



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 224 OF 2010**

**WILLIAM CHARLES**

**FRYDA.....PLAINTIFF**

**VERSUS**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES.....1<sup>ST</sup>  
DEFENDANT**

**ST. MARY'S MISSION HOSPITAL.....2<sup>ND</sup>  
DEFENDANT**

**CONSOLIDATED WITH NAKURU ELC NO. 238 OF 2012**

**REGINA PACIS UNIVERSITY COLLEGE (THROUGH THE BOARD OF TRUSTEES).....1<sup>ST</sup>  
PLAINTIFF**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES.....2<sup>ND</sup>  
PLAINTIFF**

**VERSUS**

**WILLIAM CHARLES**

**FRYDA.....DEFENDANT**

**JUDGMENT**

*(The plaintiff, a medical doctor and priest, claiming that various properties registered in name of defendant, a congregation of sisters, are held in trust for him; counterclaim by the defendant that they hold the properties absolutely and seeking to permanently restrain the plaintiff from the same; one of the properties assigned to a university which also files suit for possession; properties acquired and hospitals built through donor funds; plaintiff having recorded that the properties would be owned by the congregation of sisters when seeking donations for purposes of developing a hospital for the poor; properties registered in the name of the sisters; parties registering a limited liability company; the properties cannot be said to be held in trust for the plaintiff; properties held under a form of charitable trust; aim of charity was to provide healthcare to the poor; the charitable purpose still alive; cy-pres doctrine not applicable; properties cannot be assigned to a university or other purpose; management of hospitals; understanding that same will be with congregation of sisters through the company; plaintiff only holding position of first medical director; held that properties be transferred to the company and*

***be held under a charitable trust; management of hospitals be with the company; university having no claim over the properties)***

## **PART A: INTRODUCTION AND PLEADINGS**

1. This judgment is in respect of two consolidated suits. The first suit was filed on 8 September 2010 in the High Court of Kenya at Nakuru as Nakuru High Court Civil Suit No. 224 of 2010. The plaintiff in the said case is William Charles Fryda and the defendants are Assumption Sisters of Nairobi Registered Trustees and St. Mary's Mission Hospital. The second suit was filed on 12 January 2011, in the High Court of Kenya at Nairobi as Nairobi High Court Civil Case No. 9 of 2011. The plaintiffs in that case are Regina Pacis University College (through its Board of Trustees) and Assumption Sisters of Nairobi Registered Trustees with the defendant being William Charles Fryda. The dispute in the two suits is over ownership of a total of four properties; two properties situated in Langata area of Nairobi, which are LR Nos. 27228 (original LR No. 18590) and LR No. 27229 (original LR No. 18590/11); one property situated in Elementaita in Nakuru which is LR No. 9361/10; and one property situated in Sagana, which is Kiine/Rukanga/2846. The two suits were consolidated as they raised fairly similar issues of fact and law and with the creation of the Environment and Land Court, pursuant to Article 162 (2) (b) of the Constitution of Kenya, 2010, the two suits were moved to the Environment and Land Court at Nakuru, for hearing and disposal. They were then registered as Nakuru ELC No. 238 of 2012.

2. In his plaint, which was later amended, William Charles Fryda, has pleaded inter alia that in the year 1998, he sought for land in Nairobi specifically for purposes of catering for the poor and he thereafter purchased the two properties in Langata at a consideration of about Kshs. 38,000,000/=. He has pleaded that he wanted a body to be registered in whose name these properties were to be transferred and he therefore paid for the incorporation and registration of St. Mary's Mission Hospital as a limited liability company. He has pleaded that because this company was yet to be registered when he purchased the properties, he agreed with the Assumption Sisters of Nairobi, a Catholic Order, that the parcels of land would be registered in their name, and that they would later transfer these parcels to the body that would later be registered. Dr. Fryda has pleaded that he commenced development on these parcels of land with his own money, and money that he solicited from friends, and that he spent about Kshs. 553,000,000/= in developing these parcels of land in Langata. He has pleaded that he later got the Elementaita land and that he put up another hospital at a cost of about Kshs. 365,000,000/=. He has pleaded that he also purchased the property in Sagana at a cost of Kshs. 4.8 Million. He has averred that he operated the two hospitals while awaiting the Assumption Sisters to transfer these parcels of land as they had earlier agreed. He has pleaded that in August 2009, after a change of leadership of the Assumption Sisters, the new leaders started to claim that they owned the parcels of land and the developments, in both Langata and Elementaita, and the other property in Sagana. It is claimed that they also started to interfere with the running of the two hospitals by imposing some employees and allocating them duties without consulting Dr. Fryda or the management that had been set up to run the hospitals. It is further pleaded that the directors of the St. Mary's Mission Hospital, a company that was incorporated in the year 1999, have never been determined by the subscribers of the said company, and no guarantors appointed, although the company is one limited by guarantee. It is the view of Dr. Fryda that he stands to lose a lot, in view of what he has invested in the development of the hospitals, if the affairs of the hospitals are not sorted out. He has contended that the suit properties belong to him or to any other person that he chooses to give. He has averred that since the affairs of St. Mary's Mission Hospital Company have not been regularized so as to have the properties transferred to it, the properties should now be transferred to him. He has contended that in the circumstances, the Assumption Sisters are only registered as proprietors of the suit properties in trust for himself or his nominees and this trust should now be terminated.

3. In his suit, Dr. Fryda has sought the following orders:-

*(a) That a permanent injunction be issued to restrain the defendants by themselves, their servants or agents from entering, remaining or in any other manner interfering with the plaintiff's use and enjoyment of the suit premises.*

*(b) That a declaration be made that the 1st defendant (Assumption Sisters) is registered as*

proprietor of LR Nos. 27228 (original 18590), LR No. 27229 (original LR No. 18590/11), Kiine/Rukanga/2846 and LR No. 9361/10 in trust for the plaintiff.

*(c) That the trust be terminated by an order of this court and the said lands be transferred to the plaintiff or to his nominee or nominees.*

*(d) The costs of this suit be paid by the 1st defendant.*

*(e) The court do make any further orders as to it may seem just.*

4. The Assumption Sisters of Nairobi and St. Mary's Mission Hospital, the two defendants in Dr. Fryda's suit, filed a defence and counterclaim, which they later amended since the plaintiff had effected an amendment to his plaint. They inter alia pleaded as follows :-

*(i) That the idea of setting up a hospital was as a result of a collaborative meeting between the 1st defendant (Assumption Sisters) and the Superior General of a Catholic congregation known as Maryknoll Fathers and Brothers from New York, USA.*

*(ii) Although the idea of starting the hospital was a co-operative effort between the Assumption Sisters and the said Maryknoll Fathers and Brothers, it was agreed that Assumption Sisters would be the legal owner of the hospital and that it would be responsible for the running of the hospital.*

*(iii) Accordingly, all the suit properties were registered in the name of Assumption Sisters.*

5. They denied that the plaintiff paid the purchase price for the parcels of land and pleaded that the funds expended in buying and developing the parcels of land were provided by donors sought through correspondence written by the Assumption Sisters congregation. They averred that the Assumption Sisters were solely responsible for the formation and incorporation of St. Mary's Mission Hospital, which they stated was formed for the purpose of running and managing the day to day activities of the hospital. They declared that the subscribers and directors of the company are nominated by the Assumption Sisters and they are nuns belonging to the said congregation. They contended that although Dr. Fryda has been greatly involved in the running of the hospitals, this has only been achieved as a result of the goodwill that previously existed between them, but that this relation has since failed hence the intention to oust Dr. Fryda from involvement in the running of the hospitals. They have pleaded that it is them who are solely responsible for the running and management of the hospitals; that the properties are registered in the name of Assumption Sisters; and that St. Mary's Mission Hospital as a company, has directors, as opposed to what the plaintiff has alleged. They have averred that there is no dispute as to the ownership of the properties and that the issue is that Dr. Fryda is unwilling to accept this position and wants to forcefully be involved in the management of the hospitals despite their collapsed relationship. They have contended that Dr. Fryda has no proprietary rights over the suit properties and that no trust relationship existed in respect of the properties.

6. They have also pleaded that Assumption Sisters also runs and operates an education centre known as Regina Pacis University College on the land parcel LR No. 27228 (original 18590) and LR No. 18591/11 (now LR No. 27229). They have averred that their efforts to run and manage the hospitals have been jeopardized by Dr. Fryda's interference and that Dr. Fryda has also jeopardized their intention to carry out developments on the land in Sagana. It is averred that Dr. Fryda's activities have impacted negatively on the operations of the University College hence exposing it to the risk of its operations coming to a halt. They have pleaded that they had previously authorized Dr. Fryda to solicit funds from donors in their name and to receive the same for the development of the hospitals, but that Dr. Fryda has abused their trust and goodwill, hence the need for an order of injunction to restrain Dr. Fryda from further soliciting or receiving funds on behalf of St. Mary's Mission Hospital. It is averred that Dr. Fryda has failed to disclose and account for the operation of its bank accounts and that Dr. Fryda should thus be enjoined from dealing with the bank accounts of St. Mary's Mission Hospital and compelled to sign forms for change of signatories.

7. In the counterclaim, they have asked for the following orders :-

*(a) A permanent injunction to restrain Dr. Fryda or his servants/agents from entering, remaining or in any manner interfering with the suit premises.*

*(b) A permanent injunction to restrain Dr. Fryda or his servants/agents from interfering with the operations of St. Mary's Mission Hospital (the company) and with its hospitals.*

*(c) A permanent injunction to restrain Dr. Fryda or his servants/agents from soliciting for, receiving, collecting, expending, and keeping any funds belonging to St. Mary's Mission Hospital.*

*(d) A permanent injunction to restrain Dr. Fryda or his servants/agents from drawing or dealing with funds held in 6 specified bank accounts of St. Mary's Mission Hospital.*

*(e) A mandatory injunction to compel Dr. Fryda to sign bank forms for change of signatories of the specified bank accounts to at least two directors of St. Mary's Mission Hospital.*

*(f) An order for accounts.*

*(g) Costs of the suit.*

*(h) Any other remedy that this Honourable Court may deem fit to award.*

8. Dr. Fryda did file a defence to the counterclaim and inter alia asserted that he was the promoter of St. Mary's Mission Hospital (the company) and that he paid for its incorporation and registration. He contended that he was the one who was solely involved in the acquisition and development of the parcels of land and the hospitals in issue. He stated that the registration of the parcels of land in the name of Assumption Sisters was a stop-gap measure pending the registration of the company, St. Mary's Mission Hospital, or any other entity. He pleaded that if an educational centre (Regina Pacis University) was being run in the suit premises, this would be contrary to the tenor and intentions of the acquisition of these parcels of land. He pleaded that he was well connected and did not need authority or introduction to donors. He has denied knowledge of the existence of the bank accounts specified in the counterclaim.

9. In the case originally filed as Nairobi HCCC No. 9 of 2011, the plaintiffs, Regina Pacis University College and Assumption Sisters of Nairobi, have pleaded that Regina Pacis University College was established by a trust deed on 23 July 2009 with an emphasis on the education of less privileged women and that it is a constituent college of the Catholic University of Eastern Africa (CUEA). It is averred that it has been established on amongst other sites, the land parcels LR No. 27229 in Langata, which is adjacent to St. Mary's Mission Hospital. It is pleaded that this land is registered in the name of Assumption Sisters of Nairobi. It is contended that in the month of August 2010, Dr. Fryda was called upon to account and undergo an audit of his services in the management and control of St. Mary's Mission Hospital in Nairobi and Elementaita but he became uncooperative. It is averred that he has issued threats of intentions to interfere with the operations of the University; has trespassed into the land parcel LR No. 27229; and has made informal attempts to have the authority given to the University College to be revoked or cancelled. It is averred that unless restrained, Dr. Fryda will continue and repeat his wrongful actions.

10. In this suit, the following orders are sought against Dr. Fryda :-

*(a) A permanent injunction against Dr. Fryda from inter alia running and managing the University College.*

*(b) A declaration that the plaintiffs and their constituent institutions and organs are solely entitled to exclusive possession, control and management of the University College situated in LR No. 27229, being Regina Pacis University College.*

*(c) Damages or mesne profits that may be assessed and found fair and just to grant.*

*(d) Costs of the suit and interest thereon until payment in full.*

11. Dr. Fryda filed a defence wherein he inter alia contended that no trust deed has been registered on behalf of the Regina Pacis University College. He otherwise refuted the other issues.

12. Since there are two consolidated suits, for purposes of convenience, I will treat Dr. Fryda as the plaintiff with the Assumption Sisters of Nairobi, St. Mary's Mission Hospital Limited (the company) and Regina Pacis University as 1st, 2nd and 3rd defendants respectively. I will treat the plaint in Nairobi HCCC No. 9 of 2011 as a counterclaim alongside the original counterclaim filed in the Nakuru case by the 1st and 2nd defendants.

## **PART B: EVIDENCE OF THE PARTIES**

### **(i) Evidence of Dr. Fryda (the plaintiff)**

13. Dr. Fryda gave his background which is as follows:-

He is a citizen of the United States of America (USA) although he has been resident in Kenya since the year 1991. He is a Christian of the Catholic denomination connected with the order of the Maryknoll Fathers and Brothers. He is also a medical doctor having graduated from Baylor University in Houston, Texas and specialized in internal medicine at Mayo Clinic in Rochester, Minnesota, USA. He received his internal medicine American Board Certification in the year 1978 and stayed on at Mayo Clinic for a sub-specialty in Haematology, which he completed in the year 1980. He was ordained as a catholic priest of the Maryknoll Order in the year 1988. He explained that Maryknoll priests do not take vows of poverty but do take vows of chastity and obedience to religious matters. He had a passion to be a missionary doctor and quickly got involved in missionary work. His first missionary station was with the Baptist Church in Nigeria in the year 1976, during his vacation, when he volunteered his vacation time to get experience overseas. In the year 1977, he also spent time in Guatemala, and the following year and 1979, he worked in Haiti where he was engaged with Mother Teresa Sisters in Puerto Prince. In 1980, he was back in Nigeria with the Baptist Church and he assisted in getting medical supplies from Mayo Clinic. In 1980, he turned down recruitment with Mayo Clinic and moved to Tanzania in Bukoba area as a lay medical mission volunteer. He was here for 3 years. In 1984, he went back home to the USA and joined a seminary. In 1988, he was ordained in New York and that is how he became a Maryknoll priest. He had the option of staying in New York to be in charge of an AIDS programme but he chose to come to East Africa and went back to Tanzania, where he was assigned to be the doctor in charge of Sengerema Teaching and Referral Hospital in Mwanza/Bukoba area. He was however demoralized owing to the social model and in 1991 he moved to Kenya and was attached to Nazareth Hospital (Nazareth) in Limuru which was managed by an Italian religious order called the Consolata Group. He worked here upto April 1995.

14. Dr. Fryda testified that he had exposure to several medical ministries and he could see that standards were going down. In 1995, he stepped down from Nazareth to put together a new model of how to be an effective modern mission hospital. He reflected on the hospital model brought about by European missionaries which were mostly operated by European sisters and was of the view that this was an outdated model, for the reason that today, there are now many trained Kenyan doctors and the catholic orders were slowly losing their trained staff. He frowned on this model where nuns run hospitals, in what he compared to a high school model, and thought that trained local medical personnel would not wish to spend their career being under the supervision of nuns. He believed that most mission hospitals were going down because medical personnel do not want to go to them. He therefore came up with a model of how to be an effective contemporary mission hospital including aspects such as the hospital being managed by its own Kenyan staff and no outside Bishop or Council of Elders "dumping" their concepts in the hospital. That is what made him leave Nazareth Hospital and he stated that, that is how he came up with the idea of forming St. Mary's Mission Hospital.

15. He testified that he conceptualized it as a limited liability company without a shareholding but limited by guarantee. The aim was to give quality healthcare to the poor with the utility of the best of doctors. He however soon recognized that you must first have land before you approach donors to set up such a hospital. At about the same time, he heard that the Assumption Sisters of Nairobi (sometimes referred to in full or Assumption Sisters or ASN ), were poised to take over Nazareth Hospital from the Consolata Sisters. He thought that he could set up his model within Nazareth after its take over and he had discussion with Sister Maria Felix of ASN. He helped her put together a management model for the hospital and also in the meantime assisted some Tanzanian Sisters in Eldama Ravine.

16. In the year 1997, some land became available adjacent to Catholic University of East Africa (CUEA) and he had money to buy this land in his personal mission account as he had been talking to donors for about 2 years about his hospital model. He explained that a personal mission account holds money given directly to him by donors. The money is first put into his personal mission account in New York and then transferred to his personal mission account in Nairobi. Such money is to be used for mission work only. For his own personal expenditure, he stated that he holds a personal account which is not mission money. He did explain that mission money is spent in accordance with the directives of the donor. There is also a third account which is the Apostolic Work Account which is for Maryknoll project work.

17. He averred that although he had the money, he had not yet created a legal entity under which the land could be registered, and he did not wish to buy the land in his own name. He stated that he therefore asked Sister Felix whether the land could be registered in the name of ASN, on the understanding that they would hand it back to the company that he intended to form once it is registered, and she agreed. From his mission account he drew a cheque for Kshs. 5 Million, being deposit for the land, to ASN, on 11 December 1997. He later learnt that the land would be held in the name of the Catholic church which he was not agreeable to and he asked ASN for his money back which he was refunded in October 1998. But this intended purchase of this particular land did not materialize and that was the end of it.

18. Around mid - 1998, Dr. Fryda stated that he met Mr. Ramesh Shah, a businessman and philanthropist in Nairobi. He put him in touch with some of his family members and they got him some land in Langata in Nairobi. This is the land parcel No. 18590 (now LR No. 27228) which was then vacant land. He testified that he bought 10 acres of this land at the price of Kshs. 1.8 Million an acre. Mr. Shah also introduced him to Mr. Macharia Njeru, a lawyer, and Dr. Fryda asked Mr. Macharia to incorporate for him a company as he was handling the land transaction. Adjacent to this land parcel No. 18950, was another 10 acre piece of land which was parcel No. 18591/11 (now LR No. 27229) that was also offered to Dr. Fryda about a year later, at the cost of Kshs. 2.8 Million an acre. A couple of years later, the land in Sagana, being 47 acres, was also offered to him and he purchased it at Kshs. 6 Million. The fourth piece of land, that in Elementaita, which is about 40 acres, was donated by Mr. Joseph Ngera. All the parcels of land were registered in the name of Assumption Sisters of Nairobi.

19. He testified that the parcels of land were registered under ASN because he had yet to register St. Mary's Mission Hospital (as a company). He needed a place where the land could be held before his company was incorporated and he thought that he could trust the Assumption Sisters. He had trusted them with smaller things, such as the Kshs. 5 Million which they returned to him, and he believed that he could trust them with bigger things. He explained that the arrangement was that the Assumption Sisters would hold these properties, and after St. Mary's Mission Hospital was incorporated (as a company), have the properties transferred to the company. St. Mary's Hospital was eventually incorporated on 16 July 1999 as a company limited by guarantee. Dr. Fryda testified that Mr. Macharia Njeru was to handle the transfer of the properties from Assumption Sisters to St. Mary's Mission Hospital but this is yet to be done owing to a confusion due to change of title deed numbers.

20. He testified that the money to purchase these properties and the money to develop them came from himself (his own money) and his donors. He asserted that Assumption Sisters did not contribute a single penny. He stated that he is the one who oversaw the design of the buildings and the layout as he has experience in designing medical buildings and also oversaw the developments. In his words, he put together, "every little detail". He tendered out the construction of the Langata hospital to Kilimanjaro Construction and the architectural work to one Andrew Gremley. He signed the contracts with them and

he is the one who paid them. A hospital was built in Langata, and a few years later, the hospital in Elementaita was developed. He stated that he is the one who followed up on the registration and licencing of these hospitals and paid the requisite fees with the Assumption Sisters playing no role.

21. He testified that he formed the company (St. Mary's Mission Hospital) to manage these hospitals but the company was not functioning well. He stated that the subscribers of the company, who are Sister Teresia Gachambi, Sister T. Ndeto and Sister Gratsia Mulli, were supposed to nominate directors but he was not aware whether this had been done.

22. He explained that in so far as the accounts are concerned, the first account was created in 1998 before the company came into being. It was held at Barclays Bank under the account name ASN- St Mary's Mission Hospital Project. The account had 3 signatories but he is the one who kept the cheque book and signed the cheques alone. He claimed that this was because this was his money and the other signatories were never expected to sign any cheque. It is in this account where the initial Kshs 5 Million was put. The account operated for about 1 year and was closed after the company was formed. New accounts were opened in the name of St. Mary's Mission Hospital Limited and the money transferred there. He stated that the Assumption Sisters played no role in these new accounts as he is the one who signed everything. He asserted that no money belonging to the Assumption Sisters was ever deposited in the first account, or the latter accounts, and there was no justification for the Assumption Sisters to ask for these accounts.

23. He testified that the company pays taxes to the Kenya Revenue Authority including VAT, since it is not a church body, and that the hospital now runs itself and no longer seeks donations.

24. He stated that he is unable to allow the Assumption Sisters to run the hospitals since their mission and vision is different from what he has. He alleged that the Assumption Sisters started doing things behind his back, such as having the second Langata property assigned to Regina Pacis University, without his knowledge, yet this is not why the hospital was set up. He testified that he wants the properties back from Assumption Sisters and the same to be held in an entity that can be able to carry out his vision. He stated that he is in possession of three of the title deeds, which are in the custody of his lawyer, but the Sisters have in possession the title deed to LR No. 27229, which he claimed was taken from his advocate by deceit.

25. In cross-examination, he clarified that his current work permit is under the Medical Mission Charitable Trust formed in the year 2010 under 6 trustees, including himself, Ramesh Shah and Joseph Ngera. He changed his work permit from the Maryknoll Fathers and Brothers because he was receiving pressure from them to withdraw this suit and they had put sanctions on him. He however asserted that he is still a Maryknoll priest.

26. He testified that his first contact with the Assumption Sisters was when he heard that they were taking over Nazareth Hospital in the year 1997. Since he had been there before, he offered to assist them in any way that he could and he helped develop a manual of medical hospital management. In 1998, the Assumption Sisters gave him residence at their premise where he offered them free medical care and also doubled up as a chaplain. He denied that the idea of setting up St. Mary's Mission Hospital was conceptualized by the Assumption Sisters while he was resident at their premises. He asserted that this was his own idea. He denied that they were co-founders, as the Assumption Sisters had their own vision of taking over Nazareth Hospital.

27. He agreed that he had discussion with the then Bishop of the Catholic Church, Bishop Ndingi, who was supportive of the project. The Bishop wrote him a letter which he could use to seek funds from the Vatican but he said that this was rejected for the reason that the project was not to be owned by the Catholic Church. He was not sure if he got any funding as a result of this letter written by the Bishop. He did agree that he received some funding from Koch Foundation and Loyola Foundation, the latter being channeled through Bishop Ndingi. He denied that he received this funding because of letters written by Bishop Ndingi and the Assumption Sisters. He stated that the only assistance he got from the Assumption Sisters was the use of their legal status before the company could be registered. There was going to be reciprocal benefit since he would help introduce them to donors. He however agreed that in some letters

he did use the words that he was "co-founding" the hospital with Assumption Sisters although according to him, he used these words to mean that they were "helpers". He denied that they were co-founding the hospital with the ASN. He agreed that it was he, who instructed his advocate to transfer the parcels of land to ASN. He agreed that there was nothing in the land titles that would suggest that Assumption Sisters hold the land for St. Mary's Mission Hospital. He agreed that the subscribers of St. Mary's Mission Hospital were Sisters Gachambi, Ndeto and Gratsia Muli (now deceased) and that they were also the registered trustees of Assumption Sisters. He asserted that his intention and that of the donors was to have the parcels of land registered under the company. He testified that during construction of the hospitals, VAT and taxes were paid on the construction materials and that he never got exemptions and that income tax is paid.

28. In re-examination, he reiterated that funding was received through his requests and not that of ASN. He stated that owing to his relationship with ASN, he helped them get an offer for 100 acres of land from Mr. Ngera to put up a University. He explained that he used the word "co-founders" rather loosely and only meant that the Assumption Sisters were with him from the beginning. He stated that the land in Elementaita was personally donated to him to build the model of hospital that he had in mind. He thought that the success of the hospitals turned too many heads because there was too much money and too much land. He stated that step by step ASN and others were turning over hospital land to Regina Pacis University.

29. PW- 2 was Mr. Joseph Boro Ngera. He is a businessman and property owner. Among the properties he owns is a 900 piece of land in Elementaita. In the early 1980s, he thought of giving back to the community and wished to have a hospital for the community either on this land or on another that he owned in Njoro. He is Catholic and he approached Bishop Ndingi, then of Nakuru Diocese, who declined to set up a hospital for the reason that the Diocese was not able to run one. The Bishop however formed a committee of 18 people to brainstorm on his idea. Several proposals were made which included one from some Sisters from Italy. Out of his Elementaita land, he transferred 42 acres to this group of Italian Sisters. However, the Sisters did not put up a hospital because they changed their mind and instead wanted to set up a street children rehabilitation centre. He declined because his dream was to have a hospital. In the process, he was informed about Dr. Fryda who was running a hospital in Nairobi and was interested in having land in Gilgil. He travelled to Nairobi and looked for Dr. Fryda. After several attempts, they met and they saw the land in Elementaita, which land impressed Dr. Fryda. Mr. Ngera then offered Dr. Fryda 58 acres, including the 42 acres that he had earlier given the Italian Sisters, which the Sisters had returned to him. In place, the Sisters were given 8 acres of land that Mr. Ngera owned in Njoro for the street children rehabilitation project. The Sisters were also compensated with over Kshs. 1 Million, for the developments that they had made on the land, which money was paid by Dr. Fryda.

30. All this time, Mr. Ngera had not met any of the Assumption Sisters. They were introduced to him by Dr. Fryda who informed him that they were looking for land to put up a University. Mr. Ngera thought that it was a good project and he agreed to give them 100 acres of land opposite the land that he had given out for the hospital.

31. He testified that Dr. Fryda built a hospital on the land that he donated and his wishes as donor were fulfilled. Some years later, he came to learn of differences between Dr. Fryda and the Assumption Sisters. He tried to reconcile them with the assistance of Cardinal Njue, and the Nuncio, in vain. In the meantime, he was appointed to the Board of Trustees of Regina Pacis University. He did not want any of the two projects, that of the hospital and the University, to fail and he asked that the hospital land be transferred to Dr. Fryda or to the company (St. Mary's), and if the Assumption Sisters failed to do so, he would revoke his donation of the 100 acres of land for the University. ASN did not comply and he withdrew his donation of 100 acres and also resigned from the Board of Trustees of Regina Pacis University.

32. In cross-examination, he testified that it was on request of Dr. Fryda that the land he donated was transferred to ASN. The 42 acres of land had already been transferred to "The Servant of the Sacred Heart of Jesus And Of The Poor Registered Trustees" (presumably, the Italian Sisters) in the year 2001 and it is therefore this latter organization which transferred the land to ASN in the year 2005. PW-2 stated that this was done pursuant to his request, because his wish as donor, was not to have a children's home on his

land but a hospital. He stated that it was he, who donated the land to Dr. Fryda. He stated that Dr. Fryda mentioned that he had to use ASN pending registration of the hospital as a legal entity. He was not aware that St. Mary's Mission Hospital (the company) had become incorporated in the year 1999. He testified that the hospital and the properties are currently being managed under the St. Mary's Mission Charitable Trust of which he is a Board member. He stated that his intention in donating the land was to have the same operated by Dr. Fryda and not ASN whom he thought were persons trained in education and thus more suited to managing the University and not the hospital.

33. PW-3 was Ramechandra Khetshi Shah (Ramesh Shah). He testified that his family has been keen on charity work including the Mathare Youth Sports Organization who they helped purchase land in Eastlands area of Nairobi. He was introduced to Dr. Fryda by a Sister McClean who was managing some schools under an NGO. He and his lawyer, Mr. Macharia Njeru, then helped Dr. Fryda find land in Langata. The land was purchased, although he and his family did not contribute towards the purchase of it. His family however donated money to Dr. Fryda to assist in construction; specifically construction of X-Ray rooms and equipment. They contributed between Kshs. 25 and 30 Million in total. As far as they are concerned, their money was well utilized. He stated that he never met the Assumption Sisters in the course of his dealings with Dr. Fryda.

34. In cross-examination, he reiterated that they gave money to Dr. Fryda for the construction of the hospital. The cheques were drawn in the name of St. Mary's Mission Hospital, and to them, it was clear that the land and hospital would belong to a medical trust to be run by independent trustees but this was never accomplished. They never made inquiry as to who was behind St. Mary's Mission Hospital as they trusted the custodian, in this case, Dr. Fryda.

35. With the above evidence, the plaintiff closed his case.

## **(ii) Evidence of the Defence**

36. DW-1 was Sister Marie Therese Gacambi. She gave a background of the Assumption Sisters of Nairobi as an Organization formed by African religious women in the year 1953 in the Archdiocese of Nairobi. It became incorporated in the year 1973. Its charism is to mission to the poor through health services, education and social work. They have projects both locally and abroad, and have trained personnel for these projects, including medical doctors. She herself, holds a doctorate degree in Spiritual Theology and has taught in various universities. They run the Regina Pacis University and other secondary schools including St. Mary's Secondary School in Langata. She explained that they manage their projects from their own resources and that of donors who believe in the ministry of the poor.

37. She is familiar with St. Mary's Mission Hospital (the company) as she is an original subscriber. She is also a trustee of Regina Pacis University. The ASN congregation also has trustees of which she is one. She stated that the common denominator between St. Mary's Mission Hospital and Regina Pacis University is that they are both owned by ASN.

38. She explained that the leader of ASN is the Superior General. There is also a General Council which is the decision making organ. It is comprised of four persons and the Superior General. This council is voted in every 6 years. She expounded that between 1992 and 2002, the Superior General was Sister Maria Felix Mwikali. She herself became Superior General in the year 2003. She came to know Dr. Fryda in the year 1998 when she served as Deputy to the Superior General and she stated that she knew him as a member of the Maryknoll Father and Brothers. She testified that Dr. Fryda was only to assist them build and manage their hospital, and as a missionary, he would move on. In order to fund and build the hospital, she testified that the Superior General had to get a letter from the Archbishop of Nairobi to authorize them raise funds.

37. She testified that the four parcels of land in issue are all registered under ASN. The hospital is built on LR No. 27228, whereas in the other parcel, that is LR No. 27229, is located Regina Pacis University and St. Mary's School. She stated that the user of the land is in conformity to the conditions of the grant. She denied that ASN hold these parcels of land in trust for Dr. Fryda and asserted that it is not possible for

ASN to hold land in trust for a Maryknoll priest. She pointed out that Dr. Fryda had the option of either registering the parcels of land in his own name or that of his congregation.

38. She testified that the idea of ASN having a hospital, is based on its charism to assist the poor and that it raised funds by itself and through donors. She stated that Dr. Fryda raised money for this project after having received a letter dated 19 February 1993, from Bishop Ndingi, the then Archbishop of Nairobi, which letter was addressed to the Maryknoll Mission Project Funding Committee and Maryknoll Regional Council. She testified that it is the Superior General together with Dr. Fryda who requested for this letter. To her knowledge, Bishop Ndingi was endorsing ASN to raise funds through the Maryknoll Fathers who had in turn delegated this task to Dr. Fryda. She averred that this letter was presented to the Maryknoll Fathers with their fund raising committee in New York, the Koch Foundation, the Loyola Foundation and other donors. She testified that Dr. Fryda instructed his own lawyer to register the parcels of land under ASN and that it is ASN which paid the fees for change of user. She also pointed out that Dr. Fryda gave instructions to Mr. Macharia Njeru, that St. Mary's Mission Hospital (the company) was to be under the ownership of ASN.

39. She testified that ASN and Dr. Fryda together developed a Hospital Management Manual. It provided for a management team that was to be composed of a Hospital Administrator, Nurse Matron and Doctor in Charge, all to be appointed by the Superior General. This team was to be responsible for the daily management of the hospital. The Administrator and Nurse Matron were from ASN and the Doctor in Charge was Dr. Fryda. There was also a Hospital Board Committee comprised of 9 members. Three were from ASN. In addition, there was an Executive Advisory Committee comprised of the Superior General of ASN, the General Council Members of ASN, a representative of the Archdiocese of Nairobi and other persons. The Manual noted that the ultimate responsibility lay with the Superior General who exercised authority through the three persons that she appointed in the management team. Other Assumption Sisters ran the cafeteria, stores and finances of the Hospitals. She stressed that Dr. Fryda participated in the formulation of the Manual and that it is this which was used at Nazareth Hospital.

40. In her evidence, she did refer to various minutes of some meetings where Dr. Fryda was present, which she averred, provide inter alia that ownership of the project was to be under ASN. She did state that Dr. Fryda was the only signatory of the accounts including a project account, an optimum interest account and a dollar account although he was not a member of the Executive of Assumption Sisters. There was also a Maryknoll African Region dollar account for St. Mary's Mission Hospital.

41. She explained that differences cropped up when Dr. Fryda proposed a different hospital operation manual and proposed a different way forward for the hospitals, one of which was to have the title deeds returned, and the properties transferred to a new ownership authority. There was no agreement on this but Dr. Fryda proceeded to put in place a new Board and removed staff members of the congregation of Assumption Sisters who worked in the hospitals, an act that resulted in a suit before the Industrial Court. She claimed that the Sisters were ejected from the hospitals in the most inhumane way and thought that Dr. Fryda has no regard for religious African women.

42. She repeated that the Assumption Sisters contributed to the hospital projects by acquiring, constructing and maintaining the properties from their own resources and that of their donors. She referred to a sum of Kshs. 5,600,000/= as their initial contribution which was acknowledged by Dr. Fryda. She stated that they feel cheated by the withdrawal of the 100 acres by Mr. Ngera as they had expended money to develop a university based on his promise to deliver the land. She asked that the title deeds held by Dr. Fryda be returned to them and the hospitals be managed according to the original manual.

43. In cross-examination, she testified inter alia that she met Dr. Fryda just about the time they were taking over Nazareth Hospital. They did not succeed in taking over Nazareth, and it is after that, that they started thinking of a hospital in Langata. She stated that the concept of starting a hospital for the poor was an idea of ASN based on their charism and that Dr. Fryda corroborated the idea. She testified that they had money and donors of their own congregation with Maryknoll as the channel of their funds, and not Dr. Fryda in his individual capacity. In her words, that is how they raised money to buy the properties in

Langata.

44. With regard to construction on the parcels of land, she stated that Dr. Fryda played the role of CEO of St. Mary's Mission Hospital and he therefore prepared the plans for the hospitals and brought in the contractor and architect. She averred that he signed the contracts with these experts on instructions received from ASN. Dr. Fryda would report on the progress of the construction and seek authority from ASN to pay the contractor, if payment was beyond a certain ceiling, which ceiling she did not however know. Payment would be made by St. Mary's Mission Hospital. She did not know whether ASN ever met the contractor for any discussions. The hospital was then opened in the year 2000. For it to be operational, it needed to be registered and licenced as a hospital. She stated that it is Dr. Fryda and Sister Felix who signed the application for registration and licencing.

45. On the Elementaita land, she testified that this land was donated by Mr. Ngera but that he gave it to ASN and not Dr. Fryda. She agreed that it was Dr. Fryda who prepared the plans for this hospital and employed the same contractors who developed the hospital in Langata. She stated that the Elementaita hospital was opened in the year 2007. She, as the then Superior General of ASN, Dr. Fryda and a Dr. Rucha, signed the documents for registration and licencing of the hospital. When this hospital opened, Dr. Fryda moved from Nairobi to Elementaita. A Dr. Konya, was left to be in charge at Langata and Dr. Rucha was in charge in Elementaita. The overall in charge for both hospitals was Dr. Fryda. She did not know if Dr. Fryda was being paid a salary.

46. She testified that on the land parcel No. 27228 is where there are residential houses and the convent for the ASN. The parcel No. 27229 has a guest house, a house for the sisters, more staff houses and an education centre. The education centre is a secondary school which the Sisters had planned to move to Kibagare but ultimately they want to transfer the school to Elementaita. She stated that they had agreed with Dr. Fryda that the school could move to Elementaita.

47. She explained that Regina Pacis University is a constituent college of the Catholic University of East Africa (CUEA) and is an ASN project. The Regina Pacis University Trustees was registered in the year 2009. She stated that the University was temporarily situated in Langata with the aim of moving it to the 100 acres that was donated in Elementaita, and therefore, they only claim use of the land parcel No. 27229 and not its ownership. With the withdrawal of the donation of 100 acres, the University now intends to move to Thika on another parcel of land. Its current students are now in CUEA pending the outcome of this case. She denied that the Assumption Sisters intend to transfer one of the parcels of land in Langata to Regina Pacis University. She testified that all the parcels of land in issue are in the name of ASN and that the aim was to transfer these properties to St. Mary's Mission Hospital (the company) once it was registered. She was not worried of the fact that so many years have passed yet the parcels of land are yet to be transferred to the company. She stated that the church has procedures that need to be followed.

48. She testified that the account opened before incorporation of St. Mary's (the company), were opened in the name of ASN/St. Mary's Mission Hospital. The signatories were Sister Kainda, their Projects Manager, Sister Munguti, their Financial controller and Dr. Fryda whom she described as the CEO. Any of the three could operate the account but Dr. Fryda kept the cheque book and it is only him who actually operated the account. After registration of the company, a new account in the name of St. Mary's Mission Hospital was opened.

49. She denied that Dr. Fryda had the freedom to instruct his lawyer to have the parcels of land registered in the name of any person that he wished and stated that Dr. Fryda was following resolutions passed in meetings of which she referred to the minutes. She stated that the project money did not come to Dr. Fryda but to Maryknoll Fathers and Brothers. She did not agree, that it was Dr. Fryda who contacted donors for funds, and asserted that the original letters seeking donations, were written by Sister Felix the then Superior General.

50. She explained that on the initial land purchase in Karen, which did not materialize, the land was to be purchased by different organizations within the church and their portion was later to be carved out for

setting up the hospital. They decided to pull out owing to delays. She stated that ASN had USD 5000 for this project which money was moved to the account of St. Mary's Mission Hospital once it was opened.

51. She testified in re-examination that the donors wanted the St. Mary's Mission Hospital run by ASN and that the incorporation of the company, with all its members being of the Assumption Sisters, was in line with the wishes of the donors.

52. DW- 2 was Father Lance Nadeau. He is a member of the Catholic Foreign Mission Society of America, Maryknoll Fathers and Brothers (Maryknoll). At the time that he testified, he was the Financial Officer for Africa. He also serves as Chaplain at Kenyatta University. He was ordained in the year 1988 as a Catholic Priest and served as the Regional Superior of Maryknoll between 1 October 2010 and 1 October 2016. He expounded that the Headquarters of Maryknoll is in New York. It has a Superior General who is the CEO of their congregation and who is based in New York. The Superior General is in charge of all the Maryknoll regions worldwide and assigns people to these regions which report to him. He testified that Maryknoll has a mission of proclamation of the gospel, service to the poor, and service to the local church.

53. He testified that he is familiar with the dispute herein and he knows Dr. Fryda. He testified that Dr. Fryda was ordained in the year 1988 and assigned to Tanzania to work in a hospital. He worked at Sengerema until the year 1991 when he requested for a transfer to Kenya. He moved to Kenya in September 1991. He stated that in 1992, he worked as a medical officer at Nazareth Hospital until about the year 1995. Between 1995 and 1996 he lived in the Maryknoll house at Nairobi as he had not decided what to do. He stated that Dr. Fryda thought of going to Zimbabwe; or going back to the USA to work as a medical doctor; or teaching in the University of Nairobi medical school; or set up a medical clinic for the clergy of the Bishops of Eastern Africa. In 1996 or 1997, Dr. Fryda left the Maryknoll residence and went to live in the residence of ASN. He did not know whether the idea of setting up St. Mary's Hospital was one of Dr. Fryda.

54. He did testify that Dr. Fryda has taken a permanent oath of obedience to his legitimate superiors, that is the Superior General and the Regional Superior, as a member of Maryknoll, in accordance with the laws of the Catholic Church. He testified that Dr. Fryda is still a member of the Maryknoll Fathers although he is under suspension for disobedience. It is he, Father Lance, who issued him with the letter of suspension. Among the matters that he is alleged to have violated, are disobedience to his Superior General in New York; refusal to provide an audit for USD 4.9 Million that he received from the Maryknoll Fathers for the construction of the St. Mary's Mission Hospitals; for causing what he termed as a "public scandal" which is the filing this suit; for inciting people against his superiors, the local Bishop and other Superiors such as that of the Assumption Sisters. He testified that Dr. Fryda appealed his suspension which was denied. A decree of his dismissal was issued by the Maryknoll congregation but Dr. Fryda has appealed this to Rome.

55. He stated that he is familiar with the background to St. Mary's Hospital. According to him, in 1997, Dr. Fryda in consultation with Sister Felix of the Assumption Sisters, developed a plan to build a hospital to serve the poor in Nairobi. There was fundraising for the project and the seed money, USD 4.9 Million, was raised by the Maryknoll Fathers in the USA. He stated that this money was used to build both Langata and Elementaita hospitals. He did state that ASN also raised money alongside other local donors whom he did not know. He explained that the Maryknoll Fathers raised money in two ways. First, they had a magazine where they put up the story of the hospital and sought for donations. Secondly, their financial officer approached large donors in the USA and requested for funding for the hospital. The money was received in two ways. In the first, cheques were written to Maryknoll Fathers and Brothers in the USA, designated for the hospital in Kenya. Once received in New York, it was transferred to their regional Maryknoll accounts in African banks. From the regional accounts Dr. Fryda would request for disbursement from the financial officer of the region. The second mode of receiving money was through Dr. Fryda's mission account. Donors could make deposits into this account designated for the hospital. He expounded that the mission account can only be used for mission activities and not personal use and an account of it submitted to the regional financial officer who sends a report to the Chief Financial Officer in New York every six months. He testified that they raised money on the basis that the hospitals would

be owned and operated by ASN.

56 He stated that one of the reasons for Dr. Fryda's suspension was a lack of financial transparency for refusal to submit to an independent audit. He testified that Dr. Fryda refused to have an audit because he gave the reason that the funds were held by ASN and the money went to them for their hospital, and if an audit of these funds was needed, then they should contact ASN. He referred to a letter dated 5 January 2009 (but probably meant 2010) written by Dr. Fryda.

57. He testified that he has never come across a situation where a member of Maryknoll, or Maryknoll itself, owns a project. He explained that if he got money to build a school, he will not own the school but will turn it over to the local church. He gave an example that they have built a chaplaincy at Kenyatta University valued at over USD 1 Million, but they will not own it, and instead they have handed it over to the said University. He testified that in order to be enabled to work in these projects, one needs the approval of the local Bishop where the project is situated, and must be assigned by his Superior. He gave his own example; that he has been assigned to manage the chaplaincy at Kenyatta University, but he needs approval of the Bishop of Nairobi. He stated that Dr. Fryda was assigned by his Superior, one Raymond Finch, to work with ASN to build St. Mary's Hospital, and that there is a letter to that effect dated 6 April 1998, written by Archbishop Ndingi. He also referred to another letter dated 19 February 1998.

58. He elucidated that only money given for personal use can go into the personal account but money for mission projects has to go through the mission account which does not attract any tax. The mission account money must be accounted for to the Superior. He expounded that money received in service as a priest is turned over to the congregation. To illustrate, he revealed that he is employed by the Kenyan Government as a chaplain in Kenyatta University but he does not collect his salary, which is paid to the Maryknoll Fathers. In return, he receives a stipend for his maintenance, what is known as the "viatique"; the rationale being that a priest is meant to live a simple life. To work in Kenya, his work permit is applied for by the Maryknoll Fathers. He explained that that was the case with Dr. Fryda until the year 2012, when Maryknoll wrote to the Kenyan Government stating that they would no longer pay for Dr. Fryda's work permits. He referred to some letters written by Maryknoll relating to Dr. Fryda's work permits. He testified that Maryknoll refused to renew Dr. Fryda's work permits because he was asked to leave Kenya by the Superior General of Maryknoll in February 2011.

59. He did testify that there were attempts to mediate this dispute but which did not succeed, as Dr. Fryda did not wish to put a stop to the court process. It is because of this refusal by Dr. Fryda that the Superior General directed him to leave Kenya. This resulted in two suits, one being Nairobi High Court Constitutional Petition No. 80 of 2013, where Dr. Fryda sued several persons, including Maryknoll, to petition that attempting to stop him from pursuing legal remedies was a violation of his constitutional rights. This case was eventually withdrawn. The other case is Nairobi High Court Civil Suit No. 383 of 2013 where Dr. Fryda sued Maryknoll and Father Lance, to stop his dismissal from the Maryknoll Society. Father Lance testified that this case was dismissed for the reason that Dr. Fryda had not exhausted the internal appeal mechanism. To his knowledge, at the moment, Dr. Fryda is not raising money through Maryknoll, but through another Organization known as the American Foundation for Children with AIDS, and he referred to some newsletters authored by Dr. Fryda to this effect. This is because Maryknoll had informed Dr. Fryda that they will no longer be receiving funds for the hospital project.

60. In cross-examination, he testified that this case started in August 2010, and he became Regional Superior in October 2010 after having been elected in April 2010. At the time he was still serving as Chaplain of Kenyatta University. He attended some mediation meetings at the invitation of Dr. Fryda before taking office as the Regional Superior. He did not have contact with ASN at that time and he came to know most about the dispute from Dr. Fryda. They did attend some mediation meetings with Cardinal Njue, and he wrote some emails relating to these meetings. The first time he met any of the Assumption Sisters was in July 2010 in one of the mediation meetings with Cardinal Njue. His only contact with ASN was through these meetings until the year 2016. He however met Dr. Fryda occasionally throughout this period as he was his friend and they would discuss the matter. Other mediation meetings were also held

with the Nuncio. The meetings also involved Mr. Macharia Njeru who was Dr. Fryda's lawyer, and Mr. Ngera as the latter had donated the Elementaita land. He also held some meetings with ASN over their Regina Pacis University Project as they had come to him to talk about raising funds for the University.

61. He testified that the dream of a hospital for the poor was realized in St. Mary's Hospital and no donor has complained of how their money has been used. He believed that Dr. Fryda was co-founder of the hospital with the Assumptions Sisters.

62. He did testify that Dr. Fryda's Superior General, in a letter, did direct Dr. Fryda to withdraw this suit but Dr. Fryda disobeyed. There was also correspondence asking him to leave the country, for fear of his security, and report to New York. The refusal to withdraw the case and refusal to leave the country were mentioned as acts of disobedience and absence from his place of assignment. He also cited financial disobedience in failing to account for funds.

63. In re-examination, he stated inter alia that persons sending money through Maryknoll are considered to be Maryknoll donors and that Maryknoll is responsible for Dr. Fryda's mission account and money donated for the hospital.

64. DW-3 was Sister Maria Felix Mwikali. She is a trustee of ASN. She served as the Superior General of ASN from 1991 to 2003 having served two six year terms. She was thus the Superior General during the construction of St. Mary's Mission Hospital at Langata.

65. She gave evidence on how Dr. Fryda came to be in contact with the Assumption Sisters. According to her, in the year 1996, she received a phone call from Dr. Fryda and she gave him an appointment. They met in her office and held a discussion. Dr. Fryda introduced himself as a Maryknoll priest and medical doctor who had worked in various places including Nazareth Hospital. He informed her that he had heard that they were taking over Nazareth Hospital and wanted to see how they could work together. It seemed to her that Dr. Fryda was asking for employment at Nazareth Hospital because they were going to take it over. She informed him that he would have to meet the General Council since this was the decision making organ of ASN. The Council made an appointment with him and they met. But no concrete answer was given, since Dr. Fryda was from a different congregation, and the two congregations had to meet and agree on this. Later Dr. Fryda called her and informed her that his Superior General, alongside two other members of his Council from New York, were in the country. They met with the General Council of ASN. DW-3 stated that in the meeting, they discussed the charism of ASN, and advised that they wished to start their own hospital, following their charism which was to assist the poor. They asked whether Maryknoll could help them buy the land and develop the hospital and that they accepted Dr. Fryda's request to work with them as a medical doctor.

66. She testified that discussion to take over Nazareth Hospital from Consolata Sisters was in full gear in the year 1996 but the proposal did not materialize because the Consolata Sisters gave them a long time to take over. A decision was therefore arrived in their General Council meeting of 27 July 1997 to start a completely new hospital if Consolata Sisters did not hand over Nazareth by 30 December 1997 and that was the end of the pursuit for Nazareth Hospital.

67. She went further to state that they invited Dr. Fryda to live within their residence for purposes of coordinating the development of the new hospital. They first informed the Catholic Church through Archbishop Ndingi, the then Bishop of the Archdiocese of Nairobi, -of their intention to develop a hospital. This was important as they could not develop a hospital within his Archdiocese without informing him. She stated that this was the practice in the Catholic Church as they had to be committed and be responsible to the Archdiocese. The letter was written by herself and Dr. Fryda and she testified that she was representing ASN whereas Dr. Fryda was representing the Maryknoll Fathers. The letter sought audience with Bishop Ndingi and they did meet him. Bishop Ndingi then authored the letter dated 17 February 1998, to help them seek out donors for funds. This letter was written to the Maryknoll Mission Project Funding Committee through Maryknoll Kenya Regional Council. She stated that a lot of money was received through this letter because the same had the weight of authority and that about USD 5 Million was received from Maryknoll. Money was also received from Franciscan Fund in USA (USD

60,000), Manos Unida of Spain (USD 187,000), International Foundation of USA (USD 30,000) and Loyola Foundation (USD 10,000). She stated that the latter was received via the Archdiocese account since it was applied for through the Archdiocese and it was directly given to St. Mary's Hospital.

68. A bank account was opened for the project. DW-3 is the one who wrote the introduction letter to Barclays Bank. She introduced three signatories, Dr. Fryda who was introduced as treasurer, Sister Kainda as the Project Coordinator of ASN and Sister Christine Munguti as Secretary. The latter was the general bursar of ASN whose role was to coordinate finances. She testified that money was put into this account, but later, Dr. Fryda opened other accounts without their knowledge. In April 2000 she wrote another letter for the opening of another account, being an operational account for the hospital, as the hospital was due to be opened in May 2000. The signatories were to be the same.

69. She refuted the claim by Dr. Fryda that ASN did not contribute towards the project. She contended that they contributed Kshs. 5.6 Million for purchase of the land and the money was paid into the project account. She stated that during construction, they received money and grants by way of equipment from within and outside the country. The equipment were paid with tax exemption as ASN is tax exempt. She referred to some letters written by them to the Kenya Revenue Authority (KRA) on tax exemptions, one of which was a hand written note written by Dr. Fryda, advising that the ASN need to respond to KRA and advise that St. Mary's is a non-profit organization owned by ASN which is exempt from income tax. She avowed that Dr. Fryda could not benefit himself by use of their tax exemption.

70. She testified that St. Mary's Mission Hospital (the company) was incorporated by ASN through their own lawyer, Mr. Macharia Njeru, who was introduced to them by Dr. Fryda. She stated that it was never agreed that ASN would hold the properties in trust for Dr. Fryda. She referred to a letter dated 26 August 1998, whereby Dr. Fryda instructed Mr. Macharia to register the title deeds of the properties in the name of ASN and was of the view that this letter was clear on the ownership of the properties. She averred that their agreement with Dr. Fryda was that if he enters into their charism, he may work with them as the Doctor in Charge. She testified that they never looked for Dr. Fryda, but instead, it is him who came looking for them. She referred to a note written by herself and Dr. Fryda on the understandings with regard to Dr. Fryda. She stated that Dr. Fryda never gave audited accounts, and when asked, he stated that ASN should be the ones to seek accounts. She testified that if Dr. Fryda wanted anything kept for him, he would have used his own congregation.

71. In cross-examination, Sister Felix did agree that she is a theologian by profession and does not have the experience to run a hospital although she did emphasize that their congregation has personnel trained in the medical field. She testified that the project was conceptualized in the year 1996 when she was Superior General. According to her, Dr. Fryda came to see her because he was looking for a job. He came in his private capacity, but they asked for his superiors, because they do not work with individuals. Her understanding was that the two congregations would work together. She explained that if one wishes to work with another congregation, the Superior General makes the request on his behalf to the Superior General of the other congregation, and that is how the Superior General of Maryknoll (Father Fischer) got involved. In her view, Dr. Fryda was coming to work for them. She mentioned that they asked Fr. Fischer for a letter to that effect but he stated that there was no need since Dr. Fryda was a missionary and he would go to another place. There was no formal document that was recorded between Maryknoll and ASN.

72. She insisted that Dr. Fryda was an employee and not an "equal partner" and that they used to pay him a salary of Kshs. 100,000/= per month from the month of May 2000, when the hospital started operating. During the coordination and construction phase they were not paying him a salary. At that time, he was staying at their residence where he offered medical services at no fee. They had a good working relationship with him and there were no problems when funding was sought or when construction was done. Problems started during the operation of the hospital when Dr. Fryda declined to follow the hospital manual. Dr. Fryda wrote a document titled "reflections of the founders after 10 years of operational experience" which among other things proposed the creation of "St. Mary's Mission Trust" which was not agreeable to ASN.

73. She testified that the hospitals were constructed entirely through donor funds. Both Dr. Fryda and the Assumption Sisters proposed some donors. She did state that Mr. Ramesh Shah donated money to St. Mary's and not to Dr. Fryda. She was not aware of some donors said to have been sourced by Dr. Fryda or whether they contributed any money. She was shocked to learn that some of these donors were not contributing money to the Catholic church. She faulted Dr. Fryda for not revealing to them what was donated. She asserted that the hospital was never going to be independent from the Catholic church, since from the beginning, it was supposed to be a church institution. She testified that Loyola Foundation was one of the donors of ASN. She also personally went to the church at St. Bonaventure Parish to raise money. She did state that when the Karen land was being purchased (which transaction eventually did not materialize) ASN put in Kshs. 5,040,000/=. The money came from Maryknoll who had given them a cheque. She claimed that they were never informed that the money came from Fr. Fryda's mission account. This money was returned as Kshs. 5,600,000/=. having earned some interest. She did testify that the first of the land parcels in Langata was purchased in 1998 before St. Mary's (the company) was incorporated in the year 1999.

74. She testified that congregation accounts are only operated by members of the congregation but a non-member can sign project accounts. Dr. Fryda was introduced as Treasurer, because he was going to look for donors. She denied that he was allowed to sign the accounts because he was a "partner". She agreed that the postal address used to open the account was not that of ASN, and did not refute that it was Dr. Fryda's. She agreed that it was Dr. Fryda who kept the cheque book and signed most of the cheques. Questioned on the accounts identified in the counterclaim, she did not have anything to show that the said accounts do exist, and she was not sure of them.

75. She was referred to the Trust Deed of Regina Pacis University, part of which provides that the trustees would hold LR No. 18591/11 (now LR No. 27229) in trust for the University, but denied that the land is being held in trust for Regina Pacis University. She could not believe that the Trust Deed has a provision that the land is to be transferred to Regina Pacis University.

76. She testified that the construction and the equipment of the Elementaita land came from donor funds and surplus from the hospital in Nairobi although she could not tell the amount of these surplus funds.

77. In re-examination, she stated that they entered into a "spiritual partnership" with Dr. Fryda to serve humanity, without any person later saying that they own this or that.

78. With the above evidence, the defendants closed their case.

### **PART C : SUBMISSIONS OF COUNSEL**

79. In his submissions, Mr. Mindo, learned counsel for the plaintiff, (who was assisted by Mr. Okeke, learned counsel, in conducting the proceedings), inter alia submitted that the parcels of land in issue, save for the Elementaita land, which was donated, were procured through donor funds. On the claim by Regina Pacis University, he pointed out that nobody gave evidence on its behalf, and Mr. C.N. Kihara, who appeared for the college, did not ask any questions. He submitted that none of the witnesses were trustees of the University. He referred to the evidence of DW-1 and DW-3 as being that the University does not claim the properties in issue and therefore submitted that the case by the University should be dismissed with costs to the plaintiff. With regard to St. Mary's Mission Hospital (the company), he submitted that it ceased to exist following the death of one of its subscribers, Sister Muli, in the year 2001, as the company was to have at least three and not more than seven directors, and three members, according to its Articles of Association. He also submitted that it was not clear what exactly the company wanted in the counterclaim.

80. On his client's suit, he gave his background and submitted that because of the good relationship that the plaintiff had with ASN, he requested to use their name pending the registration of the company for the purpose of registration of land. He pointed at the evidence of DW-1 that there was intention to transfer the parcels of land to the company. He submitted that in the opening of the accounts, it was clear that Dr. Fryda was to deal with the money that he received from his donors. He wondered why ASN thought of

demanding the title deeds from Dr. Fryda in the year 2010 and not earlier if indeed they were their title deeds. He submitted that Dr. Fryda signed all the building contracts and caused the hospitals to be registered, managed the same, and hired and fired employees. He submitted that it was to Dr. Fryda that donations were made including the gift of land by Mr. Ngera. He submitted that the fall out with the ASN was due to "lies" sent from Kenya to his superiors in New York.

81. On the case of the Assumption Sisters, he submitted that they cannot hinge their case solely on the fact that they are the registered proprietors of the suit properties. He hinted at a hidden hand of Cardinal Njue in the matter and attempt to have the properties transferred to the University against the wishes of the donors. He wondered how Dr. Fryda was suddenly declared a trespasser after being on the suit properties for 11 years. He submitted that there was bad faith exhibited by the 1st defendant in its pleadings and in its pursuit of ex-parte orders at the interlocutory stage of the suit and that the suit filed by Regina Pacis University was an abuse of the court process.

82. He submitted that the court is facing what he termed as a "Solomonian situation". He offered that for the court to solve the problem, it is necessary to consider the interests of the donors and the society that has been enjoying the services at the hospital. He submitted that the suit properties were to be handed over to a company which has however been killed by the inactivity of the three subscribers and the 1st defendant now wants the property given away to the University through its trustees as evidenced in the Trust Deed of Regina Pacis University. He submitted that the relationship between the founders of the hospitals, that is Dr. Fryda and the Assumption Sisters, has so soured that the same cannot be entrusted to the joint care of the two and the court needs to find out who to hand over this "baby". He submitted that Dr. Fryda has sacrificed his priesthood and his own safety for this "baby" yet ASN were prepared to give it away for free to a private university. He proposed a way forward, including the proposals that Dr. Fryda should be given the right to continue operating the hospitals; the properties be transferred to a body similar to St. Mary's Mission Hospital Nairobi (the company) and which will conform to the wishes of the donors; to prevent abuse of any of the wishes of the donors, some of the donors such as Mr. Ngera and Mr. Shah be made directors of this body with Dr. Fryda playing a major role in selection of the directors which can be done under the supervision of the court. He submitted that Dr. Fryda has a vested interest in the properties and further submitted that it is only Dr. Fryda who can protect and advance the interests of the public in the institution of the hospitals at stake.

83. On her part, Mrs. Wambugu, learned counsel for ASN, inter alia submitted that the construction of the hospitals was through donor funds and grants, together with the contribution of ASN. The parcels of land came to be registered under ASN with the user of mission hospital and educational center. She submitted that from the outset they were to purchase the land for their own use and the same was registered in the name of the congregation. She submitted that Dr. Fryda instructed his lawyer to incorporate the hospital under the ownership of the 1st defendant and confirmed that they would be the owners of the hospital. She submitted that the plaintiff did not produce any evidence to support his claim that he purchased the land and built the hospitals with his own money and that the evidence reflects that all this was done through donor funds. That being the case, she submitted that the plaintiff cannot claim that the suit properties are his. She submitted that even if there was a trust deed to support the plaintiff's contention, the same would be unenforceable on account of fraud. She submitted that in the circumstances of this case, no presumption of trust imposed or implied can be said to have resulted and asked that the plaintiff's suit be dismissed with costs. She relied on two authorities, *LN vs SMM (2013) eKLR* and *Gissing vs Gissing (1971) AC 886*. Mrs. Wambugu also made brief oral submissions to highlight and I have taken account of these.

84. On his part, Mr. C.N. Kihara, counsel for Regina Pacis University, submitted inter alia that evidence on behalf of his client was presented by ASN witnesses and did not see the place of the argument that no evidence was led by them. He did not believe that the plaintiff had tabled sufficient evidence to support his claim for a trust. He submitted that the evidence revealed that donations were made to support the establishment of a hospital and education centre to assist the poor. He submitted that these gifts were absolute and not reversible and were given to institutions of ascertainable legal status. He faulted the plaintiff for filing these proceedings when all he was asked for is to produce an account of his activities. He submitted that the principles of equity provide that even where it is impossible for a designated

charitable purpose to be carried out, the charitable purpose will not necessarily fail because the so called "Cy-pre's doctrine" will come into play and will have applied what was donated to a purpose closest to what the charitable purpose intended. He submitted that the court is obliged to provide conditional transitional mechanisms in place and the plaintiff be directed to provide an inventory of the assets and liabilities and accounts of the hospitals since the year 2011. He pointed me to the Charities Act, 2006 of England and Section 13 of The Trustees (Perpetual Succession) Act, Cap 164, Laws of Kenya. Though he intended to rely on a case, the same was neither identified nor annexed.

## **PART D : ANALYSIS AND DECISION**

85. I have gone through the pleadings, the evidence and submissions of counsel. I appreciate that this is an important case, not just for the parties before me, but to various Congregations and Orders of the Catholic Church, the Catholic church itself, and the general public who are beneficiaries of the health services given at the St. Mary's Mission Hospitals in both Nairobi and Elementaita, and the educational institutions based in the Nairobi property in dispute. Before I go far, there is a small issue, but again, maybe not too small, about the description given by DW-2, Father Lance, that this case is a "public scandal." There is nothing scandalous in filing a suit if somebody feels aggrieved so long as that suit raises legitimate issues for determination and is not an abuse of the court process. The courts in Kenya exist for the very purpose of resolving disputes such as these. There may be canon laws and all that, but here in Kenya, it is our Constitution which is supreme and the Constitution protects the right of one to access justice in our courts. So if one wants to file a suit for the protection of what he/she feels is his right/s, the other party, or a third person, cannot point at that as being a public scandal. In short, there is nothing scandalous about this case and it was perfectly within the rights of Dr. Fryda to file this suit for the determination of the various issues that have revealed themselves in this case. In my view, it was wrong to attack, victimize and harass Dr. Fryda, merely for pursuing rights that are granted in Kenyan law. If that was against canon law, then let me repeat, that here in Kenya, it is the Constitution which is the supreme law and not canon law.

86. If the Catholic Church or indeed the Order of the Maryknoll Fathers and Brothers, thought that this case was such a big "public scandal" to the Catholic Church, probably they needed to have done much more than they did to ensure that the matter is amicably resolved out of court, and not vilify Dr. Fryda. Some effort appears to have been made at the initial stages of the case, but in my opinion, it was probably not sincere and impartial, and may not have gone far enough to resolve the dispute. In my view, it was wrong, if not completely misplaced, for the Catholic Church to scandalize and even defrock Dr. Fryda for coming to court. It is not right in my view to destroy somebody's life for the reason only that they have opted to pursue their rights in court.

87. Having said that, this case has also exposed the low uptake of the out of court processes of negotiation, mediation and arbitration. Given the relationship of the parties, and their standing in the order of the Catholic church, I would have thought that this is the perfect case for an out of court settlement. I must say that I was rather taken aback that the parties herein could not agree, even to an attempt to resolve their dispute out of court, despite my continued encouragement and cajoling that they pursue this path. Regrettably, my efforts on this came to naught. It is a high time that parties considered pursuing out of court remedies which bring satisfaction to both parties, especially where they have unique relationships such as the one in this case. This way, there will be a win-win situation, unlike a court process, where usually, "the winner take all" scenario ends up being the result.

88. I appreciate the central issue in this suit, as being, who should be in charge and control of the properties and hospitals built on the suit properties. To answer this question, I will need to determine some issues of fact and law after which I can give my final verdict on the central issue. In my view, the following questions are key in leading to the determination of the main issue.

*(i) Who conceptualized the hospitals in issue ?*

*(ii) Who built these hospitals , is it Dr. Fryda or the Assumption Sisters ? Where did donations come from ?*

(iii) *How did the properties come to be in the name of the Assumption Sisters of Nairobi?*

(iv) *What was the relationship that Dr. Fryda had with the Assumption Sisters of Nairobi ?*

(v) *How were these hospitals to be managed?*

(vi) *What has brought about the dispute?*

(vii) *Can the Assumption Sisters do what they want in these properties?*

(viii) *Are these properties held in trust and if so to whom ?*

(ix) *Is Regina Pacis University entitled to these properties, or any of them?*

(x) *Who between Dr. Fryda and Assumption Sisters should manage the hospitals?*

(xi) *Are the Assumption Sisters entitled to their prayer for accounts, and permanent injunctions against Dr. Fryda ?*

**(a) Who conceptualized the hospital/s ?**

89. Both parties tried very hard to demonstrate that it is them who brought to being the hospitals, and that the other party had no input in the idea of developing a hospital for the less fortunate in society. I would have thought that on this issue, being a simple question of fact, the parties would have been candid on the input of the other, but I do not think that they were.

90. Dr. Fryda did testify that given his wide experience in the hospital mission field he conceptualized the idea of a hospital that was professionally run without it being under the management and doctrines of nuns unlike other Catholic mission hospitals that he had been in. He stated that the idea of St. Mary's hospitals was his own idea. On the other hand, the Assumption Sisters of Nairobi gave evidence that the idea of St. Mary's was solely their own, conceptualized by them, following their charism to minister to the poor and needy in society. It was stated that they came up with the concept of putting up this hospital after their takeover of Nazareth Hospital failed.

91. On my part, I think both parties were not entirely honest on the input that the other had in the initialization of the hospital. I say this with a heavy heart, given that both parties profess the Christian religion, and are both senior persons within the church pecking order. I do not disbelieve Dr. Fryda's evidence that he conceptualized a hospital and wanted it to come to being, but also the Assumption Sisters had a similar idea, and that is why they wanted to take over Nazareth Hospital. If Nazareth had materialized, it is probable that they would not have established a hospital from scratch. Both parties had envisioned a hospital to serve the poor, and they had a meeting of minds at about the same time, and both, in my view, agreed to cooperate to put into being their joint scheme. I come to the conclusion that the thought of establishing a hospital to serve the poor, was a joint idea of both Dr. Fryda and the Assumption Sisters of Nairobi, and nobody can say that they alone conceptualized the hospital.

**(b) Who built the hospital/s and where did the money come from ?**

92. Being a joint concept, it followed that the establishment of the first hospital was a joint project. Indeed, you see the word "co-found" being used liberally, in the letters written in the year 1998, when the project was in its initial stages. To illustrate, in a letter written by ASN on 20 February 1998, Sister Maria Felix, the then Superior General, wrote inter alia as follows :-

*"Dear Brothers and Sisters in Christ,*

*I am pleased to confirm that we, the Assumption Sisters of Nairobi, have committed ourselves to the co-founding and ownership responsibility of the "St. Mary's Mission Hospital" project now*

*under development.*" (emphasis mine).

The letter goes on to state in another paragraph that :-

*"Assumption Sisters of Nairobi ownership of this mission hospital in no way diminishes the critical role of responsibility Fr. Fryda, as a Maryknoll missionary, has (and will continue to have) as co-founder of St. Mary's Mission Hospital..."* (emphasis mine).

It will be discerned from the above letter, that the Assumption Sisters were revealing that they were "co-founding" the hospital. The only person that they were "co-founding" the hospital with, was none other than Dr. Fryda (also described as Fr. Fryda), and indeed this is apparent in the clear words of this letter.

93. This position is also exhibited in a letter dated 19 February 1998, written by Archbishop R. S Ndingi Mwana'a Nzeki, the then Archbishop of Nairobi. He wrote to the Maryknoll Fathers, recommending and endorsing the hospital project. Inter alia, he stated in his letter that :-

*"I am pleased to see Rev Dr. Bill Fryda of your Maryknoll Order join hands with the Assumption Sisters of Nairobi to co-found this much needed mission hospital...Together, I'm sure they will create a mission hospital for the poor which will be a positive reflection upon both Maryknoll Society and the Assumption Sisters Congregation."*

94. In his application form for Ambassador's Self Help Fund, written by Dr. Fryda, Dr. Fryda described himself as *"co-founder of hospital project"* and did name the Assumption Sisters. He also wrote as follows in the same application :-

*"The Assumptions Sisters of Nairobi and Rev. Dr. Bill Fryda (Maryknoll Fathers) are working together in co-founding this much needed 'St. Mary's Mission Hospital' in Nairobi, specifically aimed at providing competent, affordable medical care for poor persons of the slums across the city."*

100. In the same application is the following sentence :-

*"This critically-needed 130 bed (Phase I) mission hospital for the poor is being co-founded by the Assumption Sisters of Nairobi ("ASN Sisters" and Rev. Dr. Bill Fryda of the Maryknoll Fathers (USA mission order)..."*

95. The above are not the only documents which state that the hospital is being "co-founded" by Dr. Fryda and ASN. There are several letters addressed to the various donors giving this description. Although there are some documents which suggest that Maryknoll and ASN were getting into some kind of "mission partnership" such as the 1999 Progress Review document, in my view, the role of Maryknoll, as an organization, apart from providing funds, was quite peripheral. It could be that their name was used, at times, because Dr. Fryda was a Maryknoll priest, but nowhere have I seen that this was an actual Maryknoll project or a partnership project between Maryknoll and ASN.

96. With the evidence that I have at hand, it is my finding that the hospital project, as originally conceptualized, was a joint project between Dr. Fryda and ASN, and none can say that it was "their" project, to the exclusion of the other.

### **(c) What was the relationship between Dr. Fryda and ASN ?**

97. The initial relationship between Dr. Fryda and ASN, was one of like-minded persons, coming together to actualize a project that they both held dearly. This was not an employer-employee relationship as the witnesses from ASN tried to say; and, no, I do not believe that Dr. Fryda came to ASN looking for employment because he was jobless and had nothing to do. In fact, it is stretching the truth too far, and I am being polite here, for it is an outright lie, to say that Dr. Fryda was an employee of ASN. If indeed he was an employee as claimed, you would expect ASN to apply for his work permit, have an employment

contract, pay him a certain salary, give him leave days, make statutory deductions on his behalf and such like things. There is nothing of this sort that has been displayed by ASN. These two persons, Dr. Fryda and ASN, came together because they had a commonality of purpose and nothing else. They both had a similar project in mind and they felt that they could work together to actualize their shared idea. Their relationship was not one of master-servant. None was taking instructions from the other. It was a relationship of equality and mutual understanding aimed at a common goal; the goal of providing affordable health care services to the less fortunate in society. They were essentially embarking on a sort of spiritual journey, walking together towards a particular destination, which destination was the creation of a hospital to cater for the poor.

98. Initially, the idea was to have one hospital in Nairobi. To actuate the vision, land had to be found where the hospital could be developed. Some land in Karen became available but the transaction became complicated and this was abandoned. It is then that the land in Langata was offered with the assistance of Mr. Ramesh Shah and the same was purchased. According to Dr. Fryda, this land was purchased using his own resources, although ASN gave evidence that they contributed a sum of Kshs. 5,600,000/= towards the purchase of this land. This contribution of Kshs. 5,600,000/= was contested by Dr. Fryda, who stated that this money, although it came from the account of ASN, originated from his mission account for the purchase of the land in Karen that did not materialize, and the same was placed into the account of ASN, and therefore ASN cannot claim that it was their own contribution. Apart from this conflict, the parties also tried their utmost best to demonstrate that it is them, and not the other, who fund raised for the hospital project.

99. Despite the parties having dwelt a lot on this issue, to me it is quite immaterial because the fact of the matter is that most, if not all the money, was raised through donor funds. I have evidence that both parties tried to reach donors, and both parties did, through their contacts, raise money for the project. Both parties cooperated in reaching out to various persons and institutions of good will in order to raise funds for the hospital project. Some funds were raised jointly through cooperation and some were raised separately by the individual parties. Maryknoll Fathers and Brothers, were themselves a huge donor, if not the biggest of donors.

100. To me, it does not matter who raised more money than who, although I must say, that from the evidence that I have, most of the money was raised through the personal efforts of Dr. Fryda, who must have walked his soles off, to ensure that sufficient funds were raised to make this project a reality. Without seeming to belittle the money raising abilities of ASN, without the additional fund raising skills of Dr. Fryda, I doubt that ASN, at that time, would have raised money that was enough to develop a hospital of this magnitude. If they had sufficient money of their own, or a network of their own donors, they would not have needed the input of Dr. Fryda, and they would simply have gone it alone.

101. I actually find it is detestable, if not immoral, in the manner in which ASN witnesses tried in their evidence, to belittle the significant input that Dr. Fryda made. This is an about-turn from how they perceived him when the hospital was still being developed. In their own minutes of 23-24 January 1999, the Sisters themselves acknowledge at Minute 9/99 that *"Father Fryda has bought land for the hospital costing Kshs. 18,000,000. The title deed was being processed."* In another letter dated 8 September 1998, Sister Felix herself, thanked Dr. Fryda *"for the very dedicated work you are doing to make it possible for people, especially the poor, to have affordable and conveniently situated medical services they need in the near future, please (sic) God. Looking forward to our continued collaboration with you in His service..."*. It is incredible how the Sisters, while giving evidence, turned against the very person that they had very high accolades when the hospital was in its formative stages.

102. Anyway, as I have said before, it really doesn't matter who raised what amount of money from which donors. What is important for our purposes is that this was not a project where Dr. Fryda or ASN solely gave money from their own resources. The hospital project came to being out of donor funds, which donors were moved by the vision of the project as articulated by both parties, and they gave generously to ensure that the hospital came to being. They were giving so that a hospital may be developed, and they entrusted both ASN and Dr. Fryda to ensure that their donations put up a hospital for the less privileged.

103. There is no question that the construction of the hospital in Nairobi, was under the direct supervision of Dr. Fryda, with ASN playing a very limited role. The parties of course, at this time, trusted each other. Dr. Fryda personally engaged the contractor and the requisite experts to put up the hospital building and ensured that they were paid. It is not clear from the evidence tendered how payments were made to these building experts, and exactly how much was spent, but there is common ground that there was opened a project account in Barclays Bank of Kenya. The account was opened in the name of ASN with the instruction that it was for St. Mary's Mission Hospital. The signatories were three, but in all respects, it was Dr. Fryda who dealt with the account and there does not seem to have been any complaint from ASN in the manner in which Dr. Fryda operated the accounts. If there was a problem, I would have expected this to be discussed in one of the meetings of ASN during this particular period, but I have not been shown any evidence of any issue raised by ASN at this time. In their meeting of 23 -24 January 1999, at Minute 9/99 note 2, the Sisters stated that "*Dr. Fryda has shown the financial situation of the project as per Jan 18th 199... (exact year not clear) i.e he stated what has been carried out and what was pending (see report).*" In another meeting of ASN of 17-18 April 1999, "*Father Fryda was commended for his accountability.*" All these buttress my finding that during the construction phase of the project, there were no issues between the parties and all was going well according to what they had in mind.

**(d) Are the properties and hospitals held in trust for Dr. Fryda ?**

104. The central question in this matter, and indeed the main prayer sought by Dr. Fryda in his pleadings, is that it be held that the hospitals are held in trust for him. I mentioned earlier that the vision of the founders was to have one hospital in Nairobi, which was eventually built in Langata, on the 20 acre piece of land comprised in two titles, which are LR Nos. 27228 and 27229. These two parcels of land were registered in the name of ASN. So too the land that was donated at Elementaita and the land that was purchased in Sagana. The hospital that the founders envisaged was duly built on the land in Langata around the years 1998-2000 and the hospital was officially opened about the month of May of the year 2000. The land in Elementaita was donated by Mr. Ngera in the early 2000s and a hospital was built on it and opened around about the year 2007. I do not have much evidence on how the funding for the building of this hospital in Elementaita was sought, but I believe that it was in the same way as the funding for the initial hospital developed in Nairobi.

105. The land in Langata is comprised of two parcels of land. In one parcel of land, that is LR No. 27228, is the hospital and accompanying buildings. In the other parcel of land is an educational institution and the Sisters' convent. One of the educational institutions on this land is Regina Pacis University, who in their suit assert to be entitled to occupation of the same, a claim that is vehemently opposed by Dr. Fryda. Regarding this parcel of land and its occupation by Regina Pacis University is a controversial Trust Deed, which purports to vest this land upon Regina Pacis University. I will come to this aspect later after I address whether ASN holds the land and hospitals in trust for Dr. Fryda.

106. Dr. Fryda's case is premised on the pleading that all the four pieces of land in issue are held in trust for him, and or an entity that he may choose. He is aggrieved by the manner in which ASN wish to manage the hospitals and further distressed by the threat that the land in Langata is to be assigned to Regina Pacis University. ASN of course contend that they are the exclusive owners of these parcels of land and refute any insinuation that they hold the properties in trust. In fact, in their counterclaim, they wish to have Dr. Fryda declared a trespasser in these properties. To answer whether or not the parcels of land are actually held in trust, one needs to go back and find out why these parcels of land were registered in the name of ASN in the first place.

107. Starting with the properties in Langata, I have already found and held that the idea of developing a hospital was a joint idea of both Dr. Fryda and ASN and that is how the hospital at Langata came to being. It is apparent to me, from the outset, that Dr. Fryda was not keen in having the envisaged land in Langata, or the hospital on the said land, registered in his name or having them identified as owned by himself. This is not surprising, as it was a joint project, and I doubt if ASN would have agreed to have the land registered solely under the name of Dr. Fryda given that they had their own input in the project.

108. The evidence that I have shows that there was a mutual understanding that ASN would be the legal

owners of the land and hospital in Langata, either by themselves or through another legal entity that would be under their control. This comes out in various documents tendered in evidence as I will demonstrate here below.

109. There is a letter dated 20 February 1998 written by Sister Felix, the then Superior General of ASN, which letter I had earlier alluded to when referring to the relationship that Dr. Fryda had with the Assumption Sisters. Part of that letter states that ASN have committed to the *"ownership responsibility of the St. Mary's Mission Hospital project"*. In his various "begging letters" to donors, Dr. Fryda did emphasize that the ownership of the hospital would be vested with the Sisters. If one looks at the funding application sent to the Franciscan Fund, for example, Dr. Fryda noted inter alia that :-

*"St. Mary's Mission Hospital is specifically being created due to the lack of medical care for the overwhelming numbers of the poor living in deplorable slums around Nairobi. The hospital will be owned and staffed in-part by the Assumption Sisters of Nairobi. This is a well established pontification congregation of professional African women who have a charism of walking with the poor in the society and economically unjust structures of their lives." Note the words, "the hospital will be owned... by the Assumption Sisters."*

110. This theme is evident in almost all other funding applications. In the application to the Ambassador's Self-Help Fund, again written by Dr. Fryda, Dr. Fryda states that, *"the hospital shall be under ASN Sisters' ownership, which will provide long term stability."* In the funding application to Manos Unidas, when talking of the title deeds, Dr. Fryda stated that, *"both title deeds (there was proposal to split the then one title deed into two portions of 5 acres) will be under ownership of the Assumption Sisters of Nairobi."* In the application to the Dallas Regional Community, Dr. Fryda stated that, *"The hospital's ownership will be per The Assumption Sisters of Nairobi, with Rev. Dr. Fryda (Maryknoll missionary priest and medical doctor) serving as the hospital's first medical director and chief of medical staff."*

111. I take it that any serious donor would wish to know who would eventually own the project that he/she is giving to, and it was made clear to them, that ownership of the project would be under the Assumption Sisters. It is probable that they gave their donations on the basis of this assurance, for if they were not comfortable with this position, they would certainly not have made any donations.

112. To give effect to this promise, Dr. Fryda did address his advocate on this point. He wrote a letter dated 26 August 1998 to Mr. Macharia Njeru where he gave various instructions. One of the instructions was as follows :- *"Title deed is to be under ownership of 'The Assumption Sisters of Nairobi, P.O Box 25054 Nairobi'... It is important that the title deed be made out to the full name 'Assumption Sisters of Nairobi' as there is another organization 'Assumption Sisters of Eldoret' here in Kenya which is a completely different organization ! ...Legal registration of the project 'St. Mary's Mission Hospital' under the ownership of the Assumption Sisters of Nairobi. Can you work on this ?"*

He continued :-

*"For your information :*

*Sister Maria Felix Mwikali is the Superior of the Assumption Sisters of Nairobi. Her address is as mentioned in (a) above. The Assumption Sisters of Nairobi will be the legal owners of the St. Mary's Mission Hospital, not the Catholic Archdiocese of Nairobi. The church (Bishop Ndingi) is in full agreement with this. By this step, one particular group of Sisters has the longterm responsibility for the hospital, and make their plans accordingly. This arrangement is in the hospital's best interests.*

*I am a doctor (licensed here in Kenya) and also a Maryknoll Fathers priest. Although the Maryknoll Fathers are assisting in co-founding the St. Mary's Mission Hospital, all ownership of the land, hospital buildings etc. will be directly in the capable hands of the Assumption Sisters of Nairobi. The Sisters will be the exclusive owners of this mission hospital..."*

113. The above documents indicate that despite his enormous input, Dr. Fryda was comfortable in having the land and the hospitals under the ownership of ASN. What was not very explicit, at least to the donors, was whether there was an understanding that ASN would hold these properties in their own names, or whether a company under the control of ASN would be registered and the property and hospitals held in the name of the company and not that of ASN. It will be noted that the company, St. Mary's Mission Hospital Nairobi, was incorporated on 16 July 1999 as a company limited by guarantee and it obtained exemption not to use the word "limited". There are three subscribers noted in its Memorandum of Association, being Sister Marie Therese Gacambi, Sister Teresia Ndeto and Sister Gratia Muli. All the three are members of the ASN congregation although it did emerge that the latter, Sister Muli, is now deceased. These three were also noted to be the first directors in Article 2 of the Articles of Association of the Company. Pursuant to Article 32, the number of directors is not to be less than three and not more than seven as may be determined by the subscribers to the Memorandum of Association or a majority of them. It is not necessary for the directors to be members of the company. I believe that the creation of this company, was to have the entire assets of the hospital, which were conferred upon ASN, transferred to the company. If this was not the position, then there was absolutely no need of going through the trouble of creating the company. In her evidence, Sister Gacambi, (DW-1) did testify that she is not too worried about the fact that the properties are yet to be registered in the name of the company. Sister Felix in her evidence tried to feign ignorance as to why the company was formed but as I have mentioned, there was no need of registering the company if the same was not the legal entity that was to hold, at least, the properties and manage the business of the hospital. All the same, the company was to be entirely owned by the Assumption Sisters and this was pursuant to the original vision of the founders.

114. The issue of the company holding the property in Langata is also disclosed in a document prepared in September 2002, titled *"Founding Principals (sic) of St. Mary's Mission Hospital-Nairobi"*. That document was produced by ASN. Although it is an unsigned document, part of that document has the sub-title, *"Ownership of St. Mary's Mission Hospital."* In part, it states that, *"St. Mary's is legally owned completely by the Assumption Sisters of Nairobi, per their Board of Trustees. The hospital has been legally created as a limited liability corporation 'with no capital shares.' This legal step created the hospital specifically as a non-profit limited liability corporation, with its articles of incorporation bylaws duly registered with the Kenyan government."*

115. In my view, it is clear from the above documents, authored by Dr. Fryda himself, that the intention was to have the land and the hospitals in Langata, held by ASN, through the company St. Mary's Mission Hospital Nairobi. The purpose was for the Sisters to manage a hospital, and other related purposes, through the vehicle of a company limited by guarantee on these parcels of land. I am not persuaded that there was any trust created in favour of Dr. Fryda. He had his input but he relinquished the outcome to the Assumption Sisters.

116. It could be that Dr. Fryda had little choice in this. As explained by Father Lance, DW-2, the general rule is that missionaries facilitate projects, but do not own them. This bit of evidence was actually not seriously challenged by the plaintiff and DW-2 was not extensively cross-examined on this aspect of his testimony. It should be noted that Maryknoll itself was a serious donor and Father Lance, representing Maryknoll, stated that ownership of the hospitals was to be under ASN and not Dr. Fryda. This evidence is of extreme significance as it is direct evidence from the main donor of the project. I am not too sure that the donors would have been ready to give in the manner that they did, if the proposal was that the hospitals and the property that they sit on, would be owned by Dr. Fryda.

117. Apart from the fact that Dr. Fryda explicitly wrote that the hospitals would be managed by ASN, he also sought tax exemptions under the argument that the hospitals were owned by the Assumption Sisters. In as much as he stated that he paid tax on hospital equipment and continues to pay tax, no evidence of this was brought forth. Indeed, his own handwritten note to ASN, requesting them to write to the Kenya Revenue Authority (KRA), that the hospitals are owned by the Assumption Sisters and therefore exempt from tax given their charitable status, betrays the allegation that the hospitals were to be held by Dr. Fryda or in trust for him.

118. I therefore do not see how these Langata properties and the hospital built on the said parcel/s of land

can be said to be held in trust for Dr. Fryda or his nominees. When sourcing for funds for the purchase of these properties, and in his explanation on how they would be managed, he made it clear that this was to be under ASN. I can understand his frustration over how the Sisters wish to manage the hospitals, and his concern, legitimate in my view, of being excluded on a project that he co-founded. But he did inform the donors that the hospitals would be owned by ASN and he cannot now be heard to say that they are held in trust for him.

119. From the above discourse, I am not persuaded that Dr. Fryda has demonstrated to me that the properties in Langata are held in trust for him. Neither am I persuaded to hold that the other properties in Sagana and Elementaita are held in trust for Dr. Fryda. Interestingly, both parties did not adduce much evidence with regard to the Sagana property. It is not however disputed that the property was purchased and registered in the name of ASN. The only conclusion that I can reach is that it was also purchased by donor funds as I have no other evidence to the contrary. I would place the circumstances of this property in the same category as that of the Langata properties. I would conclude that it was purchased by donor funds and donors informed that the property would be held by the Assumption Sisters. I really have no reason to come to any other finding other than this. In the same way that I have held that the property in Langata is not held in trust for Dr. Fryda, I would reach a similar conclusion with regard to that land in Sagana.

120. With regard to the Elementaita land, the same was donated by Mr. Joseph Ngera. In his own words, Mr. Ngera donated this land directly to Dr. Fryda and not to ASN. He had his own dream of having a hospital established on this parcel of land and he thought that this dream could be realized through Dr. Fryda. The evidence shows that the land was at the time registered under the name of "The Servants of the Sacred Heart of Jesus and of the Poor Registered Trustees". Nobody from this organization came to give evidence on how they obtained the land and why they transferred the land to ASN. But I am persuaded from the evidence tendered, and it is not in dispute, that this land was donated to the said organization by Mr. Ngera. The purpose for which the land was donated did not materialize and Mr. Ngera asked that this parcel of land be "re-routed" to another person for purposes of putting up a hospital, and there was no objection by the organization, which then followed the requests of the donor. It is this same land that Mr. Ngera gave to Dr. Fryda and which became registered in the name of ASN.

121. Sister Gacambi (DW-1), was clearly being economical with the truth when she attempted to state in her evidence that Mr Ngera gave this land directly to ASN. DW-1 herself never met Mr. Ngera and never discussed with Mr. Ngera the donation of this land. Neither is there any document from Mr. Ngera to ASN where he has documented that he is giving this land to the Assumption Sisters. You would have expected that if Mr. Ngera was giving this land to ASN, that he would have had a direct meeting with the Superior General of ASN, which never happened. The evidence is overwhelming that it was Dr. Fryda who was contacted by Mr. Ngera, and it is to him that Mr. Ngera wanted to donate land so as to develop a hospital in the same style as that which existed in Langata. It will be discerned from the evidence tendered that Mr. Ngera was extremely protective of Dr. Fryda, such that when the Assumption Sisters wanted to exclusively manage the hospitals, Mr. Ngera threatened to revoke a donation of a separate 100 acres of land, and he made good his threat, when ASN did not relent in their pursuit to take charge of the hospitals and exclude Dr. Fryda. This buttresses my conclusion that it is to Dr. Fryda that the Elementaita land was donated and not to ASN despite the property being registered under their name.

122. But that said, I do not think that the legal ownership of the Elementaita property was going to be any different from that of the Langata properties. Mr. Ngera fully trusted Dr. Fryda to make the necessary decisions regarding how this property would be owned. He handed the property to Dr. Fryda and completely entrusted the same to him. I have no evidence that he gave the land on the condition that the same must be registered in the name of Dr. Fryda. Neither do I have any evidence that he had a problem with the registration of the land to any entity that Dr. Fryda would nominate and that explains why he raised no issue when the title was transferred to the name of ASN and not to Dr. Fryda. I believe that it was pursuant to the direction of Dr. Fryda that the land in Elementaita came to be registered under ASN and the holding of the property by ASN was to be under the same terms as the other properties.

123. Mr. Ngera may not be happy with the manner in which ASN wish to exclude Dr. Fryda from the

management of the hospitals, but the general rule however is that donations cannot be revoked once given out where such donation is being utilized as intended by the donor. Mr. Ngera gave out his donation for purposes of setting up a hospital to cater for the poor and he cannot now revoke it as the same is being used for the very purposes that he gave and I have pointed out, that it was never given out on condition that the same be registered in the name of Dr. Fryda. Dr. Fryda entrusted this donation to ASN in the same way that the Nairobi properties were entrusted to ASN and it therefore follows that the Elementaita property cannot be said to be held in trust for Dr. Fryda.

**(e) Under what form of ownership does ASN hold the suit properties and does Regina Pacis University have a claim to any property ?**

124. Let me now turn to the question whether ASN hold the properties absolutely and whether Regina Pacis University deserve any of the properties in dispute. Our starting point is that the properties in issue and the hospitals were developed through donations. The money and assets donated were specifically aimed at establishing a hospital for the poor in society. The end result of the funding was thus aimed at benefitting the public by providing health services to them and Dr. Fryda and ASN were entrusted by the donors to ensure that such a facility will be developed and put into operation. The donors also expected that the facility will benefit the less fortunate members of society. Following this designation, it is apparent to me that what was formulated was a form of charity which ought to be operated as a charitable trust.

125. The definition of "charity" was ably given by Lord MacNaghten in the case of **IRC vs Pemsel (1891) AC 531** where he stated that:

*"Charity in its legal sense comprises four principal divisions: Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community".*

Trusts or entities created for purposes of charity are referred to as charitable trusts. In England, charitable trusts are regulated under the Charities Act, 2011. Many other jurisdictions also have statutory provisions regulating the manner in which charitable trusts are managed. Australia has the Charities Act, 2013; and in Canada, there is a Charities Directorate aimed at regulating charities. Many States in the United States have laws regulating charities. I have however not seen any law that specifically regulates charities or charitable trusts in Kenya and I think that it is probably time that a statute of this nature be enacted. That does not however mean that in an appropriate case, the court cannot imply a charitable trust, depending on the particular circumstances of the matter. In the case of **Royal College of Surgeons of England vs National Provincial Bank Ltd (1952) 1 All ER, 984**, the question arose whether the college was a charity. It was held that its object was the due promotion and encouragement of the study and practice of the art and science of surgery hence a charity. A more or less similar issue arose in the case of **Council of Law Reporting vs Attorney General (1973) All ER 1029** where the matter in question was whether 'The Incorporated Council of Law Reporting for England and Wales', ought to be registered under the Charities Act, 1960. The entity itself was incorporated under the Companies Act of England and was a company limited by guarantee. The English Court of Appeal held that the Association was established exclusively for charitable purposes and was accordingly entitled to be registered as a charity.

126. In our case, I am of the view that ASN or St. Mary's Mission Hospital (the company) were entrusted by various donors to hold the properties and hospitals in issue for purposes of providing health services to the poor. The hospitals were duly developed and they have been operating as such. They are therefore entitled to be construed as a charity and the properties are thus held under a charitable trust.

127. Property law in Kenya does provide for holding of properties in trust even when such trust is not noted in the register. The Registered Land Act (repealed in 2012 by the Land Registration Act, Act No. 3 of 2012) did provide at Section 28 as follows :-

*28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated*

*except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.*

The current law is contained in Section 25 and 28 of the Land Registration Act, 2012. Section 25 provides as follows :- **25. (1)** *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

Section 28 provides for overriding interests, which apply even where they are not noted in the register. At Section 28(b), trusts, are overriding interests.

128. It is my holding therefore that ASN although registered as proprietor, does not hold the properties absolutely, but under a charitable trust. Being a charity, there is a legitimate expectation among the donors, Dr. Fryda included, that ASN will utilize these properties pursuant to the wishes of the donors and on my part, I see no problem with a donor or other person of special interest, and Dr. Fryda would fall into that category given his intimate connection with the project, suing to ensure that the purposes for which donations were given, land transferred and hospitals built, are given effect.

129. Despite the heavy trust that has been vested upon ASN, it appears that there is a danger that ASN now wish to part with some of the properties vested in them, specifically, the property LR No. 227229, and have it transferred to Regina Pacis University, not for the purposes of providing health services to the poor, but for purposes of putting up a University which does not necessarily have to be tied to provision of health services and not necessarily aimed at providing education to the poor. This is apparent in the Trust Deed of 23 July (year not clear, but probably, year 2010) where inter alia the document does provide that the Assumption Sisters "*agree to hold in trust all that parcel of land comprised in the registration LR No. 18591/11 Otiende Langata, Nairobi.*" It also promised to "*cause to be transferred to Regina Pacis University Trustees*" the said land parcel and "*have the same dedicated in perpetuity for the purposes of the College.*"

130. When the above provisions of this Trust Deed were put to Sister Felix, she expressed shock at the contents, despite she herself being one of the persons noted in the said instrument. It will be noted that in their case, Regina Pacis University claim to be solely entitled to exclusive possession, control and management of the University College situated in LR No. 27229, being Regina Pacis University College. My own view of the matter is that the purported assignment of this land parcel, by ASN, to Regina Pacis University, was a negation of the trust imposed upon them by the various donors who contributed, not to have a University college to be on the suit properties, but to have a hospital dedicated to the poor. The position that ASN hold, is similar to that held by a charitable trustee. It is a duty imposed upon trustees,

not to convert the charity fund to other uses other than in accordance with the intents of the donors so long as those uses are capable of execution (See generally, *Lewin's Practical Treatise on the Law of Trusts, 15th Edition, pg 461*). Thus in the case of ***Re Weir Hospital (1910) 2 Ch 124***, it was held that a fund given for the establishment of a hospital in one locality could not be applied for the purposes of a hospital in a neighbouring locality. In the case of ***Attorney General vs Kell, 2 Beav. 575***, it was held that if a fund is raised to erect a hospital, it cannot be diverted to lighting, paving, and cleansing the town.

131. In the same vein, it is improper in my view, for ASN to go against the charitable purpose for which they received funds and now establish a private university, or a school, not tied to the original purpose of the charity, which will no doubt go to prejudice the very existence of the hospital; for example, any future expansion plan may not take place or funds aimed at improving the hospital may be diverted to these other purposes. The reason that persons gave donations, was to have a hospital for the poor developed, and it behoves upon ASN to give effect to this purpose.

132. I agree with the submissions of Mr. Kihara, that this purpose is still alive and there is therefore no need to invoke the *Cy-Près* doctrine. The *Cy-près* doctrine applies where the purpose for which a charity has been established has failed or can no longer be achieved. If property is given in trust to be applied to a charitable purpose, and it becomes impossible or impracticable or illegal, to carry out the particular purpose, and if the settlor manifested a more general charitable intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settler (See American Law Institute, *Restatement of the Law (Second), Trusts* (ALI Publishers, St Paul Minn, 1959) Vol II, § 399, p 297 and for a good elaboration on the *Cy-Près* doctrine, see, ***Rachael P. Mulheron, The Modern Cy-Près doctrine, Routledge, Taylor & Francis Group, 2006***). A charitable purpose can either fail from the outset, that is the purpose can never be put into effect, or subsequently, that is, the purpose has become impossible to continue being effective. (See generally, ***Re Robinson, Besant vs German Reich, (1931) Ch 122; Re Slevin (1981) 2 Ch 236; Re Tacon (1958) Ch 477; and Re Woodhams (1981) 1 WLR 493***). In such instance, the court is permitted to apply the funds or other assets of the trust to another purpose closest to the original aim of the charitable purpose that has failed ( See ***Re Avenon's Charity (1913) 2 Ch 261***).

133. The charitable purpose herein has not failed and therefore there is no need to invoke the *Cy-Près* doctrine. My holding is that ASN, despite being the registered proprietors of the land, and despite being the legal owners, are holding the suit properties under a form of a charitable trust aimed at providing health care to the poor and for that reason, they cannot assign the same to Regina Pacis University, and therefore the purported assignment of land to Regina Pacis University is null and void. Regina Pacis University therefore cannot succeed in their claim that they are entitled to exclusive possession and/or ownership of the land parcel LR No. 27229.

134. While I am still on this point, it was mentioned that ASN wish to transfer a Secondary school to the land in Elementaita. This cannot be allowed, for the simple reason that the donor never gave out his land for purposes of putting up a school. Indeed, even the other uses of the land in Langata, need to conform to the intentions for which they were purchased and entrusted to ASN. The sole purpose was, and remains, the development of a hospital for the less financially endowed and nothing else. The only other things that can be allowed are those that are auxiliary to the core purpose. Probably a medical training school may pass the test, but it cannot be said by any stretch of imagination that the establishment of a general University, or Primary and/or Secondary school, are in tune with the original purpose. I could excuse the Guest House because this can be used as a residence for visiting Doctors or other persons, and maybe the convent, for the reason that ASN aimed to house its nurses and other staff within the hospital. But the other grand plans that have no connection with the development, maintenance or improvement of a hospital to cater for the poor cannot be allowed. I need to emphasize that any holding of the properties must be in sync with the purposes of the donors, unless that purpose fails and the court applies the *Cy-près* doctrine and permits the facilities to be used for other needs, and I have already held that the *Cy-près* principle cannot apply to the circumstances of this case.

**(f) Who should manage the hospitals in issue ?**

135. The question of ownership of the properties, that is the legal ownership of them, is different from the question, of management of the hospitals developed on these properties. The holding of the suit properties under the name of ASN, as I have held above, is not in trust for Dr. Fryda but is held in a form of a charitable trust aimed at maintaining a hospital to benefit the poor. There cannot therefore be any personal benefit accruing either to Dr. Fryda or to ASN from the operations of the hospitals as they hold the position of trustees. Indeed, it is a duty imposed on trustees that they should not derive a personal benefit from the management of the trust.

136. When Dr. Fryda and ASN were shopping for funds, the management of the hospitals was never really a key issue. It does appear from the evidence that even after the hospitals started operating, the question of who should be the ultimate controller was not a topic that was subjected to deep thought and/or discussion. It seems from the evidence that both parties did have some element of control over the management of the hospitals. ASN did recruit some of its Sisters to various positions in the hospitals but there is also evidence that Dr. Fryda recruited some doctors and staff who were not from among the congregation of ASN. There may have been some tacit understanding that somehow held but matters came to a head when Dr. Fryda wished to have full control of the facilities. He sacked some, if not all, Sisters appointed by ASN and in place he put his own personnel. This aggrieved ASN who felt that they were being side lined.

137. At the core of the conflict that Dr. Fryda has with ASN is the manner in which the two parties feel the hospitals should be managed. They have a difference of opinion in how the hospitals need to be managed and staffed. Dr. Fryda's view is that modern hospitals, even if they are mission hospitals, ought not to be under the pure supervision and management of nuns. He feels that there is a place in management for Doctors and other trained personnel who do not have to be Sisters, or under the authority of any congregation. His concept is contained in the document "*Contemporary Catholic Mission Hospital Management.*" He has questioned the organization of a hospital, following an authoritarian hierarchy structure, where the ultimate authority of a mission hospital is with the Mother Superior, which in his view, limits the growth potential of a hospital. He has argued that the Sisters manage their mission hospitals under the concept that it is a thing that they own, as one would own any other property, with the attitude that they can do whatever they wish. According to Dr. Fryda, this does not auger well with professional staff leading to deterioration of these mission hospitals. He is of the opinion that a hospital is as good as its staff and wishes to have a participatory management/ownership and control. He does not see how a mission hospital can only rely on its few medically trained religious sisters and be successful. He believes that a competent mission hospital must attract the best and brightest medical professionals available, what he calls the "cream of the crop." He does not see how such personnel are going to entrust their careers to the whims of some external authority having its own agenda. He believes in incentive plans where staff also share in the surplus of the hospital which would cure sloppy and lazy behavior. There is no place in such a model for staff to be appointed per the wishes of some external Sisters' Council or Bishop's Board but merit is the only cornerstone. He has questioned Catholic Orders which fiscally rely on its members' employment income. He has termed his model as a "basic Christian Community focused upon medical ministry" which will pass Christ's message of compassion.

138. The Assumption Sisters are of course of a different view and feel that the model where the hospitals are managed by persons of their congregation should be the template to employ. They have a hospital manual which establishes three institutions, that is the Advisory Committee, the Hospital Board, and the Hospital Management as explained by DW-1. The Hospital Management team is to be comprised of a hospital administrator, nurse matron and doctor in charge, all appointed by the Superior General of the Assumption Sisters and her Council. The responsibility of the team is the daily running and supervision of the hospital. The Hospital Board is to comprise of the Hospital Administrator, Nurse Matron, Medical Officer in Charge, Assistant Nurse Matron, one Assumption Sister (who is not a member of the management team), one doctor (who is not a member of the management team); one employee who is elected by the Hospital Board; and Two employees elected by the Workers' Assembly. The Executive Advisory Committee is to comprise of The Superior General of the Assumption Sisters; The General Council members of ASN Sisters; Representation of the Archdiocese of Nairobi (the Archbishop or his delegates) and several selected members from the Nairobi area. The ultimate responsibility of the hospital is to rest with the Superior General of the Assumption Sisters and her General Council. She retains the

right to veto and nullify any decision made by the Hospital Board. In this structure, there is actually little or no role for a person such as Dr. Fryda.

139. I stated earlier that when the parties were busy establishing the hospitals, they did not give much thought on how the hospitals would be managed. I have not seen a concrete document where the management of the hospitals was discussed and agreed. The closest that I have come across is the document titled "*Founding Principals (sic) of St. Mary's Mission Hospital- Nairobi*", which appears to have been made in September 2002 and which bears the names of Sister Felix and Dr. Fryda. That document refers to a Hospital Management Manual and further bears a sub-heading of "*Understandings particular to Rev. Dr. Fryda*" that provides as follows :-

*"Rev. Dr. Fryda was one of the principal founders of St. Mary's. It is the mutual understanding of both Societies that he be allowed to remain at the hospital, however subject to the usual term limitations of administrative positions. Maryknoll Society, with its limited personnel, is not expected to replace him nor expected to provide other Maryknoll personell at the hospital. Fr. Fryda has requested consideration of allowing him to remain at St. Mary's after finishing his term as Doctor-in-Charge, working under his Kenyan successor. Similarly, he has requested permission from the ASN Congregation (owners of the hospital) to reside at St. Mary's compound upon retirement, with eventual simple burial near the hospital chapel."*

140. Unfortunately, Dr. Fryda was not cross-examined on this document so as to affirm whether he agreed to it, and as I have said, the document is not signed. I cannot therefore state that it is upon the above terms that the two entities agreed to have the hospitals managed; which brings me back to the position, that I have no document that sets out the manner in which the hospitals were to be managed that was agreed by Dr. Fryda and ASN.

141. I have elaborated in this judgment that Dr. Fryda ceded ownership of the hospitals to ASN and there appears to have been a mutual understanding that the hospitals would be managed by the company, St. Mary's Mission Hospital. I have spelt out the letters written to donors where Dr. Fryda stated that ownership would be with ASN and that he will be the "first medical director and chief of medical staff". These are Dr. Fryda's own words and I guess that this was the understanding with the donors. I have absolutely no evidence that there was any agreement or understanding that Dr. Fryda would manage the hospitals apart from playing the role of medical director and chief of medical staff. I do not see how he can then assert that he is entitled to full management of the hospitals beyond that scope.

142. I have stated in this judgment that the parties envisaged a company to be established and I have pointed out that such company could not have been registered for any other reason other than to hold the properties in issue and manage the hospitals so as to bring to life the dream of the donors. That being the position, the management of the hospitals must now be granted to St. Mary's Mission Hospitals Limited. The company will be at liberty to develop whatever hospital manual they wish to put in place and appoint the necessary personnel to manage the hospitals. Until that is done, Dr. Fryda continues holding the position of medical director and chief of medical staff.

143. There was argument that because one of the subscribers of the company is deceased, the company is moribund. This certainly, is not the position of the law as explained in the case of ***Lesaan Hardware Limited vs Settlement Fund Trustee & 2 Others, Nakuru ELC No. 334 of 2012 (2016) eKLR***. There is therefore nothing that can prevent the suit properties being transferred to the company and being managed by this company utilizing the normal principles of company law. It is this company which ought to hold the properties in issue and also who should be mandated to manage the hospitals under a form of a charitable trust. They will essentially be trustees of the many persons who donated for purposes of having a hospital for the poor.

144. It should however be remembered that the privilege given to an institution to hold property under a charitable trust, does not authorize the said institution to enact rules or regulations which would tend to pervert or destroy the directions of the original founder and the objects of the charity. (***See Lewin's supra Pg 466***). As trustees, ASN and the company are bound to apply equitable principles in the way that they

deal with donors, persons of special interest and beneficiaries. They have to be alive to the fact that what they hold is not held in absolute terms as one would otherwise hold personal property. As an entity bound by principles of equity, they need to deal and act in an equitable fashion and give full effect to donor intentions. To give effect to the donor intentions, and to what I consider to have been a mutual understanding between Dr. Fryda and ASN, my order is that the properties and the management of the hospitals be under St. Mary's Mission Hospital (the company) and they should operate the hospitals and utilize the properties in the manner intended by the donors.

145. Without seeming to advise ASN or the company, I would not entirely wish away the style of management proposed by Dr. Fryda and it may be useful for them to have an objective look at his proposals and see what they can borrow so as to fully give effect to the intentions of donors. With wise counsel, an objective mind, and a give and take attitude, I believe that the parties herein can come up with a hospital model that is workable in contemporary Kenya, and that is accommodative to their different paradigms. The wise manager listens to fair criticism and makes the necessary adjustments. My personal view is that what is articulated by Dr. Fryda is not completely misplaced. Probably, this can be married into the fact that this is a Sister managed organization and bits of every one's view can be taken into consideration to develop a model that embraces both ideals and achieves the dream of the donors.

146. Let it not be thought that I am holding that there cannot be a position for Dr. Fryda in future. The initial understanding was that he is to be the first medical director. The intention, I believe, was for him to put into operation systems that would give effect to the aim of the donors. At an appropriate time, other persons would come after him and take over. I am not sure whether the hospitals have reached that moment yet, but that will be a decision to be made by the company once it fully takes over the management of the hospitals. I do not believe that the donors envisaged a situation where Dr. Fryda would be declared a trespasser, and I think that in as much as control is now with ASN, through the company, they can and probably should, enter into some form of negotiations and arrangement with Dr. Fryda, so that he is not entirely cast out of the hospitals. It will be sad, if, despite his input, the only form of gratitude that he will receive is being kicked out completely from the St. Mary's Mission Hospitals. But as I have said, I leave that to the company to decide and I trust that wisdom will prevail. The parties of course need to put aside their personal differences and any friction that may have arisen out of this court case. I believe, strongly, that despite my holding that the Assumption Sisters and the company being ultimately in charge of the hospitals, there is a place that they can find for Dr. Fryda and I trust that they will do so.

147. A final word of advice to ASN is that there is no benefit in antagonizing donors. In this world, if you are a charitable organization, you will achieve pretty little if you continuously cause friction with donors. The Assumption Sisters have already lost what would have been a perfect gift, that of 100 acres, to start a University. These frictions, unnecessary in my view, simply constrict giving, and the ultimate sufferer is the ordinary Kenyan.

#### **(g) The final orders of the court**

148. I have dismissed Dr. Fryda's claim that the suit properties are held in trust for him. He therefore needs to hand over the title deeds in his possession to ASN, so that these may be transferred to the company.

I am alive to the prayers of ASN in their counterclaim. The first lot of prayers is a permanent injunction to stop Dr. Fryda from being on the suit premises; the second category is to stop Dr. Fryda from soliciting or expending funds of St. Mary's Hospitals; the third is for accounts and the fourth is for change of signatories. On the first category of prayers, I am afraid that I cannot issue a permanent injunction against Dr. Fryda to stop him from being within the suit premises for the reason that Dr. Fryda was a co-founder, a sort of a co-trustee, in the whole set-up, and is meant to hold the position of medical director and chief of medical staff. I think the donors would cringe if I am to give a holding that he is a trespasser. What is important for our purposes is that I have found that the properties are not held in trust for Dr. Fryda and I have also decided that management of the hospitals will be under the company and not Dr. Fryda. All other issues I believe can be resolved with utility of these prayers and I ask them to embark on

negotiations on the position of Dr. Fryda given the judgment herein. The prayers to stop Dr. Fryda from soliciting for funds on behalf of St. Mary's Hospitals is also a prayer that I cannot grant. The hospitals were built with the fund raising efforts of Dr. Fryda and if donors want to continue giving to St. Mary's Hospitals through Dr. Fryda, as they did from the outset, I see nothing wrong with that. The only rider I can put is that Dr. Fryda cannot receive funds on behalf of St. Mary's Mission Hospitals yet divert the same to other entities. The order for accounts is not a superfluous prayer and ASN and the company, as the managers of the project, and indeed other donors, are entitled to accounts. While the hospitals were under the control of Dr. Fryda, he still held the position of trustee on behalf of the donors. When one holds such a position, one cannot say that he is beyond scrutiny and as I have expounded earlier, a trustee must be accountable. It was however not proved to me that the accounts mentioned in the counterclaim are accounts that actually exist, or that they are accounts of the hospitals. Nevertheless, since I have held that they are entitled to accounts, I direct Dr. Fryda to forthwith and no later than 7 days to disclose to ASN, and the company, the full accounts of the hospitals, and if found necessary, have the same audited by an auditor to be agreed by both parties within 14 days of disclosure, and if they cannot agree, the accounts be audited by a qualified individual or firm, to be appointed by the Chairman of the Institute of Certified Public Accountants of Kenya within 7 days of being informed.

149. The question of change of signatories goes without saying. Since I have held that management of the hospitals is now going to be with the company, then it follows that they should be in charge of all the accounts. I have held that Dr. Fryda should disclose all accounts within 7 days and he should therefore engage with ASN and the company for the latter to give information on who the new signatories will be. But from the date of this judgment, management is with the company as I have held above. 160. This brings me to an important point; at the moment, the hospitals are under the management of Dr. Fryda. This will now need to change. I direct Dr. Fryda to immediately embark on handing over the hospitals to the company, which handover should take effect immediately. However, let all parties be alive to the fact that there are patients in these hospitals and the handover needs to be least disruptive. Where ASN and the company can retain personnel or service providers, it would be best that this be done if only to avoid interruptions to the services being offered. I trust that both parties will give their cooperation with regard to this.

150. There is also the university and schools that are within the suit premises. As I mentioned in the judgment, these are misplaced as they were not envisaged by the donors. ASN will need to ensure that these are relocated to other premises and they should immediately embark on a relocation or discontinuation program. Regina Pacis University, on its part has not proved to me that they are entitled to any of the suit properties.

151. Before I go to my final orders, may I just say that I would be disappointed if any party takes my judgment as a victory for one and a loss for another. What I have done is merely give the position of the law mostly on the issue of the legal ownership of proprietary rights and control of the facilities within these properties, having regard to the facts before me. I would wish the parties to take more out of this judgment. I ask the parties to sit back, reflect on all that they have gone through, assess what they have achieved together, forget the bitter fights in and outside court, embrace each other, and push forward with one mission, that of developing the best healthcare for the poor in the Kenyan society. They need to have a second look at the Christian principles that they believe in and find space for each other. Egos need to be deflated. No one should feel that they have lost for backing down to accommodate the other. There is of course no place for pride.

152. Having dealt with all issues herein, I now make the following final orders in regard to the suits before me:-

**(i) That the properties LR No. 27228; LR No. 2 7229; LR No.9361/10 and Kiine/Rukanga/2846 are not held in trust for Rev. Dr. William Fryda.**

**(ii) That the properties LR No. 27228; LR No. 27229; LR No.9361/10 and Kiine/Rukanga/2846 currently registered in the name of Assumption Sisters of Nairobi Registered Trustees be transferred to the company St. Mary's Mission Hospitals being a**

company limited by guarantee and to be held by the said company under a charitable trust for purposes of developing, maintaining and/or operating a hospital specifically aimed for the poor in society.

(iii) That the hospitals located in LR No. 27228 and/or LR No. 27229, and LR No. 9361/10 commonly identified as St. Mary's Mission Hospitals be henceforth under the management of the company St. Mary's Mission Hospitals a company limited by guarantee.

(iv) That Regina Pacis University has no claim over the land parcel LR No. 27229, or over any of the other land parcels in issue in this suit and the Trust Deed assigning land to the said University is void to the said extent.

(v) That the user of the properties LR NO. 27228; LR No. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 other than that of providing health services to the poor or such other auxiliary purposes is null and void and Assumption Sisters of Nairobi are hereby directed to embark on a relocation or discontinuation programme of any such purposes.

(vi) That in respect of accounts, Dr. William Fryda to provide details of all accounts forthwith and to surrender the same to St. Mary's Mission Hospital (the company) and if found necessary submit to an audit as directed in this judgment.

(vii) That the prayer to have Dr. William Fryda permanently restrained is not granted but the parties to agree on the position of Dr. Fryda within the hospitals given the import of the judgment herein that ownership of the suit properties and management of the hospitals will be with the company St. Mary's Mission Hospital.

(viii) There shall be no orders as to costs.

164. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 28<sup>th</sup> day of September 2017.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr. Mindo and Mr. Okeke instructed by M/s Mindo & Company Advocates and Ogola H. J Okeke & Company Advocates present for the plaintiff.

Mrs. Wambugu instructed by M/s W. G Wambugu & Company Advocates present for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and holding brief for Mr. Kihara instructed by M/s C.N. Kihara Company Advocates for the plaintiff in ELC No.238 of 2012.

Court Assistant: Carlton Toroitich

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**