIRA NOOR H. BILE 2ND PLAINTIFF
JOSEPH MWANGI 3RD PLAINTIFF
ROBERT OKWOYO MIRONGA 4TH PLAINTIFF**

AND

MUUNGANO WA WANAVIJJJI AKIBA MASHINANI TRUST DEFENDANT

AND

**JOHN MBATIA WAWERU INTERESTED PARTY
CECILIA WANJIRU KIBE INTERESTED PARTY
JACINTA WAKINA NJUE INTERESTED PARTY
THOMAS D GITHINJI INTERESTED PARTY
GULA FADHILI YUSUF INTERESTED PARTY**

JUDGMENT

1. The Plaintiffs instituted this suit *vide* a Complaint dated 18th September, 2013 seeking as against the Defendant the following orders:
 - i. Transfer of L.R 7109/88 Nairobi and L.R 7109/89, Nairobi to Mukuru Makao Bora Trust.



- ii. An order that the Defendant discloses and pays to Mukuru Makao Bora Trust interest earned on Kshs 27,212,450 which it deposited in a fixed deposit account on or about the 28th May, 2009 and 16th October, 2009.
 - iii. Costs of the suit.
 - iv. Interests on (b) and (c) hereinabove at court rates
2. In the Plaintiff, the Plaintiffs have averred that they are members of the Board of Trustees of Mukuru Makao Bora Trust (hereinafter the “Trust”) and have instituted this suit on behalf of the Trust and its 2221 members; that the Trust was initially registered as a Self Help Group known as Sisal Settlement Savings Self Help Group(hereinafter after the “Group”) and that the Group was formed with the intention of acquiring two parcels of land being L.R No 7109/88 Nairobi measuring 7.658 Ha and L.R No 7019/89 measuring 1.619 Ha (hereinafter the suit properties).
 3. It was averred that as the Group was not an entity capable of purchasing property, they approached the Defendant to purchase the property on their behalf; that sometime in 2010, the Defendant entered into an agreement with Milwhite Limited for the purchase of the suit properties for the agreed sum of Kshs 81,000,000 and that it was agreed between the Plaintiffs and the Defendant that the funds for the purchase of the property would be deposited into an interest earning fixed deposit account.
 4. The Plaintiffs’ case is that they deposited the total sums of Kshs 27, 212, 450 into a fixed deposit account; that the Defendant took a mortgage loan facility of Kshs 55,000,000 on their behalf from Eco Bank Limited; that pursuant to the agreement between Eco Bank Limited and the Defendant, the Defendant was to deposit the sum of Kshs 26,000,000 and the Bank would in-turn offer the mortgage of Kshs 55,000,000 to cover the balance of the purchase price and that the suit properties were duly charged on 31st August, 2010.
 5. The Plaintiffs averred that the members of the Group duly serviced the mortgage by depositing money into the Defendant’s mortgage account; that the Plaintiffs deposited a total sum of Kshs 72,073,963 and have fully paid the purchase price of the suit property and that the unaccounted interest earned on the sum of Kshs 27,212,540 together with other undisclosed sums is sufficient to clear the full purchase price and leave a surplus.
 6. The Plaintiffs averred that on 7th November, 2012, they duly created and registered the Trust which took over all the assets and liabilities of the Group; that on 1st February,2013, they requested the Defendant to transfer the suit property into their names and that the Defendant’s response was that although it was not averse to transferring the suit properties, certain conditions had to be met before the said transfer.
 7. The Plaintiffs have stated in the Plaintiff that the conditions the Defendant gave them included carrying out a full financial audit, list of beneficiaries to be prepared, a decision to transfer be made at a general meeting in which the beneficiaries would be present and the process of setting up the institution to hold land in trust for the beneficiaries be participatory. According to the Plaintiffs, the Defendant, not having any supervisory powers over the Trust, cannot purport to make demands on its operations as their relationship was limited to purchase of the property.
 8. It was averred in the Plaintiff that the mortgage has been repaid in full and the title discharged; that sometime in April, 2013, the Trust wrote to the Defendant issuing them with a notice of termination and asking for a transfer of the suit property and that through various correspondence, the Plaintiffs sought from the Defendant copies of the loan statements, interest earned through the fixed deposit



sums of Kshs 27,212,450 and the statement of account with respect to the mortgage account to establish the exact payments made and the balance, if any.

9. According to the Plaintiffs, they are in possession of the suit property which is currently valued at Kshs 900,000,000; that the Trust cleared the land rates owed to Nairobi City County and that the Defendant has not cleared the land rent and as at 11th April, 2013, the land rent due was Kshs 1,171,731.54.
10. The Defendant filed a statement of Defence on 20th November, 2014 in which it denied the allegations as set out in the Plaint. The Defendant averred that the total purchase price owed between the Defendant and Milwhite on behalf of the Group was Kshs 81,000,000; that Milwhite owed Eco Bank Kshs 68,000,000 and that the bank was willing to discharge the suit properties on condition that it received the Kshs 68,000,000 after which it would forego its right to demand additional interest.
11. It was averred in the Defence that the bank agreed to be paid the sum of Kshs 68,000,000 in two parts being Kshs 13,000,000 and a financial facility advanced to the Defendant of Kshs 55,000,000; that the bank demanded the sum of Kshs 50,000,000 to be deposited into its accounts from which Kshs 8,100,000 was to be paid to the advocates joint account at Eco Bank and that Kshs 4,900,000 was to be released to Milwhite as part of the purchase price.
12. According to the Defendant, the deposits by the members were insufficient to meet the purchase price of Kshs 81,000,000 plus interest and that the Defendant sourced for these monies from third parties which the Plaintiffs have to pay; that the Defendant has one voting right in the board of Mukuru Makao Bora Trust which entitles it to seek a list of beneficiaries of the project and that the accounts rendered by the Plaintiffs are inaccurate.
13. The Defendant contends that the Plaintiffs are acting in bad faith and with ill motive with the intent to personally benefit; that there have been numerous complaints by beneficiaries that their names are missing from the list of beneficiaries and that the Defendant has received numerous requests asking it not to release the title documents to the Plaintiffs.
14. Vide a Ruling of 14th November, 2014, the Interested Parties were joined in the suit. It is their case that that they have an interest in the suit property on their own behalf and that of the beneficiaries of the Trust; that they are not in agreement with the four Plaintiffs who have filed the suit, and that they oppose the orders for the land to be transferred to the Plaintiffs, as this would cause the members whom the Interested Parties act for to be disenfranchised.

Hearing and evidence

The Plaintiffs' case

15. The matter proceeded for hearing on 25th January, 2018. The 3rd Plaintiff, PW1, adopted his statement and produced the documents. PW1 testified that he is the Chairman of the Mukuru Makao Bora Trust which was started in 2007; that the group was initially known as the Sisal Savings Self Help Group; that they approached the Defendant to help them purchase the suit property as they were not a legal entity and that the Defendant negotiated on their behalf for the purchase of the land.
16. PW1 informed the court that the group borrowed funds for the purchase of the suit properties through the Defendant to the tune of Kshs 55,000,000 from the Bank; that the loan was to be repaid in 5 years but was repaid by the members of the group in 1 year, 7 months; that the group has 2221 members and that they are in occupation of the suit property although the Defendant is holding on to the title.
17. According to PW1, the Plaintiffs have never borrowed any funds from the Defendant as alleged; that the group raised 27 million which they deposited with ECO Bank as fixed deposit, which money earned



an interest of Kshs 10 million and that the Defendant has never accounted to the Plaintiffs the amount of interest earned from the said fixed deposit.

18. During cross-examination, PW1 testified that it was the intention of the Trust to buy land for settlement of its members that all the names appearing in the Groups register are similar to those in the Trust; that there are 27 zones at Mukuru Kwa Njenga and that money was collected from the heads of the 27 zones. According to PW1, he could not tell how much money was contributed by each zone and that he was the treasurer for both the Group and the Trust.
19. It was the evidence of PW1 that the members used to hold annual general meetings whose minutes he did not have; that there was no formal agreement with the Defendant; that the money expended by the Defendant was not to be reimbursed as the same came from the donors; that they do not have the details of the monies that were repaid and that the title deed is in the name of the Defendant.
20. During re-examination, PW1 reaffirmed that the Group no longer exists because the members formed the Trust; that there are minutes authorizing its formation; that the members raised Kshs 72,000,000; that they deposited Kshs. 13.6 million into a fixed deposit account twice and have never been informed about the interest earned from the monies and that the role of the Defendant ended when it successfully negotiated for the loan.

The Defence case

21. DW1 was Jane Mumbi Weru, the executive Director of the Defendant. DW1 adopted her witness statement and produced the documents. It was her testimony that the Plaintiffs approached her to aid them in purchasing the suit properties from Milwhite Ltd; that Milwhite Ltd had used the properties to guarantee a loan to a company called Dhrupa Ltd which company had defaulted; that Eco Bank was selling the land to realize its money and that after negotiations, it was agreed that Eco Bank would accept the sum of Kshs 68,000,000 from Dhrupa Ltd as final settlement of the monies owed to it.
22. According to DW1, the Defendant, Milwhite Limited and the representatives of Sisal Savings Limited agreed on the purchase price of Kshs 81,000,000; that they approached Eco Bank Ltd which agreed to grant them a loan on condition that they make a deposit of Kshs 50,000,000 and that other than the principal loan of Kshs 81,000,000, there was monies for stamp duty to be paid.
23. According to DW1, the Defendant obtained a loan of Kshs 3.5 million; that they further lent the Plaintiffs Kshs 1,500,000 and that there was equally interest charged on the mortgage loan and spent money for putting up the wall to prevent dumping of waste on the suit property all of which came to a total of Kshs 96,000,000. It was the evidence of DW3 that the Defendant has no problem surrendering the title to the Plaintiffs but due to the disagreements amongst the beneficiaries, there is need to verify the beneficiaries and agree on who should get the title and that they should also be paid all the monies due and owing to them.
24. During cross-examination, DW1 stated that the total amount advanced is not ascertainable because they only have unaudited accounts; that the Defendant is willing to abide by the court's and the beneficiaries' decision; that she cannot confirm whether the Trust and the Group are the same entity and that the Defendant was registered to give technical support to slum dwellers and not give donations.
25. DW1 testified that the interest earned from the fixed deposit account was to be credited on the mortgage account; that the Kshs 24,000,000/= given to Eco Bank to hold as security for the loan was given by Slum Dwellers International; that no donor funds were to go towards repayment of the loan;



- that the interest rates kept varying; that the loan was partly completed by the beneficiaries; that there is an outstanding sum of Kshs 24,000,000 and that the beneficiaries repaid Kshs 74,000,000.
26. DW2 was an auditor who produced into evidence an audit report. It was the testimony of DW2 that it was his role to determine how much was used in purchasing the suit property; that looking at the bank statements for the mortgage and the fixed deposit, he found that the Defendant was owed Kshs 23,532,016.32; that the group raised Kshs 72,837,727.57 and that the Defendant raised Kshs 30,000,000 making the total cost of the purchase of the suit property to be Kshs 99,579,404.20.
 27. According to DW2, the total interest earned on fixed deposit was Kshs 3,926,767.98; that the mortgage account was opened to manage the loan that had been taken; that the interest paid to the bank on the loan was Kshs 9,787,155.85 and that he compiled his report based on the bank statements on the fixed deposit account and the loan account.
 28. It was the evidence of DW2 that he did not consider the mortgage account; that he does not have evidence of payment for stamp duty and payment for a perimeter fence; that there was no evidence of the payment of Kshs 1,500,000 for the loan and that although there is a transfer of Kshs 13,000,000 on the Eco Bank statement, it is not indicated where the monies went.
 29. On further cross-examination, DW2 admitted that he did not attach documents with respect to the mortgage account on his report; that he was not given any evidence with respect to the deposit of the sum of Kshs 72,000,000; that he is aware that there was transfer of money from the equity account to the mortgage account and that his report is sufficient and need not be subjected to an audit report.
 30. DW 3 was an employee and board member of Akiba Mashinani Trust and the current Global Chair of Slum Dwellers Association. DW3 adopted his witness statement in which he stated that he is the National Executive Council member of Kenya Federation of Slum Dwellers; that sometime in 2008, DW1 informed them that she had been approached by residents of Mukuru for assistance in purchasing the suit property and that it was agreed that the members of Mukuru residents would open an account at Equity Bank where savings for the purchase price would be held.
 31. According to DW3, the Plaintiffs have refused to carry out a financial audit of the project; that the Plaintiffs arbitrarily registered the Trust without informing the Defendant; that there have been complaints by the beneficiaries that they have been asked to pay sums over and above the Kshs 45,000 each member was required to pay; that he was removed as a mandatory signatory of the account held by the Group; that he received complaints that unspecified amounts had been withdrawn from the Group' account and that the new leaders of the Group opened new accounts and embarked on a smear campaign against the Defendant.
 32. On cross-examination, DW3 admitted that Slum Dwellers Association is not a party to the suit; that it is undisputed that the Defendant is holding the land in trust for the Plaintiffs and that he has no problem the land being transferred to them on condition that payment of the balance to the Defendant is made and proper management of the suit properties by the Plaintiffs is put in place.
 33. DW 4 adopted his witness statement as his evidence in chief and produced copies of the documents. It was the testimony of DW4 that he is the Chairman of Kware Zone and Mukuru Sisal Greenfield Housing project and a former member of the Trust; that some of the Trustees forged his signature and wrote to the Defendant terminating the relationship between Mukuru Greenfields and the Defendant and that he reported the said forgery to the police vide O.B Number 22/13/5/2013.
 34. According to DW4, the Plaintiffs have been carrying out illegal activities such as allocating portions of the suit parcel and carrying business thereon; that he represents 11 zones whose members want their



title to remain in the Defendant's custody and that the beneficiaries of Greenfield have a loan balance of Kshs 6,392,513,0765.

35. On cross-examination, DW 4 testified that he used to be a member of Mukuru Makao Bora Trust but had ceased to be a member; that they were about 2,200 members and used to pay monies into Equity Bank and later on Eco Bank; that the loan has not been fully repaid and the payments are ongoing and that he does not have a statement showing the payments.
36. However, it was the evidence of DW3 that he is aware that the title was discharged; that initially, the group was known as Sisal Settlement Savings Scheme Self Help Group and the members thereafter registered Sisal Green Fields Housing Project; that Mukuru Makao Bora Trust came into being much later and did not transact with the Defendant and that the members still owe the Defendant money.
37. During re-examination, DW4 affirmed that the membership of Sisal Settlement Scheme was composed of small groups; that he represents one of the smaller groups known as Kwale Network Self Help Group who contributed the sum of Kshs 9,860,125 and owe the group Kshs 5,208,825; that the groups of Sisal Settlement Scheme had 32 zones which formed the group known as Sisal Green Fields Housing Co-operation Society Ltd and that Sisal Green Fields became small and Mukuru Makao Bora Trust was created to accommodate everyone.
38. DW5 stated that she is the Chairlady of Kanguruwe Self Help; that she opposes the Plaintiff's suit on behalf of her members; that twelve members of her group were removed from the list of beneficiaries of the Trust without her knowledge; that her group has not finished paying for the land and that her group has 73 members. According to DW5, her members are not on the list produced by the Plaintiffs.
39. DW6 testified that the Group was given money by the Defendant to purchase the land; that they decided to form the Trust which would be used to register the title document; that seven trustees conspired to have the title deed registered under their names and planned to put up a school; that this caused disagreement amongst the members of the Trust; that she hopes that an AGM can be called for all beneficiaries to agree on the way forward and that the seven people who put a caveat on the suit property are using it.
40. DW6 testified on cross-examination that Sisal Green Fields Housing Co-operative was registered; that they started buying the land in 2007; that they were 2,221 members and not all of them created Mukuru Makao Bora Trust; that after payment, she discovered Mukuru Makao Bora Trust had that been created; that she has nothing to do with Mukuru Makao Bora Trust and they were made members of the Trust without being aware of what the Plaintiffs were doing.
41. During re-examination, DW 6 testified that that the members of Sisal Settlement Scheme are the ones who borrowed monies and paid the owners of the land; that her zone Sisal C has 43 members; that they did not authorize the filing of this suit by the Plaintiffs and that the list adduced by the Plaintiffs does not include her members.
42. DW 7 testified that he first differed with the Plaintiffs when they ignored a letter from the Defendant; that the Defendant informed them that they owed Kshs 24,088,624.79; that attempts to have meetings have been thwarted by the Plaintiffs; that he represents Vietnam zone; that he was a trustee in 2013 when the suit was filed; that the Defendant paid money for the property and that they were re-paying the Defendant having financed the purchase of the property. According to DW7, his zone has a debt of about 900,000.
43. DW8 stated that he withdrew from being a member of the Trust; that he withdrew due to dishonesty by the Plaintiffs; that the members were not informed how much they had contributed for building a fence and leveling the ground; that the office bearers closed the Equity account and opened one at KCB



without informing the members; that the Trust office did not conduct proper accounts and that it was Sisal Settlement Scheme that was paying the Defendant and the Trust was registered for purposes of registering the land.

44. It was his evidence that not all members of Sisal Settlement Scheme became members of the Trust; that the Scheme had an account with Equity Bank; that zone leaders would collect the money from members and would take it to the office and that by the time the trust was established, the entire loan had not been repaid.

Submissions

45. The Plaintiffs' advocate filed submissions on 23rd November, 2021 in which he reiterated the facts of the case as set out by each of the parties. It was submitted that the Plaintiffs have proved their case on a balance of probabilities and that the Plaintiffs have proved that the members/ beneficiaries of Mukuru Makao Bora Trust paid the full purchase price for the suit property and therefore a resulting trust arose between it and the Defendant herein.
46. Reliance was placed on the cases of *Juletabi African Adventure Limited & Anor vs Christopher Michael Lockley* [2017] eKLR and *Charles K. Kandie vs Mary Kimani Sang* [2017] eKLR where the Court of Appeal, placing reliance on the case of *Twalib Hatayan Twalib Hatayan & Another vs Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR extensively discussed the concept of trust.
47. According to counsel for the Plaintiff, the Defendant having admitted that it is liable to transfer the suit property to the Trust is estopped from denying that it was dealing with the aforesaid trust; that the Defendant cannot purport to make demands on the operation of the Trust as it has no supervisory role over it and that the relationship between the Defendant and the Trust was strictly limited to the purchase of the suit property.
48. Counsel for the Plaintiff submitted that despite claiming the Plaintiffs owe it monies, the Defendant did not counter-claim for the same; that the figures of the alleged balance are inconsistent and that the Defendant has not put forth a credible Defence.
49. With respect to the Interested Parties, it was submitted that they were enjoined in the suit by virtue of being members of the Trust and beneficiaries of the suit property; that they are acting at the behest of the Defendant as evinced by the fact that they were both represented by the same counsel and that the Interested Parties have departed from their initial statements and now allege not to be members of the Trust.
50. The Defendant's counsel submitted that the Plaintiffs herein were members of Sisal Savings Self Help Group and after disagreements amongst themselves, some decided to set up a trust known as Mukuru Makao Bora Trust; that the Trust was never registered as a corporate trust under the *Trustees (Perpetual Succession) Act* and that it can only act if all the named trustees registered their agreement in a written document.
51. With respect to the question of funds, it was submitted that the Ksh. 30 Million being a deposit from the Sisal Self Help Group was part of the loan agreement between the Defendant and Eco bank and that one of the conditions for the loan was that the Defendant was to deposit with Eco bank the sum of Kshs 50 Million prior to any disbursements of the loan amounts of Kshs 55 Million.
52. It was submitted that the Defendant could not file a counterclaim against Sisal Settlement Saving Self Help Group because each beneficiary made an individual commitment to pay the sum of Kshs 45,000 to the Defendant towards the loan repayment, so as to entitle them to an interest in the plot; that it



would require suing over 1000 low income families which is unfeasible and that the internal conflicts within the Trust make it difficult to get payment.

53. Counsel for the Defendant submitted that the Defendant never entered into an agreement, loan or otherwise, with the Trust and that by the time their Trust deed had been lodged, the transactions had long since occurred.
54. The Interested Parties' advocate submitted that Mukuru Makao Bora Trust was created vide a Trust Deed dated 29th October, 2012; that despite the Trust Deed having been registered on 7th November, 2012, there is no evidence to show that the same was incorporated by law and as such the same remains an unincorporated body and that the Plaintiffs lack the capacity to sue without including all the Trustees.
55. Reliance was placed on the Indian case of *Dull Chand vs Mahabir Pershad Trllok Chand* AIR 1984 Delhi 144, 25 (1984), citing the case of *Atmaram Ranchhodhbhal vs Gulambuseln Gulam Moblyaddln & Another*, where the court affirmed that a co-trustee could not maintain a suit in the absence of a resolution passed by all the other co-trustees authorizing the filing of the suit.
56. Counsel also cited the cases of *Kipsiwo Community Self Help Group vs Attorney General And 6 Others* [2013] eKLR where the court in dealing with the manner in which unincorporated bodies may commence proceedings stated that the members of the group have to bring an action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action.
57. It was submitted that the Plaintiffs have not proved their case on a balance of probabilities as Mukuru Makao Bora Trust was not in existence at the time the members of Sisal Savings Self Help Group raised monies for the purchase of the properties and that all relevant transactions with respect to the suit property were undertaken by Sisal Savings Settlement Scheme.
58. The Interested Parties' counsel submitted that Mukuru Makao Bora Trust group has split into two factions, one represented by the Plaintiffs and the other represented by the Interested Parties herein leading to the need by the Defendant to set conditions requiring the ascertainment of the beneficiaries of the suit property; that the Plaintiffs have not given assurances that they will ensure fair distribution of the suit property amongst all members who contributed and that the resulting trust alleged by the Plaintiffs is in favor of the individual members who contributed the purchase price and not in favor of the Plaintiffs.
59. The Plaintiffs' counsel filed supplementary submissions and submitted that the question of the Plaintiffs' capacity to institute the suit is res judicata having already been determined by the court vide its Ruling of 14th November, 2014, where it affirmed that the Plaintiffs had the requisite locus; that notwithstanding the aforementioned, whereas the Trust is duly registered, it is not incorporated and that an unincorporated body can only sue through its registered officials as affirmed by the Court of Appeal in *Anderson Mole Munyanya & 3 others vs Morris Sulubu Hare* [2017] eKLR.
60. It was submitted by the Plaintiffs' counsel that the Plaintiffs herein are members of trustees of the board of the Trust being the Chairperson, secretary, treasurer and one board member and that they were duly authorized vide the meeting of 16th August, 2013 to institute this suit.

Analysis and Determination

61. Having considered the pleadings, the evidence by the parties and submissions; the following issues arise for determination:



- i. Whether the Plaintiffs have *locus* to institute this suit?
 - ii. Whether the Defendant has refused without any reasonable cause or lawful excuse to transfer the titles of L.R 7109/88 and L.R 7109/89 to the Plaintiffs?
 - iii. Whether the Plaintiffs are entitled to the reliefs sought in the plaint?
62. It has been submitted by the Defendant and the Interested Parties that the Plaintiffs have no *locus* to institute this suit and that there being no evidence that Mukuru Makao Bora Trust is incorporated, the Plaintiffs lack capacity to sue on its behalf without including all the Trustees. In response, the Plaintiffs contend that the question of whether they have the requisite *locus standi* or not is *res judicata*, the issue having been earlier determined by the court *vide* its Ruling of 14th November 2014 and that they are in any event duly vested with the *locus* to institute this suit.
63. In its Ruling of 14th November, 2014, while dealing with the Interested Parties' application to be joined in the suit, this court (Obaga J) held as follows:
- “However, I have perused the Trust Deed which provides at Clause 6 that there shall be a Board of Registered Trustees that shall be the Supreme Organ of the Trust comprising of between 32 – 52 trustees and its membership shall be drawn from among others, zones. Sub-clause (b) states that a registered trustee representing a zone must have been elected by his group members at the zones. Consequently, therefore, the Applicants are not strangers but representatives of members of MMBT in their respective zones. It is stated at Clause 9 that there shall be executive officers – Chair, Vice Chair, Secretary, Vice Secretary and Treasurer who shall manage the day to day administrative affairs of the trust. Though the zone representatives are not part of the executive officers of the Board, they are an integral part that forms part of the Supreme Organ of the trust. It is my finding therefore that the Applicants have a stake in the suit, thus qualify as Interested Parties.”
64. In noting that Clause 9 of the Trust Deed provided for the executive officers responsible for the day to day management of the Trust, the court cannot be said to have been validating the Plaintiffs *locus*. Indeed, in its Ruling, the court never delved into the issue of whether or not the Plaintiffs had the requisite *locus standi* to institute this suit. The issue is thus not *res judicata*.
65. It is trite that the presence of proper parties in a suit is sine quo non the jurisdiction of the court. This position was fortified by the court in *Apex Finance International Limited & another vs Kenya Anti-Corruption Commission* [2012] eKLR citing with approval the Nigerian Supreme Court case of *Goodwill & Trust Investment Ltd & Another vs Will & Bush Ltd* SC.266/2005 (25.03.2011) where the court held:
- “it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”



66. The term *locus* signifies a place of standing and where a party is accused of not having *locus*, it means he/she cannot be heard. As espoused by the Court of Appeal in *Alfred Njau vs City Council of Nairobi* [1983] eKLR 625;

“The term *locus standi* means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding”

67. In the Complaint, the Plaintiffs have averred that they are the Board of Trustees of Mukuru Makao Bora Trust and that they bring the suit on behalf of the Trust and its 2221 members. They have produced in evidence a Trust Deed dated 29th October, 2012 and registered on 7th November, 2012. The Plaintiffs have admitted that the Trust has not been incorporated pursuant to the provisions of section (3) (1) of the *Trustees (Perpetual Succession) Act*.

68. The Defendant and the Interested Parties assert that the Trust having not been incorporated, it remains an unincorporated entity which lacks capacity to sue, without including all the Trustees, while the Plaintiffs maintain that they are the executive members of the Trust duly authorized by the Board of Trustees to institute the suit.

69. It is trite that a Trust having been established by way of a Trust Deed ought to be stamped and then registered at the Lands Registry under the *Registration of Documents Act*, which was done. Once registered, it became an unincorporated Trust. The implication of an unincorporated Trust is that it can only own property, enter into contracts or do any other thing in the name of its trustees but not in its own name.

70. An unincorporated Trust does not have a separate legal existence from its trustees. With respect to institution of suits, an unincorporated Trust can only institute a suit through its trustees and/or recognized officials. Indeed, that is the position that the court took in the case of *Erick Lumosi Asiligwa & another vs Peter Felix Baumgartner* (2011) eKLR where it held as follows:

“In sum Gentiana Self-Help Centre is not a trust in terms of Cap 164. It is not a corporate body. It cannot sue and nobody can sue on its behalf as its registered trustees.”

71. The court has analysed the Trust Deed. Clause 6 thereof provides for the Board of Trustees as the Supreme Organ of the Trust and whose numbers shall not be less than 32 nor more than 50 trustees with membership drawn from the various zones. Clause 9 provides for the Executive officers of the Board, responsible for the day to day running of the Trust who are the Chairperson, Vice Chairperson, Secretary, Vice Secretary and Treasurer.

72. The Plaintiffs produced the minutes of the Board of Trustees meeting held on 16th August 2013. The meeting was attended by thirty-two trustees, five were absent with apologies while thirteen were absent without apologies. Under Agenda 3 thereof, under the heading-Filing case in court, it reads as follows:

“After a long deliberation and reports from Trustees who had been consulting lawyers for legal advice, the board unanimously passed to file a case against Akiba Mashinani Trust to be given back the titles.”

73. It is apparent from the foregoing that the Board of Trustees, the supreme organ of the Trust, authorized the filing of this suit. The Plaintiffs, as the recognized officials of the Trust responsible for the day to day running of the Trust, cannot therefore be said not to have had authority to institute the suit. The contention that the Plaintiffs, as officials of the Trust, lack the requisite authority is hereby rejected.



74. The Plaintiffs' case is that they are members of Mukuru Makao Bora Trust which was initially a Self Help Group known as Sisal Settlement Saving Self Help Group; that they approached the Defendant to purchase the suit properties on their behalf as the self- help group was not an entity capable of owning property and that the Defendant acquired a loan facility from Eco Bank Limited on their behalf and purchased the suit properties
75. According to the Plaintiffs, the suit properties were to be registered in the name of the Defendant pending re-payment of the loan at Eco Bank after which the properties would be transferred to the Plaintiffs; that the Plaintiffs have made all the necessary payments and that the Defendant ought to transfer the suit properties into their names.
76. In response, the Defendant, while admitting to have purchased the two suit properties on behalf of the Plaintiffs organization, submitted that the Plaintiffs still owe them money and secondly, that they are holding the suit properties in trust for all the beneficiaries. According to the Defendant, the Plaintiffs have not settled money that is due and owing to them.
77. The Interested Parties constitute a break- away faction of the Plaintiffs. The Interested Parties assert that that the title to the suit properties should not be issued to the Plaintiffs because they still owe monies to the Defendant. According to the Interested Parties, having contributed money for the purchase of the suit property before the Trust was registered, the suit properties cannot be validly registered in the name of the Plaintiffs.
78. It is undisputed that sometime in 2007, an entity known as Sisal Settlement Savings Self Help Group entered into an informal agreement with the Defendant, wherein the Defendant purchased the suit properties on behalf of the Group, which later on transitioned into a Trust whose officials are the Plaintiffs herein; the purchase price of the suit properties was Kshs 81,000,000 of which the Defendant acquired a loan of Kshs 55,000,000 from Eco Bank towards the purchase of the same. The suit properties were discharged on 15th February, 2013 and the Title to the suit properties is in the name of the Defendant.
79. As aforesaid, the terms of the Agreement between the Plaintiffs and the Defendant were not set out in writing. Indeed, there is little evidence with respect to the precise terms of the same. According to the Plaintiffs, they fully abided by the terms of their informal agreement with the Defendant and that their members paid a total sum of Kshs 72,073,963 towards the purchase of the land.
80. It is the Plaintiff's case that the interest on the fixed deposit of Kshs 27,490,000 and other disclosed sums is sufficient to clear the surplus loan. The Plaintiffs have in this respect adduced various correspondence between themselves and the Defendant; schedule of payments made to the Defendant and the sale agreement for the suit properties.
81. It is undisputed that that the loan was fully repaid within 1 years, 7 Months and the Certificates of Title for the suit property was discharged on 15th February, 2013. The Defendant contends that other than the purchase price of Kshs 81,000,000, there were stamp duty charges as well as interest to be paid on the mortgage loan and expenses incurred in putting up a perimeter fence around the property, and that in total, a sum of Kshs 99,855,250 was incurred towards the suit properties. According to the Defendant, the Plaintiffs' members only raised Kshs. 72,837,727 and should pay them the difference.
82. It is trite law that he who alleges must prove. Sections 107 of the *Evidence Act* provides as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

83. The evidential burden of proof is captured in sections 109 and 112 of the same Act and states;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

84. The Court of Appeal in *Mumbi M'Nabea vs David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in this jurisdiction stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

85. The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another vs IEBC & 2 Others* (2017) eKLR had the following to say on the evidential burden of proof;

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

86. It is not in dispute that the suit properties the subject of this suit have been discharged and the loan in that respect cleared. The dispute is whether it was the Plaintiffs’ members who fully cleared it or whether the Defendant used their own funds to clear the same, and if so, whether the Plaintiffs should reimburse the Defendant.

87. According to the schedule adduced by the Defendant in its list of documents, the breakdown of costs incurred in the purchase of the suit properties is as follows;



Costs of Land	Kshs 81,000,000/=
Interest	Kshs 13,823,090/=
Stamp Duty	Kshs 3,532,160/=
Land Fencing	Kshs 1,500,000/=
Total Cost	Kshs 99,855,250.23
Total Amount repaid by Mukuru	Kshs 70,730,190.93/=
Amount owed by Mukuru	Kshs 29,125,059.30/=

88. On the other hand, the Auditor's report dated 25th July, 2018 states as follows:

Cost of Land	Kshs 81,000,000/=
Interest on Mortgage	Kshs 9,787,155.83/=
Stamp Duty	Kshs 3,532,160/=
Perimeter wall	Kshs 2,000,000/=
Accounts Maintenance fees	Kshs 11,150,00/=
Withholding tax on interest	Kshs 76,983,37/=
Swiss Bond	Kshs 3,172,000/=
Total	Kshs 99,579,404.20/=
Total Amount repaid by Mukuru	Kshs 72,837,727.57/=
Amount owed by Mukuru	Kshs 23,532,016.32/=

89. It is clear from the two reports that there are significant discrepancies with respect to the amounts claimed by the Defendant. Indeed, it was admitted by DW1 on cross-examination that it was impossible to ascertain the precise amounts due the Defendant because they did not have audited accounts.

90. Further and more importantly, the Defendant has failed to render the mortgage accounts in its name despite admitting that it was given all the relevant documents with respect to the same. The mortgage accounts would have gone a long way in affirming if indeed, as alleged by the Defendant, the interest earned on the fixed deposit accounts went towards the mortgage account and the amounts paid by the Defendant over and above the deposits paid by the Plaintiffs.



91. Having failed to render the mortgage accounts and give a reasonable explanation for their failure to do so, the court is entitled to make an inference that the accounts would be prejudicial to the Defendant. As held by the Court of Appeal in *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* [2019] eKLR;

“We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See J. Wigmore, Evidence § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witness may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial. Comparatively, in *Bukenya and Others vs Uganda* [1972] EA 549, it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In *Mann Holdings Pte Ltd and another vs Ung Yoke Hong* [2018] SGHC 69, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial.”

92. As stated above, the failure by the Defendant to tender in evidence the mortgage account and audited accounts, which documents are crucial in determining the dispute herein leads naturally to the inference that it fears such evidence will expose facts unfavourable to it.

93. The Defendant contends that the Kshs 24 Million given to Eco Bank to hold as security was monies that they sourced from Slum Dwellers International. There is no evidence in this respect. There is equally no evidence of the source of the monies for stamp duty and the payment for the perimeter wall as alleged. Neither is there any evidence of the alleged loan of Kshs 1,500,000 given to the Group.

94. That being the case, this court is satisfied from the evidence on record that the Plaintiffs fulfilled their obligations to the Defendant in respect of the informal agreement that the parties had entered into for the purchase of the suit properties. Indeed, the only engagement the Defendant had with the Plaintiffs' organization was for the purchase of the suit property on behalf of the group. If the Defendant went out of its way to make payments on behalf of the Plaintiffs, a formal agreement should have been entered into, and evidence to that effect produced.

95. Having found that there is no evidence of the Plaintiffs' indebtedness to the Defendant, the next issue for determination is whether the Defendant is entitled to set conditions precedent to the transfer of the suit properties to the Plaintiffs.

96. The evidence before this court shows that on 1st February, 2013, the Plaintiffs requested the Defendant to transfer the suit properties into their names. The Defendant's response was that although it was not averse to transferring the suit properties, certain conditions had to be met by the Plaintiffs before the said transfer could be effected.

97. The conditions that the Defendant set included the carrying out of a full financial audit, list of beneficiaries to be prepared and a decision to transfer the land to the Plaintiffs to be made at a general meeting in which the board would be present. The Defendant further required the Plaintiffs to set up an institution that will hold land in trust for the beneficiaries.

98. According to the Plaintiffs, the Defendant does not have any supervisory powers over the Trust and cannot purport to make demands on its operations as their relationship was limited to purchase of the property. The Defendant contends that it has one voting right in the board of Mukuru Makao Bora



- Trust which entitles it to seek a list of beneficiaries of the project and that the accounts rendered by the Plaintiffs are inaccurate.
99. Both the Defendant as well as the Interested Parties contend that if suit properties are transferred to the Plaintiffs, the Interested Parties will be disenfranchised. They contend that the Plaintiffs are acting with ill motive and that they do not have the interests of all the beneficiaries at heart.
 100. The evidence shows that vide the meeting of the executive committee and zone leaders held on 19th October, 2012, members of the Sisal Savings Self Help Group resolved to transform the Self Help Group into a Trust as captured under Agenda 2 to enable it acquire corporate and legal personality and among others register and hold the suit properties in its name.
 101. The above resolution was formalized. Although not incorporated, a Trust was registered. The Plaintiffs are the officials of the Mukuru Makao Bora Trust. It is undisputed that the Defendant and Mukuru Makao Bora Trust are two separate entities. Indeed, the Defendant was keen to show that its role was simply to aid the Self Help Group, which later on converted itself into a Trust, to acquire the suit properties. DW 3 admitted on cross-examination that other than the question of funds, the Defendant was not entitled to interfere with the management of the Trust.
 102. Having found that the Plaintiffs have proven on a balance of probability that they paid the sums due and owing to the Defendant, and the Defendant's witnesses having admitted that the Defendant own the property in trust for the beneficiaries who fall under the umbrella of the Group and now the Trust, it follows that the Defendant has no right to dictate how the properties should be held by the Trust.
 103. The Trust having been created specifically for owning the suit properties on behalf of 2221 members, the Plaintiffs who are the officials of the Trust should be allowed to manage the affairs of the Trust, including how they will distribute the suit properties to the beneficiaries of the Trust. Indeed, if the Defendant has a voting right in the Trust's board, it will exercise that right just like any other board member of the Trust pursuant to the constitution of the Trust.
 104. The Interested Parties have alleged impropriety on the part of the Plaintiffs. They assert that the Trust was created in the absence of some members of the Group and therefore certain members who have paid for the land stand to lose out if the suit properties are transferred to the Plaintiffs. They further allege that some of their members have not finished repaying the monies due to the Defendant.
 105. The Plaintiffs have adduced the membership list indicating that the beneficiaries of the Trust are 2221. The Interested Parties are part and parcel of this list. Indeed, the basis of their enjoinder in this suit was on the basis that they are Trustees representing the zones which comprises members of the Mukuru Makao Bora Trust.
 106. Whereas some of the Interested Parties have alleged to have cut ties with the Trust, and that some of the members of their zones have been removed from the list of beneficiaries, there is no evidence in that regard, neither is there evidence to show that payments for the suit property are due and owing as alleged.
 107. Indeed, if some of the beneficiaries have not paid for the suit properties, it is upon the Plaintiffs and the entire board of the Trust to decide how the said members will be treated vis a vis the distribution of the suit properties. This determination can only be made after the suit properties have been transferred to the Plaintiffs who are to hold the suit properties in trust for the beneficiaries. The internal disputes that may be existing within the Trust is not the subject of this suit.
 108. That being the case, the court is satisfied that the Plaintiffs have proved that the Defendant has no reasonable cause for refusing to transfer the suit properties to them. However, there is insufficient



evidence with respect to prayer (b) for the payment of the interest earned on Kshs 27,212,450 that was deposited to a fixed account by the Plaintiffs.

109. Indeed, it was upon the Plaintiffs to either provide the statement of account to show the interest that was earned on the said deposit or summon an official from the bank to provide that evidence. Having failed to do so, it is the finding of this court that the said claim has not been proved on a balance of probabilities.
110. In the circumstances, the court enters Judgment for the Plaintiffs against the Defendant as follows:
- i. The Defendant be and is hereby ordered to unconditionally transfer L.R No. 7109/88 and L.R No. 7109/89, Nairobi to the Plaintiffs to hold them in trust for the members of Mukuru Makao Bora Trust within 30 days.
 - ii. The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF MAY, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Mageya for the Plaintiffs

Mr. Wanjohi for Mr. Bryant for the Defendant

Mr. Wanjohi for interested Parties

Court Assistant – Caroline Kajuju

