

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 11 OF 2023

**KAPESE COMMUNITY CHARITABLE
TRUST.....PLAINTIFF**

-VERSUS-

**AFRICAN CAMP SOLUTION.....
....DEFENDANT**

JUDGMENT

Introduction

1. In its Plaint dated **16/02/2023**, the Plaintiff sought the following reliefs against the defendant:

- (a) A declaratory order that the defendant is in breach of the terms of the lease agreement with the County Government of Turkana and the trust deed establishing Kapese Community Charitable Trust, the plaintiff herein;**
- (b) An order that the defendant owes the defendant (*sic*) the plaintiff the sum of Kshs. 68,750,262.54 to be settled with interest being outstanding dues;**

- (c) **An order directing the defendant to pay to the plaintiff the sum of Kshs. 46,412,928.00 in respect of 5% contribution for rent received for the period January 2014 to January 2019 together with interest therefrom from January 2014 until payment in full;**
 - (d) **An order directing the defendant to pay to the plaintiff the sum of Kshs. 22,337,334.54 in respect of 5% contribution for outstanding arrears claimed and received for the period February 2019 to the expiration of the lease together with interest until payment in full;**
 - (e) **Costs of the suit;**
 - (f) **Any other relief that the Honorable Court may deem fit and just to grant.**
2. On its part, the defendant entered appearance on **21/03/2023**. It thereafter filed its statement of defence dated **05/04/2023**. It denied the averments and contents set out in the plaint maintaining its innocence. It prayed that the suit be dismissed with costs.

The Plaintiff's case

3. The plaintiff called two witnesses to the stand: **PW1** Dorcas Akai Akuru, the plaintiff's former CEO serving between August

2019 and November **2023** and **PW2** Peter Lochuchu Clement, a trustee. When **PW1** was called to the stand, she adopted her witness statement dated **16/02/2023** as her evidence in chief. She testified that by agreement dated **13/02/2014**, the defendant and Tullow Kenya B.V. Limited, agreed to set up a charitable trust on behalf of the Kapese Community; the plaintiff herein. Its **certificate of incorporation** was marked **PExh3**. She, however, clarified that at the time of filing suit, the plaintiff and not been incorporated.

- 4.** The idea was to receive funding from a portion of the revenue from bed occupancy from the Integrated Operating Base and the service charge. This would be derived from rental payments made by the lessee, sub-lessees or licensees for occupation of the land to supporting community-based projects in the trust area.
- 5.** It was explained that generally, the defendant was in the business of providing comprehensive and professional services to organizations involved in operations in remote or hostile

areas where accommodation is not readily available. In that regard, the defendant's task is to manage the buildings, run and organize fixed and/or temporary camps allowing clients to focus on their core business activities.

- 6.** On the other hand, the plaintiff is a group of local families and community residing in the trust area. The group comprised of pastoralists, herders and other persons entitled to have legislative claim to be part of the community. This is based on common ancestry, similar culture or unique mode of livelihood as defined by the trust deed.
- 7.** By lease agreement between the defendant and the County Government of Turkana, the defendant was the lessee of all that property measuring **318.60** acres (**2** kilometres by **0.85** kilometres). The property is situated in Kapese area in Lokichar Ward of Turkana South District within the County Government of Turkana. It was a term of agreement that Tullow Kenya B.V. Limited would meet bed occupancy fees and service charge

derived from rental payments from various occupiers. There was no other obligation on its part.

- 8.** It was also agreed that a bed night fee for the camp would be charged at USD **5** per occupant per night and a levy rate of **5%** on the rent, sub-lessee or licenses of Tullow Kenya B.V. Limited. Those sums would be withheld by Tullow Kenya B.V. Limited for onward transmission to the plaintiff.
- 9.** Furthermore, the defendant was required to pay a fixed rate of USD **0.25** per square meter as land rent to the head lessor, the County Government of Turkana. This was payable as long as the lessees occupied the premises. Additionally, where the lessor made concessions to a lower rate, the balance of the difference between the lower rate and USD **0.25** would be paid to the plaintiff.
- 10.** Pursuant to a license agreement dated **13/02/2014** between Tullow Kenya B.V. Limited and the defendant, Tullow Kenya T.V. Limited was licensed to purchase, dispose and hold property in trust, conduct transactions, incorporate any

companies, invite donations and partnerships, operate bank accounts and otherwise use the priority as may be necessary in the course of its drilling and exploration activities in the area.

11. At its own expense, the defendant converted the property into an Integrated Operations Base that provided for accommodation, a transport hub for land and air, storage, work facilities, office space and fuel supply. An airstrip under Category C Aerodrome was also set up. Furthermore, the charitable trust to be set up on behalf of the plaintiff was designed to receive a portion of the funding from the revenue of bed occupancy from the Integrated Operations Base and service charge derived from rental payments by the defendant. This was intended to support community projects in the trust area as the property leased was community land.

12. It was computed that in total, Tullow Kenya B.V. Limited was required to pay an annual rent of USD **1,933,872.00** for the first three (3) years of the license agreement and

subsequently, an annual rent of USD **996,936.00** for the remaining term. Tullow Kenya B.V. Limited, it was testified, made all remittances to the plaintiff as per the lease agreement for **5%** bed levies for the period **2014** to **2021**.

13. In spite of the above agreements, **PW1**'s evidence was that the defendant failed to honor its obligations by failing to remit **5%** of revenue as land rent to the plaintiff since **2014** to date. Yet, the defendant continued to make use of the property and reap proceeds from the same.

14. **PW1** recalled that the defendant sued Tullow Kenya B.V. Limited in **Kitale ELC Cause No. 17 of 2021; African Camp Solutions vs. Tullow Kenya B.V. Limited and Kapese Community Charitable Trust** over unpaid annual rent for a period of five (5) years. It further sought outstanding arrears from **2019** to **2021** when Tullow Kenya B.V. Limited was still in occupation of the suit premises. The matter was determined by consent letter dated **15/12/2022 [PExh2]** where Tullow

Kenya B.V Limited was to pay the defendant USD **1,500,000.00** in full and final settlement of the claim.

15. PW1 explained that the defendant received the sum of USD **7,735,448.00** from Tullow Kenya B.V. Limited as rent dutifully paid for the period January **2014** to January **2019**. However, the defendant had not remitted the **5%** contribution translating to USD **386,774.40** (Kshs. **46,412,928.00**).

16. In addition, the defendant received USD **3,722,889.00** as outstanding arrears for the period February **2019** to the expiry of the lease agreement. However, the **5%** remittance of USD **18,614,445.45** (Kshs. **22,337,334.54**) was not paid to the plaintiff. This, **PW1** lamented, was in total disregard of the agreement dated **13/02/2014** and the trust deed. It is for those reasons that the plaintiff filed the suit.

17. PW2 a trustee member of the plaintiff and representing four families living near the Kapese Operation Camp adopted his witness statement dated **17/09/2024**. He testified that though he was registered as a member of the plaintiff on **04/01/2019**,

the certificate of registration indicated that the plaintiff was registered on **29/05/2023**, issued after the suit had been filed. It was registered with fifteen (**15**) trustees. He however stated that they were fourteen (**14**) in number that authorized to file suit but did not file the resolution. He could not however confirm whether an unincorporated trust had the legal capacity to sue.

18. PW2 continued that the plaintiff's objective was to implement different projects in the community with funds received from investors of the oil extractive industry. He recalled that the plaintiff received Kshs. **156** million from Tullow Kenya B.V. Limited. It utilized a larger portion of the sums in education, health, water and community management training, leaving a balance of Kshs. **32** million. The said Tullow Kenya B.V. Limited also paid service charge to the plaintiff. He admitted that he was not aware of the letter dated **08/02/2016**.

19. PW2 alleged that they held a meeting with the defendant to furnish the relevant documents for accountability purposes but that did not take place. He affirmed that **PW1** was their CEO but could not establish if she was aware of the defendant's projects. **PW2** also admitted that the minutes referred to in page **59** of the defendant's documents, the plaintiff-members applauded the work of the defendant. He defendant that though the defendant knew that they plaintiff members were supposed to be participants in the meetings, they were never invited. He was absent from the meeting. For that reason, he was emphatic that the defendant had not carried out any projects in their area of domicile.

20. PW2 continued that though the defendant was part of the plaintiff's agenda in several meetings, their representatives were never asked to be excluded from the meetings. They were not invited in the meetings. During the passing of their resolution to sue the defendant, he confirmed that Tullow

Kenya B.V. Limited was not present. That the onus was on the defendant to enjoin it to these proceedings.

21. PW2 testified that the defendant once met them at a hotel in Nairobi. In that meeting, the defendant's representatives informed them that they had no money to give them as they spent it on paying bills, statutory deductions and paying directors. The defendant's representative thus offered to give them Kshs. **2** million. However, the plaintiff members declined that offer hence the suit. He urged this court to grant the reliefs sought in the plaint. He explained that the Kshs. **68,750,262.54** was arrived at from **5%** of the rent charge which Tullow Kenya B.V. Limited paid the defendant. This accounted for a claim of Kshs. **46,412,928.00** + Kshs. **22,337,334.54**.

22. PW3 Cynthia Mudanye an advocate of the High Court of Kenya, testified that she registered the plaintiff and a certificate of incorporation issued. She confirmed that all statutory requirements were complied with, stamp duty was

paid. She produced the **certificate of incorporation** marked **PEXH2** (*sic*). She further testified that she participated in the registration of the trust deed franked on **01/02/2019**. The **certified copy of the trust deed** was thus produced and marked **PEXH1**.

23. PW4 Hon. Nancy Rop interim deputy registrar produced the original file in **Kitale ELC No. 17 of 2021**. She produced the **plaint, list of witnesses** and **witness statements** in evidence as **PEXH5, PEXH6** and **PEXH7**. From the proceedings in the file, the plaint was amended on **10/11/2022** and filed on **14/11/2022**. A consent was adopted on **25/01/2023**. The interested party, the plaintiff herein was present and participated in the proceedings of the day. She confirmed that the court had the jurisdiction to determine the dispute before it.

The Defendant's case

24. The defendant called **DW1** John Muhoho, the defendant's investor and director to the stand. He adopted his witness

statement dated **06/09/2024**. His co-directors were David Walker and Daniel Walker. His evidence was that the plaintiff lacked legal status and therefore lacked the *locus standi* to institute the present proceedings. This is because it was never duly registered when the defendant and Tullow Kenya B.V. entered into an agreement on **13/02/2014**.

25. He adduced a copy of the **trust deed** that was marked **DExh1**. It was executed by his co-director David Walker. The said agreement envisioned that a charitable trust be set up on behalf of the Kapese Community in order to receive funding. In that vein, the defendant contracted with Tullow Kenya B.V. to provide the services of forming an Integrated Operation Base (IOB) in Kapese community. In augmenting this evidence, he produced a copy of **agreement for licence**, dated **13/02/2014**, set to expire on **31/01/2019**, marked **DExh2**. Going by this, he was of the view that thus there did not exist an area that could be defined as a trust area. In the circumstances, he explained that it could not be said that any

one person or family could legislatively claim to be part of the community on account of common ancestry, similar culture or unique mode of livelihood.

26. DW1 explained that the trust was not created because the community failed to agree on the membership that would be trustees. Furthermore Tullow Kenya B.V. refused to incorporate it. It was not the responsibility of the defendant. In support of this, he produced a copy of **minutes** of a meeting held on **08/12/2018** marked **DExh3**. He continued that while it was agreed that there would be a bed night fee for the camp costing USD **5** per night occupant and a levy of **5%** on the rent that the proposed community charitable trust would be allocated the difference between the fixed rate of USD and any lower negotiable rate. The failure of the registration of the trust meant not no payment could be made as envisioned.

27. Following the delays in obtaining registration of the trust, **DW1** testified that it was agreed between the Turkana County Government, the community and the defendant that any funds

that would have been payable by the defendant would, as a goodwill gesture, be paid towards Kapese Community Projects. In a meeting, he acknowledged that Josephine Akim, the area chief and a member of the community, was present.

28. Notwithstanding the non-existence of the trust, **DW1** testified that the defendant paid an *ex-gratia* amount totaling Kshs. **169,287,433.57** towards Kapese community projects. **PW2** was among the people who saw was aware of and were beneficiaries of these projects. The projects covered the fields of education, bursaries, water, health services, development of small business enterprises and emergency between **2015** and **2019**. Those payments were calculated on information received from Tullow Kenya B.V. on bed occupancy and paid out in accordance with figures received from Tullow Kenya B.V. He produced a **schedule of payments made towards the Kapese Community projects** marked **DExh5**.

29. **DW1**'s evidence was that Tullow Kenya B.V. did not make all the remittances to the Defendant and did not make **5%** bed

levies for the period **2014** to **2021**. In support of this allegation, **DW1** produced a **letter** dated **31/08/2016** marked **DExh6**. He therefore contended that it was incorrect for the plaintiff to state that the defendant refused to remit **5%** of its revenue as land rent. He contended that the defendant has made up to date payments to the County Government of Turkana. It was therefore not privy to any breach of contract as it had honored its obligations.

30. DW1 confirmed that the defendant indeed filed a suit against Tullow Kenya B.V. in **Kitale ELC No. 17 of 2020** for unlawful occupation and a consent was arrived at between the parties. It was agreed that the sums claimed were not for unpaid rents. That it refused to pay for the land since the defendant held no lease. He produced **correspondences** and of dispute between the defendant and Tullow (K) B.V. marked **DExh7** and **statements of account** showing disbursements of funds for community projects marked **DExh8**.

31. DW1 maintained that the defendant had not received USD **7,735,488.00** from Tullow Kenya B.V. The plaintiff was therefore not entitled to **5%** of that sum. He added that the plaintiff was not entitled to any outstanding areas of USD **3,722,899.00** as outstanding arrears owed by Tullow Kenya B.V for the period beginning February **2019** to the expiration of the lease period. **DW1** recalled that it sought extension of the contract with Tullow Kenya B.V. but that did not materialize. It was at this juncture that the plaintiff was incorporated; when its business ceased to operate.

32. DW1 testified that certain persons named as trustees were never persons that were contemplated when the trustee was created. These are Dorcas Akom, Erastus Etheikom, Sylvano Mutembei and Eyani Abengole. That it had attended all meetings it was invited to by trustees. He confirmed that the trust deed did not operate retroactively. Its mechanisms were set up by the County Government, the area MCA and MPs, the area chief and council of elders as stakeholders. Regurgitating

that the defendant was not indebted to the plaintiff at all, **DW1** prayed that the suit be dismissed with costs.

33. DW2 Lotabo Lopenek Shaapan, a ward administrator at Turkana County Government, testified that he initially served at Lokichar ward from **2015** to March **2019**, the area where the subject matter was situated. He testified that he complied the **minutes** dated **29/01/2016** and **04/04/2017** that were marked **DExh4**. He added that the meetings were chaired by the subcounty administrator Turkana South and coordinated by the national and county governments and not the defendant or Tullow Kenya B.V. The members of the plaintiff participated in the meetings. He confirmed that the minutes were a true reflection of the transpirations that occurred during the meetings.

34. DW3 John Lokoli, an employee of the County Government of Turkana since **2014** recalled that he interacted with the defendant and wrote a **letter** dated **08/02/2016** that was marked **DExh4**. He confirmed that the community held an

agreement with the defendant to share profits. An issue arose prompting a stakeholder engagement held on **29/01/2016**. The stakeholders included Community elders, faith-based organizations, CSOs, *maendeleo ya wanawake*, youth and leaders, MCAs, county government officers and government officers, chiefs, DCC and assistant county commissioner.

35. One of the directors of the defendant, Willy Roberts, said that there was some for the community that had accrued to it from the land rent arising from the land given by the community to the defendant. It was then agreed that the money would be used for community projects. **DW3** chaired the said meeting. During the meeting Samuel Echoras was named as the chairman of the Kapese community. Projects were thereafter put in place by the defendant. He recalled that Kshs. **31,000,000.00** was invested in boreholes. Money was also allocated to bursaries and relief. More money was injected into the community in **2017**.

36. DW4 Jockshan Ebei a camp manager working for the defendant and secretary of the Kapese Community projects implement committee established on **29/01/2016** adopted his witness statement dated **13/11/2024** as his evidence in chief. He also produced **account statements** marked **DExh9 - DExh21**. His evidence was that the committee was set up in response to pressure by the community on the defendant's use of their land. He added that by agreement between the defendant and Tullow Kenya B.V., the defendant was to pay land levy revenue to the Kapese community during the pendency of the community projects.

37. When it was realized by the community that there was a delay from **2014** and **2016**, it asked the defendant to give them their money to kick start the benefit of the profits. This led to the stakeholder meeting held on **29/01/2016**. It was organized by the national and county governments. The defendant was invited to assure the community that they had remitted the land levy funds. That is the **5%** amounting to

Kshs. **31,000,000.00** collected between **2014** and **2016**. The community was ably represented.

38. Also present in the meeting, *inter alia*, were the DCC, chiefs, women groups, council of elders' representatives, the youth, persons living with disabilities, church representatives, *maendeleo ya wanawake* and the county and national government. It was resolved in the meeting that funds for the community from the levy fund were available from the defendant. Some of the Kapese community elders were appointed to represent the community in that meeting.

39. DW4 testified that the committee held several meetings to roll out the community projects. These projects were water related projects, bursaries and small-scale groups. Money was disbursed and properly utilized, **DW4** continued. He thus stated that the reliefs sought by the plaintiff had already been utilized by the Kapese community. He further confirmed that transactions were done through cheques, bank transfers, MPESA and directly to institutions.

40. DW4 verified that Tullow Kenya B.V. did not send any money for the bed levy. He added that the sum of Kshs. **31,000,000.00** was arrived at based on the agreement between it and Tullow Kenya B.V. that ended on **31/01/2019**. He also produced statements of accounts in **2018** and **2019** made for bursaries and other projects.

41. He recalled that the committee advertised for bursaries for those interested before making payments after approving those that have applied for them. At the end of the project a sum of over Kshs. **100,000,000.00** had been expended. He testified at as at **2024**, the camp was run by Tullow Kenya B.V. he recalled that the community was very pleased with the projects the defendant had set up and there were no complaints lodged against them. **DW4** thus denied the averments set out in the plaint praying that the suit be dismissed.

Submissions

42. At the close of the evidence, parties argued their cases via written submissions persuading me to find in their favor. This court has considered the elaborate submissions filed by the parties and thanks the respective Counsel for their industry.

43. The plaintiff filed written submissions with attached authorities dated **10/03/2025**. Having abridged the facts giving rise to the dispute, the plaintiff submitted that it had proved its case on a balance of probabilities by establishing that a trust was created on **13/02/2014** without duress, mistake or fraud. It submitted that the defendant failed to honor its obligation and the duty called upon by this court was to enforce that contract. In its view, the defendant failed to demonstrate that the expenditures they purported to spend were meant to benefit members of the Kapese community. It therefore prayed that the suit be allowed with costs.

44. The defendant filed written submissions dated **09/04/2025**. It summarized the facts giving rise to the dispute to submit that the plaintiff did not have capacity to sue as it was

unincorporated as admitted in paragraph **1** of the plaint. Accordingly, the entire suit was incompetent and incurably defective. Furthermore, no authority was adduced from the trustees to demonstrate that authority was granted to file suit.

45. The defendant continued that the claim for Kshs. **22,337,334.54** for the period February **2019** to the expiration of the lease could not stand as the licence agreement expired on **31/01/2019**. It argued that contrary to the plaintiff's contention, the defendant was lauded for its investments to the community as was evidenced in the stakeholder engagement that was held on **26/02/2019**. That there was credible evidence to demonstrate that at least Kshs. **100,000,000.00** was invested in the community for bursaries, payment to women and self-help groups, hospital bills, medical and funeral expenses, existing water projects and other general contributions. For those reasons, they prayed that the suit be dismissed with costs for the plaintiff had not proved its case on a balance of probabilities.

Analysis and determination.

46. I have considered the evidence on record, examined the parties' submissions and securitized the documents relied on by the parties and analyzed the law. Having done so, I find that the following germane issues fall for determination, and which I proceed to determine sequentially are as follows:

a) Whether the plaintiff had the standing the sue

47. At the fulcrum of the dispute lay an allegation by the defendant that the plaintiff, having failed to be incorporated as a trust, was not capacitated to sue. In other words, the plaintiff had no *locus standi*. It is common ground that the plaintiff obtained its certificate of registration on **29/05/2023**. This was way after the suit had been filed on **16/02/2023**. In the parties' description, of themselves the plaintiff pleaded, at paragraphs 1 and 5 as follows:

"1. The plaintiff is an unincorporated public community charitable trust established pursuant to an agreement dated 12th February 2014 between the Defendant and Tullow Kenya B.V.

and its partners during operation of the Integrated Operation Base...

5. The Plaintiff is a group of local families and local community that resides in the trust area comprising of pastoralists, herders and any other persons who are entitled to have legislatively claimed to be part of that community on account of common ancestry, similar culture or unique mode of livelihood as defined by the trust deed signed on 13th February 2014 between the defendant and Tullow Kenya B.V.”

48. It is apparent from the description of the Plaintiff, coupled with the fact of registration after the suit had been filed and heard almost fully, that the plaintiff was unincorporated at the time of filing this suit. It was not in compliance with **section 3 (3)** of the **Trustees (Perpetual Succession) Act** which provides as follows:

“The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey,

transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

49. Deducing from the above, any registered trust has the ability to sue and be sued in its own name having garnered the status of a body corporate. This was not the case for the plaintiff. In any event the plaint describes an entity that was established under an agreement dated 13th February 2014 yet the claimant in this suit was established in 2019. In the circumstances, since the plaintiff was unincorporated, it ought to have sued in the names of the trustees and not in its own name. This was the holding of the court in the case of **Erick Lumosi Asiligwa & another vs. Peter Felix Baumartner** [2011] eKLR that held as follows:

“In sum Gentiana Self-Help Centre is not a trust in terms of Cap 164. It is not a corporate body. It cannot sue and nobody

can sue on its behalf as its registered trustees.”

50. Similarly, in the case of **Kihiu & 3 others vs. Trust; Waweru & 4 others (Interested Party)** [2022] KEELC 2416

(KLR), this Court held as follows:

“The Defendant and the Interested Parties assert that the Trust having not been incorporated, it remains an unincorporated entity which lacks capacity to sue, without including all the Trustees, while the Plaintiffs maintain that they are the executive members of the Trust duly authorized by the Board of Trustees to institute the suit...The implication of an unincorporated Trust is that it can only own property, enter into contracts or do any other thing in the name of its trustees but not in its own name. An

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

51. In my humble view, since the plaintiff was unincorporated, it ought to have filed the suit in the name of the trustees rather than in its own name. This is because at the time of filing the suit, it was not a body corporate, with perpetual succession, capable of suing and being sued. The fact of its registration after commencement of the suit did not and could not in any way sanitize or cure the illegality arising from that technicality because the law does not operate retrospectively.

b) Whether the plaintiff has proved its case on a balance of probabilities?

52. Having found that the plaintiff improperly filed the suit, I find that the interest of justice in this matter dictate that the suit be determined on its merits. I say so because regardless of the technicality, as far as *locus standi* is concerned, there are instances where parties should not be driven away from the seat of justice but be heard on the merits. This is one of those suits that falls on that wayside. I will therefore proceed to establish whether the plaintiff had a merited claim.

53. The crux of this matter/ suit is premised on the trust deed adduced by both parties in evidence. As per clause A of the trust deed:

“pursuant to an agreement dated 13 February 2014 (the licence) entered between the ACS and Tullow, it was agreed that a charitable trust was to be set up on behalf of the Community

(defined below) so as to receive funding from a portion of the revenue from bed occupancy from the Integrated Operating Base (defined below) and service charge derived from rental payments made by the Lessee (and its sub-lessee or licensees) for occupation of space on the land (defined below) to support community projects in the Trust Area (defined below). The relevant extracts of the Agreement, providing for the creation of the Trust are captured as Annex 1 to this Deed.”

- 54.** From the wording of the stated clause, the trust deed was premeditated by agreement dated **13/02/2014** between the defendant and Tullow Kenya B.V. Limited. This was a licence agreement entered between the parties where the defendant was to ensure that provision of accommodation is made to

Tullow Kenya B.V. Limited during the pendency of their stay at the Lokichar region. This is where the Kapese Community, the members of the plaintiff resided. The agreement by and large covered the subsisting relationship of licensor and licensee setting out the necessary modalities that would sustain their relationship insofar as it existed.

55. Withal, from the agreement, Tullow Kenya B.V. was obligated to set up operations in the Lokichar region of northern Kenya and to generate long term opportunities and benefits for local communities. The idea was to set up an Integrated Operations Base (IOB) in the Kapese sub-division of Lokichar. It was further agreed that the IOB would consist of a secure facility containing accommodation, a transport hub for both land and air, storage, work facilities, office space and fuel supply.

56. Another germane clause was to be found in clause **5.4** which provided that the parties were to work together to establish and operate the Trust Fund designed for the benefit of the Community Trust (Kapese Conservancy). That the Trust

Fund was to be funded from bed occupancy fees from the IOB and service charge derived from the rental payments. Other than that, there was no obligation to contribute any moneys to the Trust Fund. The bed night fee per occupant per night was charged at USD **5.00** and an additional levy rent at **5%** to both be withheld by Tullow Kenya B.V. Kenya for onward transmission to the Trust Fund.

57. Another agreement made was that the defendant was to pay a fixed rate of USD **0.25** per square meter to the headlessor (the Turkana County Government) for the duration of Tullow B.V. Kenya Limited's occupation of the premises. Where an amount was agreed at a lower sum, the balance of the difference was to be paid into the Trust Fund.

58. It was on the basis of that agreement, and in particular the clauses touching on the Kapese Community, that the trust deed established the Kapese Community Charitable Trust. In clause **2**, the trustees were declared a non-profit and non-political forum for the promotion of education training

including vocational training and generally capacity development and provision of education bursaries.

59. Another expectation that was derived from the trust was the alleviation of poverty for the community through various activities such as access to improved amenities, social services, access to water solutions, provision of employment and establishment of community-based enterprises. Another expectation was for the promotion of improved livelihoods for the community through capacity development in the area of health and the promotion of access to health services.

60. According to the plaintiff witnesses, the charitable trust to be set up on behalf of the plaintiff was designed to receive a portion of the funding from the revenue of bed occupancy from the Integrated Operations Base and service charge derived from rental payments by the defendant. This was intended to support community projects in the trust area as the property leased was community land.

61. From their calculations, Tullow Kenya B.V. Limited was required to pay an annual rent of USD **1,933,872.00** for the first three (**3**) years of the license agreement and subsequently, an annual rent of USD **996,936.00** for the remaining term. Tullow Kenya B.V. Limited, it was testified, made all remittances to the plaintiff as per the lease agreement for **5%** bed levies for the period **2014** to **2021**. However, the defendant failed to honor its obligations by failing to remit **5%** of revenue as land rent to the plaintiff since **2014** to date. They were emphatic that the defendant received the sum of USD **7,735,448.00** from Tullow Kenya B.V. Limited as rent dutifully paid for the period January **2014** to January **2019**. However, the defendant had not remitted the **5%** contribution translating to USD **386,774.40** (Kshs. **46,412,928.00**).

62. In addition, the defendant received USD **3,722,889.00** as outstanding arrears for the period February **2019** to the expiry of the lease agreement. However, the **5%** remittance of USD

18,614,445.45 (Kshs. **22,337,334.54**) was not paid to the plaintiff; contrary to the agreement dated **13/02/2014** and the trust deed. According to **PW2** further, the plaintiff received Kshs. **156** million from Tullow Kenya B.V. Limited utilized for education, health, water and community management training, leaving a balance of Kshs. **32** million. The said Tullow Kenya B.V. Limited also paid service charge to the plaintiff.

63. However, from the evidence adduced, it is my finding that the plaintiffs' witnesses, in particular **PW1** and **PW2**, appeared to have preferred to see the money exchange hands tangibly. That is why they made the claims as they stated. Unfortunately, the sums arrived at were not backed by any documentary evidence. Surely if they indeed had cause to show that they were owed, nothing would have been easier than for them to document the evidence in the form of financial statements, demand letters and statements of accounts. They just swung those allegations by word of mouth in court bereft of bearing in mind that he who alleges must

prove. They ought to have documentarily demonstrated how they arrived at those figures and what the justification for that sum sought was.

- 64.** Secondly, as stated earlier, I am of the considered view that it is apparent from the star witnesses of the plaintiff, that is **PW1** and **PW2**, that the money ought to have been tangibly given to the members of the plaintiff in fulfillment of the trust deed. However, a cursory perusal of the trust deed, read together with the licence agreement, reveal that a charitable trust was set up to give providence to the community at large. It was not indicative from the wordings of the two documents how the funds were to be utilized with specificity.
- 65.** From the trust deed, a portion of the funding received from the Integrated Operating Base and service charge derived from rental payments made by the lessee for occupation of space on the land were designed to support community projects in the trust area. Flowing from that agreement, the trust deed provided that the funds injected in the Trust Deed

were intended to be utilized for the alleviation of poverty for the community through various activities such as access to improved amenities, social services, access to water solutions, provision of employment, the establishment of community-based enterprises as well as the promotion of improved livelihoods for the community through capacity development in the area of health and the promotion of access to health services.

66. PW2 also admitted that from the minutes referred to in page **59** of the defendant's documents, the plaintiff-members applauded the work of the defendant. That alone proves that the defendant discharged its mandate in line with the trust deed and the licence agreement. It is further fortified by the evidence of **DW1**. He explained that following the failure by the necessary parties in registering the trust, that the defendant paid an *ex-gratia* amount totaling Kshs. **169,287,433.57** towards Kapese community projects. **PW2**

was among the people who were aware of the existence and were beneficiaries of these projects.

67. The projects, **DW1** continued, and corroborated by **DW4**, covered the fields of education, bursaries, water, health services, development of small business enterprises and emergency between **2015** and **2019**. Those payments were calculated on information received from Tullow Kenya B.V. on bed occupancy and paid out in accordance with figures received from Tullow Kenya B.V. This evidence was supported by the **schedule of payments made towards the Kapese Community projects** marked **DExh5**, a **statements of account** showing disbursements of funds for community projects marked **DExh8** and **account statements** marked **DExh9 – DExh21**.

68. According to **DW4**, these projects were water related projects, bursaries and small-scale groups. He recalled that the committee advertised for bursaries for those interested before making payments after approving those that have applied for

them. At the end of the project a sum of over Kshs. **100,000,000.00** had been expended. **DW4** was emphatic that the community was very pleased with the projects the defendant had set up and there were no complaints lodged against them.

69. It was recalled that during the pendency of the licence agreement, Tullow Kenya B.V. did not make all the remittances to the for the period **2014** to **2021**. This was evidenced in the **letter** dated **31/08/2016** marked **DExh6** and the suit file in respect of **Kitale ELC No. 17 of 2020** of which **PW4** produced its original file in evidence in this matter. One wonders why the plaintiff never enjoined this party into the proceedings especially taking into account the dispute herein. It is as if they elected to vindicate them when enjoining them in these proceedings may have shed further light into the facts giving rise to the dispute before me.

70. In a meetings held on **29/01/2016** and **04/04/2017**, whose minutes were compiled by **DW2**, the members of the plaintiff

participated in the meetings. The minutes revealed the projects being carried out by the defendant in the area. This was further underpinned by the evidence of **DW3** who recalled writing a letter dated **08/02/2016** marked **DExh4** to the defendant. He confirmed that the community held an agreement with the defendant to share profits. It therefore could not be substantiated by the plaintiff that they were not aware of the projects taking place. In fact, in the minutes held on **04/04/2017**, under minute **03/04/2017** it was captured as follows:

“the members applauded the ACS for continuous support in fees supplement to students from poor families and Kapese water project which as (sic) seen hundreds of the community members benefiting from it.”

71. Further supporting the defendant’s evidence was **DW3** and **DW4** who recalled that Kshs. **31,000,000.00** was invested in

boreholes. **DW3** also chaired the meeting held on **29/01/2016** involving the implementation of the projects. Money was also allocated to bursaries and relief. More money was injected into the community in **2017**.

72. Ultimately, I find that the defendant not only gave *viva voce* evidence but supported the same with documentary evidence. I find that they ably discharged their evidentiary burden proving that indeed the licence agreement and the contents of the trust deed were reflective of the projects that they had carried out and were well known to the community. When the evidentiary burden was proved, it shifted to the plaintiff to disprove the same. However, that did not happen.

73. Finally, it is also instructive to note that **DW1** and **DW4** both confirmed affirmatively that the licence agreement **13/02/2014**, expired on **31/01/2019**. **DW1** recalled that it sought extension of the contract with Tullow Kenya B.V. but that did not materialize. From the wordings of the licence agreement, the trust deed was only inoculated with life the

moment the defendant and Tullow B.V. Kenya were in an existing agreement. So that the moment the licence agreement expired and ceased to exist, there was no basis for the sustenance of the trust deed. After all, the trust fund was defined in the agreement to mean:

“the charitable Trust to be set up by the Lessor and the Lessee on behalf of the Community that will receive a portion of the revenue from bed occupancy on the IOB and rental payments made by the Lessee and the sub-lessee or licensees for occupying space on the land.”

74. Looking at the cause and effect of that agreement, I find that this court can only interpret to mean that nothing could be claimed as of **2019**. The fact of expiration was also confirmed in the letter dated **08/01/2019 [DExh7]** by the defendant’s chairman to Tullow B.V. Kenya Limited. In response, Tullow B.V. Kenya Limited wrote to the defendant on

30/01/2019 [DExh7]that indeed the agreement to licence was to expire on **31/01/2019** and were not interested in a renewal. After all, it is settled in our jurisdiction that a court cannot rewrite a contract. This was the holding of *Onyiengo, J.* in the case of **City Classic Enterprises Limited & 3 others vs. County Government of Wajir & 2 others** [2025] KEHC 15756 (KLR) that held:

“...See the case of National Bank of Kenya Ltd V. Pipeplastic Samkolit (K) Ltd & Another (2002) 2 EA 507 where the court held that it is not within the province of the court to vary contracts duly executed between parties. The court stated that a court of law cannot rewrite a contract between the parties.

The parties are bound by their terms of contract unless coercion, fraud or undue influence is pleaded and proved.

63. Further in the case of Fina Bank Ltd V. Spares and Industries Ltd (2000) 1 EA 52 Shah J.A observed that save for those special cases where equity might be prepared to relief a party from a bad bargain, it is ordinarily not a function of

equity to allow a party to escape from a bad bargain.”

75. I am therefore persuaded by the defendant’s contention that the claim for **Kshs. 22,337,334.54** for the period February **2019** to the expiration of the lease was untenable as the licence agreement expired on **31/01/2019**. That claim lacks basis.

76. PW2 testified that the defendant once met them at a hotel in Nairobi. In that meeting, the defendant’s representatives informed them that they had no money to give them as they spent it on paying bills, statutory deductions and paying directors. The defendant’s representative thus offered to give them Kshs. **2** million. However, the plaintiff members declined that offer hence the suit.

77. The plaintiff’s evidence and claim revolved around the parameters of a breach of contract emanating from a trust relationship between it and the defendant. The alleged breach was based on the relationship the Defendant had with Tullow B.V. Kenya. In the law of contract, the doctrine of privity of

contract controls transactions and relationships of parties to agreements. Only parties to a contract can sue on, to enforce, it. Thus, in **Aineah Liluyani Njirah v Agha Khan Health Services (Civil Application 194 of 2009) [2013] KECA 481 (KLR) (Civ) (12 July 2013) (Ruling)**, the Court of Appeal rendered itself as follows:

“Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd. The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.”

78. Also, in **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR)**

the same court held as follows:

“In its classical rendering, the doctrine of privity of contract postulates that a contract

cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

79. Additionally, in **DUNLOP PNEUMATIC TYRE CO LTD V**

SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC

expressed the principle as follows:

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

80. Thus, it can be stated as it was, in **AGRICULTURAL**

FINANCE CORPORATION V LENGETIA LTD, where ***Hancox,***

JA quoting with approval from ***Halsbury’s Laws of England,***

3rd Edition, Volume 8, paragraph 110 reiterated it as

follows:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom

the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

81. The doctrine has evoked a lot of criticism to the extent that it is viewed generally, that where parties agree expressly in a contract between them that it is for the benefit of a third party, that party can sue on it, based on the doctrine of freedom to contract. Thus, in **DARLINGTON BOUROUGH COUNCIL V WITSHIRE NORTHERN LTD [1995] 1 WLR 68** Lord Steyn expressed himself valiantly in the following terms:

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is

therefore unjust to deny effectiveness to such a contract.”

82. In the instant suit, this Court longed to see a clause in any agreement between the Defendant and Tullow Kenya B.V. which would clothe the Plaintiff with the power to enforce the benefit as a third party to the said contract. However, the plaintiff failed to demonstrate that on a preponderance of the evidence adduced, the defendant ought to be held culpable under the said contract. No particulars of breach were established for the reasons expounded in this judgment above herein.

83. The upshot of my above findings is that the plaintiff's suit is not only incurably incompetent but also unmerited. Accordingly, I am persuaded to find that it lacks merit. It is hereby dismissed with costs to the Defendant.

Judgment **dated, signed and delivered** via **electronic mail** through the **Teams Platform this 03rd day of December 2025.**



HON. DR. IUR FRED NYAGAKA

JUDGE

From 03:07 Pm, in the presence of,

Ms. Chebet for Yego Advocate for the Plaintiff

Mr. Ned Chemoiwa Advocate for the Defendant