



**Nduva & 3 others v John Ndar & 3 others (Civil Case 24 of 2017)
[2023] KEHC 3185 (KLR) (Civ) (6 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 24 OF 2017

CW MEOLI, J

APRIL 6, 2023

**IN THE MATTER OF ST. VINCENT DE PAUL SOCIETY
KENYA REGISTERED TRUSTEES (“THE TRUST”)**

AND

**IN THE MATTER OF THE TRUSTEES (PERPETUAL
SUCCESSION) ACT CAP 164 LAWS OF KENYA**

AND

THE TRUSTEES RULES, 1948

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT & CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF CHANGE OF TRUSTEESHIP WITHIN THE SOCIETY OF ST.
VINCENT DE PAUL SOCIETY KENYA REGISTERED TRUSTEES (“THE TRUST”)**

BETWEEN

MICHAEL MUSEMBI NDUVA 1ST PLAINTIFF

MARY GORETTI GITARI MUNYI 2ND PLAINTIFF

URBANUS MUTHAI KINUTHIA 3RD PLAINTIFF

ST CATHERINE MULLIGAN 4TH PLAINTIFF

AND

JOHN NDAR 1ST DEFENDANT

SUSAN NJERU 2ND DEFENDANT



ISAYA NYABERA 3RD DEFENDANT
REGISTRAR OF DOCUMENTS 4TH DEFENDANT

JUDGMENT

1. The suit herein, brought by Michael Musembi Nduva, Mary Goretti Gitari Munyi, Urbanus Muthai Kinuthia and St Catherine Mulligan, (hereafter the 1st, 2nd, 3rd, and 4th Plaintiffs, respectively) on behalf of the St. Vincent De Paul Society Kenya Registered Trustees (hereafter the Trust) against John Ndar, Susan Njeru, Isaya Nyabera and Registrar of Documents (hereafter the 1st, 2nd, 3rd and 4th Defendants respectively) was commenced by way of the Originating Summons (hereafter the Summons) dated January 24, 2017.
2. The Summons seeks various reliefs including a permanent prohibitory injunction to restrain the 1st, 2nd, and 3rd Defendants from acting as and/or masquerading as Trustees of the Trust; an order to compel the 4th Defendant to certify and register the appointment of the 1st, 2nd, 3rd and 4th Plaintiffs as the new and only Trustees of the Trust; an order directing the 1st, 2nd and 3rd Defendants to vacate office with immediate effect and to hand over all official documents, seal of the Trust and the Trust office to the 1st, 2nd, 3rd and 4th Plaintiffs being the newly elected Trustees of the Trust pursuant to elections under the aegis of the international office of the Trust; and an order directing the 1st, 2nd and 3rd Defendants to hand over the original Certificate of Incorporation and the Official Seal of the Trust forthwith. The Plaintiffs also sought for costs of the Summons.
3. The Summons is supported by the affidavit sworn by the 1st Plaintiff on January 24, 2017, where he averred that a lawful decision was made to strike out the 1st Defendant as a member of the Trust on grounds of breach of trust and mismanagement of the Trust's resources, whilst the 2nd and 3rd Defendants were removed from office as Trustees. That despite the above turn of events, the 1st, 2nd, and 3rd Defendants continue to hold office while refusing and/or declining to surrender the Original Certificate of Incorporation and Official Seal of the Trust.
4. The 1st Plaintiff further deposed that the 4th Defendant had refused to register the Plaintiffs as the newly elected bona fide Trustees of the Trust. While the 1st, 2nd and 3rd Defendants purported to pass a resolution to appoint other Trustees in place of the 2nd and 3rd Defendants, and to appoint an additional Trustee without the consent and approval of the Plaintiffs who are the rightful Trustees.
5. The 1st Defendant swore a replying affidavit on May 12, 2017 to oppose the Summons. He swore that he was a rightful registered Trustee of the Trust following his appointment on March 07, 2006 and that the local Trusteeship of the Trust has neither affiliation to the International Body of the Trust nor term limit. The 1st Defendant averred that the Plaintiffs are unknown to him and that no mandate has been conferred to them to act in the capacity of Trustees of the Trust. It was the assertion by the 1st Defendant that the Summons is improperly before the court and that the Plaintiffs were merely seeking an avenue to create new positions for themselves.
6. In rejoinder, the 1st Plaintiff swore a further affidavit on June 12, 2017 followed by a supplementary affidavit on December 20, 2019. Stating inter alia that, the Trust was registered for and on behalf of a body or association of persons established for a religious and charitable purpose known as the Society of St Vincent De Paul ("hereafter the Society"); that the Trust and the Society are not mutually exclusive since Trusteeship is derived from the Society and its members. The 1st Plaintiff stated further that the Trust was created to hold property on behalf of the Society and that both the Trustees and the officials



of the Society are appointed following consultations with the members of the Society and with the consent of the President General of the Society.

7. It was averred by the 1st Plaintiff that pursuant to the expulsion and removal of the 1st Defendant as an official of the Society, his Trusteeship automatically ended, and he could no longer perform any duties for and on behalf of the Trust. The 1st Plaintiff went on to reiterate that following the expulsion of the 1st, 2nd, and 3rd Defendants as Trustees on allegations of mismanagement of the properties assigned to the Trust, the Plaintiffs were appointed as the new officials of the Trust.
8. And that pursuant to the resolution of the Annual General Meeting (AGM) held on November 01, 2019 and November 02, 2019, the Plaintiffs were confirmed as the bona fide Trustees of the Trust and the decision by the 1st Defendant to continue to hold office and run the affairs of the Trust are detrimental to the interest of the Trust. Thus, the 1st Plaintiff urged that the reliefs sought in the Summons be granted. The Plaintiffs thereafter filed their statement of issues on March 09, 2020.
9. The record shows that the Plaintiffs withdrew the case against the 3rd Defendant, vide the undated Notice of Withdrawal dated March 23, 2017. The said Defendant is apparently deceased. The 4th Defendant did not file a response or participate in the trial.
10. At the trial, the 1st Plaintiff gave evidence as the sole witness. During his testimony as PW1, the 1st Plaintiff adopted his witness statement as evidence and produced the Plaintiffs' documents constituting annexures to the Summons, as P Exhibits 1-16. He proceeded to state that he was testifying on his behalf and on behalf of the other Plaintiffs, all being Trustees of the Trust.
11. The 1st Plaintiff stated that the Trust was created by way of a Trust Deed annexed to his affidavits and that contrary to the averments made in the replying affidavit of the 1st Defendant, he had no knowledge of any amendments having been made to the said document. He further stated that the Trust Deed and the Constitution belonging to the Society are not independent documents. It was the testimony by the 1st Plaintiff that the constitution Constitution of the Society provides for the appointment of Trustees.
12. Under cross-examination, the 1st Plaintiff testified that the 1st Defendant was expelled from the Trust for mismanagement of the resources of the Trust, as were the 2nd and 3rd Defendants. However, the Trust Deed makes no provision for the procedure for removal of Trustees. He proceeded to state that the Plaintiffs herein were appointed in the year 2015 by the National Council following an election.
13. During re-examination, the 1st Plaintiff affirmed existence of a relationship between the Society's Constitution and the Trust Deed, and that the 1st Defendant had previously been appointed by the then President of the Society, Hon Nyakiamo.
14. The Defendants did not adduce any evidence and upon the close of the trial, the parties filed written submissions as directed by the court. On the part of the Plaintiffs, it was submitted that their case was uncontroverted in view of the fact that the Defendants did not call any evidence to rebut the testimony by the 1st Plaintiff. To buttress their arguments here, the Plaintiffs cited a few authorities, including the case of *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* HCCC No 68 of 2007 where the court stated thus:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”



15. It was also submitted by the Plaintiffs that they are the bona fide Trustees of the Trust by virtue of their appointment on April 08, 2019 following the expulsion and/or removal of the 1st, 2nd and 3rd Defendants respectively. The Plaintiffs also argued that the position held by a Trustee is fiduciary in nature and is intended to serve the interest of the Trust in question, rather than the personal interests of the Trustees, citing the English case of *Armitage vs Nurse* [1997] 3 WLR 1046 in which the Court of Appeal observed that:

“... 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.”

16. For the above reasons, the Plaintiffs urge the court to find merit in the Summons and to grant the reliefs sought therein.

17. For the 1st and 2nd Defendants, it was contended that notwithstanding the Defendants’ failure to adduce witness testimony, the burden of proof rests with the Plaintiffs. That the Plaintiffs cannot merely place reliance on the fact of their evidence being uncontroverted. To support this proposition, the Defendants cited the case of *Albert Kigera Karume & 2 others v George Ngugi Waireri & 3 others (sued as Trustees of the Njenga Karume Trust & another; Grace Njoki Njenga Karume & 7 others (Interested Parties)* [2020] eKLR where the High Court determined as follows:

“...it is my finding that the claim fell short of proof. Section 109 of the *Evidence Act* places the burden of proof as to any particular fact 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). In civil cases the burden of proof is always on the plaintiff. This position was clearly stated in *Kirugi & Ano. -Vs- Kabiya & 3 Others* [1987] KLR 347 where the Court of Appeal stated that:

“The burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.”

18. The 1st and 2nd Defendants maintained that they continue to hold their positions as the registered Trustees of the Trust and that the 1st Defendant was unaware of his alleged expulsion or dismissal. Thus, the reliefs being sought by the Plaintiffs were illegal and unfounded. The 1st and 2nd Defendants further asserted that the alleged appointment of the Plaintiffs to act as Trustees of the Trust was unprocedural and illegal. They cited in that regard from the case of *David Kipsang Kipyego & another v Registrar of Documents & 4 others; Eric Kiptum Teimuge (Interested Parties)* [2019] eKLR where the court declared the appointment of interested parties as trustees to be illegal and *ultra vires* the certificate of incorporation and trust deed.

19. It was the argument of the 1st and 2nd Defendants that the Society is governed by the Trust Deed and its Constitution, and not by the International Office of the Trust. It was similar to the argument of the 1st and 2nd Defendants that the Constitution and Trust Deed of the Trust provide that the appointment of Trustees shall be by way of resolution of a meeting of Trustees, among other procedures. In this respect, the 1st and 2nd Defendants submitted that the Plaintiffs are strangers to them and their appointment, if at all, cannot be recognized. In conclusion, the 1st and 2nd Defendants submitted that the Plaintiffs’ case has no bearing and ought to be dismissed with costs.



20. The Court has considered the respective pleadings, affidavits, and annexures thereto as well as the trial evidence, and submissions of the respective parties. The key issues falling for determination are whether on a balance of probability the Plaintiffs herein proved their claim against the Defendants and if so, what reliefs ought to be granted.
21. First, the Defendants, despite filing a response by way of a replying affidavit did not call any evidence at the trial. That said, the burden rests with the Plaintiffs to prove their claim against the Defendants to the required standard. In so saying, the Court is guided by Sections 107, 108 and 109 of the *Evidence Act* and the decision rendered by the Court of Appeal thereon in the case of *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 namely that:
- “The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
22. The crux of the matter herein lies in answering the question as to who the rightful Trustees of the Trust are. Upon my examination of the pleadings and material tendered, it is not in dispute that the Trust was registered vide the Certificate of Incorporation dated March 07, 2006 which was marked as P Exh 2 in the supporting affidavit by the 1st Plaintiff and later tendered as an exhibit. It is apparent from the record that the Trust was created to hold and manage the assets and properties belonging to the Society.
23. The record discloses that prior to the registration of the Trust, the Trust was created pursuant to the Trust Deed dated 02.03.1970 and which Trust Deed listed Peter Otieno Nyakiamo, Francis Joseph Hockenhull and Francis Joseph Addly as the original Trustees. Further to this, the Plaintiffs tendered a copy of the Constitution of the Society for which the Trust runs (P Exh 6). Clause 2 thereof provides for the affiliation of the local Society of St. Vincent with the international Society of St. Vincent. Under Clause 13.1 of the Constitution of the Society the Trust was formed for the purpose of holding the properties and investments of the Society. Moreover, Clauses 13.2 and 13.3 stipulate that the local Board of Trustees would be comprised of not more than 5 and not less than 3 trustees, to be appointed by the National Council from among Society members.
24. Hence in my considered view, the Trust Deed and Constitution of the Trust and Society were not intended to operate as independent instruments. Or the Trust to operate independently of the Society when the Trust derives its existence from the Society. There is no material to support such a construction which would, given the relationship between the Trust and Society, to be tenuous. Accordingly, it is the considered opinion of the court that the two instruments were intended to be read, interpreted, and applied in consonance.
25. Upon further examination of the pleadings and material tendered, it is apparent that the 1st and 2nd Defendants were appointed as Trustees of the Trust together with one Jane Were who is not a party to the proceedings, and thereafter, the 3rd Defendant, whose appointment was registered on November 17, 2010. The Plaintiffs tendered in their material a copy of the letter dated January 24, 2011 (Same copy marked as PExh. 1 and 11) issued by the President General of the International Trust communicating the expulsion of the 1st Defendant as a Trustee. See also P Exh 3 in the same regard.
26. The expulsion of the 1st Defendant was confirmed vide the letter dated July 05, 2011 (PExh 4) addressed to the National Presidents of the African branch by the Vice President General of the International Body of the Trust. It is noteworthy that the 1st Defendant in his affidavit in reply did not address



- the expulsion while dwelling on the alleged separation between the local St. Vincent Society and the International Office. He asserted that the trustee's tenure had no term limits.
27. The plaintiffs also adduced a copy of the resolution passed (by way of the minutes) whose effect was that the removal of the 1st, 2nd and 3rd Defendants as Trustees was confirmed with effect from October 22, 2016, alongside the appointment of the 1st to 4th Plaintiffs in their place (See P Exh 1, 13 & 16).
 28. Further to the foregoing, the Plaintiffs herein tendered the letter dated January 21, 17 (PEXh 3) addressed to the Registrar of Societies and requesting immediate action to be taken against the persons purporting to be officials of the Trust. From my reading and understanding of this letter, it is apparent that the persons referred to therein are the 1st to 3rd Defendants. The Defendant's claims that there was no affiliation between the local Society and the International Society of St Vincent does not hold water. The Society Constitution (P Exh 6) is explicit on the matter. Besides, the Defendants' earlier correspondence with the International Society contained in P Exh 9 and 12 constitute an admission of the affiliation and role and of the international Society.
 29. The expulsion of the 1st Defendant from Society and the removal of all the Defendants as trustees was long communicated to them (See P Exh 3 and 11). There is no evidence that they challenged the removal, but instead, they seem to have carried on as if nothing had happened, hence necessitating this suit. In that regard, the Plaintiffs adduced minutes of a purported special meeting held on April 16, 2016 wherein the Defendants purported to bring on board new Trustees and members to replace the 2nd and 3rd Defendants while retaining the 1st Defendant in his position as trustee. (P Exh 5).
 30. It appears inconceivable, given the demonstrated relationship between the Society and the Trust, that a trustee expelled from the membership of the Society or removed from the position of trustee for alleged mismanagement of assets of the Trust could continue to occupy the position of a Trustee in respect of the Trust supposedly because the trustees' tenure was unlimited. Besides, on account of the 1st Defendant not having testified, his affidavit depositions remained no more than untested averments that are of little, if any, probative value.
 31. Flowing from the above, and in the absence of any rebuttal evidence to the contrary, I am satisfied that on a balance of probability, the Plaintiffs have demonstrated through credible evidence that they are the rightful Trustees following the removal of the 1st to 3rd Defendants. Hence any decisions made by the Defendants after their removal are illegal. I am equally satisfied as a result, that the 4th Defendant ought to have registered the Plaintiffs as the newly appointed Trustees upon request but failed to do so. Consequently, I find that the Plaintiffs have proved their case against the 1st, 2nd, and 4th Defendants jointly and severally.
 32. Concerning the second issue for determination, and based on the findings above, I am satisfied that the Plaintiffs are entitled to the following orders which are hereby granted: -
 - a. A permanent prohibitory injunction restraining the 1st and 2nd Defendants from acting as and/or purporting to act as the Trustees of the Trust herein.
 - b. An order directing the 1st and 2nd Defendants to vacate office with immediate effect and to hand over all official documents, seal of the Trust and the office to the Plaintiffs herein being the newly elected Trustees of the Trust pursuant to the election of the international office of the Trust.
 - c. An order directing the 1st and 2nd Defendants to hand over the original Certificate of Incorporation and the Official Seal of the Trust forthwith to the Plaintiffs.



- d. An order directing the 4th Defendant to forthwith certify and register the appointment of the 1st, 2nd, 3rd, and 4th Plaintiffs as the new and only Trustees of the Trust.

33. The respective parties will bear their own costs in the matter.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF APRIL 2023.

C MEOLI

JUDGE

In the presence of:

N/A for the Plaintiffs

N/A for the Defendants

C/A: Carol

