



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 125 OF 2015 (ORIGINATING SUMMONS)

IN THE MATTER OF THE NJENGA KARUME TRUST REGISTERED TRUSTEES

-AND-

IN THE MATTER OF THE OF THE NJENGA KARUME TRUST

-AND-

IN THE MATTER OF THE TRUSTEES IN THE WILL OF JAMES NJENGA KARUME (DECEASED)

-BETWEEN-

ALBERT KIGERA KARUME.....1ST PLAINTIFF

SAMUEL WANJEMA KARUME.....2ND PLAINTIFF

LUCY WANJIRU KARUME..... 3RD PLAINTIFF

-VERSUS-

GEORGE NGUGI WAIRERI, HENRY WAIRERI KARUME, KUNGU

GATABAKI & MARGARET NDUTA KAMITHI (sued as

Trustees of THE NJENGA KARUME TRUST.....1STDEFENDANT

THE NJENGA KARUME TRUST

REGISTERED TRUSTEES.....2ND DEFENDANT

AND

GRACE NJOKI NJENGA KARUME.....1ST INTERESTED PARTY

JANE MUKUHI MATU.....2ND INTERESTED PARTY

TERESIAH NJERI KARUME.....3RD INTERESTED PARTY

DR. FRANSISCA WANJIKU KAHU.....4TH INTERESTED PARTY

KENNETH WATHUGI KARUME.....5TH INTERESTED PARTY

DR.MICHELLE WARIARA KARUME.....6TH INTERESTED PARTY

MICHELLE WARIARA KARUME.....7TH INTERESTED PARTY

MORRIS WAGACHIRE KARUME.....8TH INTERESTED PARTY

JUDGMENT

1. **ALBERT KIGERA KARUME, SAMUEL WANJEMA KARUME AND LUCY WANJIRU KARUME** are the plaintiffs in this suit. They are all children of the deceased Njenga Karume (NK) and are also beneficiaries of the Njenga Karume Trust (NKT). They instituted this suit by way of Originating Summons dated 25.03.2015 pursuant to, among other provisions of the law, Order 37 Rules 1,2,11,13 and 14 of the Civil Procedure Rules (2010), the Trustees Act Cap 167 of the laws of Kenya and the Trustees (Perpetual Succession) Act Cap 164 of the Laws of Kenya.

2. The 1st defendants are **GEORGE NGUGI WAIRERI, HENRY WAIRERI KARUME, and KUNG'U GATABAKI & MARGARET NDUTA KAMITHI**. They are all jointly and severally sued as Trustees of **THE NJENGA KARUME TRUST**.

3. The 2nd Defendant is the Njenga Karume Trust Registered Trustees.

4. In the Originating Summons, the plaintiffs /Applicants prayed for determination of the following questions:

1. There be a declaration that the interests of the plaintiffs and the beneficiaries under Njenga Karume Trust and the Njenga Karume Trust Registered Trustees would be served best by the removal of Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Margaret Nduta Kamithi as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees and James Raymond Njenga as an observer;

2. Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Margaret Nduta Kamithi be replaced as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees by any other three (3) beneficiaries of the Njenga Karume Trust.

3. There be a declaration that Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Margaret Nduta Kamithi in their capacity as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees have contributed to the wastage of the assets of the Njenga Karume Trust and diminishing of the income to the Njenga Karume Trust.

4. That this Honourable court do direct the Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees to account and/ or give an account of all transactions undertaken, payments made, and funds received and expenditures incurred on behalf of the Njenga Karume Trust since 24th February 2012.

5. Upon compliance with order (4) above, this Court do assess the losses and damages incurred and/ or suffered by the Njenga Karume Trust out of the acts and actions of the Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees.

6. This Honourable Court do find Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Margaret Nduta Kamithi personally liable to indemnify the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees for losses and damages suffered and/ or incurred by the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees arising from their acts and actions as Trustees and further direct them to indemnify the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees for all such losses.

7. This Honourable court do grant such further directions and orders as it may necessary under the circumstances of this case

8. The defendants do pay the costs of this cause.

5. The said Originating Summons is predicated on the supporting affidavit sworn by Albert Kigera Karume the 1st plaintiff herein (with the authority of the other Plaintiffs/applicants). It was deposed on behalf of all the plaintiffs/applicants their late father Hon. Njenga Karume (NK) executed the Declaration of Trust wherein he was the Founder and also Trustee and (NK) also appointed other Trustees and which Trust the objectives and the beneficiaries were well cited and identified.

6. The plaintiffs averred that the said Trustees had breached the provisions of the Trust and in summary, it was asserted in deposition that the Trustees had **breached the Trust Deed by**: appointing Mr. George Ngugi Waireri, Mrs. Margaret Nduta Kamithi and Mr. James Raymond Njenga as the Trust's Chairperson, new Trustee and a second observer respectively without notice or reference to the beneficiaries, regard to the provision of the Trust document or the Will and intention of the Founder nor that did they consult or discuss the said appointments with the beneficiaries; failing to account for proceeds of sale of *Land Reference Number 3644 to Kenyatta University Retirement Benefit Scheme* more so, Kenya Shillings two hundred and eighty Million (Kshs. 280,000,000/=) which had been left behind by the founder for purposes of settling of debts which would arise and to develop other of his properties (after the Trustees took over the control of the bank account); failing to communicate or inform the beneficiaries and the children of the deceased regarding most of the payments made from various bank accounts previously held by the deceased and/ or his companies and which accounts, the Trustees were in exclusive control; failing to

communicate or inform the beneficiaries as to the number of Bank Accounts opened by the Trustees after the demise of the founder or on how funds from the said accounts was used or the eventual recipients of the withdrawals or payments made therefrom; making direct payments to themselves from the said accounts more money than to the beneficiaries which was in breach of the Founder's intention; borrowing substantially from financial institutions without consulting the beneficiaries of the Trust instruments or considering the business interests of the entities used as securities and in breach of good corporate governance; incorporating The Njenga Karume Trust Registered Trustees (NKRT) (2nd Defendant) under the Trustees (Perpetual Succession) Act without involving the beneficiaries or informing them of the said incorporation; failing to involve the beneficiaries under the Trust in the businesses of the Founder; treating the beneficiaries with a lot of contempt; failing to completely meet the objectives of the Trust as set out by the Founder and expressly stated in the Declaration of Trust; participating in and superintending acts that had prejudiced the business of the Jacaranda Hotel and caused it to diminish in value to the prejudice of the Trust and the beneficiaries due to lack of experience in managing and running the hotel by the Defendants and the Team appointed; and commencing various transactions disposing off the assets of the Trust without notifying the beneficiaries and accounting for all such transactions.

7. Pursuant to the orders made on 3.12.2015 (directing, amongst others, that all parties to this suit including the Interested Parties who wished to respond to the Originating Summons do file and serve on all the other parties replying affidavits and documents intended to be relied upon at the hearing within 14 days), the Defendants herein filed their replying affidavits in opposition to the Originating Summons.

8. The Interested Parties too filed their affidavits with some supporting the Originating Summons whereas others sided with the Defendants in opposing the Originating Summons.

9. I shall first deal with the pleadings by the primary parties to the suit.

10. Opposing the suit herein, the defendants filed Replying affidavits as follows: Mr. GEORGE NGUGI WAIRERI (who was sued in his capacity as one of the Trustees) and Chairman of the (NKT) Trust filed his replying affidavit on 16.12.2015 (which affidavit was sworn the same day), denying all the averments and depositions in the Affidavit in support of the Originating Summons and further deposing, (amongst other depositions), that the Trustees had no ulterior personal pecuniary interests in the subject Trust; that the Trustees had given the beneficiaries regular updates of all the material progress in the management of the Trust and done everything humanely possible to discharge their duties regarding the welfare of the beneficiaries even under extremely difficult challenges; the Trust had disbursed a total of Kshs. 235,098,294/- for the benefit of the Trust beneficiaries and a further Kshs. 94,725,434/- in expenses incurred in running the Trust and thus the Trustees had been faithful, transparent and meticulous in managing the Trust; that the assets of the Trust had not been mismanaged and that neither had the Trustees been punishing some of the beneficiaries, as the 3rd plaintiff declined to receive her allowances so as to lend credence to the allegations that she was being discriminated against; that the 1st plaintiff by virtue of being the director of Jacaranda Hotel was present in numerous meetings which discussed renovation of the said Hotel and Pizza Inn and thus was aware of the same; that the law firm of Iseme Kamau & Maema (IKM) Advocates accounted for the funds paid to Cianda Estate Limited following the sale of *Land reference No. 3544 to Kenyatta University Retirement Benefit Scheme* and all the payments questioned by the plaintiffs as having been made to under paragraphs 32 to 35 were lawfully made; that the Trustees were under no statutory or fiduciary obligation to consult the beneficiaries on the day to day running of the Trust and that it would indeed undermine the very essence of corporate governance if they were to do so; that beneficiaries were made aware of the intentions to dispose of some non-core assets which included the assets that the plaintiffs complained of lack of knowledge on their disposal; that the appointment of the new Trustees was properly done in conformity with the Trust Deed's provisions; and, finally, that the Trustees remained committed, amicable and in respectful relations with the plaintiffs and other beneficiaries. As such, the plaintiff deponent prayed that the Originating Summons be dismissed.

11. **MARGARET NDUTA KAMITHI** (sued in her capacity as one of the Trustees) responded to the Originating Summons vide her replying Affidavit on 16.12.2015 (which affidavit was sworn on 14.12.2015) and where she denied the averments in the Affidavit in support of the Originating Summons and in doing so duplicated and/ or repeated the averments by **GEORGE NGUGI WAIRERI** and prayed that the Originating Summons be dismissed.

12. The 2nd defendant replied to the Originating Summons through the replying affidavit filed by **MR. KUNG'U GATABAKI** (one of the Trustees) on 16.12.2015 (which affidavit was sworn 16.11.2015) wherein he denied the averments in the Affidavit in support of the Originating Summons and further deposed that the founder was alert and fully in-charge of the first meeting at the time he was establishing the Trust and conversant with the terms of the Trust Deed and that he knew the founder having intended the Trust to act as a source of supplemental income for his family members and not as a substitute for personal responsibility, enterprise or industry in meeting daily living needs; that the founder during his lifetime had instructed transfer of his specific assets to the Trust and they belonged to the Trust; that after the death of the founder, the beneficiaries were briefed as to amongst other things, details of the Trust, the assets of the Trust and the principles that would guide the operations of the Trust and further that a beneficiary of the Trust sits on each Board of Directors of the three Holding Companies through which the Trust owns its assets, that the beneficiaries have also fully participated at meetings of the Trust which are held regularly and that the Trustees had given the beneficiaries regular updates of all the material progress in the management of the Trust; that the Trust had disbursed and/ or paid between 2012 and December 2014 Kshs. **235,098,294/=** on the welfare of the beneficiaries and spent a sum of Kshs 94,725,434/= in managing the Trust and as such, the Trustees had been very faithful, transparent and meticulous in the discharge of their duties; that the plaintiffs had deliberately misrepresented facts for the sole purpose of misleading the court into making orders favourable to them and that the Trustees harbored no ill intentions against any of the beneficiaries but only had the desire, as Trustees, to fulfill the intentions of the Founder in relation to the beneficiaries as set out in his written Will and the Trust; that the Trustees had accounted for the use of funds by the Trust and the law firm of Iseme Kamau and Maema Advocates fully accounted for the funds paid to Cianda Estate Limited following the sale of *Land reference No. 3544 to Kenyatta University Retirement Benefit Scheme* and further that the beneficiaries were made aware of the intentions to dispose of some non-core assets which included the assets the plaintiffs complained of lack of knowledge on their disposal and thus it was not correct to allege that they had no knowledge of the same; that the allowances made to the Trustees and the professional fees were justified and the Kshs. 69 Million allocated to purchase a residential house for the Founder's widow and minor son was done at the request of the widow so that she could relinquish her Cianda home (which was too large for the family and expensive to run) to be put to alternative use; that Pizza Gardens was not being wasted but had been closed due to dust and noise generated by the refurbishing of the same and further due to court orders served on the Trustees; that the Trustees had done everything humanly possible to discharge their duties regarding the welfare of beneficiaries even under the extremely difficult challenges and obstacles; that the Trust came up with policies such as school fees' policy due to limited resources at their disposal and which ensured the limited resources available under the aforesaid circumstances are deployed in the most effective and equitable manner and as such the expectation of

instantaneous improvement and settlement of all needs was unrealistic and could not be achieved by the removal of the Trustees and the sources of available funds to meet the obligations of the Trust to the beneficiaries had dwindled as a result of the effects of the ex-parte injunction orders in force and the Trustees had kept the beneficiaries aware of all the developments and financial state of the Trust and further that it was the plaintiffs who had interfered with the ability of the Trust to discharge its obligations by hindering access to funds by the Trustees so as to meet its obligations, including those of the beneficiaries and as such they could not assert or accuse the Trust of failure to meet the requirements of the beneficiaries; that Mr. George Waireri and Mrs. Margaret Kamithi were duly appointed in compliance with the provisions of the Trust Deed; that the beneficiaries were represented in the Trust by the Founder's eldest son, Henry Waireri and the widow; that the Trustees remained committed, amicable and in respectful relations with the plaintiffs and other beneficiaries. The deponent prayed that the Originating Summons be dismissed.

13. The Originating Summons was further opposed by **DR. FRANCISCA KAHIU** who in her replying affidavit she essentially supported the position stated by Mr. George Waireri and that of Mr. Kung'u Gatabaki for the 2nd defendant. In the said affidavit, Dr. Kahiu deposes that the founder was of sound mind at the time of executing the Declaration of Trust, that he was within his rights to identify and appoint the Trustees as they were and leaving out the plaintiffs despite their alleged qualifications; that the court choosing other people as Trustees would be akin to stepping into the shoes of the founder who was best placed to choose the people he considered fit; that the Trustees were managing the Trust in a good manner and were taking care of the beneficiaries until the Plaintiffs frustrated the Trust's ability to generate revenues by reason of the ex parte orders and adverse publicity; that the Trustees were not favoring some of the beneficiaries over others but had strived to meet all the beneficiaries' unique needs as and when they arose, and, lastly, that the Trust was never meant to be a substitute to beneficiaries' personal initiative and enterprise but intended to supplement the hard work on the part of the beneficiaries. The deponent prayed for the dismissal of the Plaintiffs' Originating Summons costs.

14. Pursuant to the leave granted by the Court vide the orders of 17.12.2015, **MORRIS WAGACHIRE KARUME** and **SAMUEL WANJEMA KARUME** filed further affidavits in response to the Replying Affidavits of George Ngugi Waireri and that of Kung'u Gatabaki basically denying the contentions in the said replying affidavits and reiterating the averments by the 1st plaintiff in the affidavit in support of the Originating Summons on the failure by the Trustees to fulfill the object of the Trust; failure to give status reports, updates and audited accounts; the Trust being in total control of the Holding Companies by virtue of being the majority shareholder; the Trustees owing a duty to account to the beneficiaries (at least once in a year) but which duty they had failed to discharge and/ or had produced accounts whose accounts and the figures indicated therein was never accompanied by sufficient supporting documents and hence a need for audited accounts so as to ascertain the true financial position and whether the Trustees had been faithful and meticulous in the discharge of their duties, Trustees and the employees of the companies under the Trust benefitting more as opposed to the actual beneficiaries; some of the beneficiaries dropping out of school and sick one undergoing untold suffering and stress due to frustrations by the Trustees, the appointment of Mr. George Ngugi Waireri and Margaret Nduta Kamithi being in breach of the express provisions of the Trust and failure to be notified of the sale of any assets by the Trustees as the Trustees.

15. Mr. Kung'u Gatabaki was granted leave to file a supplementary affidavit in response to the further affidavits (vide the orders of 25.01.2016). In the said supplementary affidavit, he reiterated his depositions contained in the replying affidavit to the effect that the founder was fluent in English as evidenced by the Hansard Report he attached; the plaintiffs were directors of the various Holding Companies which controlled the assets of the Trust and that they had been involved in the running of the Trust and that the Trustees had not discriminated against the beneficiaries.

16. Several interested parties who were originally enjoined to the suit also filed supporting or opposing affidavits to the Originating Summons but as earlier indicated, their respective positions either support or oppose the positions held by the plaintiffs and the defendants hence it would be a waste of time to reproduce their propositions or oppositions here.#

ORAL EVIDENCE

17. Pursuant to the orders of 17.12.2015 granting leave to the parties herein to cross examine the deponents of the various affidavits; the plaintiffs and defendants who were also deponents of various affidavits were called for cross examination. **PW1, ALBERT KIGERA KARUME** (a son of the deceased founder and beneficiary of the Trust adopted the affidavit in support of the Originating Summons together with the bundle of documents attached thereto as exhibits and also the affidavit in support of the Application for interim orders together with a bundle of documents attached thereto as his evidence in chief.

18. During cross examination by Senior Counsel **Mr. Oraro** for the 1st defendant, PW1 stated that that the deceased expressed himself in English which he understood well and that before he died he had tried to restructure his business empire through IKM Advocates and that (PW1) was appointed the Director to Jacaranda Holdings Ltd (by the deceased) but that he was not a Director in other companies though the Directors (of the other companies) only consulted him at times.

19. On the matter in question (Trust), PW1 stated in response that his father established a Trust but his opinion was that the signature on the Trust Deed was not his (father's) signature though he was not a handwriting expert. He however did not dispute the chairmanship of Hon. Justice Paul Kihara Kariuki nor the content of the Trust. Further that the deceased did not rank the objectives equally but the Trust was meant to be the sole source of income for purpose of meeting the first objective of the Trust. That despite the Trustees having discretion (pursuant to clause 10.10) and the power to appoint Trustees (under clause 4.1 of the Trust Deed), they were answerable to somebody and it was not in the sole discretion of Trustees to appoint beneficiaries as Trustees.

20. On the alleged irregular payments, PW1 stated that he was not aware of how Kshs. 280,000,000 left in an account with Co-operative bank by the founder was applied and in which account that money was deposited and further that he was not aware of who the signatories to Karume Investments Limited were, and neither did he know a Mr. L. Gachugia or whether he was an employee to Karume Investment Limited or whether the Directors of the said company were aware of the payments by the said company. Further, he stated that he was never notified of the payments made to Sichangi & Partners yet it was a matter of logic that he should have been informed as a beneficiary and neither did he have full information as to how Lytton Farm's account was managed by the Trustees.

21. PW1 however stated that he did not see any entry in the Lytton Farm account paid to the Trustees. He conceded that he was a signatory to the Jacaranda Hotel's account together with other directors and thus they controlled the account but were answerable to Trustees and further that the cheques to Mr. Gachugia were issued by the signatories. He stated that they received payments from Kacharoba Limited together with Samuel Wanjema and that the Trustees were not signatories to the account. He also stated that the borrowing from the G.T Bank was approved by a meeting in which he was sitting as a Director and which meeting the Trustees did not participate. According to PW1, Trustees were never involved in any corporate governance of the board. He stated that the refurbishment of Pizza Garden's tender was approved by the Board and was for the interest of the company. And finally, that though he relied fully on the Trust Deed in the filing of the suit, he still doubted whether the deceased founder and father signed the same.

22. On being cross examined by Mr. Macharia Advocate for the 2nd defendant, PW1 testified that he was not aware that 80% of total income was from the three Holding Companies and further that he was baffled by the PWC's reports and recommendations (that there were losses, business was conducted through borrowing consistently and that despite the borrowing, cash flow challenges persisted). That the said report recommended inclusion of external directors who should be professionally suitable with industry knowledge and pursuant to this, Jacaranda Holdings Limited recruited a Chief Executive Officer Mr. Killian Lugwe which recruitment he was part of.

23. Further, the plaintiff stated that the report was to the effect that the cash flow was negative and that it further called for renovation of the Hotels of the Trust, and he was a party to the approval of borrowing from GT Bank of Kshs 480,000,000. He however could not recall saying that Pizza Garden was being destroyed.

24. With to alleged irregular payments, he testified that he did not know L. Gachugia (who had been paid (as per paragraph 32 of his affidavit in support of summons) and further that he would not be opposed to lawyers being paid for the work of subdivision and transfer of land in favour of beneficiaries. That (from the payments disputed in his affidavit- paragraph 35), Richard was an employee of the company (Kacharoba) and was paid as such but that at the time of filing the suit, he had no sufficient information on all the employees.

25. When referred to the various compliance affidavits sworn by Mr. Gatabaki, as to the auditors' reports and financial statements for Jacaranda Holdings Limited, Forest Road Flats Ltd, Karume Investments Ltd, Gracia Ltd and Kacharoba Ltd, PW1 stated that he had no reason to doubt the audited accounts. He testified that he had an issue with his step mother moving far away from Cianda Home (which was a bigger house) as his deceased father wanted her to be close to Cianda not Runda. He testified that he disputed the payments made to him under Trustees' meeting expenses as he was not a Trustee and further that he did not recognize the audit report as valid as he did not know who did it. That he knew of the requirement that chairman of the Trust ought not to be a beneficiary of the Trust and further that they were briefed of how the estate and Trust would work after the demise of their father and also that assets would be sold.

26. In re-examination, PW1 stated that they were called to the offices of Iseme Kamau & Maema Advocates after the death of their father (the Founder) where the Will and the Trust Declaration was presented to them in power point form but that they were not allowed to interact with it and that neither were they given a copy of the Will. He added that not all the beneficiaries were present at the meeting. He further stated that no financial statements had been availed to the beneficiaries and that despite clause 10:11 calling upon the Trustees to prepare proper books of accounts and annual financial statements, and further, that the accounts in the compliance affidavit of Kung'u Gatabaki filed in court on **31.3.2016** prepared on 3.3.2016 had never been brought to their attention as beneficiaries and that neither had they had an opportunity to engage Trustees or question them on the same and this was also for the accounts for 2013, 2014 and 2015.

27. In addition, the plaintiff responded that since the death of the deceased Founder, they only met twice to be briefed of the Trust. That he received Kshs. 200,000 as a beneficiary until December 2014 when the Trustees said they had no money to pay allowances and that no meeting was called to inform them of the decision and as such the objective of maintenance had not been achieved.

28. On medical expenses, the plaintiff stated that the Trustees stopped paying medical expenses for the beneficiaries saying that there was no money and further wrote cheques for PW1's children's school fees but which cheques were dishonored and this also happened to the children of his brothers and further that they did not know how much the Trust had received from the 3 Holding Companies.

THE DEFENCE CASE

29. At the close of the plaintiff's case, the defendants called three witnesses in support of their case, which was premised on the Replying affidavits whose depositions I have reproduced hereinabove and which were adopted as the defence evidence in chief.

30. **DW1 GEORGE NGUGI WAIRERI** reiterated his depositions and on being cross examined by Mr. Munge advocate for the plaintiffs on the his appointment and on the appointment of Mrs. Margaret Kamithi as Trustees, he testified that that he was procedurally appointed and that his appointment arose from a resigning Trustee (Justice (now Retired) Paul Kihara Kariuki) who approached him through Iseme Kamau & Maema Advocates and which advocates sent him emails telling him that it was the wishes of Hon. Justice Kihara Kariuki that he (DW1) joined the Trust. He stated that his appointment documents were signed by Hon. Kihara, although he did not have the said documents in court and further that from the minutes he had seen, they never considered any beneficiaries as per clause 4.5 and that neither was there assessment of the beneficiaries. Further, he stated that when he became chair, the Trustees appointed Mrs. Margaret Nduta Kamithi but that there was no assessment of beneficiaries before her appointment and that neither was there voting during his appointment and that of Margaret Kamithi, as their appointment was by unanimous agreement, since there was no alternative person discussed for appointment.

31. DW1 further stated that the bank accounts had about Kshs. 1.2M but had reduced to less than Kshs. 1M but that the same could be accounted for. Questioned on the management of the Holding Companies, DW1 stated that the Trust did not get involved in the management of Holding Companies but that the Trustees appointed the Boards of Management (BoM) and who reported to the Trust.

32. He further stated that the Trust could also remove the BoM. He responded saying that the company management only gave them annual audited accounts. That if the companies did not have any accounts, then they (Trustees) had got no accounts and that they employed Price Waterhouse Coopers to carry out a forensic audit to establish the status of the company. That all the assets under Karume Holdings Limited were managed by the Board appointed by the Trust and that the Trust owned 99 shares (and the Founder one share.) Further, that he believed

that Mutithi House which was under lease by Karume Holdings was generating income and this was the same to Amani and Unity House (in Kiambu) which had tenants and further that Forest Road Flats Ltd ran Cianda House on Koinange Street and which house had tenants hence they were all generating income.

33. He further testified that were not able to enforce clause 6.1 of the Trust Deed in the year 2012, 2013, 2014 and 2015 as there was no profitability and further that registered Trust was registered two years after the death of the founder because they (Trustees) thought incorporation of the Trust would enable the Trust own properties but they did not share the decision with the beneficiaries. Further that Cianda farm (ran by Cianda Holdings Limited) was generating income. That under Gracia Ltd there were flats of about 50 apartments in Kiambu town, which were all for sale but others were leased out. That (in Cianda Holding Ltd) the Trust held 99 shares and the founder 1 share. That the company was for agricultural, tea and coffee and was a well-established business in 2012 when the founder died and though he could not tell the acreage of Cianda farm it was generating income. That Kacharoba farm Ltd was run by Cianda Estates and was also growing tea and coffee. However, he did not know how tea and coffee performed on the said farms. That though the two companies had been getting bonuses from Ngorongo and Karirana Tea factories he did not know the actual amount received and neither could he know the performance of the two farms in the year 2015 or the amount received (as bonuses). However, he testified that it was not true that he had no interest in the companies and how they were being run. Further that the Trust appointed boards to manage the companies and they (Trustees) usually relied on those boards to give feedback and they would get report on an annual basis and he would call a meeting to get the figures or call the chairman of the independently run companies.

34. On the sale of part of Cianda Ltd, which was part of the land sold to Kenyatta University Retirement Benefits Scheme, DW1 testified that the sale was conducted during the founder's lifetime and before he (DW1) became a Trustee and that he did not know that the deceased left debts to be settled or that he had intentions to settle them. (as per paragraph 7 of Ann's affidavit) he however stated that he was aware that debts were settled (as per the document which showed Cianda Estates Ltd sold land to settle debts).

35. On the money held in the various accounts, DW1 stated further in cross examination that he did not know what happened to the money which had been transferred to Kacharoba, totaling (Kshs. 555,279,975) and that he did not find such money in the Kacharoba accounts when he took over as Chair of the Trust and neither could he know whether there was over Ksh.200 million in Co-operative Bank. Further that he did not know how many bank accounts were there or the balances therein but most companies were in debt with Kenya Revenue Authority and that they employed a forensic auditor (PWC) to enable them know the status of the companies.

36. He further stated that for the years 2008-2012 the gross profit was about Kshs. 6 million but said that he did not know the actual performance for years 2012, 2014, 2014 and 2015. He admitted that the audit report by PWC was not shared with the beneficiaries. Further that the main banks for the three Holding Companies were Co-operative Bank, Equatorial Commercial Bank, Standard Chartered Bank and GT Bank and that though the founder was a shareholder in Jamii Bora Bank with shares worth about 42 million, no dividends had been paid from the said shares. Further that the founder had interests in K24 TV as shareholder but no income was flowing from there.

37. On meetings with the beneficiaries, DW1 stated that when he took over the Trust as Chairman, he was taken through the objectives of the Trust. Further, that it was critical to have a good relationship with the beneficiaries as the Trustees would not operate properly where there was a poor relationship with beneficiaries and that he had met some primary beneficiaries to understand the issues but the meetings turned out to be a shouting match between Trustees and the beneficiaries. The witness conceded that after coming to court, there were no formal meetings but that the Trustees were willing to continue engaging with the beneficiaries.

38. On maintaining the beneficiaries, the defendant stated that the Trust opted to give to all primary beneficiaries' monthly allowances, medical and housing where there was need and that when the Companies' operations slowed down, and due to debts, they could not get sufficient funds for maintenance. That they could give Kshs. 200,000/- per month but the minors were not getting the allowance and further that they did not consult the beneficiaries or seek their opinion (before setting this amount).

39. He stated further that as Trustees, they developed a Trust handbook (which was developed by IKM Advocates) and made it's signing a condition precedent to getting allowances, so that whoever did not sign the same could not get any allowances, although as Trustees they did not discuss with the beneficiaries upfront. He clarified that the Founder's grandchildren were not expected to sign the handbook.

40. The witness further stated that Lucy Wanjiru Karume disagreed with the handbook and she refused to sign the same therefore the Trustees did not give her that monthly allowance but that the rest were given allowances before and after signing the handbook. He stated further that albeit the Founder had not restricted in any way the expenditure, as Trustees they gave conditions and circumstances for withdrawal of the allowances, and that the beneficiary would state what they wanted and their written request would be presented to the Trustees for consideration upon which IKM Advocates would certify completeness of application and if additional documents are required, so as to keep order and style in the Trust, and ensure the companies make profits by controlling expenditure of beneficiaries. Trustees the witness reiterated that they stopped paying allowances to the beneficiaries and to themselves on Christmas day of 2014 and thus he denied the suggestion that the Trustees were earning any sitting allowances.

41. On being cross examined as to the discrepancies on the allowances paid to the beneficiaries, he testified that he could not tell why some of the beneficiaries got more money than other for instance why in 2013 Dr. Kahiui received Kshs. 3.180M but Lucy Karume received nothing, as opposed to Kshs. 200,000/- per month.

42. Answering questions on keeping accounts, DW1 testified that the Trust instructed an accountant in the office to prepare an accountability statement but the said statements were not signed. He added that the statements were prepared before December 2012.

43. Asked about his allowances, DW1 stated that he received allowances of Kshs 2.4 million because Trust Deed allowed it. He stated that the payments included responsibility allowances, sitting allowance and other meetings' expenses which included travel expenses.

44. He further stated that although the businesses were not doing well, they managed to pay some allowances from cash flow availed by the 3 Holding Companies and that no dividends were paid to the Trust since 2012 when he joined the Trust.

45. Responding to questions on **the objective of promotion of education**, DW1 stated that after the demise of the founder, the beneficiary children were taken to high cost schools and universities the moment they discovered that the Trust was to pay for their education, which action made the Trustees develop an education policy but conceded that they did not consult the beneficiaries on the same.
46. He added that in the said policy, they classified the beneficiaries into primary and secondary beneficiaries and further came up with maximum school fees (though the Trust instrument did not provide for maximum school fees for the beneficiaries), so as to reign in on costs to enable them (Trustees) manage the fees as the companies were not generating profits, but that they did not consult the first line parents (when creating the maximum fees payable). The defendant stated that IKM Advocates came up with the schools and fees payable where they gave a choice of six universities and 10 schools and which were the institutions where the children were attending before the Founder's demise, but that in doing so, no consultations with the children's parents were held, because, according to the defendants, they did not think that the consultations were important.
47. On paying fees for employee's children, DW1 stated that it was a term of employment of the Jacaranda Hotel's Chief Executive Officer that his children's school fees would be paid by the Trust and that they did not set the ceiling for the fees payable for the said children as they did to the fees payable for the children of the beneficiaries. Further that it did concern him that the beneficiaries had limitations but not an employee's children. The witness added that he was aware that children of the beneficiaries were chased from school but that it was because they were processing payment by way of sale of some assets and that the reasons for not paying the school fees for the beneficiaries' children were because the Trust had no money.
48. On the bounced school fees cheques, DW1 stated that the same were issued with expectation of a facility with Jamii Bora Bank but negotiations were not concluded, and that they later made good that payment and as such, he could not say that they had failed to meet the objective of education but only that there was no dividends coming from the Holding Companies as the said companies were not generating profit but they that the Trustees were in the process of selling one of the assets to take care of the companies' liabilities so as to make them start generating profits and hence pay dividends to the Trust so as to enable the Trust pay fees comfortably.
49. On the objective of **advancement in life of individual beneficiaries**, the defendant stated that Jane Mukuhi was given Kshs. 2 million to set up events' management company in 2012 and Kshs. 1.5m was given to Dr. Kahi for her medical facilities and further that Henry Waireri too was given the loan and Teresia Njeri was given Kshs. 1 million for sporting equipment for water sports in Mombasa and which advancements were loans payable with interest.
50. He further stated that they established medical covers in 2012 with UAP Insurance for the beneficiaries but that they were unable to service so they stopped it after 1 year but they later renewed the cover in 2016 after the sale of land (to Athi Water) but that they had been struggling to get funds for treatment which made them unable to cater for a grandchild who had cancer (Michelle Karume).
51. With regard to the beneficiary who was suffering from diabetes, DW1 testified that when the medical cover lapsed, they opened an account with the doctor and pharmacy for her to receive medication. That as such, he believed that the Trust had done their best and that they had provided accommodation for most beneficiaries.
52. On **advancement of business prospects and interests of the corporate entities** he testified that indeed they had not created any entity or Trust as envisaged (in the Trust document). That in Jacaranda Holdings Limited, they had completed purchase of plots in Naivasha and Maasai Mara. That in relation to Karume Holdings Limited, nothing had been purchased but the company was profitable and for Cianda Holdings Ltd there was no asset which had been purchased but there were sales which were in the process and that the company was breaking even.
53. On other objectives of the Trust, the defendant stated that they had not made any investment in relation to the application of the net income (under clause 6.1.1), that there had been no any net income for reinvestment in the 3 Holding Companies; that there had been no net profit to be reinvested in the Trust fund (pursuant to clause 6.12.4) and further that they had not created a Trust fund.
54. On sale of land to Kenyatta University, he testified that he did not know why the property was sold but he suspected it could be because the founder wanted to pay off his debts and that substantial part of that money went to pay debts. That Kshs. 60 M and Kshs. 73 M were paid out after the death of the founder by the Trustees but he believed that some money was used to pay the founder's medical bill with Karen Hospital though he could not tell how much and further that about Kshs. 100M was deposited at Equatorial Bank but every cent could be accounted for. Further, that the fixed deposit funds were withdrawn and expended to pay fees for the grandchildren.
55. On the Kshs. 480 Million borrowed from GT Bank, he testified that Jacaranda Hotel Westland's' title was charged to secure the borrowing so as to refurbish the hotel and that they did not seek opinion of the beneficiaries or children of the founder in doing so. Further, that the Trust approved the said borrowing and was paid to Jacaranda Holding Limited's account which was spent by the company and he believed that the money was expended in Indian Ocean Beach and upgrading of rooms at Jacaranda Hotel. He testified that the Declaration of Trust gave them powers to borrow provided that they were satisfied with the usefulness of the money and that he did not know how the Kshs. 555 million which had been received in Co-operative Bank from the Kacharoba Ltd was spent.
56. On the audit by PWC, he testified that the Trust called for the same and that they did not consult the beneficiaries and neither did they give the beneficiaries any report. That the audit was aimed at doing a forensic audit to give the true status of the 9 companies and that he believed that the final report was presented but the one in court was a draft report. That they did not share with beneficiaries the final report.
57. On the sale of assets of the Trust, he testified that the Limuru property was sold by Karume Holdings Ltd (who was the registered owner) and the beneficiaries were not involved or informed and the entire of the purchase price was paid (Kshs. 53M) which went to pay the Trust obligations including school fees. That the South C property was sold in 2014 after the founder's demise for Kshs. 35M and that they did not consult the beneficiaries before the sale and the proceeds were shared in the ratio of 50:50 between Karume Holding Company and the Trust pursuant to the decision by the said company for the Trust to meet some liabilities. That the Trust received more than 50% (Kshs. 28 million) and used it to meet its financial obligations of fees, medical etc.

58. On sale of Kiambu Sawmill (Kiambu/Municipality Block 1/254) he testified that Karume Investments Limited got the buyer on behalf of Karume Holdings Ltd and that the beneficiaries were never consulted over the sale. That the purchase price was Kshs. 59 M and the entire amount was paid and the proceeds were to be shared in the ratio of 50:50 between Karume Investments Limited and the Trust because of obligations and the amount received by the Trust was immediately paid towards children's fees.

59. The witness further stated that they had management accounts and audited accounts done in 2015 completed in 2016 but they did not give the audited accounts to the beneficiaries and neither had they brought them to court but if requested, the witness would be able to present them.

60. On the sale of Kacharoba to Athi Water, he testified that the purpose of the said sale was to fund and stabilize the Trust and that they had received about Kshs. 15 million from Cianda Holdings and the said amount was part of the expenditure of 30M as included in the compliance affidavit filed on 22.9.2016. That out of the said amount, he was paid travel expenses (Kshs.734, 000 on 27/4/2016 and 13/7/2016) and that they did not pay the monthly maintenance to the beneficiaries but only paid upkeep. He further testified that they did not consult any beneficiaries (or their lawyers) before sale of Kacharoba even on the portion to be sold. However, that they would account for every cent as all the documents were available and he could present them if directed to do so as per prayer 4 of the Originating Summons. Further, that they intended to sell shares at Asteriks Holdings Ltd so as to make the Trust fluid but the sale was never made.

61. On the sale of Gracia apartments, he testified that there was sale of 32 apartments before the founder's death and was done by Karume Holdings Ltd (which company owned the apartments).

62. On the spending from the accounts held by the Trust, he testified that the Trust had one account at Bank of Africa and that they had other dormant accounts and a fixed deposit account at Spire Bank. That he was a signatory at Jamii Bora Bank together with Kung'u Gatabaki and from which account they borrowed (on 8/10/2014) Kshs. 33 million as a loan and they paid themselves responsibility allowances, paid IKM Advocates for legal services and further paid for accounting services and that the statement clearly indicated the purposes for expenditure and which loan they charged the shares held at the bank and the Trust was paying the interest, but that they did not consult the beneficiaries (before the said borrowing).

63. He further stated that they borrowed (on 7/11/2014) Kshs.25M for purchase of the Rights issue and they did not consult beneficiaries and which money they transferred to Bank of Africa in four tranches same day and which money met obligations of the Trust. He however stated that they did not have the accounts/statements of the Bank of Africa. He denied that they had any other hidden accounts and maintained in his testimony that they spent the money on financial obligations of the Trust and that they indeed told the beneficiaries that there was no money and further that he had not maintained the beneficiaries since December 2014. The witness denied having received (together with Mr. Kung'u Gatabaki) 95% of net income as there was no net income received. He stated that the Trust was operating except where there was an injunction.

64. On the relationship between the Trustees and the beneficiaries, he conceded that indeed, the Trustees and beneficiaries were not in talking terms and that majority of first line beneficiaries and the majority of the grandchildren who were adults were seeking the removal of Trustees and that their status was therefore stale. As such, he stated that as Trustees, they were unable to discharge their mandate but he could not resign as he had not wasted or mismanaged the Trust.

65. Upon being cross examined by Mr. Peter King'ara Advocate for the 3rd and 8th interested parties, DW1 testified that Teresiah Njeri Karume was his niece and that she used to receive rent from a house in Kiambu from Karume Holdings (during the lifetime of the founder) but that he could not tell whether she was still receiving any rents. He denied stopping her from receiving rent and stated that Karume Holdings' management must have stopped it.

66. For Lucy Wanjiru Mukuhi, he testified that she owned homes and they were to build her a home worth about 15 million as directed by her father (founder) but they had not bought her a house and that although they had offered her an apartment at Kiambu, she wanted a stand-alone house. He however conceded that he did not have evidence that they offered her an apartment.

67. On the Trust issue, he testified that it was his view that the Trust had succeeded in articulating wishes of the founder but affected by the court cases. Further, that the boards of the subsidiary companies were responsible to the Trust which formed them and were answerable to the Trust. In addition, he stated that in 2015 they (Trust) made a loss and that also there were losses in Jacaranda Holdings in 2015 but they were optimistic that they would make profits in the year 2016 as they had hired highly trained professionals.

68. On the spending by the Trust, he testified that Mr. Killian Lugwe (the CEO of Jacaranda Holdings) was being paid Kshs. 1.2 million monthly and further that the Trust would pay his children's fees of about Kshs. 2 million per term. That they did not pay school fees for any other directors of Jacaranda Holdings Ltd. That they got consultants whom they paid to perform certain services and included auditors and lawyers and further that the executors of the Will and the Directors could get paid compensation (sitting allowances). That he did not know how much Cianda Holdings collected per month but there was coffee also and which generated the same amount as profit.

69. He stated that they paid Teresiah's medical bill after borrowing money from Cianda Holding Ltd. Further that she was housed at Indian Ocean Beach and she received allowances until it was suspended. He stated that they had never given Maurice Wagachire (Teresiah's son) any direct benefit except through his mother (Teresia). The witness stated that they had nonetheless advanced him a facility to advance his business in ocean sport (Kshs. 1 M) but he was unable to repay and the Trust repaid the loan. He admitted that it was the founder's wishes that Teresia be built for a house worth Ksh.15M but they were unable to keep that promise.

70. On his appointment as Trustee, he testified that the Trust document specified how the Trustees were to be appointed and relieved and that clause 4.5 of the Declaration talked of preference in appointment of Trustees. That he was not aware of a meeting by Trustees/chair or any assessment of the said beneficiaries for appointment as a Trustee and that he was appointed by the Trustees, an appointment which he accepted (though there were many people who could do his job as chair of the Trust better than him including the Plaintiffs /Applicants) and that although the Trust was a revocable private Trust, he was not sure who could revoke the same in the absence of the Founder but that he

believed that the court has power to revoke the Trust.

71. The witness further responded that he knew that in Kenya it is an offence to issue a bouncing cheque. He conceded that he signed the cheque for Kshs.360,000 which was returned due to insufficient funds and further that he signed a cheque for Kshs.200,000 and which was returned unpaid as the process (credit facility) that was to provide funds for the cheques did not materialize with Jamii Bora Bank, but that the Managing Director of the Bank had agreed to give them funds but he did not have any written agreement on the same.

72. On the allowances received, he testified that he became a Trustee in May 2012 and further that the Trust Deed never provided for payment of responsibility allowance but he was immediately paid Kshs. 1.2 M and also got sitting allowances of Kshs. 1M but that he was not being paid by the Holding Companies. He stated that in 2012 he personally received Kshs. 2.4M and was also paid travel reimbursements which he received for every trip and which costs varied depending on the season. He stated that in 2013, he received responsibility allowance of Kshs. 2.35M and Kshs. 1.1M as sitting allowances and reimbursed for travel allowance and that he was paid by the Trust all the allowances which were approved by the full board and that he was one of the signatories to the account which paid the allowances.

73. On the expenses on the legal fees, he testified that in 2014, over Kshs. 40 million was paid to lawyers which included IKM and Maina Ng'ang'a & Co Advocates for an apartment purchase as they did the conveyance for the purchase of apartment C7 but he did not know the cost of the apartment C7 at Evergreen Properties Ltd and further that he could not tell the exact amount of legal fees paid to IKM.

74. He stated that he did not know where Kshs. 300,000,000 was kept, adding that the money was carried forward to meet financial obligations the following year, and that that was before he became the chairperson of the Trust and that it was possible to give a breakdown but he was unable to do so.

75. The witness also stated that the Kshs. 64,300,000 was purchase of shares within Jamii Bora Bank and that the shares were still available as they had not been sold and the Maasai Mara property still belonged to Jacaranda Holdings Limited. He further stated that Malindi and Diani properties were still in existence.

76. On Maurice Wagachire's child's paternity issue, the witness stated that they ordered for a DNA test which were disqualified and that they did not provide for the said son as Wagachire's and the son refused to present themselves for sampling of DNA hence the Trustees had no other evidence to show that the child was not a grandchild of the Founder.

77. On Teresiah's issue, he testified that he was aware that she was receiving rent from Kiambu House as her income but that the rent was stopped upon which she was provided with a monthly allowance instead and that the property belonged to the company as the law required that rental income goes to the company that is why they replaced Kshs.200,000 for rental income and they paid her until the Trust could not pay allowances. He denied the suggestion that they paid Teresiah's bills after coming to court saying the money was remitted to her by Mpesa and which money was in excess of Kshs.100,000 and which was as per her requests. He conceded that he had not filed in court any Mpesa account statements.

78. He further testified that the companies had not paid dividends but the companies were turning around and breaking even but Karume Holdings Ltd declared Kshs. 10m dividends to shareholders although he did not have documents showing dividends so declared and that if they sold 200 acres of Kacharoba Farm, they would be able to pay all debts and the companies would be profitable.

79. Responding on the PWC forensic audit report, the defendant testified that it showed that the companies were not doing well during the lifetime of the founder and that there was no surplus money left after sale of land to Kenyatta University, nonetheless, PWC found about Kshs. 280 million still available in the books.

80. When the witness was recalled for cross examination by Mr. Macharia for the 2nd defendant (pursuant to orders the court had earlier made reserving the 2nd defendant's counsel leave to cross examine DW1,) he testified that he had never been mentioned adversely by Credit Reference Bureau (CRB) in Kenya or elsewhere and that neither had there been any threat to auction of any of his property by anybody and that he did not seek to be appointed as Trustee and neither had he lobbied or campaigned to be appointed Trustee. That he was not a Trustee initially but later found that he had been appointed by the founder as Trustee and executor of his will and that there was a process which led to his appointment as a chair of the Trust and thus any request for his removal or retirement had followed due process to enable him exit. That their priority as Trustees was to look at individual beneficiaries before going into their allowances and that they first did put in place a medical insurance for beneficiaries to manage costs of medical care except in one year when they paid only half year and for the remaining 6 months they used their resources to cater for the medical expenses. That the Trust Deed mentioned that the Trustees be paid allowances and reimbursements including travel allowances and when they fell short of funds, they postponed payment of allowances and that they had made direct reimbursements to themselves lastly in December 2015.

81. On the appointment of Mrs. Margaret Nduta Kamithi, he testified that the said appointment had been informed by many circumstances as she was very close to the Founder and was the guardian appointed for his last born young son Emmanuel and that she was his close sister.

82. As to his influence on where Green Tea would be delivered by the respective subsidiary companies, he testified that he had no relationship with Karirana Tea Factory and only knew shareholders and that the decision as to where Green Tea would be transported was made by Holding Companies that is Cianda and Kacharoba subsidiaries and that as Trustees, they would never be involved in the choice of where the Green Tea would be delivered.

83. On the audit by PWC, he testified that they appointed the auditors who reported that the companies were in red but there was great potential for the 3 Holding Companies and as such, they directed the 3 Holding Companies to develop a strategy of reviving the companies and they (Trustees) appointed experienced managers to manage the companies and subsidiaries.

84. He stated further that they agreed to dispose of one asset to meet the needs of other companies but owing to resistance by beneficiaries,

they suspended the education policy although not all children had finished schools and or colleges. He added that when funds become available they would be ready to take the children to best schools but at the time, the Trustees encouraged local training/ schooling. Further, that they had even advanced money to beneficiaries and guaranteed them loans to start their own businesses. Further that the sale of land to Kenyatta University was done by the founder and the residue fully accounted for by the Trustees. The defendant reiterated that Trustees had complied with clause 10.1.1 of the Trust Declaration (which required keeping records and books of accounts), and that they were keeping proper books of accounts in compliance with the companies Act and further that they had audited, signed books of accounts for 2016.

85. DW1 further stated that it was not true that they favoured corporate beneficiaries against natural beneficiaries as they had paid fees and medical expenses for children and beneficiaries while supporting corporates to meet their obligations, but that the needs of corporates came last and that the Trustees could not demand for release of money to the beneficiaries but in extreme cases the beneficiaries would borrow from the Trust without being charged interest, and refund later.

86. The defendant denied the allegation that the Trustees had micromanaged the Holding Companies, as the said companies had their Boards of Directors where in every Board, a son of the Founder sits as a Board member (that is Albert Karume in Jacaranda Holdings, Samuel Wanjema Karume in Cianda Holding and Samuel Karume in Karume Holding), and that these sons always got first-hand information. Further, that there were open channels of communication between the Trust and beneficiaries and that initially they created a channel of communication but when the relationship was strained, they stopped and would only communicate based on the beneficiaries' needs.

87. On the bounced cheques, DW1 testified that they approached Jamii Bora Bank for an overdraft and that they issued the cheques believing the money had been credited but due to delay in charging a Kiambu property which was the condition for the overdraft, the cheques bounced.

88. On the sale of Gracia Apartments, the witness testified that they were owned by Karume Holdings who borrowed money from KCB to construct the same, sell and repay the loan and get profit and that no preferential sale took place as the Trustees would pay the market price rate and that he was not aware of any sale below the market price.

89. **DW2, MR. KUNGU GATABAKI** adopted his affidavit evidence sworn on 16/12/2015 in reply to the Originating Summons, the supplementary affidavit filed on 17/2/2016 and the compliance affidavits sworn on 31/3/2016, on 23/5/2016 and that sworn on 13/2/2017 as his evidence in chief. The depositions in the said affidavit have been reproduced in the pleadings above.

90. On being cross examined by Mr. Peter King'ara counsel for the 2nd, 3rd, 7th and 8th interested parties), the witness stated that he knew that the Founder had huge debts and that he helped him pay most of these debts and that at the time of his death, the Founder left a debt of about Kshs.300 million and further, that he had debts including statutory debts. He stated that the Trustees had received a demand notice from Kenya Revenue Authority for Kshs. 160 million in taxes for Jacaranda Holdings which he did not know before and which issue Jacaranda Holdings Limited through its Board was negotiating with the Kenya Revenue Authority and which issue he had not intervened as he was not authorized to intervene in the Board matters of the Holding Companies.

91. He stated that they upheld the vision of the Founder and ideas of the Trust until there was a disruption by beneficiaries going to court and that PWC told them what they had inherited and they started reorganizing the Boards of Directors to strategize on what to do but they could not do more due to the court injunctions. Further, that by the time this suit was instituted, they had sold a house in South C, a property in Kiambu and a property in Limuru and they were in the process of selling part of Kacharoba Farm and that the money (gotten from the said sales) was fully accounted for and they paid school fees and paid beneficiaries but when they sold the said properties, they did not consult the beneficiaries.

92. He also stated that the injunction was issued because beneficiaries raised issues about the Trust but that at the time of coming to court, the Trustees were paying beneficiaries' maintenance but stopped when the injunction came as they ran out of money.

93. He denied the suggestion by counsel that the Trust collected rent and said that the rents were collected by Holding Companies but that he did not know how much they collected as rent. He stated that not all the Holding Companies and that it was only Karume Holdings Ltd, Cianda House, Limuru Property, Sagana and Gracia Apartment. He conceded that he knew as a fact that the Founder had said that the Trust buy a house for Teresia, a wish which they did not honour but that they would have succeeded in the Trust if there were no injunctions.

94. The witness maintained that they had accounted for all the assets and denied a suggestion that as Trustees, they had stolen any of the assets. Further, he stated that the Trust had not failed but would have succeeded if there were no injunctions from court. He stated that he was not aware that they had to consult the beneficiaries on the sales.

95. The witness further stated that they paid accountancy fees of Kshs. 2.8M which had accrued for a long period of about 2 years and also paid for audit to different firms such as Kshs. 1M paid to Muigai. He added that they paid legal and professional fees Kshs. 40,366,474 but he did not recall to whom the said payment was made and further that they paid Kshs. 1.2M as audit fees but he could not tell whom they paid the money and that he would check to establish the agreed rates that they negotiated with the auditors and that at no time did they steal from the Trust.

96. On whether the Trustees had or kept a Register of Assets of the Trust, the witness stated that they did not have a register of assets and that he knew how much the Companies owed but he could not tell it off-head, and that the Trust had an oversight role over the Holding Companies but not their management and that as an individual, he did not earn from the Holding Companies but he used to get sitting allowance of Ksh.75,000 per sitting and the Trust further gave them a responsibility allowance. He stated that an accountant ran accounts of the Trust where him and DW1 signed cheques.

97. DW2 stated further that the Trust had accounts with Bank of Africa, Jamii Bora Bank, Cooperative Bank, Diamond Trust Bank, but that he could not remember whether they had an account with Barclays Bank of Kenya. Further, that the Trust did not have accounts with Commercial Bank of Africa (CBA) or Eco Bank.

98. On cross examination by Mr. Munge counsel for the plaintiffs, DW2 stated that he had known the Founder at a personal level for between 30-40 years and he related with him after DW2's Father had appointed the founder) as the guardian to their (DW2's) family and that he knew the founder's children personally and he had a good relationship with the said children.

99. DW2 further stated that he was the Chairman of Jacaranda Holdings Ltd, Karume Holdings Ltd and Indian Ocean Beach where he used to be paid sitting allowances as chairman (consolidated allowance of about Kshs. 200,000) and that they received reports from each company. That he also sat as chair of Karume Investments Ltd but that after the formation of the Trust, he was not appointed as chairman of the Trust.

100. Concerning the sale of Trust property to one William Kung'u Kinyanjui, DW2 stated in cross examination that the said purchaser was his relative (distant cousin) and that he disclosed that fact to the Trustees although there was no minute evidencing the disclosure. He denied being a director of Cianda Holdings which owned Kacharoba, as its shareholding is made up of the Trust (99%) and the founder (1%). He further stated that he did not know that his cousin had applied to buy Kacharoba farm and that the survey of the same was done by 2M Associates Ltd. He denied being aware that one Catherine Kinyanjui (wife to the purchaser) was a director in that company. He admitted that Mr. Kinyanjui had made a down payment of 10% of the purchase price and was given possession of the purchased portion as he had agreed to pay 10% more and other expenses and that he had explained on how the proceeds of sale were applied. Further, DW2 stated that the said purchaser was paid for the felled trees after he made a verbal demand and that the trees were valued by a forester and that the verbal demand was made to the Holding company and relayed to them as a Trust.

101. DW2 further stated that he was present in the meeting where the terms of Declaration of Trust were read and which was the first meeting with the founder over the Trust. He added that the desire of the founder was to maintain the well-being of the individual beneficiaries which meant advancement in life, education, health and that this included holding assets, and that the terms thereof were explained to the beneficiaries by Mr. James Kamau (from IKM Advocates) and he signed the same.

102. DW2 further stated in response to further questioning by Mr. Munge advocate that the founder beseeched the Trustees to help meet the objectives of the Trust through proper execution of their powers and that as Trustees, they had done their best to achieve the said objectives save for the challenges that they had with the beneficiaries within 6-7 months after the demise of the founder, which challenges they had tried to resolve before this suit was filed. He also stated that he was aware that the beneficiaries requested for a copy of the will and Declaration of Trust but the Trustees were advised by their advocates not to release the same as the release could only have come from the advocates themselves. He admitted that the Trust was a shareholder in the Holding Companies and got dividends from the said Holding Companies.

103. It was his further response that before the demise of the deceased, he, the founder provided for the beneficiaries and that he entrusted the Trust to provide for the said beneficiaries his death and further that maintenance meant providing for the beneficiaries depending on their individual needs. He added that the Trustees had assisted beneficiaries to set up their businesses but they had not set up businesses for them nor set up any profession for beneficiaries. That they did set an allowance of Ksh.200,000 for each beneficiary monthly which continued until beneficiaries interrupted the Trust by going to court and stopped the companies which generated income.

104. On why the Trustees never gave Lucy Karume her monthly allowance, DW2 stated that Lucy Karume refused to accept the arrangements made by the Trustees for each beneficiary to sign the Charter and that the Trust document had a clause instructing that any beneficiaries who went against the wishes of the founder and interrupted the Trustees then they would not be entitled to any maintenance. The witness stated that he could not tell why Dr. Kahiua was given Ksh.1.4M while Albert Kigera was given Ksh.200, 000 and that he could not remember whether they paid Lucy Karume Ksh.56, 000. He denied the suggestion by counsel that Trustees were discriminating those who opposed them and favoured those who supported them.

105. On being questioned why Mr. Killian Lugwe's children were being paid for their school fees of about Kshs. 2 million per term by the Trust, he stated that that was in the contract of employment.

106. On school fees issues, he stated that he signed the cheques which bounced which were for fees to beneficiaries and further that he was aware of the pending arrears but that the Trust performance depended on the availability of funds and that they were waiting for the funds from the sale of Kacharoba farm to utilize the money to pay fees. According to the witness, the objectives of the Trust were to be met from the net income of the Holding Companies but the said companies were not making sufficient profit to meet the objectives. He added that the founder only paid for school fees for grandchildren if their parents asked for help from him.

107. On advancement of life, the witness stated that they had come up with a medical cover with UAP Insurance which was on until this suit was filed in court and that nonetheless, the Trust continued providing medical care for the beneficiaries.

108. On the performance of the Holding Companies, he testified that under Cianda Holding Ltd, they had never acquired a single asset but they had improved on some of the assets under the holding company and that they did not involve themselves in the running of Hotels. He stated that it was the responsibilities of the Boards as the Trustees' work was only overview. For Karume Holdings, he testified that they had not acquired any assets but it collected rent from Cianda building in town, although he did not know the exact rental income collected and further, that in November 2014, a property was sold (by Karume Holdings) and that the beneficiaries were never informed. He stated that the proceeds of sale were used to pay the arrears of education needs of beneficiaries. Further, that Karume Holdings had sold South C property for Ksh.35 million but what they owed the schools and hospitals exceeded the proceeds of sale. He could also not remember whether they paid legal fees to IKM who acted for them in the said sale. He stated that Gracia Apartments were sold bit by bit and that Margaret Kamithi Nduta also bought an apartment but he did not know whether she paid for the same. Further that when this matter was filed (in 2015), accounts had not been audited for some years.

109. On the appointment of the Trustees, he testified that after the demise of the founder, they discussed in the meeting of Trustees and it was agreed on advise of Hon. Justice Paul Kihara that the chairman of the Trust be Mr. Waireri who had been appointed by the deceased founder as executor of his will and that they evaluated the beneficiaries but he had no minutes of any meeting where they agreed as such. And that they brought in Margaret Kamithi as a balancing act as she was the sister and Emmanuel's (founder's last born child) guardian in the event of

his mother being away, and that they looked at the bigger picture. He testified that they did not carry out any assessment.

110. On being cross examined by Miss Kimere Advocate DW2 stated, concerning the various payments as per his statement of accounts attached to his replying affidavit, that, in the year 2012, the Trust had received about Kenya shillings nine million from Jacaranda Holdings Ltd. He however conceded that he had not mentioned this amount in his replying affidavit and that they paid Kshs. 12,277,130 for a forensic audit by PWC out of the income received of Kshs. 273 million. He further conceded that he did not mention Kshs 7 million having been received from Jacaranda Holdings to the Trust. On being referred to his compliance affidavits, DW2 stated that he did not have the invoice for the Ksh.160, 000 owed to Azali CPS.

111. He further responded that the Trust document was prepared by IKM Advocates and that the Trust offices were based at IKM offices and that the Trust document provided that in case of a dispute, IKM would be the ones to determine it. Further, that IKM represented the Trust in the properties that had been sold but he did not know of the firms which the Holding Companies would instruct and neither of the firm which represented Karume Holdings Limited in the sale of Gracia Apartments and neither did he know the firm which the founder used in the sale of land to Kenyatta University. He stated that Samuel Wanjema Karume asked IKM for an account of proceeds for sale of Kenyatta University land but that DW2 was not involved.

112. On the housing issue, DW2 stated that they had bought a house for the 1st interested party and that the other beneficiaries had not asked for a house. That they offered to buy a home for Teresia at Gracia Apartments and further that Michelle and Ken Karume lived in the South C house since the 1980s, a house which the Trustees sold and relocated Ken Karume to Gracia apartments.

113. On being reexamined by Mr. Macharia Advocate, DW2 stated that the process of appointing the Trustees was informed by the founder's wishes and after they established who was a very close person to the founder and that after Justice Paul Kihara left the Trust, they considered the closest persons to the founder to join the Trust hence George Waireri and the founder's sister Margaret Kamithi, as the founder had appointed her to be his son's guardian in the event that the son's mother was not available. He insisted that Margaret Kamithi was very close to the founder.

114. On the relationship between the Trustees and Holding Companies, DW2 stated that the Trust was a shareholder of the Holding Companies of all assets and managed all the assets of the Holding Companies and that the Trust was not to interfere with management of the Holding Companies and that the Holding Companies were to produce resources to manage Trust beneficiaries in that they would declare dividends and pay to the Trust and therefore the Trust could not go and collect money from Holding Companies without an acceptable arrangement to the Kenya Revenue Authority. That they could only borrow money from the Holding Companies and any proceeds of sale of properties for the Holding Companies has to go to the companies first before it was loaned to the Trust or paid as dividend.

115. On the sale of Kenyatta University land, DW2 stated that the said land was sold by the founder but not the Trustees and that it was sold so as to pay large outstanding debts but that the Trustees were not involved or at all. That they had produced documents that showed which money went where and how the money was spent.

116. On maintenance of the beneficiaries vis a vis payment of allowances to the Trustees, DW2 denied the suggestion that the Trustees had abandoned the beneficiaries and paid themselves huge allowances. He added that they had paid for medical expenses and school fees for the beneficiaries. Further that the Trustees' allowances were made by the founder himself where he paid the Trustees Kshs.75,000/= per sitting and Kshs. 100,000/= to the chairman of the Trust. He stated that the founder made provisions for the Trustees to manage the Trust and he (DW2) used to earn Kshs.200,000 as chair of Holding Companies. He denied that he ever earned any extra money as the Trust Deed allowed him and others to earn an allowance which was reasonable.

117. When re-examined further, he testified that the corporate beneficiaries generated money which they used to give to individual beneficiaries, paid Trustees and managed the Trust and that it was the issue of sustainability of the Trust as designed by the founder which was not favouring corporate beneficiaries. He stated that they had put in place policies to manage the Trust as the money from the Holding Companies was by way of dividends and hence maintenance depended on the money that the Trustees received from the Holding Companies. He stated further that the policy helped them meet the wishes of the founder as it guided the beneficiaries on the limit of the maintenance.

118. On buying the house for Mrs. Karume, DW2 stated that Trustees did not favour her but that they considered her as the wife of the founder who had a small child both living in a coffee plantation and so they wanted to secure them to live among other people. Therefore, at her request, they bought her a house in Runda. He added that the founder himself had provided accommodation for other beneficiaries and that they provided each beneficiary according to their needs.

119. On being asked further, the witness stated that the Trust was a shareholder of property managed by Holding Companies while external experienced directors managed the companies who in turn appointed competent managers to manage the companies. He stated that the accounts of Holding Companies were the business of the Boards of those companies and that the Trust only received accounts at the Annual General Meetings when the Trust attended as a shareholder.

120. On the appointment of Mr. Killian Lugwe, DW2 stated that he was recruited by Jacaranda Holdings on agreed terms and that the Trustees did not recruit him but he (DW2) was happy to know that Mr. Lugwe had been recruited.

121. On the sale of Gracia Apartments, he testified that Mrs. Kamithi and a lawyer partner at IKM also bought apartments and that all including beneficiaries were invited to buy the apartments and that what was important was that they paid the price which other buyers were paying as they did not get special prices.

122. On the sale of Kacharoba Farm to William Kinyanjui and the survey of the said land for subdivisions, he testified that the same was advertised and conducted by Knight Frank who invited bidders and William Kinyanjui though his distant cousin did bid for the land though

he was not aware of his bid until much later and that he did not conspire with him to bid for the land. Further, that he did not know the land surveyor until he was asked about her by Mr. Munge (Counsel for the plaintiffs). That they extended the contract as a result of the need to get all the documents registered at the Ministry of Lands and further, that due to the fact that the beneficiaries had placed caveats at the Lands' office to block the sale so the Trustees had to extend the term of the contract. He added that the purchaser was compensated for the trees cut on the farm after they discussed and agreed on the same and that the trees were valued by a professional forester and that they allowed him to take possession of the same. He stated that he declared to the Trustees that the buyer was his relative but it was the Board of Kacharoba (which has Samuel Wanjema a beneficiary and Trustee as well) who approved the sale hence there was no conflict of interest.

123. On the alleged discrimination between beneficiaries, DW2 stated that they paid beneficiaries according to their individual needs and this was pursuant to the discretionary power conferred by clause 6.1.3 of the Trust Deed on the Trustees in allocations to be beneficiaries. That Teresia Karume and Michelle had special health needs but Trustees had gone an extra mile in dealing with issues of health such as Trustees personally paying for Michelle's expenses to the USA but that they were providing money as and when it was needed as would be advised by specialist doctors, but there was a limit as to what they had as Trustees.

124. On accessing of the Trust Deed, he testified that the custodian of the legal documents were the lawyers who drafted the Declaration of Trust and so the Trustees did not hide any information and that if a beneficiary wanted to access the Trust Deed, they needed to approach the lawyers who would advise him on who would access it and who would not. That however, a presentation was also made on the workings of the Trust.

125. On the allowances earned by DW2, he stated that it was not true that the Trustees had taken money from the Trust to buy houses and cars and that what he earned was only the sitting allowance from the Trust and the sitting allowance from sittings in the executive committee of a Board in charge of Holding Companies and which payment was in accordance with clause 17 of the Declaration of Trust

126. **DW3, MRS. MARGARET NDUTA KAMITHI** adopted her replying affidavit sworn on 14/12/2015 as her evidence in chief. And was cross examined on the same. On being cross examined by Mr. Peter King'ara Advocate, she stated that she was a sister to the founder and that the founder had left her in-charge of his child Emmanuel. That she did not know that the Trust provided for the appointment of one of the founder's children when one of the Trustees resigned. That she was paid Kshs. 75,000/= per sitting and that as Trustees, they could be called upon to attend meetings once or twice or four times if there was more work and further that she had not counted the total amount she had been paid but it was possible that she had been paid up to 2.5 million. She stated that she was not aware that there were debts or that some accounts had been closed or frozen by Kenya Revenue Authority, (KRA). Further that she did not know how much Cianda House fetched in terms of rent or the amount which went to the children from the rent proceeds from the said House and further that it was not true that she accepted an appointment because she did not know anything so that other Trustees could steal from the Trust. She stated that they had not directed that tea be taken to Karirana Tea factory as it was the discretion of the tea managers on where to sell the same. She stated further that the South C House was sold but she could not remember for how much though the proceeds of the sale was used for medical and school fees and that the same could be accounted for.

127. **Concerning hotels, DW3 stated that** the hotels had issues though she could not tell the value of the said hotels. She added that Village Inn was closed and that she was aware that it was vandalized and that they agreed to give it to Lucy Karume to run the same and she was to pay rent on the same but that the said hotel was never reopened.

128. DW3 further stated that Teresia had been given an apartment in Kiambu and that the Trust collected rent and banked money in Njeri's (Teresiah's) account and that Karume Holdings was in-charge, and that Teresia was aware that she was given for maintenance while the rest of the money was banked by Karume Holding Limited.

129. On being cross examined by Mr. Musyoka Counsel for the plaintiffs, DW3 stated that she was very close to the founder and that she was appointed as a Trustee after his death in 2012 and that the chairman of the Trust called her. That she did not know of the Trust until she was appointed the Trustee in July 2012 and that she did not see the minutes of her appointment. That the Trust had many advocates and was represented by Mr. Kamau Karori who worked with IKM and that they had not paid legal fees but they would pay the same when they got money and that the legal fees came from the Trust.

130. On the Holding Companies, she testified that the Trust had 99 shares and could appoint Directors of the Boards running the companies. That the companies were independent and so the Trustees did not micromanage the same but they reported to them (Trustees) and the Trustees attended meetings with them and that she could not remember the number of times they had met.

131. DW3 stated that as Trustees, they were to cater for beneficiaries and that they discussed the welfare issues of the children who needed fees, medical care and general welfare. That initially, they had meetings with beneficiaries but when they filed the instant case and (the beneficiaries) started abusing the Trustees, they never met them for discussions on the workings of the Trust. That she was in good relationship with all the children of the deceased and that though they had abused her, she had no grudges against them.

132. On the Trust accounts, she testified that she could see the audited accounts for the company and the Trust but the 2016 accounts were not complete and that she could not recall whether the beneficiaries had been given the 2015 and 2014 accounts and that they gave to beneficiaries earlier accounts but not the recent accounts.

133. On the debt owed by Jacaranda Holdings, she testified that there were 3 Jacaranda Hotels (Mombasa, Nairobi and Elementaita) and that the debt owed from the said hotels were age old from the time of the founder but the Kshs. 90M owed by Jacaranda Mombasa to KRA and Kshs. 243M owed by Jacaranda Nairobi and the Kshs. 4 M owed by Lake Elementaita all covered their tenure.

134. She stated that the beneficiaries were the owners of the Trust and that they had the right to know the status but the Trustees had no money to clear debts and that they could go to the secretaries to get all details. Further, she stated that the beneficiaries knew the position because all the companies had directors who managed the companies and the children were represented in the Board of Directors so they watched over the property.

135. On being cross examined by Miss Kimere, DW3 testified that on the Kshs. 300M left by the founder in a fixed deposit account, they used part of the money to clear his hospital bill, school fees and that they also bought a house for Lucy Karume. That they were to build a house for Albert but he never brought drawings. For Teresia, she testified that she had two houses in Kiambu and Gracia but she was living in Mombasa.

136. On the sale of the South C house, she testified that the founder's grandchildren lived in the said house for over 10 years and that they were given two houses in Gracia.

137. On her buying of an apartment in Gracia, she testified that she bought the same at Kshs. 7.5million in 2014 and paid all the money, which money went to the Bank. She stated that the money that came from the sale of Kacharoba was utilized and that they gave priority to medical and education.

138. In re-examination, DW3 stated that she was a business lady with four supermarkets and that she schooled at Karunga Primary School in 1957 and later went to a secretarial college for her shorthand course and later worked with Unga Limited as a secretary around 1966, where she left and was employed in Kenwood Factory of Pines before the founder called her to work in his company and be in-charge. She further stated that she understood all the businesses of the founder as she was very close to him and that Village Inn had been closed because there was no business and that they did not refuse Lucy to run it only that they asked her to rent it at a fee.

139. On the provision of houses for the beneficiaries, she testified that Njeri had a house at Kiambu but that the father (founder) wanted her to be given one house at Gracia and when the same was given to her and set aside, she never occupied the same but she lived in Mombasa Indian Ocean. For Jane, she testified that she lived in Jacaranda Hotel Nairobi and that the Trustees had bought a house for her but she left it. For Albert, she testified that he had a plot in Runda and if he brought building plans, they would build a house for him. Regarding James Kihato, she testified that he was arrested and they focused on his case so they did not have money for fees and that they had spent Kshs. 4.5M on his lawyers. However, she stated that Trustees they were ready to pay his school fees if he brought a letter for fees from college.

SUBMISSIONS

140. At the close of the defence hearing, the parties filed written submissions with authorities, which they highlights orally, isolating the issues which they called upon the court to determine.

141. **The plaintiffs filed** joint submissions with the 2nd, 3rd and 5th to 8th interested parties in which submissions they invited the court to consider the following issues:

a. Whether the Trustees have failed in their duties under the Trust?

b. Whether the Trustees should be removed and replaced with other Trustees?

c. Whether the Njenga Karume Trust Registered Trustees was properly incorporated?

d. Whether the Law Firm of Iseme Kamau & Maema Advocates (hereinafter "IKM") are unfit and should have been disqualified from acting for the Trust or any party in the suit?

e. Whether some provisions of the Declaration of Trust are unlawful, null and void?

f. Whether the Trustees have acted in Contempt of orders issued by the Court?

142. On the first issue (**whether the Trustees have failed in their duties under the Trust**) it was submitted that the Trustees owed beneficiaries some duties which included **the duty of efficient management of the Trust; fiduciary duties; duty to act impartially; duty to act by majority or unanimously; and duty to keep and render accounts** and which duties (it was submitted) that the Trustees had breached.

143. On the alleged breach of the **duty of efficient management of the Trust** it was submitted that despite it being a trite law that the Trustees ought to take responsibility to ensure that the Trust was managed in an efficient and economic manner the Trustees had breached this duty for the reasons that they **failed to know the terms of the Trust and failed to obey the said terms** in that the appointment of the new Trustees (Mr. George Ngugi Waireri and Mrs. Margaret Nduta Kamithi) and James Raymond Njenga did not adhere to the terms of the Trust (Clause 4.5 therein) and the wishes of the founder. That this was despite the Trustees having the duty to know and understand the terms of the Trust and to strictly adhere and faithfully carry out those terms. Further, it was submitted that the Trustees (in breach of the duty of efficient management of the Trust) had **failed to realize the objects of Trust** as was provided under clause 3 of the Declaration of the Trust and as a result of which failure, the relationship between the Trustees and individual beneficiaries had significantly and irretrievably broken down.

144. It was the plaintiffs' and 2nd, 3rd and 5th to 8th interested parties' submissions that the Trustees failed in the objective of **promoting the education** (of the beneficiaries) as they started putting unnecessary conditions and subsequently refused to give the educational support to the beneficiaries and further came up with the an education policy without consulting beneficiaries and which policy (though could be well intentioned), significantly limited ability of beneficiaries to access education by amongst other things, classifying the beneficiaries and giving some beneficiaries preference over the others, limiting the rights of beneficiaries to access education on the basis of their age amongst others. It was further submitted that the Trustees had continuously been frustrating the beneficiaries by refusing or delaying to pay their school fees and other associated expenses (case in point being failure by the Trustees to pay school fees for Dr. Michelle Karume, beneficiaries studying in Nairobi International Schools, Gems Cambridge School and Braeburn School, beneficiaries studying in Universities abroad; for Hannah

Njeri Kihato while studying in United Kingdom, refusal by the Trust to support Emmy Wariara in paying part of her admission fees and failure to pay school fees for Curtis Kigera), which failure, was a deliberate act or an act of negligence that was aimed at frustrating the beneficiaries as could be seen from the response by the Trust's Chairperson to the request by Mr. Samuel Wanjema for assistance in paying school fees. This failure, according to the plaintiffs and 2nd, 3rd and 5th to 8th interested parties, was despite the Trustees managing huge assets under the Trust and was further despite the court making an order (on 2.05.2016) that the Trustees do ensure payment of fees for beneficiaries from the rent collected from Cianda House.

145. On **maintenance and advancement in life** it was submitted that the Trustees had breached the objective and obligation in that they delayed medical funds for Michelle Wariara (a beneficiary) who was suffering from cancer of the chest and the neck and thus making her frequently miss critical check-ups, medical sessions and crucial medication; frustrated the 3rd Interested Party's efforts to seek for medical funds from the Trust to enable her access proper treatment/ medical care and further rejecting her requests to the Trustees to increase her medical cover and this led to the worsening of her diabetic condition which further led to kidney failure; withdrew the medical scheme for the beneficiaries without considering their plight; stopped the 3rd Interested Party from receiving rent from the rental properties in Kiambu/ Block 137, a property gifted to her by the Founder and her only source of income; sold the South C property (Land Reference No. 209/5236) without consulting or notifying the beneficiaries (Joseph Karume's children) who were living in the premises and a place they called home; declined Lucy Karume's request to be allowed to run Village Inn despite them closing the same since 2014 (and hence closing one source of revenue without any justification); and further failed to give the 3rd Plaintiff any maintenance allowance from the Trust as she refused to sign the document that was to indemnify the Trustees from their actions.

146. Regarding promotion of the **advancement of business interests of the corporate beneficiaries**, it was jointly submitted that the same had not been achieved for the reasons that the Trustees had not acquired any asset for the Trust since their appointment but had only reduced the assets of the Trust by selling numerous assets and that neither had they given an inventory of all assets they had sold or rendered account of the funds received from the sales; that two major businesses *to wit* Pizza Garden and Village Inn located in Kiambu had been closed under the management of the Trustees although Pizza Garden had been later reopened and renamed but the Trustees did not render an account of the amount incurred in the renovation; that most of other companies under the Trust were struggling to meet their financial obligations and were making losses due to gross mismanagement and wastage and failure to ensure that qualified staff were employed.

147. It was further jointly submitted that the Trustees had borrowed huge amounts of money from banks leaving the companies under the Trust with huge liabilities, failed to pay the taxes due to Kenya Revenue Authority and which led to the Trust incurring substantial penalties and interests and this made the Trust risk losing valuable assets if KRA levied distress and this was despite the Trustees having collected VAT from sales and PAYE from employees.

148. Further, it was jointly submitted that the Trustees (**in breach of the duty of efficient management of the Trust**) had **failed to apply the net income in accordance with the provisions of the Declaration of Trust** as was provided under clause 6 of the Declaration of Trust and further failed to prepare any accounts for the Trust in order for them to even know the net income of the Trust and as such, they did not know the net income of the Trust. It was further submitted that no amount had been advanced to educate needy and bright children as per clause 6.1.1 and further that the Trustees were unable to explain or identify the amount the Trust had received from the Holding Companies, how the amount had been administered and which purpose the amount had been utilized for and which was a clear case of gross mismanagement and breach of the terms of the Trust warranting their removal.

149. **On the alleged breach of the fiduciary duties, it was submitted that though** the Trustees were fiduciaries and as such required to act at all times for the sole benefit and interest of the beneficiaries, to carry out the Trust according to the terms of the Trust, to act in the highest degree of fidelity and utmost good faith, to act honestly and in good faith, not to place himself in a position or situation where his personal interests conflict with those of Trust beneficiaries and not to profit from his fiduciary position, (as was held by the Supreme Court of India in **Central Board of Sec. Education –vs- Aditya Bandopadhyay & Ors** and further as was held in **Fuller Family Holdings LLC –vs- Northern Trust Company**), the Trustees herein had breached the **duty to act in good faith and in the best interest of the beneficiaries in the management of the Trust or taking care of the needs of the Beneficiaries**. It was submitted that despite the Trust and the Holding Companies of the Trust having continuous income and funds in their respective Bank accounts, the Trustees had frequently refused to support the beneficiaries' urgent needs such in payment of their respective school fees which led to the beneficiaries being sent out of school and being denied a chance to sit for exams and this was despite the Trust paying on time, fees for employees' children who studied in the same schools like the beneficiaries.

150. Further submissions were that the Trustees further delayed medical funds for beneficiaries with serious ailments such as cancer, high blood pressure and kidney failure; denied the beneficiaries who were opposed to the management of the Trust the benefits entitled to them unilaterally and in breach of the objectives of the Trust and further treated beneficiaries opposed to them with bad faith and contempt. It was submitted that the Trustees further breached this duty as they sold the South C property (Land Reference No. 209/5236) without consulting or notifying the beneficiaries who were living in the said house that had been given to them by the Founder of the Trust during his lifetime and further failed to disclose how they received the proceeds of the sale or how it was utilized; and closing down Village Inn despite one of the beneficiaries offering to run the said premises and to pay rent on the same.

151. The plaintiffs further submitted jointly with supporting Interested parties that as part of their fiduciary duty, the Trustees breached their **duty to avoid conflicts of interests and duty not to profit from the Trust** in that Margaret Nduta Kamithi, a Trustee had admitted having bought an apartment from Gracia Apartment which is part of the Trust property and that there was no evidence produced by the Trustees or even Margaret Kamithi to demonstrate any payment for the said apartment. Further, that Mr. Kung'u Gatabaki's cousin one William Kungu Kinyanjui was the person behind the entity which bought Kacharoba property and which relationship he did not disclose to the Trustees (or tender any evidence of the disclosure if any) and which relationship made the purchaser to benefit from the said purchase. It was further submitted that the Trustees paid themselves huge amounts as monthly allowances as opposed to the allowed Kshs. 200,000 and thus making them benefit more than the beneficiaries and thus profiting from the Trust.

152. **On the duty to act impartially**, the plaintiffs submitted that the Trustees had breached their duty to administer the affairs of the Trust impartially and had acted in an impartial manner towards the beneficiaries in that they had failed to pay the 3rd Plaintiff her monthly allowances just because she was opposed to the terms of Trust Handbook and further disbursed more money to beneficiaries who supported

the Trustees than those who demanded accountability and opposed the mismanagement of the Trust and which discrepancies the Trustees could not explain.

153. **On the duty to act by majority/ unanimously**, it was submitted that the Trustees had failed to act unanimously and further failed to consult the beneficiaries, which was in breach of the Trust Deed (clause 10.6) and that the Chairperson of the Trust, had been making unilateral decisions without involving the other Trustees such as application for contempt and reporting children of the Founder in a police station.

154. **On the duty to keep and render accounts**, it was submitted that the Trustees had failed to keep proper books of accounts, financial statements and records of all the affairs of the Trust since 2012 and further cause the same to be audited and which was in breach of the express provisions of the Trust Deed (clause 10.11). It was further submitted that the accounts filed by Mr. Gatabaki could not be Trusted as they had been tailor-made for the proceedings herein and further, that some of the accounts were incomplete.

155. It was submitted that the Trustees had not done any valuation of the assets of the Holding Companies or even ascertained the liabilities of the Trust or even confirmed or substantiated the Bank accounts operated by the Trust. As the Trustees held the Trust property for the benefit of the beneficiaries, it was submitted that the beneficiaries were justified in seeking an account to be rendered as it was from the said accounts that they would be able to enforce the terms of the Trust and hold the Trustee accountable for misuse of the Trust funds. It was further submitted that the Trustees never informed the beneficiaries on the running of the Trust.

156. It was further submitted that by the failure of the Trustees on their duties (above) they had contributed to the wastage of the assets under the Trust and therefore they ought to be removed.

157. On the second issue (**whether the Trustees should be removed and replaced with other Trustees**), it was submitted that this court was bestowed with the powers to appoint new Trustees in substitution of existing Trustees under section 42 of the Trustees Act (Cap167 Laws of Kenya), if it is expedient to do so and that this was part of its inherent jurisdiction to supervise the due administration of Trusts and that it was expedient to remove the Trustees herein; replace them with new Trustees so as to safeguard the assets of the Trust; ensure that the Trust is properly administered; ensure that the Trust is ran in the best interest of the beneficiaries; and to ensure that the harmonious operation of the Trust was not at a standstill as a result of the hostility between the Trustees and majority of the beneficiaries. Reliance was placed on **Angus –vs- Emmott & Another (2010)Ch, Letterstedt –vs- Broers (1884) 9 App Cas 371** and the Australian case of **Miller v Cameron [1936] HCA 13; (1936) 54 CLR 572 (29 April 1936)**.

158. In the instant case, it was submitted that the Trustees having grossly mismanaged the Trust and led to loss of the Trust property; and being unable to account for income from assets under the Trust; and having not put in place mechanisms to safeguard the Trust assets, they ought to be removed.

159. On the third issue (**whether Njenga Karume Trust Registered Trustees-2nd defendant was properly incorporated**), it was submitted that this entity was incorporated after the demise of the founder under the provisions of Trustees (Perpetual Succession) Act Cap. 164 Laws of Kenya and by virtue of the provisions of section 3(1) of the Act, the Minister had no powers to register the same as a Trust. It was submitted that *under the provisions of the said Act, a Trust could only be incorporated for the religious, educational, literary, scientific, social, athletic or charitable purpose, or the Trustees of a pension fund or provident fund* and which was not the case in the Trust in question (which was a revocable private Trust formed for the benefit of the Founder's beneficiaries).

160. Further it was submitted that the Njenga Karume Trust Registered Trustees having perpetual succession, it would continue to do business even after the expiry of the 75 years as envisaged by the founder and until its wound up.

161. On the fourth issue (**whether Iseme Kamau & Maema Advocates should be declared unfit to act for the Trust**), it was submitted that this issue arose from the application dated 20.05.2015 and which was to be determined together with the Originating Summons and that by virtue of the provisions of the Trust (clauses 4.8, 10.5, 10.7 and 16), the firm of IKM were supposed to be arbiters and custodians of the Njenga Karume Trust and further witnesses of the Trust in case a dispute arose. It was submitted that, however, in disregard of the pivotal position that they hold in the Trust, IKM has participated in the proceedings in this Court and represented the 4th Interested Party and further taken assertive and definite stand against the Plaintiffs and the supporting beneficiaries.

162. On the fifth issue (**whether some clauses of the Declaration of Trust were unlawful and void**), it was submitted that clause 6.1.3.1 of the Declaration of Trust negated the whole purpose of a Trust as it gave the Trustees absolute and unchallengeable discretion on a number of issues. It was submitted that this discretion ought not to override the Trustee's duty to act in fairness and impartiality when dealing with the beneficiaries and thus was against the general principles of fairness and impartiality and thus null and void. The court was referred to the case of **Rowds –vs- Bibb (1900) 2 Ch 107**.

163. Further submissions was that Clause 6.1.3.2 was an ouster clause as it ousted the jurisdiction of the Court to intervene in situations where it was of the view that the Trustees had exercised their discretion unfairly and which was contrary to the basic principles of equity and did put the Trustees in a position where they were not accountable to the beneficiaries and further, that it limited the beneficiaries' right to access justice as guaranteed under Article 48 of the Constitution and was further discriminatory and contrary to Article 27(1) of the Constitution which guarantees equality of all persons before the law, equal protection of all persons and equal benefit of the law for all persons.

164. It was further submitted that the proviso to clause 10.11 which deemed the books, records and financial statements of the Trust as confidential was null and void and that the court ought to nullify the same on the grounds that it attempted to create a Trust without any accountability mechanism, which was against the principles of Trust and equity law which requires the Trustees to be held accountable by the beneficiaries whom they manage the Trust for. The court was referred to the decision of the Court of Special Appeals of Maryland in **Jacob -vs- Davis, 128 Md. App. 433 (1999)**.

165. The 1st defendants in their submissions identified the following issues of determination:

- a) *Whether the appointment of the Trustees was proper*
- b) *Whether Njenga Karume Trust Registered Trustees was properly incorporated*
- c) *Whether the Trustees have met the objectives of the Trust;*
 - a. *Whether the education policy*
 - b. *Maintenance and advancement of life*
- d) *Whether the Trustees have failed to apply the net income in accordance with the Trust*
- e) *Impartiality among different beneficiaries*
- f) *Whether the Trustees are bound by the requirement that the decision must be made by the majority*
- g) *Whether the Trustees have failed to render accounts*
- h) *Whether the sales of property are in accordance with the terms of the Declaration of Trust; and*
- i) *Jurisdiction of the court to remove the Trustees*

166. **On the first issue (whether the appointment of the Trustees was proper)**, it was submitted that the Trustees were appointed as per the provisions of clause 4 of the Trust Deed and that the said appointment was bona fide and not out of malice and a manifestation of the founder's intentions to ensure that an independent person who was not a beneficiary presided over the Trust and that so long as the Trustees exercised their powers and discretion with no improper motive, their exercise of power could not be challenged. The court was referred to the case of **Re Londonderry's Settlement Peat & Others -vs- Welsh (1964) 3 All ER 855 (at page 862 paragraphs E and G)**.

167. **On the second issue (whether Njenga Karume Trust Registered Trustees was properly incorporated)**, it was submitted that section 3 of the Trustees (Perpetual Succession Act) Cap 164 of the laws of Kenya granted the Minister a discretion to grant a certificate under the Act on such condition as he may deem fit and that once granted, it could only be dissolved under section 16 of the Act or by the court setting aside the Minister's decision on a Judicial Review application and thus the plaintiffs' recourse was to proceed against the Minister to set aside the incorporation but further that the said prayer had been introduced in the submissions and ought to fail.

168. **On the third issue of whether the Trust had met its objectives**, it was submitted that the structure of the founder's estate was asset rich but deficient on liquidity and that the liquidity could only be injected either by borrowing or disposal of some assets (of the Trust) and further that the intention of the founder was to grant each beneficiary an *inter vivos* gift and further gift by way of his will and thus the Trust was supplemental. It was submitted that therefore, the attempt by the beneficiaries to ensure that all assets of the Trust were placed in their hands would defeat the wishes of the founder and which objectives. It was further submitted that the Trustees had exercised their powers in the interests of the beneficiaries to the best extent possible by setting up a medical cover and education policy despite the hard financial times faced by the Trust. Counsel further submitted that the mere existence of the Trust could not act as a ticket for the beneficiaries not to pull their weight in meeting their obligations in ensuring that their children attended schools.

169. It was further submitted that there was evidence that the Trustees had chipped in from their personal reserves to ensure that the beneficiaries who needed medical attention among other maintenance were attended to. As such, it was submitted that the Trustees had met the objective of promoting education by applying the only available resources and even going out of their ways to ensure that even in the absence of funds, they made necessary arrangements to ensure that the beneficiaries (children) remained in school.

170. **On the objective of maintenance and advancement of life**, it was submitted that the Trustees did promote the advancement of life of the beneficiaries by giving grants and loans to the beneficiaries (such as Jane Mukuhi, Dr. Kahiu and Teresiah Njeri), guaranteeing the said loans and eventually paying the said loans.

171. **On the fourth issue (whether the Trustees had failed to apply the net income in accordance with the Trust)**, it was submitted that there was no net income to be applied/distributed as the subsidiary companies were never making any profit.

172. **On the issue of impartiality among different beneficiaries**, it was submitted that the Trust Deed gave them Trustees absolute and unchallengeable discretion with regard to maintaining parity between the beneficiaries (under 6.1.3.1, 6.1.3.2 and 10.10) and thus the Trustees' actions were protected by the Trust Deed. The court was referred to the case of **Re Londonderry's Settlement (supra)** and further to the English case of **Edge -vs- Pension Ombudsman (1999) 4 All ER 546 (at 566)**.

173. **On whether the Trustees were bound by the requirement that the decision must be made by the majority**, it was submitted that whereas it was a common law duty for the Trustees to act unanimously, the Trust Deed (under clause 4.5) allowed the Trustees to act by a majority vote.

174. **On whether the Trustees have failed to render accounts**, it was submitted that the Trustees had availed the accounts in addition to other information including in various compliance affidavits filed in this suit and further that the beneficiaries had been informed of all the

happenings with various meetings convened at the IKM offices and in the various family meetings as had been testified by DW1.

175. **On whether the Trustees committed any breach in the sale of various properties of the Trust**, it was submitted that the charge of the Jacaranda Hotels Ltd was approved by directors of the board of the said hotel and which the 1st plaintiff was a member and further that the borrowing was allowed by the Declaration of Trust. It was further submitted that the purchase of Gracia apartment by Margaret Kamithi was not in breach of the Trust as it had nothing to do with the Trust.

176. Further it was submitted that the Declaration of Trust allowed the reimbursement for the expenses incurred by the Trustees in the running of the Trust and the advances they had made and which advancement constituted a first charge on the Trust property. The court was referred to the decisions in **Chief Comr of Stamp Duties –vs- Buckel (1995) 38 NSWLR 54** and **Scott –vs- Milne (1884) 25 Ch. D 710**.

177. **On the jurisdiction of the court to remove the Trustees**, it was submitted that the beneficiaries had not demonstrated in what way the Trustees had acted improperly and further that the power to exclude any beneficiary who would otherwise benefit but was so disruptive of the affairs of the Trust or who was wasteful to the Trust Fund was bestowed upon the Trustees by the Declaration of Trust (clause 6.1.3.2). Further, it was submitted that the discretion to remove the Trustees was limited to instances where the Trustees exercised their discretion improperly or where they failed to exercise the said discretion and which discretion should seldom be interfered with. In this regards the court was referred to the case of **Tempest -vs- Lord Camoys (1882) 21 Ch. D 571, Re Norrington Brindley –vs- Partridge (1879-80) XIII LR 654** amongst others.

178. **The 2nd defendant in their submissions** identified 3 issues for determination namely:

i. Whether the Plaintiffs have made out a case for the removal of Mr. Ngugi Waireri, Mr. Kung'u Gatabaki and Mrs. Kamithi as Trustees and Mr. James Raymond Njenga as an Observer and their replacement by any other 3 Beneficiaries.

ii. Whether the Plaintiffs have established that the Trustees have contributed to the wastage of the assets of the Njenga Karume Trust.

iii. Whether the Plaintiffs have proved that the current Trustees have failed in the management of the Trust in catering for the needs of the individual and corporate beneficiaries

179. **On the first issue (removal of Trustees)** it was submitted that prayer 2 of the Originating Summons which sought removal of the Trustees and replacement with the plaintiffs was contrary to the intentions of the founder who had made a provision in the Trust Deed that the Chairman of the Trust ought not to be a beneficiary and further that the appointment of Mr. Ngugi Waireri and Mrs. Margaret Kamithi as Trustees was done in accordance with the Trust Deed (clause 4). Further that the said Trustees could not be replaced with the plaintiffs as it was clear that the founder did not include the plaintiffs as Trustees and putting them as such would be contrary to the intentions of the founder. It was further submitted that the Chairman of the Trust ought not to be a Beneficiary and which was to ensure that there would always be accountability in the administration of the Trust, which situation would not be achieved where all the Beneficiaries of the Trust, who are all related to one another become Trustees. The Court was referred to the South African Supreme Court of Appeal decision in **Land & Agricultural Bank of South Africa –vs- Parker & Others 2005 (2) SA 77 (SCA)** in support of this contention.

180. It was further submitted that there was no proof of dishonesty that had been brought forth by the Trustees to show that the Trustees had mismanaged, wasted or in any way failed to administer the Trust as per the wishes of the Founder as had been set out in the Trust Deed but that what was evident was that there was mutual mistrust and hatred between the Trustees and the Beneficiaries and as the plaintiffs had not made a case for the removal of Trustees according to the standards set by the Supreme Court of Appeal of South Africa in the case of **Gowar –vs- Gowar (149/2015) [2016] ZASCA 101**, that there was no conduct on the part of the Trustees that had imperilled the Trust property or its proper administration. It was further submitted that a strained relationship between the Trustees and beneficiaries was no reason for removal of Trustees. Reference was made to the Nigeria Supreme Court's decision in **Theophilus Adebayo Doherty & Another –vs- Richard Ade Doherty, S.C. 600/1965** in support of this argument.

181. **On the 2nd issue (no proof by the plaintiffs that the Trustees had contributed to the wastage of the assets of the Trust)**, it was submitted that the proceeds of sale of L.R. No. 3644 to the Trustees of Kenyatta University Staff Retirement Benefit Scheme were well accounted for as per the replying affidavits of the Trustees and further that the Trustees had involved the beneficiaries in dealings in the estate and the business empire of the founder. Further, that the Kshs. 280,000,000/- allegedly left by the founder in the Co-operative Bank account was part of the money realized from the sale of L.R. No. 3644 to the Trustees of Kenyatta University Staff Retirement Benefit Scheme and which entire purchase price was fully accounted for.

182. It was further submitted that the beneficiaries sat in the Boards of the corporate beneficiaries as Directors and made decisions in relation to the said corporate beneficiaries as they had the management and operational oversight of the companies including being signatories to the accounts and keeping proper records of accounts and thus the Trustees could not be accused of withdrawal of funds from bank accounts belonging to those companies as they were not in management of the affairs of the said companies. Further, that the borrowing by the Trustees was for the benefit of the beneficiaries as the funds went towards payment of school fees, upkeep and maintenance of the beneficiaries, travel expenses and medical expenses and this was done since the group companies were experiencing cash flow problems and could not raise enough funds to meet the Beneficiaries' needs.

183. The 2nd defendants submitted therefore that there had been no wastage of the assets of the Trust by the Trustees and that all the actions they took to manage the Trust were based on the findings and recommendations of the PWC Report and carried out as per their duties under the Trust Deed and for the benefit of the Beneficiaries; and as such, the Trustees took all the precautions which an ordinary prudent business person would take in managing similar affairs of his or her own. The court was referred to the case of **Speight –vs- Gaunt [1883] UKHL 1** in this regard.

184. **On the third issue (whether the Plaintiffs had proved that the Trustees had failed in the management of the Trust in catering for the needs of the individual and corporate beneficiaries)**, it was submitted that the Trustees had not treated the beneficiaries with contempt but they had indeed gone out of their ways to loan funds to the Trust when it was low on funds required to meet the Beneficiaries' urgent needs. It was submitted further that the Trustees' allowances were made in accordance with the provisions of the Trust Deed. Further, that the Lucy Karume was not paid her allowances due to the fact that she did not sign the Trust Handbook and which action was in effect seeking preferential treatment from the other beneficiaries. On the payment of the school fees for the beneficiaries, it was submitted that as per the findings by PWC's audit, the group companies from which the Trust was supposed to get funds to use in catering for the needs of the Beneficiaries had consistent cash flow problems but that, that notwithstanding, none of the Beneficiaries had been sent out of school.

185. Further, that even at the time when the Trust had been low on funds, the Trustees wrote letters of comfort to the various schools that the Beneficiaries attend and gave their commitment word that the fees would be settled, which promises the Trustees kept.

186. On payment of school fees for the children of Killian Lugwe, it was submitted that the same was being paid by Jacaranda Hotel Limited and not the Trust and which action formed part of his contract of employment.

187. On the provision of medical needs and advancement in life of the beneficiaries, it was submitted that the Trust had paid medical expenses for the beneficiaries such as the 3rd interested party and as such the allegations by the plaintiffs were false and mere fabrications made up by the Plaintiffs and some Interested Parties in an attempt to throw mud on the reputation of the Trustees.

188. On the failure to be informed of the sale of assets, it was submitted that the beneficiaries were made aware of the intention to dispose of some non-core assets so as to raise funds to fulfil the Founder's wishes and further that the renovation of the Pizza Garden was approved by the Board in which the 1st plaintiff was part of and thus he was aware of the same.

189. On the increased cost of managing the Trust, it was submitted that hiring of new staff and agents was pursuant to the recommendations by the PWC in their audit report and further, that this was allowed under section 24 of the Trustee Act, CAP 167 Laws of Kenya.

190. It was thus submitted that the Trustees had acted honestly and in good faith and carried out all the general duties required of them under the Trustee Act and as set out in the case of **In the Matter of GW & Another (Minors) [2016] eKLR** and thus they ought not to be removed. It was further submitted that the Plaintiffs ought not to be allowed to found a cause of action which is based on their own wrongdoing. Reliance was placed on the case of **Abu Chiaba Mohamed –vs- Mohamed Bwana Bakari & 2 others [2005] eKLR**.

191. The 2nd defendant further submitted that the Trustees (Mr. Gatabaki and Mrs. Kamithi) did not put themselves in a position of conflict between their duties to the Trust and their personal interest in the two transactions they were involved in relating to properties owned by Gracia Limited and Kacharoba Limited and which two properties were separate and distinct legal entities from the Trust, run by independent boards of directors and that in none of the boards did either Mrs. Kamithi nor Mr. Gatabaki sit or get involved in their day to day management. As such, it was submitted that there was no conflict of interest and neither was it shown that the two Trustees benefited in any way from the said transactions. Further that the Trust Deed allowed the Trustees to contract with the Trust (clause 9.11).

192. It was further submitted that the Trustees acted honestly and in good faith in taking care of the needs of the beneficiaries but the same was affected by the consistent cash flow issues on the Holding Companies which made them to look for alternative sources of raising money so as to meet the beneficiaries' needs. Further that the Plaintiffs had not adduced any evidence of instances when the Trust had funds in the bank accounts but declined to meet the needs of the beneficiaries.

193. It was further submitted that the Trustees had not acted partially or favoured some beneficiaries as opposed to others but only that they did not pay equally to all beneficiaries as they considered the beneficiaries' varying needs and paid according to these needs.

194. **On behalf of the 1st interested party**, it was submitted that the Trust in question was a family Trust and that the court ought to interpret the law so as to strengthen it as opposed to breaking the same and should further adopt a narrow definition of beneficiaries within the meaning of the Trust. Further, that the court should give an interpretation that best reflects the wishes of the founder as his decision ought to be respected at all times. The court was referred to the decision in **Maxley vs title Trust Insu. & Trust Co.27**

195. It was further submitted that the Trustees updated the beneficiaries as to how the Trust was being managed and further that they had been updating the court and filed compliance affidavits.

196. The 1st interested party further submitted that the court would only in exceptional circumstances modify what has been decreed in the Trust document and that the wishes of the founder ought to be respected and upheld and further that any construction of a Trust document should be aimed at that. The court was referred to case of **Scottish-American Mortgage Co. v. Massie, 94 Tex. 339, [60 S.W. 544]**.

197. Further submission was that the court ought to save the minor beneficiaries (and more so the 1st interested party's son) from an aftermath and any foreseeable challenges that might arise after the removal of Trustees as the plaintiffs were all adults and who had already acquired an education, have a comfortable and reasonable housing, access to medication and have enjoyed a better life of their lives during the lifetime of the founder.

198. It was further submitted that the Trustees were properly appointed as per the provisions of the Trust Deed and further that the education policy was beneficial to the minors and that the removal (or appointment) of the Trustees ought to be exercised with caution and to the benefit of the beneficiaries.

199. **The 4th interested party** on her part framed the following issues for determination:

a) *Whether Mr. George Ngugi Waireri, Mrs. Margaret Kamithi and Mr. James Raymond Njenga should be removed as Trustees and observer respectively of the NKT.*

b) *Whether the Trustees have contributed to wastage of the assets of the NKT and diminished the income of the NKT.*

c) *Whether the Trustees should give an account of all transactions undertaken/payments made, funds received and expenditures incurred on behalf of the NKT since 24th February 2012.*

d) *Whether the Plaintiffs have established the losses and damages incurred and/or suffered by the NKT out of the alleged actions of the Trustees.*

e) *Whether the Trustees should be held personally liable to indemnify the NKT for losses and damages suffered.*

200. It was submitted at the preliminary stage that the plaintiffs could not introduce new issues for determination in their submissions and which issues were not pleaded in the Originating Summons. These new issues, according to the 4th Interested Party are:

i. *whether the Njenga Karume Trust Registered Trustees was properly incorporated;*

ii. *whether the Law Firm of Iseme Kamau & Maema Advocates were unfit and should have been disqualified from acting for the Trust or any party in the suit; and*

iii. *whether some of the provisions of the Declaration of Trust are unlawful, null and void*

201. According to the 4th interested party, it would be against the rule that issues for determination flow from the pleadings and further, that it would be prejudicial and amount to trial by ambush as the Defendants/Respondents would not have an opportunity to respond to the same. Further, that such new issues could only be introduced by consent of the parties. To support this assertion, the 4th interested party relied on **Chalicha FCS Ltd v Odhiambo and 9 Others [1987] KLR**, **Mumo Matemu v Trusted Society of Human Rights Alliance & Others CA No. 290 of 2012** and **Nairobi City Council v Thabiti Enterprises Limited, Civil Appeal No. 264 of 1996** amongst other authorities.

202. It was further submitted that the plaintiffs could not introduce new evidence in submissions and this was in reference to the book authored by the deceased referred to as **“Beyond Expectations”** and that such evidence ought to be expunged from the record and disregarded.

203. However, (and without prejudice) it was submitted that, the allegations to the effect that the Njenga Karume Trust Registered Trustees was improperly registered lacked merits as the Declaration of Trust (clause 9.1.5) gave the Trustees powers to *establish further Trusts, corporation or other entities, incorporated or unincorporated, in the Republic of Kenya or elsewhere, for the benefit of the beneficiaries and that there was no limitation as to nature of the said further Trusts.*

204. Further it was submitted that there was no evidence which had been tendered to the effect that the Trustees had transferred the assets of the Trust to the new entity and that clause 8 of the Declaration of Trust expressly set out how the Trust assets shall devolve at the expiry of seventy-five (75) years and the Trustees were bound to comply with the said clause.

205. On whether the Law Firm of Iseme Kamau & Maema Advocates were unfit and should have been disqualified from acting for the Trust or any party in the suit, it was submitted (without prejudice) that the plaintiff sought to rely on the application dated 20th May 2015 (filed by the 3rd and 8th Interested Parties) to urge that point and which application, it was submitted, ceased to exist pursuant to the orders of 3rd December 2015 which directed that all interlocutory applications pending determination as at that date be dispensed with and instead the main suit (Originating Summons) be set down for hearing and which orders had not been appealed against. As such, the plaintiffs could not revive the said application at the submission stage. Further that a party had the right to legal representation of one's choice by virtue of Article 50 of the Constitution. It was further submitted that the said advocates were not conflicted as they had never acted for the plaintiffs or the supporting beneficiaries and neither did the plaintiffs disclose any prejudice that they had suffered by reason of the firm of IKM acting as it has for the 4th Interested Party. The court was referred to **Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 Others [2017] eKLR** (at page 421-423). It was further submitted that the said firm of advocates was not a party to the current proceedings and as such could not defend itself against the allegations made against it. The court was referred to the case of **G Criticos & Company Limited & another v John Njenga Kinuthia & 2 others [2011] eKLR**, (page 437) where it was held inter alia that orders cannot be issued burdening another person unless such a person is a party to the proceedings.

206. The 4th interested party submitted that the Trustees and the observers were appointed in accordance with the provisions of the Trust Deed and carried out in good faith and further that there was no requirement as to consulting the beneficiaries before making the appointment and further that it was pursuant to the exercise of the Trustees' discretionary powers as mandated by the Trust Deed and which the court ought not to interfere with. The court was referred to the case of **Moxley v Title Ins. & Trust Co. 27 Cal. 2d 457, re Downshire Settled Estates [1953] Ch 218** and **Chapman v Chapman [1954] 1 All ER 789**.

207. Further it was submitted that the removal of the Trustees was sought in bad faith as it was meant to benefit the plaintiffs and further that the same was with ulterior motives which was to get and/or take over control of the Trust. Reference was made to the case of **Re Brockbank [1948] 1 All ER 287** in that respect.

208. Further submission was that the proposal to replace the Trustees with the plaintiffs was *not only contrary to Clause 4.5 of the Declaration of Trust but also not sound since the beneficiaries would be running the Trust and thus likely to act in their own interest as*

opposed to the wishes of the Founder.

209. It was further submitted that the Trustees had not failed to achieve the objects of the Trust but only that they depended on the Holding Companies (where it could earn dividends as a shareholder) and which companies were not generating sufficient profit to enable them declare or pay dividends to the Trust; which made it impossible to pay maintenance and further, hard to pay school fees (meet the objectives of the Trust). It was submitted further that they had to dispose of some of the assets of the Trust and further come up with mechanisms to ensure that the resources were well managed so as to meet the various needs of the beneficiaries (such as introduction of the education policy which was introduced in good faith and not meant to deny beneficiaries' access to education). As such, it was submitted, that the Trust's inability to raise funds was occasioned by factors beyond the Trustees' control (serious cash flow challenges).

210. The 4th Interested party further submitted that the Trustees were not in contempt of the orders of 19th February 2016 (for sale of not more than 200 acres of the Kacharoba property) as the order did not require the beneficiaries to agree on how the funds were to be expended as this would amount to the beneficiaries co-managing the Trust, which is not contemplated under the Declaration of Trust and that if the court intended the disbursement to be subject to consent or approval of the beneficiaries, the order would have been couched in those words.

211. It was therefore submitted in contention that the proceeds of the said sale were expended in compliance of the consent order and for the benefit of individual beneficiaries, the corporate beneficiaries and for the cost of running and management of the affairs of the Trust (including Trustees' allowances, legal fees, auditor's fees, surveyor's fees, among others and the same accounted for. Further it was submitted that there can be no contempt founded on an order that is capable of more than one interpretation and reliance was placed on the decision in **Raila Odinga & Anor v IEBC & Others & Anor, Presidential Petition No. 1 of 2017 [2017] eKLR** [Page 228], adding that the essentials for court to find that there was a contempt of court were absent.

212. It was further submitted that the Trustees had at all times accounted for the income received by the Trust, prepared accounts for the Trust and further given an account of the funds received from the year 2012 to 2014 (before the current proceedings were instituted); filed an analysis/statement setting out the Trust Fund Revenue and expenditure position for each beneficiary for the years 2012 to 2014 (after the suit was filed) and further filed audited accounts with the compliance affidavits.

213. The 4th interested party further submitted that the beneficiaries benefitted from the proceeds of sale of part of Kacharoba farm (as the money was used in meeting their needs) and that there was no evidence of loss by the Trust on account of the purchaser's affiliation with Mr. Gatabaki and as such, the sale was open, transparent and above board and further that the allowances paid to the Trustees were lawful and allowed by the Trust Deed hence the Trustees had not paid themselves more from the proceeds of sale of Kacharoba as the same was not proved.

214. Further, it was submitted that the Trustees did not act impartially but only that they met the beneficiaries' requirements on a need basis and that the beneficiaries indeed had different needs, which was proper as the Trust Deed did not require uniformity in disbursement of the funds.

215. On the valuation of the assets of the Trust, it was submitted that the same ought to have been done by the individual companies under the Trust and not the Trust itself and further, that failure to value the estate was not a reason to remove a Trustee. Reliance was placed on **Kershaw v Mickelthwalte [2010] EWHC (506) Ch it was held at Page 253.**

216. **On the second issue (mismanaged and wastage of the Trust's assets)** it was submitted that the allegation was not proved, which was contrary to the principle of law that he who alleges must prove.

217. **On the removal of the Trustees**, it was submitted that section 42 (1) of the Trustee Act (Cap 167) does not give the Court the blanket power to appoint new Trustees in substitution for the existing Trustees and that the provision ought to be read together with the provisions of section 37 of the Trustee Act which provides for the circumstances under which it becomes necessary to replace or appoint new or additional Trustees and thus it was submitted that a proper reading of the provisions of Section 42(1) as read together with Section 37 of the Trustee Act require that a party desirous of obtaining the removal, addition, appointment or substitution of a Trustee or Trustees must prove the existence of one or more of the circumstances set out in Section 37 of the Trustees Act and which the plaintiffs had not proved.

218. Further submission on behalf of the 4th interested party was that the plaintiffs did not tender evidence to establish that the Trustees had contributed to the wastage or diminution of the income of the Trust; or that any payment from the accounts was not made in accordance with the Declaration of Trust; or that the payments were unauthorized and thus they did not prove that the actions of the Trustees had the effects of imperiling the Trust property. To the contrary, it was submitted that the Trustees had proved that they acted in the interest of the beneficiaries and as such, they ought not to be removed in exercise of the Court's power under Section 42 (1) of the Trustee Act. Citing **Isaac v Isaac [2005] EWHC 435** (at paragraph 66) it was submitted that **"removal of Trustees is a drastic step for the court to take" and one that should only be taken in "a clear cut case."**

219. Further for the 4th Interested party it was submitted that there was no bad blood between the Trustees and the beneficiaries but only the plaintiffs and that the said bad blood was just but a creation of the plaintiffs and further that even if there was found to be some incompatibility between the Plaintiffs and the Trustees, that would be insufficient to warrant the removal of the Trustees. Reliance was made to the New Zealand's Court of Appeal decision in **Kain v Horton [2007] N.Z.C.A.199**. It was submitted that in any event, the facts did not disclose bad blood but differences of opinion and which could not warrant removal of the Trustees. Reliance was placed on **Gowar v Gowar [149/2015 [2016] ZASCA 101** (at page 271), **H.J.T v J.M.T & 5 Others, Case No. 387 of 2017, Kain v Horton [2007] N.Z.C.A.199, Kershaw vs. Micklethwaite & Ors [2010] EWHC 506**, and finally **Lettrstedt vs Broers [1884]9 App.**

220. It was further submitted that the plaintiffs did not adduce evidence to prove that the Trustees were liable for the alleged losses occasioned to the Trust and thus they did not discharge their burden of proof and further that section 60 of the Trustee Act allowed the court discretion to relieve a Trustee wholly or partly from liability, where they had acted honestly and reasonably, and in the opinion of the court

ought to be excused. The court was referred to the case of Davisons v Nationwide Building Society [2012] EWCA Civ 1626.

DETERMINATION

221. I have carefully considered the Originating Summons, the Affidavits in support and against the suit herein, the exhibits produced and the oral evidence as well as the submissions tendered by all the primary parties and the interested parties to this Originating Summons. I have also considered the statutory as well as the decided case law most of which are from foreign jurisdictions.

222. From the onset, it is trite that the office of Trustee is onerous and *“if faithfully discharged, attended with no small degree of trouble and anxiety,”* so that *“it is an act of great kindness in any one to accept it.”* See Knight v Earl of Plymouth (1747) Dick. 120 at 126 per Lord Hardwicke LC.

223. Before embarking on the main issues that flow for determination, I must first and foremost explain who a Trustee is and outline some of the main duties of Trustees.

224. A trustee is an entity or person formally appointed to manage the assets of a trust for the benefit of its beneficiaries in accordance with the terms of the trust Deed. The law never implies, the Court never presumes a Trust, but in case of absolute necessity. The Courts will not imply a Trust save in order to give effect to the intentions of the Settlor. The intention of a Settlor to create a Trust must be clearly determined before a Trust will be implied. See Gichuki vs Gichuki (1982) KLR 285 and Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171.

225. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR, the Court of Appeal examined and stated the law on Trusts inter alia:

“According to the Black’s Law Dictionary, 9th Edition; a Trust is defined as “The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (Trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

226. Under the Trustee Act,

“... the expressions “Trust” and “Trustee” extend to implied and constructive Trust, and cases where the Trustee has a beneficial interest in the Trust property...”

227. My determination of this case will therefore be anchored on the above definition of trust and Trustee and on the duties of trustees as explained below.

228. The main duties of a Trustee are:

Duty to the terms

229. A trustee must know and adhere to the terms of the trust which are prescribed by the trust deed.

Duty of loyalty

230. Trustees have a fiduciary duty towards beneficiaries. A trustee must administer the trust solely in the interest of the trust beneficiaries and cannot place his or her interest in conflict with beneficiaries. Trustees should not profit personally from their role as trustees other than a fee which they may receive for their trusteeship.

Duty to manage the trust efficiently

231. To manage a trust efficiently, a trustee must be very familiar with the terms of the trust, the trust’s assets and liabilities, the circumstances of the beneficiaries and the purpose of the trust. Effective management systems should be in place to ensure that the appropriate decisions are made in a timely manner and taking into account the terms of the trust and the interests of the beneficiaries. This also includes effective communication with related parties and proper record keeping. A trustee also has a duty to invest prudently on behalf of the trust and should diversify the investment of trust assets in the interest of beneficiaries.

Duty to act personally

232. Trustees act personally and must be involved in decision-making in respect of a trust. While trustees are typically permitted to engage advisers such as lawyers and financial advisers, the final decision on trust matters should be made by the trustee. In certain circumstances, trustees may delegate powers to third parties by power of attorney or deed of delegation. This must be permitted by the trust deed. For example, delegating powers to an agent to purchase or sell property overseas. The trustee is still obliged to properly instruct and supervise the agent. Where there is more than one trustee, *decisions must be made unanimously unless otherwise permitted by the trust deed*.

Duty to consider the beneficiaries

233. A trustee must act impartially with respect to the beneficiaries by considering all beneficiaries in their decision making. They should

also not follow the instructions of the settlor but may give consideration to the wishes of the settlor which are not binding unless included in the terms of the trust.

Duty to account

234. Unless otherwise provided by a trust, a trustee must keep trust accounts and other records. They must also respect beneficiaries' rights with regard to requests for trust information. Generally, beneficiaries have a right to receive information about the trust but not the decisions of the trustee.

235. In the instant case, there are some undisputed facts which I must highlight before delving into the main disputed issues.

236. It is not in dispute that there was a Trust established by the deceased Dr. James Njenga Karume and which Trust is referred to as The Njenga Karume Trust. (NKT). Despite the plaintiff testifying to the effect that the Founder did not sign the Trust and thus questioning its genuineness, 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.”

237. The standard of proof in civil cases is always that of balance of probabilities (See **D.T. Dobie & Co. Ltd. Vs Wanyonyi Wafula Chebukati [2014] eKLR** where the court held:

“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

238. The genuineness of a signature or otherwise of the founder of NKT can only be proved by the evidence of an expert witness. Despite the plaintiff admitting that he was not an expert witness (during his cross examination), he did not adduce any tangible evidence to the effect that the Trust Deed was not signed by the Founder. It was his duty to call an expert in handwriting to adduce evidence as to the genuineness of the said signature. The NKT has a signature on all the pages and it was not proved on a balance of probabilities that that was a forged signature. Accordingly, I find and hold that the question of the founder not signing the Trust Deed was not proved. In the circumstances, I am inclined to find and hold that the Trust Deed was a valid Trust established through a duly executed and registered Trust Deed.

239. There is also no dispute that the plaintiffs and interested parties are beneficiaries of the Trust established by the Founder, JNK.

240. However, there are some serious issues for consideration which are:

i. Whether the Trustees were in breach of terms of the Trust and the general duties in law

ii. Whether they should be removed and replaced with other Trustees?

iii. Whether the Trustees can be compelled to render accounts

iv. Whether the summons/ application ought to be allowed as prayed

241. There are also ancillary questions which this court will endeavor to answer.

ANALYSIS AND DETERMINATION OF THE ISSUES

i. On whether the trustees were in breach of terms of the trust and the general duties in law

242. From the Originating Summons, the Plaintiffs sought the removal of the Trustees (Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Mrs. Margaret Nduta Kamithi) and replace them with other three beneficiaries of the Trust. The justification thereof (as per the supporting affidavit) was that the named Trustees had breached the provisions of the Trust Deed in a number of ways as was averred in the supporting affidavit (to be discussed later in this judgment). These averments were denied by the defendants in their various and different replying affidavits, deposing inter alia, that the Trust had been well maintained and had been performing well and that payments made were justified and could be accounted for. The Defendant's further contended that the Trust had stopped paying the maintenance to the beneficiaries as a result of it not making income. In other words, the defendants vehemently denied any wrong doing in the management of the Trust and to a large extent blamed the beneficiaries for the failure of the Trust for filing the instant suit and getting interim orders adverse to the running of the Trust.

243. When the parties herein were granted leave by the court to cross examine the deponents of the various affidavits, both plaintiffs' witness (PW1) and defense witnesses (DW1, DW2 and DW3) all testified in support of their divergent positions.

244. It is trite law that Trustees stand in a fiduciary position on matters running of the Trust. In other words, a Trustee owes a duty and an obligation towards the named beneficiaries of the Trust and 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**. The duty to act honestly, diligently and in the best interest of the beneficiaries is the basic minimum which cannot even be excluded by exclusion clauses in the Trust document. In **Armitage v Nurse [1997] 3 WLR 1046**. Millett LJ made the following observations:

*‘I accept the submission ... 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, but in my opinion it is sufficient.** It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement. The Trustees are further not entitled to show favour to a beneficiary or group of beneficiaries, but are required to act impartially and in the best interests of all the beneficiaries.**[emphasis added]**.*

245. Owing to the nature of the fiduciary relationship of Trustees, a duty is imposed on them to keep proper accounts for the Trust. The beneficiaries are entitled to inspect the accounts. As Lord Wrenbury held in **O’Rourke v Darbishire [1920] AC 581**:

“the beneficiary is entitled to see all Trust documents because they are Trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else’s documents. The proprietary right is a right to access to documents which are your own.”

246. The above are just but examples of the duties of Trustees as espoused in judicial pronouncements, towards the beneficiaries under the Trust as earlier highlighted in this determination.

247. In the exercise of their duties, powers and discretion, it is cardinal rule that the Trustees need to exhibit an objective standard of skill as would be expected from an ordinary prudent man of business. In the words of Lord Watson in **Learoyd v Whiteley (1887) 12 AC 727**, “As a general rule the law requires of a Trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs.” Further in the instances when the Trustees have been bestowed with discretion in performance of their duties (either pursuant to the provisions of the Trust Deed or generally bestowed on them by law), **the said discretion is not absolute but should be exercised in good faith and not mala fides**. This was the holding by the House of Lords in **Gisborne v. Gisborne (1877), 2 App. Cas. 300** where it was held that (in relation to exercise of discretionary powers of Trustees):

“[the Trustees’] discretion and authority, always supposing that there is no mala fides with regard to its existence, is to be without any check or control from any superior tribunal.” The Supreme Court of Queensland in **Foley v Gleeson and Ors [2013] QSC 234 (Henry J)** while discussing the issue of discretion by the Trustees held that (paragraph 57) *“The clauses confer a discretion on the Trustees to determine if, what and when distributions should be made to the applicant and the secondary beneficiaries. However, the Trustees have a duty to exercise that discretion in good faith, upon real and genuine consideration:*

“That consideration must include a real and genuine consideration of the priority accorded to the applicant by the Trust’s designation of her as the primary beneficiary.”

248. Therefore, the question that must be answered is ***whether the Trustees were in breach of terms of the Trust and the general duties in law in the performance of their duties under the Njenga Karume Trust (NKT)?***

249. To answer this question, I must interrogate each and every duty and power of the Trustee (as per the Trust Deed and the law generally) a breach of which the plaintiffs have complained of, and interrogate the execution of the said duty(ies) and power(s) by the Trustees vis a viz the provisions of the Trust Deed and the law and further vis a viz the evidence presented before in court. This would help in ascertaining whether the Trustees indeed breached the said specific duty or power. This is bearing in mind that the burden of proof and the standard of proof required in civil matters is as provided for under sections 107- 109 of the Evidence Act (Cap 80 of the Laws of Kenya) and the case laws such as **Kirugi & Ano. -Vs- Kabiya & 3 Others** (supra) respectively.

250. The various actions which the plaintiffs claim were evidence of violation of the Trust are as follows and contained in the depositions in the various supporting affidavits:

i. appointing new Trustees unprocedurally,

ii. failing to account for the funds of the Trust more so the Kshs 280M left in a bank account at co-operative bank by the founder, failure to account for most of the payments made by the Trustees from the various bank accounts held the various companies which had been incorporated by the founder and which accounts were in control of the Trustees and making direct payments to themselves from the said accounts and thus benefitting more than the beneficiaries which was in breach of the Founder’s intention.

iii. Borrowing substantially from financial Institutions without consulting the beneficiaries of the Trust instruments or considering the business interests of the entities used as securities and in breach of good corporate governance.

iv. Failure by the Trustees to completely meet the objectives the Trust as set out by the Founder and expressly stated in the

Declaration of Trust.

v. The Trustees commenced various transactions disposing off the assets of the Trust without notifying the Beneficiaries and failing to be accountable for all such transactions.

251. Having set out the alleged breaches, I now proceed to interrogate the acts which I have summarized above (which the plaintiffs complain about) and see whether the same were in breach of the Trust.

252. On alleged **Unprocedural appointment of Trustees**, the first action/ inaction complained of by the plaintiffs (in the affidavit in support of the Originating Summons) is the fact that Mr. Gatabaki and Mrs. Margaret Kamithi were not procedurally appointed as Trustees. The 1st plaintiff in his affidavit in support of the summons (paragraphs 22-26) deposed that the existing Trustees after the resignation of Hon. Justice Kihara Kariuki appointed new Trustees *to wit* Mr. George Waireri and Mrs. Margaret Kamithi without due regard to the provisions of the Trust Deed on appointment of Trustees as the Deed provided for the Trustees to give preference to one of the beneficiaries and thus breached the provisions of the Trust and acted against the will and intentions of the founder. However this was rebutted by the 2nd defendant in the replying affidavit sworn by Mr. Gatabaki at (paragraphs 66-70) where he deposed that the said Trustees were procedurally appointed following the provisions of the Trust Deed and having considered and made an assessment as to whether any of the children of the Founder should be appointed as Trustees. This rival position also came out during the cross examination of the 1st plaintiff and that of Mr. Gatabaki in that each party therein really testified in support of his position as to the election of the Trustees. With regard to the appointment of Mr. Waireri it was contended that he was one of the executors of the will of the founder and that he resigned to join the Trust, on the part of Mrs. Kamithi, it was contended that she was the founder's sister who was named in the will as the person who would be the next friend to the founder's last born son Emmanuel in the event that his mother was not available.

253. The relevant clause(s) in the Trust Deed which provides for the appointment of Trustees are clauses 4.1 to 4.9. Clause 4.5 and they provide that:

“The Trustees shall have the powers by a majority vote to remove any Trustee other than the founder and/or to nominate such additional Trustee or Trustees and/ or subject to clause 4.4 above, to appoint a successor or successors to assume office as Trustee(s) on the failure of any one or more of them, as they may in their discretion deem fit PROVIDED that (i) the Trustees shall procure that after the founder's demise, in appointing a Trustee, they shall give preference to one of the beneficiaries from amongst the persons listed in sub-clause 6.1.2.1 below (who shall select based on a fair assessment of capability but which assessment shall be final and binding and not capable of being challenged) and (ii) the Trustees shall exercise the powers hereby granted to them to ensure that the number of the Trustees shall not fall below two (2) and provided further that in that eventuality:....”

254. The clause 6.1.2.1 referred to as the reserve from which the replacement shall be gotten from mentions- **the founder, the founder's wife, the founder's children, grandchildren and great grandchildren**. DW1 in cross examination testified (in relation to this issue) that his appointment arose out of the retirement of Hon. Justice Kihara Kariuki as the Chairman and that the resigning Trustee approached him through IKM Advocates and that he received emails from IKM advocates who told him that it was the wishes of Hon. Justice Kihara that DW1 join the Trust and that his appointment documents were signed by Hon. Justice Kihara Kariuki. **He also stated that the minutes he saw never considered any of the beneficiaries as Trustees pursuant to clause 4:5 of the Trust and that he could confirm that in the minutes, there was no assessment of the beneficiaries to determine their suitability as Trustees.** [Emphasis added]. That when he became the Chairperson of the Trust, they appointed Mrs. Margaret Nduta and there was no assessment of beneficiaries before appointing Margaret Nduta as a Trustee.

255. When DW2 was cross examined over the same by Mr. Munge advocate for the Plaintiffs, he testified that after the demise of the founder, they discussed in the meeting of Trustees and it was agreed on advise of Hon. Justice Kihara Kariuki that the chairman of the Trust be Mr. Waireri who had been appointed by the deceased as executor of his will and that they evaluated beneficiaries and observed that the founder had already appointed Henry Waireri and Grace Karume to represent two houses on the Trust. However, DW2 conceded that they did not have minutes of any meeting where they agreed as such. That they brought in Margaret Kamithi as a balancing act as she was the sister and Emmanuel's guardian in the event of his mother being away. That they looked at the bigger picture and they did not carry out any assessment.

256. In his re-examination, DW1 stated that the process of appointing Trustees was informed by the founder's wishes and that they determined a person who was very close to the founder and that they looked at the will written by the deceased founder. That when Justice Kihara left the Trust, they considered the closest persons to the founder to join the Trust hence George Waireri and his sister Margaret Kamithi whom the founder appointed to be his son's guardian in the event that his mother was not available.

257. Analysis of the above evidence *vis a viz* the provisions of the Trust Deed clearly indicates that the remaining Trustees did not follow the provisions of the said Deed in appointing the two new Trustees (Mr. Waireri and Mrs. Kamithi). It was a mandatory provision that the Trustees were, in appointing Trustees after the demise of the founder, they had to give preference to one of the beneficiaries **from amongst the persons listed in sub-clause 6.1.2.1**, and select such person based on a fair assessment of capability of the said beneficiary. Despite DW2 testifying that there was such an assessment, DW1 on the other hand testified that there was no such evaluation. DW2 further testified that they did not have minutes of any such alleged meeting where they appointed Mr. Waireri and Mrs. Kamithi as Trustees.

258. This contradictory evidence by the defendants and lack of sufficient evidence to proof the existence of a meeting indeed can only lead to a conclusion that there was no such meeting or evaluation or assessment of the suitability of the Trustees to be appointed after the founder's demise and more so, there is no evidence to show that the then Trustees ever gave any consideration to the beneficiaries prior to appointing Mr. Waireri and Mrs. Kamithi as Trustees.

259. **Clause 10.5** of the Trust Deed provides that the minutes of each of the meetings of the Trustees to be taken by a representative of IKM Advocates or its successor in practice and shall be signed by the chairman and once signed shall be prima facie evidence of the matters stated

therein. The defendants did not produce the minutes and/ or resolutions of the meeting(s) appointing the Mr. Waireri and Mrs. Kamithi as Trustees. Neither did they demonstrate that they undertook any assessment of the two or any of the beneficiaries to be given priority in the appointment as contemplated by the founder.

260. I opine thus that the said appointment of Mr. Waireri and Mrs. Kamithi as Trustees after the demise of the founder and resignation of Hon Justice Kihara Kariuki was unprocedural and in gross violation of the express provisions of the Trust Deed. The evidence by the defendants on the same was contradictory and there was no evidence of the alleged assessment.

261. Defending the appointment of Mrs. Kamithi as a Trustee, DW2 testified that they considered her since she was left as the guardian of the founder's son (Emmanuel Karume) and that this was pursuant to clause 4.7 which provided that they should give preference to Emmanuel Karume in appointing the Trustee. However a reading of the said clause indicates clearly that the said Emmanuel could only be given preference if he was of the age of majority. This is so because there is no way the minor could have been appointed a Trustee, in addition, if the founder had the intention of including Mrs. Kamithi being the guardian of Emmanuel, in the event that his mother was not available, nothing prevented him from expressly stating so in the Trust Instrument. He could not have left it to interpretation as to whether Mrs. Kamithi being guardian would be the most suitable person to be appointed as Trustee.

262. For the above reason, I find and hold that the Trustees took into account irrelevant considerations and failed to take into account relevant considerations in appointing the said Trustees as opposed to the express instructions by the founder. In my humble view, the preference for Mrs. Kamithi as a Trustee was premature and misplaced.

ii. On Failure to account for funds left behind by the founder and failure to give information as to the withdrawals from bank accounts controlled by the Trustees and the application of the said funds and making payments to themselves.

263. The next alleged act/ omission raised by the plaintiffs in the affidavit in support of the Originating Summons was the failure by the Trustees to account for the funds of the Trust and to give information to the beneficiaries as to the withdrawals from the various bank accounts the Trustees controlled. According to the plaintiffs, the beneficiaries were unable to know how approximately Kshs. 280 Million left behind by the founder in a bank account at Co-operative Bank (after the sale of Land Reference No. 3544 to Kenyatta University Retirement Benefit Scheme) to cater for the founder's debts and further to develop Indian Ocean Beach Resort and Pizza Gardens was utilized by the Defendants/Trustees who took over control of Bank Accounts after the demise of the founder as the defendants had failed to give them (beneficiaries, **details or information despite repeated requests.**

264. The plaintiffs further accused the Trustees of failure to inform the beneficiaries as to most of the payments made from Karume Investment Limited's (KIL) Bank Account, Lynton Farm's bank account, Jacaranda Hotel (MSA) Limited's bank account and Kacharoba Farm Limited's bank accounts. The flagged payments were contained in paragraphs 32 to 35 of the supporting affidavit.

265. The above allegations were controverted by the defendants in the replying affidavits filed in court. Mr. Waireri in his replying affidavit deposed that the law firm of Iseme Kamau & Maema [IKM] fully accounted for the funds paid to Cianda Estate Limited following the sale of Land reference No. 3544 and further that all the payments questioned by the plaintiffs as having been made, under paragraphs 32 to 35 (payments from the various bank accounts) were lawfully made and that the correct records which confirmed the said payments was the annexures to his affidavit marked as "GNW6."

266. Mr. Kung'u Gatabaki in his replying affidavit deposed that the beneficiaries had always been represented in the Trust by their brother who is one of the plaintiffs and their step-mother one of the interested parties hereto and further that the accounts had been exhibited in the replying affidavit.

267. With the leave of the court, **SAMUEL WANJEMA KARUME** filed a further affidavit where he responded and averred that since the appointment of the Trustees they had never called a meeting of all beneficiaries under the Trust to give status reports with regard to the assets or accounts of the Trust or to update the beneficiaries on how the various businesses were operating or even availed to the beneficiaries audited accounts of the Trust but that the Trustees chose to operate in secrecy and to the exclusion of most of the beneficiaries.

268. During cross examination by Senior Counsel Mr. Oraro, PW1 testified that he was not aware of how KShs.280,000,000 left in an account with Co-operative bank by the founder was applied and in which account that money was deposited and that further, he was not aware that Mr. L. Gachugia was an employee of Karume Investment Limited or whether the Directors of the said company were aware of the payments by the said company and that (on the payment made to Sichangi & Partners Advocates), though Sichangi & Partners Advocates were involved in many conveyance transactions and paid, he was never notified of the same and that he should have been informed as a beneficiary and that is a matter of logic.

269. On payments from Lynton Farm, PW1 stated that the account was controlled by the Trustees but he did not have full information on how the account was managed.

270. On being cross examined by Mr. Macharia advocate for the 2nd defendant, PW1 testified that he did not know L. Gachugia (who had been paid (as per paragraph 32 of his affidavit in support of summons) and further that he would not be opposed to lawyers being paid for the work of subdivision and transfer of land in their favour. That (from the payments disputed in his affidavit- paragraph 35), Richard was an employee of the company (Kacharoba) and was paid as such and that at the time of filing the suit, he had no sufficient information on all the employees.

271. In re-examination, PW1 stated that no financial statements had been availed to the beneficiaries and that despite clause 10:11 of the Trust calling upon the ***Trustees to prepare proper books of accounts and annual financial statements and the accounts***, in the compliance affidavit of Kung'u Gatabaki filed in court on 31.3.2016 prepared on 3.3.2016 had never been brought to their attention as beneficiaries and that they never had the opportunity to engage Trustees or question them on the same.

272. He further stated that the accounts for the period ending 31.12.2013 were never discussed with the Trustees and that he only saw them in court and also for the accounts for the period ending 31.12.2014 and they have never interrogated them and further that they had never been shown the accounts for 2015. Further that since the death of the deceased, they only met twice to be briefed of the Trust and that they were not informed of how the Trust was fairing.

273. When the defendants testified on this issue, DW1 stated (during cross examination by Mr. Munge) that he wouldn't know when he took over as chairman (of the Trust) whether there was over Kshs.200 million in Co-operative Bank. Further when he was put to task to explain how some proceeds received by the Trust was expended, he confirmed that beneficiaries were not involved and that the balance of the amount went to the Trust to meet financial obligations but that they did not have management accounts and audited accounts done in 2015 completed in 2016 and he further conceded that as Trustees, they had not given the audited accounts to the beneficiaries. This evidence of DW1 was further corroborated by that of DW2 who in cross examination by Mr. Munge stated that when the suit was filed (in 2015) accounts had not been audited for some years. However, when he was cross examined by Ms. Kimere, DW2 stated that they had been keeping proper books of accounts in compliance with the companies Act and that they had audited, signed books of accounts for the year 2016.

274. DW 3 on the other hand stated in cross examination that she could not recall if beneficiaries had been given the 2015 and 2014 accounts but that they gave the beneficiaries earlier accounts but not the recent accounts.

275. On regular updates to the beneficiaries, it was the defendants' evidence that they met the beneficiaries and that the beneficiaries were aware of the on-goings of the Trust.

276. What emerges from the above evidence is that the beneficiaries (plaintiffs) were blaming the Trustees for failure to keep proper books of accounts and the failure to explain to the beneficiaries as to the position of the said accounts and to disclose to the beneficiaries as to the expenditures incurred in the Trust. In addition, the plaintiffs were not happy that the defendants never informed them on the running of the Trust. **In the Matter of GW & another (Minors) [2016] eKLR**, the High court sitting in Nairobi (Gitumbi J) held that:

“In summary the general duties of Trustees in relation to the Trust property are to safeguard the assets of the Trust, to invest any Trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries.in relation to the beneficiaries, Trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries.....” [emphasis added]. (See also Re Eunice Wanjeri Njenga [2013] eKLR).

277. The duty to keep books of accounts was provided for expressly in the Trust Deed under clause 10.11. This clause dictated upon the Trustees the duty to cause proper books of accounts and records to be kept of all affairs and dealings of the Trust and to prepare or cause to be prepared annual financial statements reflecting the affairs of the Trust.

278. From the evidence both oral and documentary adduced by the defendants in a bid to counter the accusations by the plaintiffs that the defendants did not keep Proper Books of Account or that they failed to keep the beneficiaries informed of the happenings of the Trust especially as far as financial expenditure was concerned, it is clear that the defendants did not keep books of accounts let alone proper books of account as commanded by the Trust Deed and neither did they adduce any evidence to demonstrate that they kept the beneficiaries informed of the status of the Trust.

279. The affidavit evidence and oral testimony adduced by PW1 that the Trustees never kept any books of account or inform the beneficiaries as to the nature of the various withdrawals and transactions in the bank accounts was corroborated by that of the defendants. DW1 for instance during cross examination by Mr. Munge testified that he would not know when he took over as chairman (of the Trust) and whether there was over Kshs.200 million in Co-operative Bank. When he was put to task to explain how some proceeds received by the Trust was expended, he confirmed that beneficiaries were not involved in the same. Further it was his testimony that they (Trustees) did not have management accounts and audited accounts done in 2015 completed in 2016 and further that they had not given the audited accounts to the beneficiaries.

280. The above evidence was similar to that of DW2 who in cross examination by Mr. Munge stated that when the suit was filed (in 2015), accounts had not been audited for some years. However, when he was cross examined by Ms. Kimere, he testified that they had been keeping proper books of accounts in compliance with the Companies Act and that they had audited, signed books of accounts and for 2016. DW 3 on the other hand testified in cross examination that she could not recall if beneficiaries had been given the 2015 and 2014 accounts but that they gave the beneficiaries earlier accounts but not the recent accounts. It is clear from this evidence that the Trustees did not keep any accounts and or records on what was happening to the Trust. This was in overt violation of **clause 10: 11 of the Trust Deed which mandated the Trustees to:**

“cause proper books of accounts and records to be kept of all affairs and dealings of the Trust and to prepare or cause to be prepared annual financial statements reflecting the affairs of the Trust.”

281. **In an attempt to answer to the issue of their failure to keep** accounts, the Trustees produced before this court copies of documents which they claimed to be accounts as to how the Trust funds had been managed. The same were attached to the Replying Affidavit sworn by Mr. Waireri (GNW 5). Mr. Gatabaki further annexed (KG 77) claiming that these were the accounts for payment of the funds to the beneficiaries.

282. **I however observe that** the said alleged accounts were never signed by the maker or makers thereof and neither were they proper, audited and/or certified to be true copies of any original copy. It would be unfair for this court to take as true accounts unaudited accounts as evidence. The defendants had the duty before this court to present as evidence documents which can be admissible under the Evidence Act (Cap 80 Laws of Kenya).

283. In my humble view, the Trustees never kept any books of accounts as required by law and as was expressly directed by the founder in the Trust Deed. This was the reasons why the Trustees could not produce any audited accounts before the court. This is further the reason that the defendants could not produce statements of expenditure of the 280 Million Kenya Shillings as demanded by the plaintiffs and they had to rely on the affidavit sworn by a partner from IKM Advocates.

284. Books of accounts are not mere scriblings or write ups especially for a Trust. *In siegel v His Creditors, 95 Cal.409,414 (Cal.1892)*, it was held that Books of Account are: financial records, ledgers and journals that make up the accounts of an organization or business entity. Books of accounts represent the financial memory of an entity whether natural or artificial such as a company or any business entity or person. They are crucial for continuity, decision making, analysis of the performance of that entity and ensuring regulatory compliance. Therefore, proper books of account could loosely be defined as

“Are such books as will enable others whether creditors to see financial status of his debtors...”

285. The Trustees herein had an obligation under the Trust instrument to exercise diligence in execution of their duties under the Trust and which diligence was expected to be that which a man of ordinary prudence would exercise in the management of his own private affairs.

286. The Trustees were no doubt persons entrusted with discretion but were in a fiduciary relationship. In my humble view, the Trustees did not run the Trust diligently. For example, they were unable to explain how the balance of monies being proceeds of sale of the “Kenyatta University Land” was utilized despite admitting that the founder left quite a substantial amount of the said money in his Bank account. They were also unable to demonstrate that they kept a Register of Assets of the Trust which is a key accountable instrument of tracking the assets of the Trust. The Trustees were also unable to tell to whom they paid Kshs 40,366,474 as professional and legal fees. Neither could they tell who was paid Kshs 1.2 million as audit fees. Hiding under what they called “*absolute and unchallengeable discretion*,” they could not keep the founder’s wishes of building Teresia a house worth 15 million and neither could they show that they gave her an apartment as promised to her. In addition, the Trustees could not account for the proceeds of sale of the South C House where some of the children beneficiaries who were orphaned grandchildren of the Founder lived for many years.

287. From their own admission, the Trustees borrowed Kshs 33 million from Jamii Bora Bank which money they used to pay themselves responsibility allowances and legal fees and the security for the loan was the assets of the Trust. This was on 8.10.2014 yet by December the same year, they claim they had no money to pay the beneficiaries their monthly maintenance so they had to stop all advances until this court intervened, noting that some beneficiaries, from the evidence on record were very needy. The court further observes that the Trustees could not explain how Kshs 555million proceeds from sale of Kacharoba Farm and deposited in Cooperative Bank was spent, although they said they were ready to account for proceeds of sale of Kacharoba farm to Athi Water Services.

288. At para 64 above, it was conceded that the trustees were unable to discharge their mandate but that the trustee could not resign because he had not wasted or mismanaged the Trust. They also blamed the success of the Trust to injunctions obtained by the beneficiaries from court. However, this court observes that the injunction only came in in 2015 upon the filing of this suit as it was not demonstrated that there had been any other pending or concluded suit in a court of competent jurisdiction relating to the administration of the Trust Declaration.

289. The trustees also conceded that they did not even share with the beneficiaries the final audit report from PWC. Therefore the question of whether in the circumstances where the Trustees were unable to prove before this court that they ever kept proper books of account, they were in a position to manage the affairs of the Trust without keeping proper books of account and records, even if this was their own personal businesses, my simple answer is a resounding NO.

290. On the question of rendering information as to the running of the Trust and the withdrawals from the various accounts, the plaintiffs flagged out the withdrawals and/ or expenses which they thought ought to be explained to them. However, in cross examination, the plaintiff stated that as a beneficiary, he ought to have been informed of the expenses and withdrawals made. What comes out from this evidence is that the Trustees indeed never involved the beneficiaries in the running of the Trust. It is my opinion that if the beneficiaries were informed on the running of the Trust, they would not have raised issues as to the withdrawals flagged out. It was out of these “huge” and suspicious withdrawals and which raised eye-brows, in my view, which made the Trustees to come to court. The same was with the keeping of proper books of accounts and allowing the beneficiaries access the same.

291. Following the demise of the founder, the Trustees were accountable to the beneficiaries hence the purpose for which the Trust was established and the command by the founder in the Trust Declaration Deed which mandated the Trustees to keep proper books of accounts in the following terms:

“cause proper books of accounts and records to be kept of all affairs and dealings of the Trust and to prepare or cause to be prepared annual financial statements reflecting the affairs of the Trust.”

292. In my humble view, keeping of proper books of accounts and records as well as annual financial statements reflecting the affairs of the Trust would also enable proper accountability to the beneficiaries and especially in tax matters to avoid penalties for understatements. It was the failure of the Trustees to keep proper books of accounts, in my humble view, that during the hearing of this suit it emerged that some of the Trust Assets were under threats of being sold and KRA was demanding heavy penalties in terms of taxes which were unremitted, albeit

293. What that then means is that in the instant case, if proper books of accounts and records of all affairs and dealings of the Trust and financial statements reflecting the affairs of the Trust were kept, and the said beneficiaries regularly informed on the management of the Trust, then it would not have taken the beneficiaries legal action to demand for the same. DW3 conceded that the 2016 accounts were not complete and could not even remember when beneficiaries were given, if at all, accounts for 2014 and 2015 years.

294. Nonetheless, Clause 10.11 of the Trust Declaration provides further that:

“...but such books, records, and/ or financial statements shall be deemed to be confidential to the Trustees and no beneficiary shall have any right of access thereto unless the Trustees so determine...”

295. With this proviso on accessibility, it can be argued and it is indeed clear that the Trustees had discretion as to the rendering of the books of account, records and financial statements to the beneficiaries. The question is how absolute is absolute discretion? The term “absolute discretion” is an oxymoron. Absolute discretion is not absolute; it does not allow the trustee to do whatever he pleases. Without being cautious and seeking professional advice, a layperson acting as trustee can easily get himself into trouble. Trusteeship is a 'fiduciary' role; regardless of the unfettered discretion contained in the trust and any perverse wishes of the settlor/testator, the trustees must act in 'good faith'. The Courts have an inherent jurisdiction to oversee the actions of trustees, and therefore trustee discretion can never be properly described as 'uncontrolled.' In **Re C Trust (2012)**, JRC 098 the Court held that it had authority to set aside a decision that 'no reasonable trustee' would have made.

296. As was held in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB 223**:

“a person entrusted with discretion must so to speak direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably.”

297. In **Gisborne v. Gisborne (supra)** and in **Foley v Gleeson and Ors (supra)** such discretion was held not to be absolute but should be exercised **in good faith and not mala fides**. Thus, the Trustees cannot hide behind this discretion. It was their paramount duty to provide information to the beneficiaries as to the running of the Trust. This is a legal duty which cannot be waived by the Trust Deed. As Lord **Wrenbury** held in **O'Rourke v Darbishire [1920] AC 581**:

“The beneficiary is entitled to see all Trust documents because they are Trust documents and because he is a beneficiary, they are in this sense his own. Action or no action, he is entitled to access them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own.”

298. It therefore follows that whereas the wishes of the person creating the trust ('settlor') will carry much weight in the trustees' decision making process, but those wishes need to be balanced against the true needs and merits of individual beneficiaries, especially if the expressed wishes might, perhaps, be described as 'perverse' or contrary to public policy.

299. The failure by the Trustees not to give information and/ or render accounts as to the administration of the Trust in my view was not in good faith but aimed at making the Trustees autonomous and not subject to any questioning by the beneficiaries and which in my view was not for the best interest of the beneficiaries. Such failure was further not in the furtherance of the intentions of the founder.

300. This court is alive to the fact that satisfying immediate and excessive wants of beneficiaries would deplete the trust and render the beneficiaries helpless in a moment of greater need. However, I do not find any evidence on record that shows that the beneficiaries demanded for accountability simply because they wanted more money from the Trust for their wants rather than their needs and neither have the Trustees complained that the beneficiaries were too demanding.

301. In the performance of this duty, it was expected of the Trustees to put themselves in the shoes of the beneficiaries and consider the plight of the said beneficiaries. In that regard, I am persuaded that if the Trustees had put themselves in the shoes of the beneficiaries, they would find it prudent, just and reasonable to inform the beneficiaries as to the running of the Trust.

302. In the instant case, although the Trustees have contended that they involved the beneficiaries in the running of the Trust for the reasons that some of the beneficiaries are also Trustees and that the said beneficiaries/Trustees sit on the Boards of the various Holding Companies, that argument does not exonerate the Trustees in their collective responsibility to account to the beneficiaries as contemplated in the Trust Declaration. The argument is therefore not viable.

303. As was clear and was contended by the defense witnesses, the Holding Companies were independent and only three of the beneficiaries were in the Boards of these companies. As such, the Board of Karume Holdings Limited for example was not privy to what happened in the companies under the Jacaranda Holdings Limited. There was therefore a need for regular briefings of the beneficiaries on what was happening in the other companies. There was no evidence adduced of the meetings of the Trustees and the beneficiaries or their representatives.

304. The only meetings whose minutes were presented before the court were the meetings of the Holding Companies and which meetings were attended (as expected) only by the board members of the said companies. I thus opine that this was not involvement of the beneficiaries which the principles I have stated above contemplate. It should be borne in mind that the Trustees were only holding the Trust assets for the benefit of the beneficiaries. This being the case, they ought to have informed the beneficiaries on the running of the Trust. Informing the beneficiaries of the Trust is not involving them on the day to day operations which would in my view compromise the management and administration of the trust. Information which is intended to account is what is expected of the Trustees. This was not done.

305. In my humble view, the Trustees were in breach of their duty to keep proper books of accounts and records on the running of the affairs of the Trust and further failed to provide information to the beneficiaries. I so find and hold.

iii. On the claim that the Trustees borrowed substantially from financial institutions without consulting the beneficiaries of the Trust instrument or considering the business interests of the entities used as securities and in breach of good corporate governance

306. This is yet another ground in support of the 'plaintiff's Originating summons. The deponent flagged the borrowing by Jacaranda Hotel from GT Bank. This can be seen from annexure 9 of the affidavit. In response to the assertion by the plaintiffs, Mr. Waireri and Mr. Gatabaki deposed that the Trustees were always aware of the transactions in the Trust and that the beneficiaries had also fully participated at meetings of the Trust which were held regularly and proper records of the proceedings maintained.

307. It was PW1's evidence during cross examination by Mr. Oraro SC and Mr. Macharia that the borrowing from G.T Bank had been approved by a meeting in which PW1 was sitting as a director of Jacaranda Holdings Limited and that the Trustees did not participate in the meeting and that the Trustees were not involved in any corporate governance of the board. DW1 testified that the Jacaranda Hotel's title was charged to GT Bank to refurbish the hotel and that the Board which approved the said borrowing was chaired by Mary M'kindia who was also the director of GT Bank and that the money which was borrowed was substantial amount which could be about Kshs. 480 million. He testified that they did not seek opinion of the beneficiaries or children of the founder and that it was the Trust which approved the borrowing.

308. I have carefully perused the minutes of the meeting in which the flagged borrowing was approved. I note that the 1st plaintiff was indeed present when the said approval was made. It is my opinion that the said approval was made after making relevant consideration as to the ability of the said hotel to repay the said loan. This exercise was undertaken by the Board of Directors of the JHL. PW1 (1st plaintiff) did not dispute his participation in the said meeting and in fact he admitted during cross examination that the Trustees did not participate in the meeting and that the Trustees were not involved in any corporate governance of the board.

309. It is my opinion therefore that the 1st plaintiff is estopped from turning around and blaming the Trustees for decisions that they did not take.

310. However, I note that the plaintiffs would be worried that it might be difficult to repay the said loan but I am of the opinion that the Trustees cannot be blamed for such an eventuality as they are never involved in the running of the subsidiary companies such as Jacaranda Hotel (the Hotel whose title was used to secure the Bank loan). It is my opinion that if at all any decision was made in breach of corporate governance principles (as averred by the plaintiffs), then the 1st plaintiff ought to take collective responsibility of the members of the Board of JHL as he was part of that decision to borrow from GT Bank and the security was the title of the land on which Jacaranda Hotel lies. The 1st plaintiff had an opportunity to refuse to be part of that decision which he now considers to have been against corporate governance.

311. It is my opinion further that the only thing the plaintiffs would have questioned was the application of the funds out of the said loan but not the taking (borrowing) of the said loan. The issue of failure to account for the funds of the Trust is nonetheless already addressed elsewhere in this judgment.

iv. On alleged Failure by the Trustees to meet the objectives of the Trust as set out by the Founder and expressly stated in the Declaration of Trust

312. The plaintiffs further raised issues to the effect that the Trustees had failed in achieving the objectives of the Trust as provided for in the Trust Deed. The 1st plaintiff deposed in the supporting affidavit to the originating Summons that the defendants had failed to maintain the beneficiaries and that they had instead turned the Trust for the maintenance of the Trustees and third parties for reasons that the Trustees colluded with Iseme Kamau & Maema Advocates and came up with a document to indemnify them and made it a condition precedent to receiving the monthly allowance and those who did not sign the said document such as the 3rd Plaintiff were never given the said allowances. Further that the Trustees agreed within themselves to be paying out of the Trust funds allowances without consulting the beneficiaries in any way.

313. Further, that after the demise of the Founder, the Trustees opened a separate Bank Account without disclosing to the beneficiaries and the beneficiaries had no information on how funds from the said account are used.

314. The plaintiffs further averred that the Trust held a Bank Account with Co-operative Bank of Kenya, being Account No. 01128152679500, which was exclusively controlled and managed by the Trustees and, the beneficiaries under the Trust and children of the Founder, noted some payments that were made directly to the Trustees and thus making the chairperson of the Trustee Mr. Waireri to benefit more, from the Trust, than the beneficiaries, in breach of the Founder's intention and notwithstanding, that the 3rd plaintiff had not been given any allowance from the entire business or empire as she refused to sign the documents given by the Trustees.

315. Further, the plaintiffs averred that they had no information on the recipients of the many withdrawals made from the Trust's Bank Account. It was a further averment that the plaintiffs had information that the Trustees had secretly opened another bank account with Bank of Africa and Equatorial Commercial Bank which were unknown to the beneficiaries and without involving the beneficiaries.

316. On the objective of education on the beneficiaries, the plaintiffs' case was that (as deposed in the supporting affidavit to the O.S,) the defendants had breached the said objective in that upon the demise of the Founder, the Trustees took over the control and management of the businesses of the Founder to the exclusion of the Founder's children but within a short time they started frustrating the beneficiaries by failing to pay school fees and other associated expenses despite the founder having left assets which were accruing that was sufficient to educate the beneficiaries under the Trust in the best educational institutions in the world and despite the fact that the founder, as at the time of his death was assisting in the education of his grandchildren in various educational institutions in Kenya and outside country as he cherished education.

317. The plaintiffs cited some of the beneficiaries whom they averred that the Trustees had frustrated by failing to pay their school fees and maintenance allowances and which beneficiaries included Dr. Michelle Karume, a grandchild of the Founder who was a student at the Nairobi International School, three (3) children of the 2nd Plaintiff who were students at Braeburn School.

318. Regarding the objective of advancement in life of the beneficiaries, the plaintiffs' case was that (as deposed in the supporting affidavit

to the O.S) the defendants had breached the said objective in that they had failed to provide funds for the treatment and medical care of the 3rd Interested Party who had been unwell for a while and the Plaintiffs had to generate funds from their personal sources and friends to pay for her treatment despite managing businesses for the Founder that were generating millions of shillings.

319. These averments were supported by further affidavit sworn by Mr. **SAMUEL WANJEMA KARUME in reply to the replying affidavit by Mr. Gatabaki.**

320. **The above averments** were strongly opposed by the defendants in their replying affidavits where they deposed that they had indeed accomplished the objectives of the Trust save for the limited resources at their disposal. This was per the replying affidavit by Mr. Waireri, Mr. Gatabaki and Mrs. Kamithi whose common position was that the Trustees had done everything humanly possible to discharge their duties regarding the welfare of the beneficiaries even under extremely difficult challenges and further that the Trust had disbursed a total of Kshs. 235,098,294/- for the benefit of the Trust beneficiaries and a further sum of Kshs. 94,725,434/- in expenses incurred in running the Trust and thus the Trustees had been faithful, transparent and meticulous in managing the Trust. Tabular presentation of the expenses and income of the Trust are contained in the replying affidavit sworn by Mr. Gatabaki (paragraphs 25-31).

321. **The Defendants'** position was further supported by the replying affidavit sworn by **DR. FRANCISCA KAHIU the 4th Interested party** where she deposed that the Trustees were managing the Trust in a good manner and had taken care of the beneficiaries' interests by setting up education and medical policies and further that the beneficiaries used to receive monthly allowances until the Plaintiffs frustrated the Trust's ability to generate revenues by reason of the ex parte orders and adverse publicity and further that there had been no favoritism of some of the beneficiaries over others and that the Trustees had strived to meet all the beneficiaries' unique needs as and when they arose.

322. During the oral hearing, PW1, testified (in support of the Summons) that he received Kshs. 200,000 as a beneficiary until December 2014 when the Trustees said they had no money to pay beneficiaries as allowances but that no meeting was called to inform them of the decision and as such the objective of maintenance had not been achieved. That the Trustees issued cheques for PW1's children's school fees but the cheques were dishonored on presentation and this too happened to the children of his brothers and further that the Trust had stopped paying for medical treatment for the beneficiaries saying that there was no money.

323. To counter this averment, DW1 testified that they gave allowances of Kshs. 200,000 per month to each beneficiary but that when companies operations slowed down, and due to heavy debts, the Trustees could not get sufficient funds for maintenance but that they nonetheless managed to pay some allowances from cash flows availed by the three Holding Companies and that no dividends were paid to the Trust or at all since 2012 when he joined the Trust.

324. Further, the defendants contended that the Trustees gave a condition in a **handbook** that whoever did not sign a Trust handbook could not get any allowances and also gave conditions and circumstances for withdrawal of the allowances. In justifying the introduction of the handbook and conditions thereto, the defendants contended that this was due to the need to keep order and style in the Trust and make sure the companies made profits by controlling expenditure of beneficiaries, albeit, he could not explain why some beneficiaries received more money in allowances for maintenance than others.

325. On the question of the education policy, the defendants contended that they developed the same due to the fact that the beneficiaries had taken their children to high-end schools after the death of the founder as they knew the fees would be paid and yet the Trust had no sufficient funds and thus the need to classify the beneficiaries so as to reign in on costs to enable them manage the fees. However, they admitted that they did not consult the first line parents.

326. The Trustees nonetheless did not limit the fees for the children of the employees. On the amount paid as allowance the defendant testified that the same was allowed in the Trust Deed.

327. DW2 testified to the effect that they had set up allowances at Ksh.200,000 monthly which continued until beneficiaries interrupted the Trust by going to court and stopped companies which generated the revenue. Further, that for Lucy Karume they never gave her monthly allowances because she refused to accept structures by refusing to sign the charter and Trust document which had a clause instructing that any beneficiaries who went against the founder's wishes and interrupted the Trustees would not be entitled to any maintenance. He however stated that they had undertaken to pay her all accrued allowances from the sale of Kacharoba farm.

328. In a nutshell, what the defense evidence led to was the fact that the objectives of the Trust had failed not by their own fault but due to limited resources at their disposal thus making the success of the said objectives a challenge.

329. The question I must pose and attempt to resolve is ***whether the Trustees ought to be blamed for the failure of the Trust to accomplish its objectives?*** The objectives of the subject Trust were provided for under clause 3 of the Trust as to

“hold the Trust fund upon Trust and to administer the same to promote the maintenance, education and advancement in life of the beneficiaries who are individual persons and to advance the business prospects and interests of the entities referred in clause 1.2(vi) and 1.2 (viii) as set out in the declaration of the Trust.”

330. It was the defense's position that they stopped paying the allowances as at December 2014. The defendants in rebuttal to the claim that the Trustees had failed to achieve the objectives of the Trust by not paying for maintenance, education and advancement of life of the beneficiaries contended that they had indeed accomplished the objects of the Trust as they had **“done their best in the circumstances”** and that they stopped paying the allowances since the Trust was not generating more funds and that they did not consult the beneficiaries when they made this decision. The same was the reason as to why they had not paid medical expenses and school fees as when required.

331. As I have opined elsewhere in this determination, it is trite law that in civil cases the burden of proof is always 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. See

sections 107-109 of the Evidence Act.

332. The plaintiffs presented a copy of the bank statement for Njenga Karume Trust and a statement which was not challenged. The said account shows that the Trust account had more than Kshs. 5 million. Further, from the unaudited Trust accounts which was presented before the court, the balance as at December 2014 (when the Trustees decided to stop payment) was more than Kshs. 25 million. It is my opinion that the money was sufficient to give allowances for some months to all the beneficiaries as the Trustees did not claim that this money was meant for any other priority purpose than the maintenance of the beneficiaries. This would have met the first objective (at least). Furthermore, as earlier stated, in October 2014 the trustees took a loan of Kshs 33 million from Jamii Bora Bank to pay themselves their responsibility allowances and IKM's legal fees and accounting services. If the trustees could charge the assets of the Trust as security for loans to advance to themselves responsibility allowances, did they consider it fit to do the same for the beneficiaries and more so, was it a prudent thing to do? Was this in the best interest of the beneficiaries for whom the Trust was established? This is against evidence by the defendants that the Trust was doing very well and that there were business prospects in the Holding Companies and the KHL was profitable but that the injunctions made it difficult for the Trustees to administer the Trust. It is my opinion therefore that the assertion that there were no sufficient funds to meet the stated objective of the Trust Declaration is unfounded.

333. The plaintiffs further raised an issue as to the Trustees making irregular payments to themselves. However, I opine that the plaintiffs did not prove this allegation with evidence. Despite the plaintiffs flagging out and questioning the various payments that the Trustees had made to themselves, it was the Trustees' evidence that the same were sitting allowances and the same was allowed under the Trust Deed.

334. The plaintiffs in my opinion had the duty to present evidence that the defendants had indeed sat for lesser number of meetings as opposed to what was paid to them. It was not enough for the plaintiffs to just highlight the said payments and aver that the same was in excess and amounted to irregular payments. They ought to have presented evidence that the said payments were indeed excessive. No evidence was adduced to this effect. I am inclined to believe that the said payments, in as much as they appeared huge, were lawful payments due and payable to the Trustees as allowances and various reimbursements on the costs they had incurred on their personal account on the matters relating to the Trust.

v. On whether the Trustees discriminated against some of the beneficiaries?

335. Related to the objects of the Trust and the failure by the Trustees to achieve the same, it was the plaintiffs' case that the Trustees had discriminated against some of the beneficiaries and mistreated them. A case in point was the 3rd plaintiff whom the plaintiffs averred that she was denied her monthly allowance when she failed to execute documents indemnifying the Trustees of the Njenga Karume Trust for any losses and which document they had introduced as a condition precedent for receiving a monthly allowance of Kshs. 200,000/-. These averments were strongly rebutted by the defendants. Mr. Waireri in his replying affidavit deposed that it was not true that the Trustees had been punishing some of the beneficiaries as the 3rd plaintiff declined to receive her allowance so as to lend credence to the allegations that they were being discriminated against. This testimony was contradicted by the evidence during cross examination where DW1 testified that they gave a condition that whoever does not sign a Trust handbook could not get any allowances and further that children of Njenga Karume were to sign the Trust handbook before getting the allowances. He further testified that Lucy Wanjiru Karume (3rd plaintiff) disagreed with the handbook so she refused to sign the handbook and they (Trustees) therefore did not give her that monthly allowance. The rest were given allowances before and after signing the handbook. DW1 and DW2 were never re-examined on this issue.

336. From the above, there is a clear admission by the defendants that indeed the Trustees refused to pay the 3rd plaintiff since she did not sign the handbook and as such it was a condition precedent to getting the allowances. The defendants however did not refute the averment that the said handbook was an indemnity against their liability and that was the reason they made it a condition precedent. I have perused the said Trust handbook and what I have seen was that generally the said handbook was to ensure proper running of the Trust. Clause 10 therein provides for the process of applying for the allowances and the timelines and in my opinion, the same was prudent on the part of the Trustees.

337. However, notwithstanding the objectives of the handbook, the Trustees failing to pay the beneficiaries (3rd plaintiff) due to the failure to sign the handbook and an assertion which is admitted, I find the same being discriminatory and against the objectives of the Trust and an intimidation of sorts.

338. In my humble view, refusal to sign a handbook was not acting in disobedience of the founder's wishes and therefore refusal to pay a beneficiary an allowance for maintenance was unjustified and an indication of abuse of the discretion by the Trustees. It clearly confirms the averments by the plaintiffs that the Trustees treated some of the beneficiaries with contempt. The beneficiaries should, in terms of receiving an allowance and for accountability purposes, have been asked to sign a payment voucher which is an accountable document. **In the Matter of GW & another (Minors) (supra), it was held that the Trustees have a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries...**

339. Refusing to pay a maintenance allowance to a beneficiary who refused to endorse the handbook was in my view, discriminatory and not in the best interest of the beneficiary in question. This was further in breach of the Trustees' implied duty not to discriminate. Making the signing of the handbook indemnifying the Trustees mandatory was not made in good faith since the Trustees had the discretion to reasonably demand that payment would be done by cheque or that for accountability purposes the beneficiaries would be required to sign a payment voucher or an acknowledgment slip. The **Supreme Court of British Columbia** in **Bronson v Hewitt 2010 BCSC 169** dealt with a similar scenario where the Trustees made signing of the release of payments to the beneficiaries as a condition precedent to the giving of the allowances. The Court held:

***“[662] the submission that the Trustee was entitled to pay certain beneficiaries and accumulate for others is, with respect, untenable. It is contrary to the terms of the BNT Trust Agreement. Further, it is clear that the Trustee was not in this case exercising a good faith discretion in accumulating for some beneficiaries and paying others. The only reason the plaintiff beneficiaries were not paid was because they were not prepared to sign the Release, a document that the Trustee was not entitled to demand.*”**

[663] by paying certain beneficiaries and not others, Howard breached the terms of the BNT. As soon as Howard paid certain beneficiaries, he was legally obliged to pay the others, regardless of whether or not they were prepared to sign the Release. Although he may have been entitled to hold all of the funds pending a passing of accounts, what he could not do, given the terms of this Trust, was to pay some beneficiaries and not others.....”

340. I reiterate that the Trustees by not paying the 3rd plaintiff for failure to sign the handbook, a fact which was admitted, the same was in breach of the terms of the Trust Deed which required payment of the allowances to all the beneficiaries and further a breach of the general duty to act in good faith. The failure to pay the beneficiary on account of failure to sign a handbook was further an abuse of the Trustees' discretion as the decision to impose such a condition was unjustified and made mala fides.

341. Furthermore, the Trustees' decision to stop payment of maintenance allowances to the Beneficiaries in December 2014 due to alleged lack of funds was not justified as no evidence was tendered before this court to show that there were no funds available. No information was supplied to the beneficiaries on the state of the funds for disbursements and the need to suspend the same. To the contrary, as stated above, there were funds in the accounts and there was no evidence to show that those funds were exclusively reserved for any other justifiable priority project. The Trustees did not controvert this evidence.

342. On alleged payment of huge allowances to themselves, this court finds that the allowances paid to Trustees were sitting allowances and reimbursable expenses. The plaintiffs did not present sufficient evidence before this court to demonstrate that the payments were excessive in the circumstance. I take note of the defendants' evidence which the plaintiffs' did not controvert that some of the Trustees sat in the Boards of the subsidiary companies and earned allowances from those sittings.

343. However, I appreciate that all the mistrust as it existed amongst the Trustees and the beneficiaries was mainly caused by the failure on the part of the Trustees to appraise the beneficiaries as regularly as possible on the running of the Trust. This was the reason why the beneficiaries had to raise their eyebrows when they discovered huge payments to the Trustees and to third parties.

344. As I have noted elsewhere in this judgment, the Trustees had a duty to exhibit an objective standard of skill as would be expected from an ordinary prudent man of business. One of the core duties expected of them as ordinary prudent men of business was to keep proper books of accounts and to appraise the beneficiaries as to the affairs of the Trust as a way of being accountable. If they had performed this duty, it would have put the beneficiaries in the know and thus avoid the instant suit. Failure to perform this core duty led to suspense as amongst the beneficiaries.

vi. On the claim that the Trustees commenced various transactions of disposing off the assets of the Trust without notifying the Beneficiaries and failing to be accountable for all such transactions.

345. The plaintiffs' case was that the Trustees had commenced some transactions disposing off the assets of the Trust without notifying the beneficiaries. The assets in question were amongst others, South C property, Saw mill and the Kiambu property. The averment by the plaintiffs however was not denied by the Trustees. Despite Mr. Waireri in his replying affidavit averring that the beneficiaries were made aware of the intentions to dispose of some non-core assets which included the assets that the plaintiffs complained of, there was no evidence on the part of the defendants that they notified the beneficiaries of the intention to do the disposal. Mrs. Kamithi and Mr. Gatabaki in their replying affidavits, stated in cross examination that -DW 1 the sale of Kiambu property was effected in 2013 after the demise of the founder and that the beneficiaries were not involved or informed and that the entire purchase price was paid but it went to pay the Trust obligations including school fees. He further stated that the South C property was sold in 2014 after the founder's demise and that they did not consult beneficiaries before the sale and that the Trust was given more than 50% because of obligations of fees.

346. On the sale of Kiambu Sawmill Kiambu/Municipality Block 1/254 DW1 stated that the Trustees did not consult the beneficiaries over this sale and that the proceeds were to be shared 50:50 between Karume Investment Limited and the Trust, and that the Trust's share was used to meet the obligations of the Trust. DW2 also testified that by the time this suit was instituted, they had sold a house in South C, a property in Kiambu and a property in Limuru and were in the process of selling part of Kacharoba Farm. She added that when they sold these properties, they did not consult the beneficiaries.

347. It is clear from the above evidence during cross examination that the defendants admitted that indeed the beneficiaries of the Trust were never consulted when the Trustees were disposing the Trust property. I am of the opinion and I concur with the plaintiffs therefore that indeed they were not consulted by the Trustees during the disposal of the assets in issue.

348. The Trustee usually has the power to sell real property without getting anyone's permission, but it is generally desirable that a Trustee obtain the agreement of all the Trust's beneficiaries. If not everyone will agree, then the Trustee can submit a petition to the Probate Court requesting approval of the sale.

349. Before a Trustee exercises that power of sale, it must satisfy itself that it has that power. Trustees do not have a general power to sell the Trust's property, because of their paramount obligation to preserve Trust property and to invest and ensure that the Trust is sustainable.

350. The power to sell can arise from the Trust instrument, statute or a Court order, as was the case herein where parties sought and obtained leave to dispose of a portion of Kacharoba Farm for a particular purpose of meeting some of the objectives of the trust namely, medical needs of some of the beneficiaries, school fees and maintenance. However, the Trustee must exercise the power according to the standard of care, diligence and skill a prudent person of business would exercise in managing the affairs of another person.

351. Regarding the accounting of the proceeds of sale of the said assets, I have opined elsewhere in this determination that the Trustees failed to keep and produce proper books of account. As such, the accounting for the proceeds of sale of the fixed assets by the Trustees was not done.

352. However, a clear scrutiny of the above issue reveals that the bone of contention between the plaintiffs and the defendants is the duty to notify the beneficiaries as to the disposal of the assets of the Trust (a duty which the Trustees admit not to have performed). The question therefore is ***whether the Trustees had a duty to notify the beneficiaries as to the sale of the said assets?*** Mr. Waireri in his replying affidavit deposed that the Trustees were under no statutory or fiduciary obligation to notify the beneficiaries of the sale or intended sale of the said Trust assets and stated that it would indeed undermine the very essence of corporate governance if the Trustees were to consult the beneficiaries regarding every operational decision or action taken on a day to day basis.

353. On the part of Mr. Gatabaki, he deposed in his replying affidavit that the plaintiffs had been involved in the running of the affairs of the Trust and that Trustees had given the beneficiaries regular updates of all the material progress in the management of the Trust.

354. As earlier stated, the Trustees have a fiduciary duty to inform the beneficiaries as to the transactions involving the Trust. It is trite law that the Trustees hold Trust property for the benefit of the beneficiaries and should therefore deal with the said property with the best interests of the beneficiaries in mind. Disposal of the assets of the Trust without involving the beneficiaries is in my humble view, a breach of Trust. Notifying the Trustee as to dealings of the Trust is an extension of the duty to inform the beneficiaries. It might not be on a daily basis but at least the Trustees have a duty to call for meetings with beneficiaries and notify them of the intended sale of the asset of the Trust and the purpose for which the sale is intended. This is one of the ways the Trustees can be said to have exercised their duties for and in the interest of the beneficiaries.

355. Furthermore, while the Trustee is given legal title to the Trust property, in accepting title, the Trustee owes a number of [fiduciary duties](#) to the beneficiaries. The primary duties owed include the [duty of loyalty](#), the [duty of prudence](#), and the impartiality. Trustees may be held to a very high standard of care in their dealings in order to enforce their behavior. To ensure beneficiaries receive their due, Trustees are subject to a number of ancillary duties in support of the primary duties, including duties of [openness](#) and [transparency](#), and duties of [recordkeeping](#), [accounting](#), and [disclosure](#). In addition, a Trustee has a duty to know, understand, and abide by the terms of the Trust and relevant law. The Trustee may be compensated and have expenses reimbursed, but otherwise must turn over all [profits](#) from the Trust properties.

356. Without informing the beneficiaries of the sale of such assets, the Trustees were simply saying they have absolute discretionary power which I have found, is not unbounded. It must be reasonable and exercised in good faith.

2. Therefore on whether the trustees should be removed and replaced with other trustees?

357. ***In Re Gaydon [2001] NSWSC 473, Barrett J stated, “It is the duty of the Court to uphold and protect Trusts, not to destroy them... [I]n the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a Trust.”***

358. ***In Chapman v Chapman [1954] AC 429, the House of Lords was asked whether the courts of equity had jurisdiction to vary a Trust for reasons that it would be advantageous for the infant beneficiaries. Lord Simonds explained (at 445-446): “It is the function of the court to execute a Trust, to see that the Trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a Trust because alteration is thought to be advantageous to an infant beneficiary.”***

359. These statements illustrate the scope of the court’s traditional jurisdiction over Trusts that has developed at equity to supervise and protect Trusts and see that they are properly executed, as well as some of the bounds of that jurisdiction.

360. The plaintiffs prayed for the removal of the Trustees in the Njenga Karume Trust. Prayer no. 2 of the summons was for orders that *Mr. George Ngugi Waireri, Mr. Kung’u Gatabaki and Margaret Nduta Kamithi be replaced as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees by any other three (3) beneficiaries of the Njenga Karume Trust.* The grounds upon which the Trustees sought the said removal were that the Trustees had breached their duties under the Trust Deed and under the law.

361. Removal of Trustees by the court is provided for under section 42 of the Trustees Act Cap 167 of the Laws of Kenya. Section 42(1) provides that ***“The court may, whenever it is expedient to appoint a new Trustee or new Trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new Trustee or new Trustees either in substitution for or in addition to any existing Trustee or Trustees, or although there is no existing Trustee.”***

362. Sub-section 2 of this section 42 provides that ***“In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new Trustee in substitution for a Trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.”***

363. Further, courts have inherent jurisdiction to remove a Trustee. This inherent power was first appreciated in the case of ***Letterstedt v Broers (1884) 9 App Cas 371*** in which Lord Blackburn sitting in the South African court summarized the position as follows:-

“...if satisfied that the continuance of the Trustee would prevent the Trusts being properly executed, the Trustee might be removed. It must always be borne in mind that Trustees exist for the benefit of those to whom the creator of the Trust has given the Trust estate”

“... If it appears clear that the continuance of the Trustee would be detrimental to the execution of the Trusts, even if for no other reason than that of human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the Trustee, and if there is no reason to the contrary from the intentions of the framer of the Trust... it seems to their lordships that the court might think proper to remove him.”

364. The removal of Trustees and the principles laid down in ***Letterstedt v Broers (supra)*** was applied by Newey J in ***Brudenell-Bruce v Moore & Cotton [2014] EWHC 3679 (Ch)*** where the court held that:-

“252. When deciding whether to remove a Trustee, the court’s “main guide must be the welfare of the beneficiaries.....”

“..253. Proof of actual misconduct on the part of the Trustee can potentially warrant his removal. A passage from stories’ ‘Equity Jurisprudence’ that was quoted in Letterstedt v Broers (at 385-386) is relevant here.....”

254. As is apparent from this passage, breach of duty on the part of Trustee will not necessarily dictate his removal, and, conversely, a Trustee can be removed without having committed any breach of duty.....”

256. When deciding whether a Trustee should be removed, a breakdown in relationship between a Trustee and a beneficiary must, as it seems to me, be taken into account in similar circumstances. On the other hand, “friction between Trustees and the immediate possessor of the Trust estate is not of itself a reason for removal of a Trustee....”

365. The principle of considering “the welfare of the beneficiaries” in removal of Trust was also emphasized in Gowar v Gowar (149/2015) [2016] ZASCA 101 where the South Africa’s Supreme Court of Appeal (Maya DP, Majiedt, Petse JJA and Victor and Baartman AJJA) in determining the removal of the Trustees due to friction between Trustees and beneficiaries held :

“...[32] Moreover, it must be emphasised that whilst a Trustee is in law required to act with care and diligence, the decisive consideration is the welfare of the beneficiaries and the proper administration of the Trust and the Trust property. And, sight must not be lost of the crucial fact that the court may order the removal of a Trustee only if such removal will, as required by s 20(1) of the Act, be ‘in the interests of the Trust and its beneficiaries’”

366. Thus it is clear from the above authorities that the courts in exercising the inherent jurisdiction to remove a Trustee, it should take the welfare of the beneficiaries as the main consideration.

367. The question that I must answer is ***whether the Trustees herein can be removed by the court in exercise of its inherent jurisdiction? To rephrase the question, “whether it is in the welfare of the beneficiaries that the Trustees herein be removed.***

368. As stated elsewhere in this determination, the Trustees are found to have breached the provisions of the Trust Deed by failing to comply with its express provision in relation to appointment of the new Trustees to wit Mr. Gatabaki and Mrs. Kamithi. The Trustees further failed in their duty to keep proper books of accounts and further to provide information to the beneficiaries. The Trustees further failed to inform the beneficiaries in the dealing with the property of the Trust. Despite them having been bestowed with discretion by the Trust Deed the Trustees further discriminated against some of the beneficiaries by denying payment of allowances on the basis that the said beneficiary did not sign the handbook indemnifying the beneficiaries.

369. Furthermore, Mrs. Kamithi ‘bought’ Trust property to wit an apartment which is part of Trust assets belonging to one of the Holding Companies but there is absolutely no evidence adduced by her to show that she paid for the said apartment. Albeit clause 9.11 allow contracting with the Trust, the clause does not permit Trustees to purport to acquire properties of the trust by way of purchase without consideration. If that were to be the case then every Trustee would rush to get a share of the Trust property and leave nothing for the beneficiaries. Mrs. Kamithi in her evidence admitted in her evidence in cross examination that she bought the Trust property, but could not demonstrate by way of documentation that she honestly acquired the said property.

370. It is a basic principle of trust law that trustees may not put themselves into a position where their personal interests conflict with their duties as trustee. If a trustee has a personal interest in a transaction relating to the trust, then he or she may be committing a breach of trust. This is called the rule against **self-dealing**. Such transactions may be undone by the court (and the trustee pay the costs of any proceedings). A long line of court decisions have held that a trustee, as with other types of fiduciary, must not place him or herself in a position where their personal interests conflict, or may potentially conflict, with their duties as trustee. It is also clear that a trustee must not derive any personal advantage from the administration of the trust unless expressly authorized to do so. In (**Megarry V-C in Tito v Waddell (No 2) [1977] (Ch) 106**) it was held:

“if a Trustee sells the Trust property to himself, the sale is voidable by any beneficiary, however fair the transaction.”

371. There are no proceedings before this court to enable it determine as Meggary V-C did in the above decision. However, it is clear to this court that self-dealing did take place by Mrs. Kamithi which places her in a conflict of interest with the Trust. In my humble view, the Trustees substantially miserably failed to execute their duties with the diligence expected of them while managing their own private affair and thus in breach of the Trust.

372. During the hearing of this matter, it emerged clearly that the Trustees were indeed conducting the business of the Trust without having the beneficiaries’ interests at heart. That was why even after selling a portion of Kacharoba farm, with leave of court and by consent duly executed by all the parties on how those proceeds were to be applied, , the Trustees instead of first taking care of the urgent needs of the beneficiaries which involved medical care, school fees and maintenance as per the consent, went on their own frolic and in their accountability statements for the proceeds of sale, they filed into court compliance affidavits showing how they had distributed the proceeds to corporate beneficiaries and payment of their own allowances and further making other payments which were never demanded as no bills were attached to the said compliance affidavits.

373. It was also the defense evidence that they borrowed Kshs. 33 million from Jamii Bora Bank and paid themselves responsibility allowances, IKM and Accounting fees which were not shown to have been urgent or demanded or billed for settlement.

374. Further the defendants admitted in evidence to making various disposals of assets such as the saw mill and the South C flat without informing the beneficiaries. The proceeds of sale of the said properties were never accounted for as no authentic books of accounts were

presented in court.

375. It should be noted that as the Trustees and the overall in-charge of the said assets, it was expected that they would take all due diligence, act diligently and in the interests of the beneficiaries. The Trust was to be sustained by the revenue collected from the businesses which the founder had established. It is a common and prudent practice that any management of a business must have accounts. In my view, this is the idea which inspired the founder (a seasoned businessman) to dictate that Trustees do keep proper and audited accounts. This was a duty expressed in the Trust. By not doing as dictated by the Trust, the Trustees were in breach of the Trust Deed command (and in my humble view, a material breach). By not keeping proper books of account and records, and further by not rendering them to the beneficiaries the trustees, reasonable in my opinion failed to take the beneficiaries' interests into consideration. I have no hesitation in finding and holding that the Trustees failed to act with the diligence and care expected of them in the administration of the Trust.

376. There was clear admission that the Trustees were unable to discharge their mandate as Trustees but that because they had not wasted or mismanaged the Trust they could not resign. In my humble view, the Trustees of NKT in essence breached the Trust Instrument. In **Miller v Cameron - [1936] HCA 13 - 54 CLR 572; [1936] ALR**. the case concerned Supreme Court battle over the Hancock/Rinehart family trust that cast a spotlight on the issue of removing trustees from their office. The case set out some of the relevant principles when a beneficiary seeks to remove a trustee, noting that Power conferred by the trust instrument is the first place to look for such power. The court stated:

“... in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove Trustees who have abused their Trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of Trustees, which will induce [the Court] to adopt such a course. But the acts or omissions must be such as to endanger the Trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity”

377. The actions by the Trustees which were in breach of the Trust as highlighted above indeed endangered the Trust property. The same acts for instance failure to keep proper books of accounts clearly show some want of honesty and a want of reasonable fidelity. As was stated in the New Zealand High Court case of **Attorney-General v Ngati Karewa and Ngati Tahinga Trust HC Auckland M2073/99,** (paragraph 66):

“.....the primary question is not whether the impugned Trustees have committed breaches of Trust. The jurisdiction to remove Trustees is merely ancillary to the principal duty of the Court to see that the Trusts are properly executed...”

378. PW1 testified that the Trustees never involved them in the affairs of the Trust as they never ever met to discuss the Trust. He alluded to some animosity between the beneficiaries and the Trustees. In rebuttal, DW1 testified that after coming to court there were no formal meetings. DW1 further admitted that it was true that Trustees and beneficiaries were not in talking terms and that majority of first line beneficiaries were seeking the removal of the Trustees and that that was the case with the majority of grandchildren who were adults. DW1 further testified that initially they had created a channel of communication but when the relationship was strained, they stopped communication and they started communicating based on the beneficiaries' needs.

379. What comes out from this testimony is that the Trustees and most of the beneficiaries who are interested parties in this suit are not in good terms. I say some of the beneficiaries because, from the pleadings filed in this court, it is clear that the beneficiaries' support of the Trustees is divided. Some of the beneficiaries indeed support the Trustees and others do not support them. In **National Westminster Bank v Lucas [2014] EWCA Civ 1632**, Patten LJ held:

“The direct intervention by the Court in the administration of a Trust ... by the removal of the Trustee ... has ... to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardize the proper administration of the Trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances.”

380. From the evidence presented before this court, the break down in the relationship between the Trustees and majority of the beneficiaries started prior and after this suit was instituted. DW1 testified that majority of first line beneficiaries were seeking the removal of the Trustees and that was the case with the majority of grandchildren who were adults. In my view, the break down in the relationship and further the mistrust as it exists will definitely jeopardize the proper administration of the Trust. It is clear that the beneficiaries no longer Trust the Trustees. That is why for instance, the beneficiaries had to question every transaction by the Trustees.

381. From the evidence in this matter it is clear that the beneficiaries are suspicious that the Trustees are benefitting from the Trust more than they are supposed to, and that they are treating the beneficiaries as if the Trustees have the discretion to give or not to give maintenance and support contemplated by the Founder. For example, the emails submitted by Michelle Wariara Karume (RIP) show that the Trustees appeared to be doing a favour to the beneficiaries. Throughout the trial, the beneficiaries appeared to be desperate for support especially Michelle Karume who, regrettably is no more as I deliver this judgment. Albeit the Trustees claimed to be assisting her from their own resources it was clear that even when funds were available from the sale of Kacharoba Farm as authorized by the court, her medical issue was never made a priority and counsel for the interested parties other than the 4th Interested party and the widow kept applying to court for enforcement of the consent. That in my humble view is unacceptable as it violates the beneficiaries' guaranteed rights to access justice and to fair administrative action. In addition, any instrument barring a beneficiary from acceding court for legal redress would in my humble view be unconstitutional. Article 50(1) of the Constitution guarantees every person the right to a fair hearing before any court or tribunal.

382. In the **Matter of Mark, C.H., 83 Misc 3d 363 (Sur Ct, New York County 2012)**, provides an example of what the New York County Surrogate's Court viewed as an indefensible attempt to rely on the broad grant of **“absolute discretion.”** In that case, at trust beneficiary was one of the most vulnerable, suffering from profound disabilities. The Court first observed that the trust at issue empowered the trustees with absolute discretion to withhold or pay out income, and, in the event of an income shortfall, to pay trust principal for the “care, comfort, support and maintenance” of the beneficiary and his descendants. The Court found:

“The trustees left [the beneficiary] to languish for several years with inadequate care, despite the fact that the [trust] had abundant assets. In so doing, the trustees failed to exhibit a reasonable degree of diligence toward [the beneficiary]. Courts will intervene not only when the trustee behaves recklessly, but also when the trustee fails to exercise judgment altogether (“even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion”)

383. In my view, in this case, I find that the Trustees failed to exercise judgment all together and placed their own interests ahead of the needy and vulnerable beneficiaries. The Trustees more so from the evidence of emails seen by the court to some of the beneficiaries, blamed the beneficiaries for seeking legal advice on their rights under the trust and filing this suit and as a condition for support they were told to terminate the court proceedings. That in my view is not acting in good faith.

384. The issue of the Trustees opening undisclosed bank accounts though not proved points to the suspicion and mistrust that the beneficiaries had of the Trustees and this is basically due to lack of communication or information to the beneficiaries by the Trustees.

385. I reiterate that it is apparent that the relationship between the Trustees and the beneficiaries is acrimonious and has deteriorated and irretrievably broken down despite the filial relationship between some of the Trustees and the beneficiaries and this dire situation is likely to jeopardize the proper administration of the Trust and thus it would therefore be against the welfare of the beneficiaries of the Trust to retain the Trustees as they are.

386. For the above reasons, I find that this is a proper case where the Trustees should be removed because it is clear that the welfare of the beneficiaries is opposed to their continued occupation of the office and by admission of DW1, it is almost impossible to discharge their mandate as Trustees save that they cannot resign because they have not wasted the Trust assets. Wastage or no wastage in my humble view, the trust was not created to be dormant. It is a living instrument which must be operational and be profitable for the beneficiaries. If the Trustees cannot discharge their mandate, the very reason why their removal is imperative without delay.

387. Having said that, the next question that I must pose and answer is **whether all the Trustees ought to be removed and if that is the case, who should be appointed as Trustees in their place?** It was the plaintiffs’ case and Interested Parties supporting them that the three Trustees that is **Mr. Kungú Gatabaki, Mr. Henry Waireri and Mrs. Margaret Nduta Kamithi** be removed from being the Trustees of Njenga Karume Trust. The plaintiffs did not seek the removal of Henry Waireri Karume who is a co- Trustee and beneficiary of the Trust. Neither did they make him a co-defendant in the Originating Summons. Neither did Mr. Henry Waireri swear any affidavit in response to the Originating Summons. It thus means that the plaintiffs are contented with Henry Waireri Karume remaining as a Trustee. The High Court of England and Wales in **Jones & Others v Firkin-Flood [2008] EWHC 2417 (Ch)** faced with a similar situation on an application for (removal of Trustees) held as follows (Mr. Justice Briggs):-

“291. In my judgment it is obvious that there must be a change from the present body of Trustees. The more difficult question is whether all or only some of them, and if so who, should be removed.

292. In my judgment, the governing criterion, consistent with the need to have regard first and foremost to the interests of the beneficiaries, is to constitute a body of Trustees who will be able with the minimum of expense and dissent, and in particular with as little as possible further assistance from the court, to restore the administration of the Trust to a basis capable of commanding the confidence and respect of all its beneficiaries, and dealing impartially with their separate claims to consideration for distribution.....”

388. Further, the court in **Re Tempest (1886) 1 Ch App 485** laid down the following principles to be applied in appointing new Trustees:-

1. The court will have regard to the wishes of the persons by whom Trust has been created, if expressed in the Trust instrument, or clearly to be collected from it. If, for instance, the settlor has declared that a particular person, or a person fitting a particular character, should not be a Trustee, the court would not appoint such a prohibited person.

2. The court will generally not appoint a person to be a Trustee, proposed by beneficiaries, in opposition to the wishes of the settlor or of the interests of others beneficiaries. It is the duty of every Trustee to hold an even hand between the parties interested under the Trust. However, the ultimate decision lies with the court. The fact that a beneficiary with a small interest objects to the appointment may not be sufficient objection. see (Re Dickinson’s Trusts [1902] WN 104).

3. The court will have regard to the question whether the appointment will promote or impede the execution of the Trust. A Trustee will not, for instance, be appointed if there would be a conflict between his interest and duty, unless the settlement contemplates the possibility of such a conflict, e.g. where the Trustee of a pension fund is also a beneficiary (Re Parsons [1940] Ch 973).

4. The court may refuse to appoint a new Trustee if the surviving or continuing Trustee has a well-founded objection. The continuing Trustee does not, however, have a power of veto. If he raises an unreasonable objection, he may himself be removed.

389. In **Jones & Ors v Firkin-Flood (supra)** the court at paragraph 298 appeared to further suggest that the court will in general require evidence of the new Trustee’s fitness. The Court held that:

“The defendants have put forward, together with appropriate CVs and consents to act, the names of two apparently suitable professional persons as new Trustees, about whose suitability the claimants have as yet (so far as I am aware) raised no reasoned objections.”

390. Taking into consideration the above principles, and applying the same in the instant case, the founder/ settler did express in the Declaration of Trust in Clauses 4.1 to 4.9 of the Trust Deed that **the chairman of the Trust ought not to be a beneficiary under the Trust.**

Accordingly, the Chairperson of the Trust should not be a beneficiary.

391. Further it is clear that the founder intended that if a Trustee resigns then one of the beneficiaries ought to have been considered in filling that position and if such vacancy occur after Emmanuel Karume Njenga is of the age of majority, then he should be appointed as the Trustee.

392. It was further the founder's intentions that there be a minimum of two Trustees at any given time. The Trustee Act Cap 167 caps the number of Trustees to a maximum of four. see

393. What this means is that the suggestions by the 1st plaintiff that the 1st -3rd plaintiffs and the 2nd interested party should be appointed as the Trustees as they have the requisite qualifications cannot hold as this will go against the wishes of the founder/ settlor. Further it means that there will be a place in the Trusteeship for the chairperson who should be an outsider. (See clause 4.9 of the Trust Deed). It thus means that assuming that Mr. Henry Karume's position has not been disputed; it is only two persons who can be appointed from the beneficiaries to be Trustees.

394. The court further notes that none of the proposed nominees for the appointment has a conflict between his interest and the duties which he/ she might get as a result of the appointment.

395. However, a reading of the Trust Deed does not imply any intentions of the founder to have professionals run the Trust as Trustees. A scrutiny at the initial Trustees does not reveal any professional aspect which the founder might have considered and or intended for the future. Thus, the plaintiffs' averments that they have experience in the hotel industry do not hold. Neither did they present any evidence as to their said professional qualifications and/ or experience as claimed.

396. It is further clear from the facts of the case that the beneficiaries have taken sides in that the plaintiffs, 2nd, 3rd, 5th, 6th, 7th and 8th interested parties are in a different camp from that of the 1st and 4th interested parties (all being the beneficiaries under the Trust). As such, the interests of the two factions must be taken into consideration while appointing the Trustees, and while appreciating that they are all beneficiaries and entitled to their different opinions which in any event should not be detrimental to the management and administration of the Trust.

397. It is my humble view therefore that the court cannot at this point substantially appoint persons to replace the current Trustees. A further reading of the Trust Deed (clause 4.8) reveals that IKM Advocates and in particular Mr. James Kamau was mandated by the founder to appoint Trustees in the circumstances that the Trustee shall remain one in the office. The said firm of advocates should provide a list of nominees whom they should select upon consulting the beneficiaries. It is only after this is not possible that the court can subrogate this role and appoint the replacement. Thus upon removal of the three Trustees, the only remaining Trustee will be the beneficiary Mr. Henry Waireri Karume.

398. My humble view in this matter is that the appointment of new Trustees in whom all the beneficiaries have confidence will enable the Trust to run smoothly and thus achieving the objectives of the founder. It is the conviction of this court that the new Trustees once appointed shall be allowed time and space to restore some measure of harmony and cooperation within the family of the founder and further to steer the Trust to success.

399. I note that the first line beneficiaries (that is the children of the founder) are all educated and people of their means. As such, it is the belief of this court that these beneficiaries should not expect immediate provision of the various benefits under the Trust. They ought to give the new Trustees time to accumulate enough wealth so as to be able to meet their needs.

400. Further and *orbiter*, it is my opinion that where a Trustee is asked to resign, and if it appears clear that the continuance of the Trustee would be detrimental to the execution of the Trust, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the Trustee, and if there is no reason to the contrary from the intentions of the framer of the Trust to give this Trustee a benefit or otherwise, the Trustee is always advised by his own conscience and counsel to resign. Once beneficiaries in a Trust pokes holes as to your diligence and care towards the Trust, the most honorable thing ought to be to resign so as to allow the beneficiaries get someone else to manage the Trust. It does not matter the filial relationship between the Trustee and the settlor of the Trust.

401. *In the end, I find and hold that all the Trustees except SAMUEL WANJEMA KARUME, who is a beneficiary are hereby removed from being Trustees of the Njenga Karume Trust(NKT)*

402. ***On whether the trustees can be compelled to render accounts***, It was one of the plaintiffs' prayers that this Honourable Court do direct the Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees to account and/ or give an account of all transactions undertaken, payments made, funds received and expenditures incurred on behalf of the Njenga Karume Trust since 24th February 2012. In rebuttal during the hearing, the defendants presented before court what they claimed accounts but which were never audited accounts. As earlier stated in this judgment, the Trustees were bound by the Trust instrument to keep proper books of account and records. They did not have any discretion not to undertake this obligation.

403. I have already found that the Trustees did not adhere to this calling which was in breach of their duty to keep proper books of accounts and render information to the beneficiaries. I further noted that though the clause on keeping accounts and records (clause 10:11), gave the Trustees the discretion not to render information to the beneficiaries, the said discretion was not absolute. It was to be exercised for the best interest of the beneficiaries under the Trust and thus the Trustees could not use this as a defense for not keeping proper books of accounts and or rendering information or accounts to the beneficiaries. The Oregon Supreme Court in **Wood v. Honeyman, 178 Or. 484, 566, 169 P.2d 131, 166 (1946)**, stated as follows:

“We are completely satisfied that no Trust instrument can relieve a Trustee from his duty to account in a court of equity. We are, however, [satisfied that when] a provision is found in a Trust instrument [relieving a Trustee from the necessity of keeping formal accounts] a beneficiary cannot expect to receive reports concerning the Trust estate. But even when such a provision is made a part of the Trust instrument, the Trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his Trust. Such being our views, it follows that, so far as the Educational Trust [relieving the Trustee from all obligation to account to the beneficiaries of this Trust, or to anyone] is or to anyone] is concerned, the defendant was not required to maintain formal records and supply information to the beneficiaries concerning the condition of the corpus of the Trust. The provision under consideration did not, however, relieve him from the accounting which the circuit court exacted of him.”[emphasis added]

404. Further in **Raak v. Raak, 428 N.W.2d 778** it was held:

“It is a strict duty of a Trustee to keep and render a full and accurate record and accounting of his Trusteeship to the cestui que Trust, and the duty is strictly enforced by the courts..Under a Trust agreement relieving the Trustee from the necessity of keeping formal accounts, while a beneficiary cannot expect to receive reports concerning the Trust estate, the Trustee may be required in a suit for an accounting to show that he faithfully performed his duties, and is liable to whatever remedies may be appropriate if he was unfaithful to the Trust...This is because a Trust instrument may relieve a Trustee from the necessity of keeping formal accounts, but cannot legally relieve him from his duty to account in a court of equity.”

405. The Privy Council (Lord Walker) in **Schmidt v Rosewood Trust Ltd [2003] UKPC 26** appreciated the right to seek disclosure of Trust documents. The Privy Council held (at paragraph 51):

“51. Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of Trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of Trusts.”

406. Applying the holdings in the above judgments and which I concur with though persuasive, it is my humble view that the Trustees can be compelled by this court to provide accounts and records despite the Trust Deed providing that they were not bound to do so to the beneficiaries. This duty to compel the Trustees to account to the beneficiaries through the court is in furtherance of the court's inherent power to seek disclosure of Trust documents as one aspect of the court's inherent jurisdiction, in exercise of its supervisory role, and where necessary, to intervene in the administration of Trusts.

407. **For all the above reasons, I find and hold that the Trustees who are hereby removed are ordered to render accounts to this court, of how they have administered the Njenga Karume Trust and the Njenga Karume Trustees Registered, from the time they took over administration of Njenga Karume Trust and Registration of the Njenga Karume Trustees Registered, after the demise of the Settlor/Founder until this date of delivery of this judgment and of their removal.**

408. The said Trustees shall from this moment of delivery of this judgment not be allowed to operate as Trustees. They cease being signatories to any bank account for and on behalf of the Trust. I decree that the Law firm of IKM in particular, in accordance with Clause 4.8 of the Trust Deed, Mr. James Kamau of IKM shall supervise the exit process for the removed Trustees who shall prepare and file into court the said accounts within the next one hundred and eighty (180) days of this date. For avoidance of doubt, after the accounts are rendered, any Trustee as removed who shall be indebted by the Trust shall be paid their dues from the Trust Fund.

409. For avoidance of doubt I find no evidence tendered against James Raymond Njenga as an observer. I decline to make any adverse orders against him.

410. On costs I observe that the parties hereto are closely related. They have also been drawing expenses for this litigation from the Trust funds thereby depleting it further to the detriment of the needy beneficiaries. For that reason, I hereby order that each party shall bear their own costs of these proceedings.

FINAL ORDERS:

A. A declaration is hereby made that the interests of the plaintiffs and the beneficiaries under Njenga Karume Trust and the Njenga Karume Trust Registered Trustees would be served best by the removal of Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Margaret Nduta Kamithi as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees ;

B. I hereby order and direct the removal of Mr. George Ngugi Waireri, Mr. Kung'u Gatabaki and Mrs. Margaret Nduta Kamithi as Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees

C. I direct that the Trustees of the Njenga Karume Trust and the Njenga Karume Trust Registered Trustees to account and/ or give an account of all transactions undertaken, payments made, and funds received and expenditures incurred on behalf of the Njenga Karume Trust since 24th February 2012 to date. Upon such accounts being rendered, the court shall determine whether there was any dishonesty on the part of the Trustees in their dealings with the Trust assets and indemnity of the trust shall be ordered only after such evidence discloses dishonesty on the part of the Trustees.

D. I direct Mr. James Kamau of IKM shall supervise the exit process for the removed Trustees who shall prepare and file into court the said accounts within the next one hundred and eighty (180) days of this date.

E. I further direct that in accordance with clause 4.8 of the Trust Deed, IKM shall undertake the process of nominating the

persons to fill the vacancies of the removed Trustees, taking into account the provisions of clause 4.9 of the Deed that the Chairman of the Trust shall not be a beneficiary; and such nomination shall be undertaken after an assessment as stipulated in clause 4.5 of the Trust Deed.

F. Each party to bear their own costs of these proceedings.

Orders accordingly.

Dated, Signed and Delivered at Siaya High Court via email to all parties advocates this 7th day of May 2020

R.E. ABURILI

JUDGE