



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 869 OF 2013 (O.S.)

(AS CONSOLIDATED WITH CIVIL CASE NO. 957 OF 2012)

ERIC LUMOSI ASILIGWA.....1ST PLAINTIFF

RICHARD SANG SALAT.....2ND PLAINTIFF

AGGREY MUHADI ARAP SABE.....3RD PLAINTIFF

VERSUS

PETER FELIX BAUMGARTNER.....DEFENDANT

JUDGEMENT

1. In the Originating Summons filed on 18/7/2013, the Plaintiffs seek to have Gentiana Self Help Centre Registered Trustees wound up and an order that upon dissolution, all the movable and immovable property held by Gentiana Self Help Centre Registered Trustees that is, L.R. No. Dagoretti/Waithaka/1460 ("Suit Property") be sold and the sale proceeds distributed proportionately among the registered trustees. In addition, the Plaintiffs also sought an order of permanent injunction to restrain the Defendant from dealing with the immovable or movable assets of Gentiana Self Help Centre and more particularly the Suit Property pending the determination of the suit.

2. The suit is based on the on the grounds that the Plaintiffs and the Defendant were constituted as trustees of Gentiana Self Help Centre registered trustees on 6/8/2005 and that they were issued with a certificate of incorporation under the Trustees (Perpetual Succession) Act Cap 164 on 14/3/2012. The Plaintiffs plead that under its constitution, Gentiana Self Help Centre was formed to support the education and welfare of children from difficult backgrounds and to enable them access basic education. It was also intended to support orphans, youth and parents living with HIV Aids including rehabilitating those in foster homes. Its other objective was the enrolment and retention of poor children in formal education with emphasis on the girl child.

3. The Plaintiffs aver that to achieve these objectives of Gentiana Self Help Centre, the Trustees sourced for funds and purchased the Suit Property on which they built Gentiana Primary School. The Trustees managed the affairs of Gentiana Self Help Centre peacefully until 2007 when they claim the Defendant side lined the other Trustees and solely run the school to the exclusion of the Plaintiffs. The Defendant also changed the signatories to the bank accounts and expelled the Plaintiffs from the school and the trust property altogether.

4. In order to safeguard their interests and those of the trust, the Plaintiffs filed **High Court Civil Case No. 808 of 2007** seeking to restrain the Defendant from continuing with these acts. The suit was dismissed on 29/3/2011. The Defendant has continued to exclude the Plaintiffs from the activities of the trust and the Plaintiffs now urge that it has become impossible for the trust to continue to achieve the objects for which it was established. Attempts to resolve the differences between the Plaintiffs and the Defendant came to naught.

5. The 1st Plaintiff swore the affidavit in support of the suit. He annexed the certificate of incorporation for Gentiana Self Help Centre, its constitution, the ruling made on 29/3/2011 by Mwera J. in Nairobi **HCCC No. 808 of 2007** together with a copy of the title deed in respect of the Suit Property which lists the Plaintiffs and the Defendant as trustees of Gentiana Self Help Centre.

6. The Defendant filed a Replying Affidavit on 21/11/2013 in opposition to the suit and application for temporary injunction. He stated in the Affidavit that he had been in Kenya for the last decade or so carrying out various humanitarian activities including Gentiana Primary School. He denied managing the school and averred that the school is run by Gentiana Development Network. Further, he averred that the Plaintiffs who were employees of Gentiana Primary School fell out with him after it became apparent that they were out to sabotage the efforts being made to assist the local community served by Gentiana Primary School.

7. He maintained that Mwera J. in his ruling in **HCCC No. 808 of 2007** found that the entity known as Gentiana Self Help Centre did not exist and was not registered as a trust within the meaning of the law. According to him, this means that any documents touching on the formation of Gentiana Self Help Centre as a trust were void and untenable in law. He denied signing the Trust Deed for Gentiana Self Help Centre. He urged that the Originating Summons must fail since it does not comply with the manner in which a trust can be dissolved.

8. Based on the ruling of Mwera J, the Defendant filed **ELC Case No. 957 of 2012** against the Plaintiffs seeking a declaration that their intended trust having failed to materialise, he was entitled to ownership of the Suit Property, the school thereon and L.R. No. Dagarotti/Waithaka/1463 under the doctrine of resulting trust. He intimated that he would crave the court's leave to have this suit consolidated or heard with the instant suit. He further urged that since the registration of the Suit Property preceded the registration of the alleged trust known as Gentiana Self Help Centre, the owners of the Suit Property could only hold the Suit Property in resulting trust but not for their own beneficial interest. He argued that the Plaintiffs are driven by mischief and were out to deprive the beneficiaries, who are the students at the school, an opportunity to make a life out of the Defendant's initiatives through the school.

9. He stated that the intention at the point when the Suit Property was purchased was to realise the common goal of assisting the community by constructing a school on the Suit Property and running it to the highest standards at minimum cost. The goal remains alive to date. The Defendant averred that he single-handedly sourced for the funds for the purchase of the land and the construction of the school from his own savings, his family and well-wishers in order to achieve this goal. He maintained that there was no form of contribution or funding which came from the Plaintiffs whom he stated that he only brought on board as local representatives of the community.

10. He accused the Plaintiffs of failing to disclose to the court that the Suit Property houses a school and a vocational institution; and that the school had been in existence for over 6 years by the time this suit was filed which had greatly assisted the community by educating their children and providing employment for the parents.

11. The 2nd Plaintiff filed a Notice of Withdrawal under Order 25 Rule 1 of the Civil Procedure Rules on 8/2/2018. The 1st and 3rd Plaintiffs gave evidence. The 1st Plaintiff stated that he was a teacher by profession with a strong desire for education and that he previously worked at Gentiana Primary School. He stated that he established Gentiana Self Help Centre in 2000 with the other Plaintiffs with the main objectives of promoting education among children from poor backgrounds; environmental conservation and the promotion of access to health for children among other objectives.

12. He met the Defendant, Peter Felix Baumgartner in 2001 and invited him to join Gentiana Self Help Centre. Gentiana Self Help Centre was registered on 25/5/2004. The Defendant did not sign its trust deed. The 1st Plaintiff stated that in 2001 he decided to establish the school and acquired property from Francis Kamau Kariuki, the original owner of the Suit Property. He averred that he purchased the Suit Property for KShs. 375,000/= which came from his savings. He claimed that he paid this sum to Mr. Francis Kamau Kariuki on 16/5/2004 in Kiserian, Kajiado County.

13. The transfer was executed in January 2005 and he decided to include the Defendant and the other Plaintiffs as proprietors because he believed at the time that the Defendant would assist in raising funds to establish the school on the Suit Property. The Defendant executed the transfer over the Suit Property and retained the original title deed. He contended that the Defendant cannot claim to be the sole owner of the Suit Property, the transfer of land having been executed by all the four persons named on the title. He denied that the Defendant or Richard Sang Salat paid the purchase price for the Suit Property.

14. He maintained that at the time of transfer of the Suit Property to their four names as co-owners, he did not know that the Defendant who is not a Kenyan Citizen could not hold a title to freehold land. Had he known this, he would not have included his name on the title deed. He also claimed that he did not know that the Defendant was engaging in business and employment in Kenya illegally. He came to learn of his illegal activities when the Defendant was charged and convicted in Nairobi **Chief Magistrate Criminal Case No. 1517 of 2008**. He also claimed that at the time of registration of the title to the Suit Property, he did not know that the name of Gentiana Self Help Centre ought not to have been included in the title since it had not obtained a certificate of incorporation.

15. He claimed that they paid the balance of the purchase price for L.R. No. Dagoretti/Waithaka/1463 on 6/3/2006 and that throughout the sale transaction, they were joint purchasers and there was no indication that the property would belong to the Defendant alone. He asserted that it would not be fair and just for his name to be expunged from the title for Dagoretti/Waithaka/1463 since he and the Defendant contributed equally in its acquisition and the Defendant not being a Kenyan Citizen is prohibited from owning freehold property in Kenya.

16. He maintained that the registration of the Defendant as a co-owner of the Suit Property and Dagoretti/Waithaka/1463 was tainted by illegality since he is not a Kenyan Citizen and is prohibited by law from holding freehold property. In his opinion, it would be prudent to either expunge the Defendant's name from the two title deeds or direct that the two properties be sold and the proceeds shared out amongst the registered proprietors. He concluded his testimony by stating that he would have been very keen to retain the two properties for future investment having participated in the acquisition but his relationship with the Defendant had become so bad that it left him with no alternative but to request the court to separate the parties by having the two properties sold and the proceeds shared proportionately by the parties named on the titles.

17. On cross examination, the 1st Plaintiff stated that he met the Defendant in 2001. He denied that the Defendant helped him finance his education. He confirmed that Gentiana Self Help Centre is not formally registered. He maintained that the process of registration of Gentiana Self Help Centre was ongoing at the time Mwera J. gave his ruling which declared that entity as being non-existent. No appeal was lodged against that ruling.

18. He maintained that he solely purchased the Suit Property from Francis Kariuki who is now deceased. He confirmed that there was no sale agreement for the Suit Property entered into between him and Mr. Francis Kamau Kariuki. He stated that he paid for this land alone with the intention of making it a self-help centre even though he was not a philanthropist.

19. He confirmed that he was the head teacher at Gentiana Primary School and Secretary of Gentiana Development Network and therefore, he was the custodian of some documents in respect of the two entities. As secretary of Gentiana Development Network, he kept the minutes and resolutions but did not deal with financial matters.

20. He confirmed that the application for Land Control Board consent for transfer of the Suit Property mentioned Gentiana Development

Network. The title deed in respect of plot no. 1463 is in the Defendant's name and his name. He kept the title over this parcel of land because he owned the plot jointly with the Defendant. The title for the Suit Property is with the Defendant.

21. He confirmed that Gentiana Primary School is erected on the Suit Property and was built in 2006. He worked as the head teacher of Gentiana School from 2001 to 2007. He was earning a monthly salary of Kshs. 24,000/=. The school started running in 2001. Currently the Defendant is running the school alone. He confirmed that initially they rented the structures of Francis Kamau to run the school and later they raised funds and built the stone structures where the school currently stands. When he worked at the Gentiana School as the head teacher, he used to be paid by the school management. He was categorical that the Defendant never paid him any money.

22. The Defendant testified. He adopted his witness statement. He is a Swiss national and a retired journalist for the Africa Correspondent for Tagas –Anzeiger Zurich Switzerland. He wanted to make a contribution in Africa for the support of children especially those in the slum region of Nairobi. He wrote an article in 1996 in respect of a school in Kawangware slums which was founded by a group of women to help educate children in the slums. With his wife, they began to support that project using their own savings. They rented iron sheet houses, bought text books and benches for the children and would pay the teachers' salaries.

23. Some well-wishers who read his article sent money with which they built a kitchen and started a feeding programme to motivate the children to come to school. He got assistance in 1999 through the Missionsgesellschaft Bethlehem Immensee (Switzerland) and named the school Arnika Primary School. In August 2000, he ended the partnership with the school's headmistress when she admitted 500 children instead of 250 as had been agreed in 1999. The Defendant paid the salaries and benefits of the teaching staff in order to end that partnership.

24. Some of the teachers including the three Plaintiffs together with Philip Omondi and Reuben Masiga approached the Defendant in November 2000 and urged him not to withdraw the sponsorship as this would be to the detriment of needy children. He asked the teachers to find alternative premises. He rented eight iron sheet houses for use as classrooms and two as a library and staffroom to run the school which they named Gentiana Primary School. Gentiana is a Latin name of a beautiful flower in the Swiss Mountains. These teachers applied to him for employment.

25. Gentiana Primary School was founded in 2001 as a successor of Arnika Primary School with 240 pupils in January 2001. The Defendant produced some of the application letters from the teachers. Most of the teachers were not trained and he offered them an opportunity to pursue their studies and assisted in the payment of their college fees.

26. The Defendant approached the Swiss Embassy in Nairobi for funding and was given an award of Kshs. 500,000/=. Of this sum, 45% was to be used for the children's educational trips while 55% was to be utilised for further education of the teachers. The Defendant produced copies of the 1st Plaintiff's acknowledgement of receipt of Kshs. 51,000/= dated 11/8/2001 for the school fees at Malezi Institute together with his examination result slip dated 13/8/2001. He also produced a copy of the 1st Plaintiff's handwritten acknowledgement dated 3/12/2004 for Kshs. 75,000/= stated to be for the further training of teachers during the December vacation.

27. The 1st Plaintiff received Kshs. 40,000/= on 12/4/2007 as honorarium for further education. The acknowledgement is on the notepaper of Gentiana Development Network. The Defendant also produced acknowledgements from the other Plaintiffs confirming receipt of payments from Gentiana Development Network. There was a loan summary dated 26/7/2007 showing the loans given and sums repaid by the Plaintiffs and other parties in 2006 and 2007. The payslip for the 1st Plaintiff which is on the notepaper of Gentiana Primary School dated 25/10/2001 confirms that he was paid Kshs. 10,300/=.

28. Gentiana Primary School was provisionally registered in 2008 and fully registered by the Ministry of Education on 19/2/2010. In October 2003 the Plaintiff approached the Head of Africa Projects at Caritas Switzerland for possible support in the construction of a school. He was informed that they had to have ready land for construction. Through a real estate agent, they were introduced to David Macharia Nduati who was willing to sell them the plot in Riruta area. He paid Kshs. 2.3 million with his wife for a plot in October 2005. None of the locals or the teachers contributed towards the purchase of the plot mainly because the teachers only relied on the monthly salary they got from the school.

29. The Defendant maintained that the 1st Plaintiff signed the receipts on behalf of Gentiana Primary School and later on behalf of Gentiana Development Network since he trusted him as his confidant and agent. He stated that the 1st Plaintiff signed the sale agreement of 10/3/2004 in the name of Gentiana School. The agreement stated that it was between David Macharia and Nduati and Gentiana School. The purchase price was stated as Kshs. 2.3 million for the purchase of one acre. The initial deposit of Kshs. 270,000/= was payable upon execution of the agreement while the balance would be paid upon the successful transfer and issuance of title to the purchaser.

30. The piece of land was described in the agreement as Waithaka/Dagoretti/219 "B" out of which an acre was to be excised. The Defendant produced a copy of his bank statement showing that this sum was debited from his account on 9/3/2004. He also produced a copy of the receipt issued by Anne W. Kimani & Company Advocates on 11/3/2004 on account of the deposit of legal fees. The receipt was issued to Gentiana School. There is a handwritten acknowledgement by David Macharia Nduati witnessed by J. Njengo Advocate confirming receipt of the sum of Kshs. 270,000/=.

31. The addendum agreement dated 20/4/2004 between David Macharia Nduati and Gentiana School confirmed payment of a further sum of Kshs. 185,000/= bringing the total deposit to Kshs. 455,000/=. The addendum clarified that Gentiana School which was the purchaser in the agreement dated 10/3/2004 was owned solely by the Defendant and that he was solely undertaking the funding in relation to the agreement. The Defendant produced a copy of his bank statement confirming a cash withdrawal of Kshs. 200,000/= in April 2005 which he claimed went towards the purchase price of the Suit Property.

32. The letter of consent of the Dagoretti Land Control Board dated 8/9/2004 confirmed that Francis Kamau Kariuki and Penninah Wanjiru had agreed to transfer the Suit Property to Gentiana Development Network for the consideration of Kshs. 350,000/=. The application for the consent of Land Control Board named Gentiana Development Network as the purchaser of the Suit Property. The 1st Plaintiff is listed as a secretary and the 2nd Plaintiff as the treasurer while the Defendant is stated to be the chairman on the application for consent.

33. The receipt dated 13/10/2004 signed by the 1st and 2nd Plaintiffs stated that the two (2) Plaintiffs as head teacher and bursar of Gentiana Primary School respectively had received cash money of Kshs. 740,000/= as a further deposit for the purchase of land at Kabiria.

34. The Defendant admitted that being a foreigner with good intentions, he was naïve and trusted the 1st Plaintiff as his agent in the transaction over the Suit Property. The 1st Plaintiff processed the title for the Suit Property issued in the names of the three Plaintiffs and the Defendant as Trustees of Gentiana Self Help Centre. The Defendant maintains that at no time did he instruct the 1st Plaintiff to include the name of Gentiana Self Help Centre on the title to the Suit Property. According to the Defendant, what ought to have been registered was Gentiana Development Network.

35. He maintained that the formation of Gentiana Self Help Centre was done secretly behind his back. He was never a member of this entity. The Defendant stated that he was travelling a lot in 43 African Countries as an African Correspondent during the time the title for the Suit Property was processed and he therefore, trusted the Plaintiffs to handle the transaction.

36. After informing Caritas Switzerland about the land deal, this Swiss organisation agreed to support the construction of the school under two conditions. Firstly, there had to be a legally registered entity which would be responsible for running the school according to Kenyan laws and secondly, an organisation would be founded in Switzerland as the counterpart of Caritas and all other sponsors.

37. Gentiana Development Network was formed on 21/1/2005 with the intention of it owning and running Gentiana Primary School. Members of this network were the teachers, some parents, some Swiss and German personalities, together with the Defendant and his wife. The 1st Plaintiff and the 1st Defendant executed the constitution of Gentiana Development Network. The Defendant became the Chairman of this network while the 1st Plaintiff was the Secretary-General. Swiss friends of Gentiana Primary School was founded in Torricella, Switzerland in July 2005 as a Swiss sponsor organization.

38. In the official contracts, the 1st Plaintiff signed the contracts as Head teacher of Gentiana Primary School and as the secretary of Gentiana Development Network. In the 2005 report for Gentiana Development Network prepared by the 1st Plaintiff as secretary, it was noted that the organization had acquired a piece of plot measuring 0.41 ha at a cost of Kshs. 2.3 million on Mbereri Road, Kabiria C, Waithaka Location, Dagoretti Division, Nairobi District Plot No. 1460 through the great efforts of the Defendant. The report included aspects such as the registration of the organisation with the Non-Governmental Organisation Board, the school academic programmes, sponsorship of some students in terms of replacing old cloths, providing necessities, medical care and other needs of children from less fortunate families. The report noted the intention to begin a technical programme to benefit students who failed to make it to secondary schools by providing skills that would enable them earn their keep in future. The school also had the initiative of supporting and assisting orphans and destitute children pay their secondary fees. The report ended with a summary of the expenditure and accounts for Gentiana Development Network.

39. The school was constructed from January, 2006 and officially shifted to the new premises on 8/7/2006. It was inaugurated on 9/7/2006 in the presence of the Swiss Ambassador, Mr. Georges Martin among other Swiss dignitaries and friends who had played a key role in the establishment of the institution. All pupils, their parents and neighbours also attended the inauguration and teaching started on 10/7/2006.

40. The 1st Defendant produced an agreement of cooperation between Caritas Switzerland and Gentiana Development Network for the construction of Gentiana Primary School at the cost of CHF 206,140 (approximately Kshs. 11.5 Million). Gentiana Development Network was responsible for the project which was to run from October, 2005 to June 2006. The agreement listed the Defendant and the 1st Plaintiff as representatives of Gentiana Development Network. The Defendant also annexed photographs of Gentiana Primary School showing the completed school and the learning activities being undertaken in the school.

41. The letter dated 7/2/2005 certified that Bethlehem Mission Immensee of Switzerland had supported Gentiana Primary School since 1989 for the outstanding work the school was doing for the children of poor parents and Aids orphans. The letter pledged continued support to Gentiana Development Network for the benefit of the disadvantaged children. The contract of service for monitoring the construction of Gentiana Primary School was signed between Gentiana Primary School and Architect Antony Ekajul. The contractor, Maaya Construction entered into a contract on 5/1/2006 with Gentiana Development Network for the construction of Gentiana Primary School. Davis & Shirtliff wrote to Gentiana Primary School care of Gentiana Development Network on 5/5/2007 regarding the supply and commissioning of the water treatment system.

42. The Defendant accused the Plaintiffs of inciting students to demonstrate against the school in September 2007. They took the students to demonstrate in town. The students were taken back to school after arrangements were made by the staff of the school. This led to the dismissal of the Plaintiffs and the other teachers who were in the group. Gentiana Development Network employed other teachers and teaching went on during the days of unrest in the school.

43. The issues for determination are:

- a. Who paid the purchase price for the Suit Property and Dagoretti/Waithaka/1463?
- b. Who between the 1st Plaintiff and the Defendant has a legitimate interest in Dagoretti/Waithaka/1463?
- c. Should the Defendant's name be expunged from the Suit Property and Dagoretti/Waithaka/1463?
- d. Should this court order that the Suit Property and Dagoretti/Waithaka/1463 are to be sold and the proceeds realised distributed among the co-owners?
- e. Who should pay the costs of this suit?

44. Parties filed written submissions. The 1st Plaintiff maintains that he has a legitimate interest in the Suit Property based on the payment of Kshs. 375,000/= indicated on the transfer. He maintains that no evidence was adduced by the Defendant to show that his inclusion on the title deeds was fraudulent. He submitted that the Defendant had no objection to his name being included on the title over Dagoretti/Waithaka/1463 since the Defendant kept the original title from December 2005 until 2012 without challenging the inclusion of his name on the title.
45. The 1st Plaintiff submitted that no illegality having been attributed to him, his inclusion on the title is protected under Article 40 of the constitution. He relied on Section 23 of the repealed Registration of Titles Act in support of the position that a certificate of title is to be held as conclusive evidence of proprietorship and can only be impeached where the holder is proved to be a party of fraud or misrepresentation. The 1st Plaintiff relied on the decision in **Justina Muringa Kanyiri v. John Mutunga** [2009] eKLR. The 1st Plaintiff argued that he had a legitimate interest in Dagoretti/Waithaka/1463 which is registered in his name and that of the Defendant. He urged that his interest is protected by the Constitution.
46. The 1st Plaintiff submitted that the Defendant had no legitimate interest in the Suit Property and Dagoretti/Waithaka/1463 due to the fact that he is not a citizen of Kenya and that no valid consent could have been obtained under Section 9 of the Land Control Act which deals with agricultural land. The 1st Plaintiff denied that the Defendant paid money for the purchase of the Suit Property to David Macharia Nduati. The 1st Plaintiff relied on the transfer which shows the purchase price as Kshs. 375,000/= and not Kshs. 1,650,000/= which the Defendant claims he paid to Mr. Nduati.
47. On the purpose for which the Suit Property and Plot No. 1463 were acquired, the 1st Plaintiff maintains that the intention of the parties was to start a private school. He submitted that whether or not the establishment of school materialised, the land remained the private property of the persons who contributed to its acquisition. He argues that private property cannot be converted to trust property without the consent of the owners. He maintained that he never consented or agreed to convert the Suit Property into trust property.
48. In so far as plot 1463 is concerned, the 1st Plaintiff's position is that it was acquired as an investment by him and the Defendant. He argues that the issue of surrendering the titles over the two plots to Gentiana Development Network does not arise since Gentiana Development Network is not a party to this suit and has not claimed ownership of the Suit Property.
49. The 1st Plaintiff concedes in his submissions that Gentiana Self Help Centre did not exist at the time the Suit Property and plot no. 1463 were purchased. This is the decision that R.N. Sitati J. arrived at in **HCCC No. 2258 of 2007**. According to the 1st Plaintiff, the indication on the title documents that the proprietors held the Suit Property for Gentiana Self Help Centre is an apparent error which can be rectified by the removal of Gentiana Self Help Centre from the title deed. The Plaintiff argued that the Defendant's name should be removed from the title due to illegality he not being a Kenyan citizen.
50. The 1st Plaintiff submitted that a resulting trust is created by operation of law where property is transferred to someone who does not pay anything for it and it is then implied that he holds the property for the benefit of another person. He contended that he had adduced evidence to show that he contributed towards the purchase of the Suit Property while the Defendant failed to show that he paid for the Suit Property.
51. The 1st Plaintiff submitted that the Defendant claimed the Suit Property for himself and only invoked the name of Gentiana Development Network in order to elicit the court's sympathy. The 1st Plaintiff argued that since ownership of property includes all the developments on the property, if any party has a claim for the development of the Suit Property then that party should file a separate suit for compensation for the development.
52. The Defendant submitted that he solely purchased the two properties for the benefit of the poor slow learning children of Kawangware. None of the Plaintiffs contributed even a single penny towards the purchase of the land. The Plaintiffs were his employees and by extension were also employees of Gentiana Development Network which was running Gentiana Primary School. As the head teacher, the 1st Plaintiff was his agent authorised to act on his behalf and on behalf of the school besides being the custodian of documents of the network and the school. The Defendant urged that the 1st Plaintiff abused his position and attempted to unjustly enrich himself.
53. The Defendant maintained that the 1st Plaintiff failed to prove that he made any contribution towards the purchase of the two properties. The two properties were purchased for purposes of building a school because the children were studying in rented houses made of iron sheets. Over the years, the Defendant developed the Suit Property with the support of his Swiss friends. Permanent structures including a kitchen and offices have been developed on the Suit Property. The Defendant submitted that Gentiana Primary School and the Technical Vocational College erected on the Suit Property were all valued at Kshs. 100 million and were developed from his savings and donor funding from Caritas Switzerland and other Swiss friends. Plot No. 1463 was acquired because of the need for space for future expansion of the school. This plot is used as a playing field by the children. At no particular time were the two properties bought for any individual's benefit according to the Defendant.
54. The Defendant submitted that the 1st Plaintiff was a party to the fraudulent activities when he was tasked to transact on behalf of Gentiana Development Network and Gentiana Primary School. According to the Defendant, this fraud was demonstrated by the 1st Plaintiff's attempt to register Gentiana Self Help Centre as a trust and registering the title over the Suit Property in the name of Gentiana Self Help Centre before it had been incorporated. The Defendant maintained that the Suit Property and plot number 1463 were to be held in the name of Gentiana Primary School and should have been registered in the name of Gentiana Development Network which runs and manages Gentiana Primary School. The Defendant denied that the Plaintiff was entitled to the orders he seeks based on fraud and misrepresentation under Section 26 of the Land Registration Act.
55. The Defendant urged the court to rectify the illegality pursuant to Section 80 of the Land Registration Act arguing that the poor children of Kawangware are the true owners of the two properties through Gentiana Development Network. He also urged the court to dismiss the

Originating Summons and issue an order revoking the entries in respect of the two parcels of land and order that the two plots be registered under the name of Gentiana Development Network to guarantee the poor slow learning children of Kawangware, Riruta Satellite a school in future. The Defendant relied on the case of **Alice Chemtai Too v. Nickson Kipkurui Korir and 2 Others** [2015] eKLR on the fact that no fraudster or beneficiary of fraudulent activities ought to gain from his fraud and that no title holder should ever be deprived of his good title by the tricks of con artists.

56. A person who is not a Kenyan citizen may only hold land on the basis of leasehold tenure whose term should not exceed 99 years under Article 65 (1) of the Constitution. Article 65(2) envisages that where an agreement, deed, conveyance or document of whatever nature confers on a non-citizen an interest in land greater than 99 years, then the provision is to be regarded as conferring on the person a 99-year leasehold.

57. The proviso to that Article states that property held in trust shall be regarded as being held by a citizen if all of the beneficial interest of the trust is held by persons who are citizens.

58. The court has looked at the title deeds in respect of the suit land. Eric Lumosi Asiligwa, Richard Sang Salat and Peter Felix Baumgartner as Trustees of Gentiana Self Help Centre were registered as the absolute proprietors of Dagoretti/ Waithaka/1460 on 5/9/2005 while Peter Felix Baumgartner and Eric Lumosi Asiligwa were registered as the absolute proprietors of Dagoretti/ Waithaka/1463 on 7/3/2006. Based on Article 65 of the Constitution, the two title deeds which confer interest to Peter Felix Baumgartner as an absolute proprietor have to be regarded as conferring no more than a 99-year lease to Peter Felix Baumgartner since he is Swiss.

59. The 1st Plaintiff procured the registration of the Plaintiffs names together with the Defendant as the owners of the Suit Property. He also got their names registered as trustees of Gentiana Self Help Centre yet he knew it was not incorporated and that the Suit Property was to be held by Gentiana Development Network, the entity which was running Gentiana Primary School. Being in charge of the registration of the transfer, he is responsible for causing the purchase price to be indicated as Kshs. 375,000/= on the transfer form yet it was purchased for much more than this.

60. Gentiana Self Help Centre was an unincorporated association. The issue for consideration is what happens to the assets of Gentiana Self Help Centre when it is dissolved? Are the Plaintiffs and Defendant listed as trustees on the title to the Suit Property entitled to have this plot sold and the proceeds distributed among the four of them? The court thinks not. The intention of the parties at the time of the purchase of the two plots was to construct a school and other educational facilities to meet the educational and other needs of slow learning children from poor backgrounds in Kawangware area.

61. The 1st Plaintiff did not provide any consideration for the purchase of the Suit Property or plot number 1463 which is registered jointly in his name and the Defendant. The persons in whose names the two parcels of land are registered are presumed to hold the plots on trust in favour of the persons who provided the purchase monies for the educational and other charitable purposes of Gentiana Primary School. The burden of rebutting this presumption lay on the 1st and 3rd Plaintiffs who failed to discharge that burden.

62. There is a resulting trust in favour of those persons who contributed funds for the purchase and development of the Suit Property and plot number 1463 for the benefit of Gentiana Primary School and the other charitable objectives of Gentiana Development Network. The two parcels of land are held by the registered proprietors on a resulting trust for Gentiana Development Network for the benefit of the educational and other needs of deserving children and the local community.

63. Under Section 12 of the Non-Governmental Organizations Co-ordination Act, a registered Non-Governmental Organization is by virtue of such registration a body corporate with perpetual succession capable in its name of taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; and doing or performing all such other acts necessary for the proper performance of its functions under the Act, which may lawfully be done or performed by a body corporate.

64. Gentiana Development Network was registered on 11/8/2005 under Section 10 of the Non-Governmental Organizations Co-ordination Act. Its Constitution states that it was set up to facilitate processes that eradicate poverty and ensure social justice; finance the primary, secondary and vocational education of deserving children from impoverished backgrounds and mentor them through life so that they can have a positive impact in the society. The Network's main objective is to promote formal education and vocational training among the youth. It aims to support children through the provision of dietary needs through a feeding program and access basic health. These are not business purposes and not a private school as the 1st Plaintiff submitted.

65. Article XV of Gentiana Development Network's Constitution provides that its funds and assets will be applied solely for the Network's objects set out in the Constitution. Bethlehem Mission Immensee, the main sponsor would decide which institution or project will benefit from the Network's assets if it is dissolved, in consultation with the members. The Constitution gives the criteria for membership to the Network which includes the urge to support children and forbids members from claiming the society's assets on personal level or taking advantage of their position to benefit from the group's funds.

66. The Plaintiffs were employed and worked at Gentiana Primary School. The 1st Plaintiff was the head teacher. The 1st Plaintiff did not provide evidence that he paid Kshs. 375,000/= for the Suit Property or any consideration towards the purchase of the two plots. The court is satisfied that the funds for the purchase and development of the Suit Property and the purchase of plot number 1463 were raised by the Defendant and the Swiss sponsors that he brought on board for the benefit of Gentiana Primary School.

67. Having found that there was a resulting trust in the two parcels of land in favour of Gentiana Primary School which is run by Gentiana Development Network; the court directs that Dagoretti/ Waithaka/1460 and Dagoretti/ Waithaka/1463 will be registered in the name of Gentiana Development Network. The names of Eric Lumosi Asiligwa, Richard Sang Salat and Peter Felix Baumgartner will be cancelled from the title deed in respect of Dagoretti/ Waithaka/1460. The names of Peter Felix Baumgartner and Eric Lumosi Asiligwa will be cancelled from the title deed for Dagoretti/ Waithaka/1463. The Land Registrar is directed to amend the records accordingly and issue title

deeds to Gentiana Development Network.

68. The court finds that the 1st and 3rd Plaintiffs have failed to prove their case on a balance of probabilities. It is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 26th day of July 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Nyaanga holding brief for Mr. Mbabu for the Plaintiffs

Mr. Ogada for the Defendant

Mr. V. Owuor- Court Assistant