



**Ngibuini & 3 others v Githaiga & 16 others (Environment and Land Case Civil Suit 198 & 206 of 2012 (Consolidated)) [2024] KEELC 5580 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5580 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 198 & 206 OF 2012 (CONSOLIDATED)**

**LN MBUGUA, J**

**JULY 25, 2024**

**BETWEEN**

**VERONICA WANJIRU NGIBUINI ..... 1<sup>ST</sup> PLAINTIFF  
IRENE N.KAGENI ..... 2<sup>ND</sup> PLAINTIFF  
AMY KUMICINSKI ..... 3<sup>RD</sup> PLAINTIFF  
JOHN KUMICINSKI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**REAH MARIE GITHAIGA ..... 1<sup>ST</sup> DEFENDANT  
JOHN MWENJA NGUMBA ..... 2<sup>ND</sup> DEFENDANT  
FRANCIS NDERITU NDIRANGU ..... 3<sup>RD</sup> DEFENDANT  
SILAS ANGUCHE OTIATO ..... 4<sup>TH</sup> DEFENDANT  
DOUGLAS MUCHOMBA ..... 5<sup>TH</sup> DEFENDANT  
SHADRACK KIMANI ..... 6<sup>TH</sup> DEFENDANT  
DUNCAN MWANGI ..... 7<sup>TH</sup> DEFENDANT  
RONALD MUTISO MUBUA T/A R.M MUTISO &  
CO.ADVOCATES ..... 8<sup>TH</sup> DEFENDANT  
JOSEPH MUREITHI ..... 9<sup>TH</sup> DEFENDANT  
JOSEPH MAINGI ..... 10<sup>TH</sup> DEFENDANT  
STEPHEN NDAMBUKI ..... 11<sup>TH</sup> DEFENDANT  
PETER KANYI ..... 12<sup>TH</sup> DEFENDANT  
JOHN KARIUKI ..... 13<sup>TH</sup> DEFENDANT**



<b>SAMUEL MWANGI .....</b>	<b>14<sup>TH</sup> DEFENDANT</b>
<b>SAMUEL KARIUKI .....</b>	<b>15<sup>TH</sup> DEFENDANT</b>
<b>GEORGE KIOKO .....</b>	<b>16<sup>TH</sup> DEFENDANT</b>
<b>DANIEL MURATHA .....</b>	<b>17<sup>TH</sup> DEFENDANT</b>

## JUDGMENT

### The pleadings

1. The plaintiffs commenced this suit by a plaint dated 17.4.2012 and amended on 29.5.2012, where they aver that in the year 2000, the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs who are a married couple and citizens of the United States of America came to Kenya and started missionary work with a society registered as Stars for Jesus Ministries (herein referred to as the society) which was running an orphanage and rehabilitation center for boys and which was run by one Philip Githaiga (now deceased), herein referred to as Philip.
2. That in June 2005, the 3<sup>rd</sup> Plaintiff mortgaged her home in the United States of America to the tune of USD 100,000 in order to secure financing to purchase the property known as L.R 57288 which was registered to the 2<sup>nd</sup> Defendant (herein, the suit property). The intention of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs was that the suit property would be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in trust for the benefit of the society and also that it would be available for them to use as and when they visited Kenya and that it would eventually be their retirement home.
3. It is further averred that the 8<sup>th</sup> Defendant reneged to transfer the suit parcel to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs or to the lawful beneficiaries, and they have learnt that the 8<sup>th</sup> defendant is in the process of transferring the said land to the 1<sup>st</sup> defendant.
4. The Plaintiffs seek the following orders;
  - a. A permanent injunction against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants forbidding them from possessing, interfering with and entering into the property registered as I.R 57288 pending the hearing of this suit.
  - b. An order of the Honourable court directing the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, their invitees, servants, employees and /or agents to forthwith vacate the suit property.
  - c. An order of the court directing the 2<sup>nd</sup> Defendant to transfer the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs and to hand over all completion documents to them.
  - d. In the alternative, an order of the court directing the 2<sup>nd</sup> Defendant to transfer the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
  - e. An order of the Court directing the 8<sup>th</sup> Defendant to release all documents in his possession in relation to the suit property to the Plaintiffs, and if a transfer will have been registered to any of the Defendants names, an order of the court invalidating it for reasons of fraud, illegality, irregularity and failure to follow procedure.
  - f. An order of the Court vesting the suit land to the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs and directing the registrar to issue them with title.



- g. In the alternative, an order of the court directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants both jointly and severally to refund USD 70,000/= plus damages constituting a sum equal to the current market value appreciation of the suit property from 2005 to date to the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.
  - h. Any other or further relief that this Honourable Court may deem fit and just to grant.
    - i. Costs of the suit.
5. The suit is opposed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants vide their joint statement of defence dated 26.4.2013. They deny all the allegations levelled against them and contend that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs entered into an agreement for sale of the suit property together with Philip as trustees of the society, of which the transfer thereof is in the process of being effected. They contend that they are the lawful owners of the suit property by virtue of being the bonafide officials of the society and that the society is the one which paid the purchase price, land rates, stamp duty and legal fees.
  6. The 2<sup>nd</sup> and the 5<sup>th</sup> - 17<sup>th</sup> Defendants did not enter appearance despite being served with pleadings herein.
  7. The 8<sup>th</sup> defendant did file an application dated 11.1.2016 seeking orders to deposit the title of the suit land in court pending the resolution of the dispute between the plaintiffs and the 1<sup>st</sup>-7<sup>th</sup> defendants. Pursuant to this court's ruling of 19.9.2017, the 8<sup>th</sup> Defendant was discharged from the suit having deposited the title to the suit property into this court.

#### **Litigation history and Consolidation**

8. No sooner was this suit filed on 18.4.2012 (as per initial plaint) did another case spring up 2 days later on as HCCC No. 206 of 2012. It was filed by the current 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants where they sued 9 defendants accusing them of gaining entry into the suit premises accompanied by the current 3<sup>rd</sup> plaintiff. The orders sought in the Case No. 206 of 2012 are;
  - a. A mandatory injunction restraining the Defendants, their agents, servants and or whosoever from entering into, residing and or remaining upon the plaintiff's property and or in any way interfering with, harassing, intimidating, trespassing on the plaintiff's peaceful possession LR 15460.
  - b. An order of Eviction evicting the Defendants from occupation of the Plaintiffs' premises situated on LR 15460 and that the plaintiffs do continue in their peaceful and lawful occupation of the said premises.
  - c. Special Damages Ksh.962,000/=
  - d. General Damages.
  - e. Any other relief this Honorable Court may deem fit in the circumstances.
9. A defence thereof was filed for all the defendants dated 8.5.2012 by Koki Mbulu advocates, the current advocates for the plaintiffs. The defendants denied knowledge of one Amy Kamunicisky, but averred that Amy was entitled to the suit property.
10. On 11.5.2012, the suit ELC 198 of 2012 was consolidated with HCCC No. 206 of 2012 whereby, file No.198 of 2012 became the lead suit. The parties were designated in such a manner that the parties in case no. 198 of 2012 remained intact, while the 9 defendants in case no. 206 of 2012 were added into Case No. 198 of 2012 as 9<sup>th</sup> – 17<sup>th</sup> defendants. It is noted that the consolidation was done at an early stage of the two suits, thus nothing much had by then transpired in the two files.



11. When I took over this matter for the very first time on 30.9.2021, I found that file No. 206 of 2012 was not incorporated in the lead file. On the same date, parties entered into a consent to the effect that the matter would proceed even though the aforementioned file was not availed in court, thus the hearing was conducted in absence of file no. 206 of 2012. However, the court encountered difficulties when it came to writing the judgment as a particular witness statement (that of PW3) was apparently in the missing file No. 206 of 2012. Thus the writing of the judgment was suspended for a while, but the file was eventually traced and retrieved by the registry staff.
12. At this juncture, I must also point out that litigation in the matter by and large revolved around the prosecution of various applications, particularly those relating to the use and management of the suit property. In particular, there are two applications which were filed by the protagonists and which are important in discerning the status quo during the trial. The one filed by the plaintiff was dated 17.4.2012 while the one by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was dated 19.4.2012. Each protagonist was seeking injunctive restraining orders against the opponents.
13. In a ruling delivered on 31.7.2012, the court found that neither party had a strong prima facie case to warrant issuance of injunctive orders. The court therefore gave directions for the suit property to be managed by property managers appointed by counsels for the warring parties. The rent thereof was to be deposited in a joint interest earning account of the advocates or in court. It is pertinent to note that the said orders of the court did not materialize as the plaintiffs appear to have taken hold of the suit property.

#### **Plaintiffs' case**

14. The Plaintiffs called 3 witnesses, the 3<sup>rd</sup> plaintiff, AMY KIMICINSKI being PW1 adopted her witness statement dated 16.4.2019 as her evidence in chief. She produced the documents contained in Plaintiff's bundle as follows;
  - Pages 42-46, Pexh1
  - Pages 56-58, Pexh 2
  - Pages 85, Pexh3
  - Pages 86, Pexh4
  - Pages 49, Pexh5
  - Pages 38-41, Pexh 6.
15. Her testimony is that herself and her husband the 4<sup>th</sup> Plaintiff are the ones who financed the purchase of the suit parcel LR 57288 from the 2<sup>nd</sup> Defendant to the tune of USD 75,000/= which was expended as purchase sum of the suit property and deposit. That the couple got the money by mortgaging their home in the United States of America for USD 100,000. She states that since they were residing in the United States of America, they entrusted Philip with details for the purchase of the house from the 2<sup>nd</sup> Defendant. That she wired 10,000 USD deposit to the vendors and a wrote a cheque of USD 65,000 USD in the name of the society to finalize the purchase and thereafter paid for all repairs.
16. That the suit property was initially intended to serve the society's needs and ultimately as their retirement home, a matter which was understood by Philip as early as 2005 at the time of the purchase of the suit property. That Philip died in 2007 and by then, there was animosity between them as PW1 was questioning the delay in the registration of the property. She contends that Mutiso (the Advocate,



- presumably the 8<sup>th</sup> defendant) had misadvised them that as foreigners, they could not be registered as the owners of the land.
17. PW1 also came to realize that Philip was involved in sexual abuse of the children of the society which led to the placement of the children to alternative homes. Thus the purpose for which the property was bought had partially abated, and that is why the suit property should vest in their names. Adding that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are not entitled to the suit property as they did not pay for it and are not proper officials of the society.
  18. In cross-examination, PW1 stated that as per the sale agreement dated 28.9.2005, the purchasers of the suit property were Philip, the 1<sup>st</sup> and the 2<sup>nd</sup> Plaintiff as trustees for the society while the 2<sup>nd</sup> Defendant was the vendor and that even though her name does not appear and she did not sign the agreement, she is the one who paid the purchase money.
  19. She stated that she had not given a Power of Attorney to authorize anyone to deputize her in the agreement, her authority to Philip was verbal.
  20. She stated that while her witness statement indicates that she donated USD 75,000/=, that is not the case, it is a misprint. She added that she has never been an official of the society but together with her husband, they supported it from year 2000 from some of their monies and from peoples' donations. That after collecting donations in the United States of America, she used to keep the funds in a church account and she would also be given cash and cheques in donations and would travel to Kenya with them and give them to Philip whom she also kept an account with.
  21. When referred to her mortgage document at page 86 of the Plaintiffs' bundle dated 6.4.2019, she stated that it is drawn on 2.6.2005 and has no seal/signature and does not show her account.
  22. PW1 also stated that the contract dated 13.6.2005 at page 49 of the same bundle signed by herself, her husband and Philip indicates that she gave Philip a cheque of USD 65,000 and wired USD 10,000/= to the 2<sup>nd</sup> Defendant through his wife Anne Mwenga and they agreed that the money was for a retirement home in Kenya and that Philip confirmed the same in his letter at page 85 of Plaintiff's bundle.
  23. PW1 also stated that the document at page 104 of the Plaintiff's bundle indicates that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are officials of the society and that this suit was filed after confirming the said information.
  24. She also stated that the society's returns for the years 2004-2005 were filed by Philip, the 1<sup>st</sup> Plaintiff and Mary Njege while those of 20.4.2009 were filed by Philip, the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant as officials of the society.
  25. PW1 confirmed that she is in control of the suit property though there is a court order to the effect that all parties should not interfere until the case is determined.
  26. She also stated that a transfer was signed in favor of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by the 2<sup>nd</sup> Defendant. She admitted to writing emails to Philip such as the one at page 121 of the Defendants' bundle dated 17.5.2019 where she indicates to him that she was trying to raise money by any means. She acknowledged the other letters at page 161-166 of the same bundle but avers that she was not trying to compromise the society to give up the suit house in the said correspondences.
  27. In re-examination, PW1 stated that they were purchasing a retirement home but had agreed that it should be used by the boys when the plaintiffs were not in Kenya to avoid vandalism. She reiterated that they borrowed USD 100 000, of which, 75,000 thereof was used in the purchase of the suit house.
  28. She also stated that the court order issued in P & C 47 OF 2009 contained at page 41 of Plaintiff's bundle proved that Philip was sexually abusing the boys.



29. She reiterated that the letter at page 85 of the Plaintiff's bundle addressed by Philip indicating that he had received donations of USD 65000 and 10,000 is untrue as the money came from their personal account.
30. PW1 avers that she knows the two entities that is; Stars for Jesus Ministries and Stars for Jesus ministries International, that the board of trustees they worked with is the former entity which closed up. That the Stars for Jesus ministries International came later from nowhere.
31. PW1 has no idea as to how Reah Marie, Francis and Sila got to be the owners of the suit property, but they are the ones who registered a new entity.
32. The Plaintiffs' 2<sup>nd</sup> witness, PW2 was Veronica Wanjiru Ngibuini, the 1<sup>st</sup> Plaintiff in this matter. She adopted her witness statements dated 17.4.2012 and 17.4.2019 as her evidence. She produced the documents in their bundle at pages 47-48, 50-55, 87, 96, 97-102, 109-109a, 110, 100-103, 84, 105 and 98 as P-Exhibit 7-16 contained in the Plaintiff's bundle dated 16.4.2019.
33. Her evidence is that she started working for the society as a volunteer in the year 1997. That around 2002, she was appointed as a trustee of the society and also acted as one of its bank signatories.
34. That in 2005, the 3<sup>rd</sup> Plaintiff financed the purchase of a house which was to be used as accommodation for mission teams which visited the society and also for prayers and fellowship by the boys, and eventually it was to be used as a retirement home for the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. That since the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were not always in the country, they could not be able to handle the transaction pertaining to the house personally. Therefore, they entrusted Philip, the 2<sup>nd</sup> Plaintiff and herself as trustees for the society, to sign the sale agreement and oversee the transaction.
35. That the 3<sup>rd</sup> Plaintiff encouraged use of the house by the boys in her absence, but they did not use it as they had a dormitory down the hill.
36. She also states that in 2007, there were allegations that Philip was abusing the younger boys and after investigations, the society was closed down and at the time, she was not involved in the operations of the ministry. She states that Philip passed on in June 2009 and shortly after, some of the older boys who sided with him occupied the suit house without permission.
37. In cross-examination, PW2 stated that as at 28.9.2005, she was an official of the society and was aware of the sale agreement which she had signed alongside Philip Githaiga as the director of the society, the 2<sup>nd</sup> Plaintiff as board member while she was the secretary and bank signatory of the society and they describe themselves as trustees of the society as per its constitution.
38. She contents that PW1 was not a trustee of the society and as such, she did not sign the sale agreement. That PW1 used to fund the society and assist it, but PW2 didn't know the source of the funds given by the 3<sup>rd</sup> plaintiff, that is; whether they were from her personal finances or donations.
39. PW2 further stated that the purchase price was paid from the Society's account and that the cheque at page 57 of the Plaintiff's bundle was drawn by PW1 to the society. She stated that PW1 has a basis to claim the suit property since she is the one who sent the purchase money.
40. She further stated that she left the society by resigning and that she was not aware as to who took over from Philip after his demise and she has no basis to say that the current officials, 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants of the society were not properly elected.
41. In re-examination, PW2 stated that her resignation from the society was not proper as she was ousted following a meeting of Stars for Jesus Ministry International which is a different entity with Stars for



Jesus Ministry. She further stated that she ceased acting for the society between 2007-2009 because of the allegations that Philip was abusing the boys and there was hostility due to investigations. That some boys were on her side while others were with Philip. Still in reexamination, PW2 stated that “ I have never resigned or been removed from Stars for Jesus ministries”.

42. PW3 was Stephen Ndambuki, the 11<sup>th</sup> Defendant herein and also the 3<sup>rd</sup> Defendant in Case No. 206 OF 2012. He adopted his witness statement dated 27.5.2019 as his evidence, the same was traced in the file ELC 206 OF 2012. He produced the annexed documents as P.Exhibit 17-21.
43. It is important to note that although PW3 is, currently designated as the 11<sup>th</sup> defendant in the consolidated suit, his witness statement is in reference to his status as a defendant in the case EL 206 of 2012. Therein, he asserts that plaintiffs’ claim for a mandatory injunction against him and others barring them from occupying the suit land is unmerited because he was on that land as Amy’s caretaker as per court orders. He termed the case as res judicata to cases like CMCC 1522 OF 2011, HCCC483 of 2011 and Machakos ELC 476 OF 2017.
44. Upon cross-examination, PW3 stated that he goes to the suit property as a caretaker of PW1 and he is not in contempt of orders issued by Justice Kimondo on 15.5.2012 in this matter.
45. He further stated that the society is registered as an association No. 24146, while Stars for Jesus Ministries International was registered as No. 45469. Referred to the sale agreement for purchase of the suit house, he stated that PW1 is not a party to the agreement thus she cannot claim rights.
46. That as per the letter dated 11.4.2012 addressed to his lawyer by Registrar General of Societies, the chair of the society is the 1<sup>st</sup> Defendant in this matter and the secretary is the 3<sup>rd</sup> Defendant while the 4<sup>th</sup> Defendant is the Treasurer.
47. In re-examination, PW3 stated that he was the caretaker for the suit parcel and works under PW1 who paid for the suit property.

#### **Case for the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants**

48. The sole witness for the above mentioned defendants was REAH MARIE GITHAIGA, the 1<sup>st</sup> Defendant herein (DW1). She adopted her witness statement dated 17.5.2019 as her evidence. She produced the 22 documents in their bundle running from page 21-249 as D- Exhibits 1-22.
49. DW1 states that by an agreement dated 28.9.2005, the Stars for Jesus Ministries purchased parcel LR 15460 Nairobi from the 2<sup>nd</sup> Defendant. That the society has been in peaceful and lawful possession and occupation of the suit premises on which is erected a house commonly known as the prayer garden since 2004. That the center was housing former street boys who were being rehabilitated and was also used as a church and rehabilitation center.
50. That the transfer of title is in the process of being completed in the name of the officials of the society as trustees, since stamp duty, discharge of charge and rates to Nairobi City Council as well as Advocates fees, were paid by the society. She states that the cheque produced by PW1 was not banked in the society’s Account and the \$10,000 wired to Anne Mwenje in June 2005 is unknown to the society.
51. She avers that Stars for Jesus was run by a board and decisions such as to the agreement between the 3<sup>rd</sup> Plaintiff and Philip that the house was for a retirement home for the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs cannot be true as Philip would have had to receive the authorization from the board.



52. That sometime since 2011, the Plaintiffs herein had begun threatening to take possession of the suit property from the Defendants though they have no color of right to do so but in 2012, they forcibly entered the suit parcel and forcibly evicted them.
53. That it is true the 3<sup>rd</sup> Plaintiff was one of the many supporters of the society and she was raising funds for it together with Philip, but she was never on the board or any other office that related and or concerned the society.
54. That the 3<sup>rd</sup> Plaintiff had coveted the house and had no means of purchasing it, thus she opened an account in the United States of America having the name Stars for Jesus USA and never accounted for the money received.
55. She states that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are not officials of the society and had so ceased before the demise of Philip. That the 1<sup>st</sup>-3<sup>rd</sup> Defendants are its sole officials and the society has never been deregistered.
56. In cross-examination, DW1 stated that she was not amongst the 1<sup>st</sup> officials of Stars for Jesus Ministries, that herself, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants became officials after a meeting of the society held at the Prayer Garden, and that their capacities as officials of the society have not been challenged.
57. DW1 identifies pastor Philip Githaiga as her husband. She stated that as at the time the Society's returns were made on 20.4.2009, the officials of the society were Philip, herself and Francis, that by then, Philip was alive as he passed on in June 2009. She avers that the returns were not fraudulent. By 23.1.2012, the returns of the society were made by herself, Francis and Sila (1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants).
58. Referred to the transfer at page 105, she stated that the transferee of the suit parcel are herself, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as trustees for the society at a consideration of ksh.2.7 million, but she has nothing to show that they paid that sum. She added that the funds used to purchase the suit property came from donations from all over the world, of which, an account for donations had been opened and it is not that Amy took a mortgage.
59. She avers that they don't own the suit property, and they don't want the said land in their personal capacity as it belongs to the society. To that effect, the transaction was completed and even stamp duty had been paid.
60. She stated that the society is still carrying out its mission of Philanthropy though they were thrown out of the suit property by Amy.
61. In re-examination, DW1 stated that at page 104 of the Plaintiff's bundle dated 16.4.2019, there is a letter from Registrar General to Plaintiff's counsel confirming that officials of stars for Jesus are; herself, 3<sup>rd</sup> Defendant as secretary and 4<sup>th</sup> Defendant as treasurer.
62. She stated that the order dated 3.6.2009 contained in the Plaintiff's bundle was not for closure of the society, that the same related to another entity known as morning star. She further stated that the Plaintiff was raising money from dinners and churches, but she did not avail documents to show which money was from donations and which one came from her personal accounts directly.

## Submissions

63. In their submissions dated 8.12.2023 the plaintiffs argue that there is a resulting or constructive trust which arises in terms of the provisions of Section 38 (2) of the Land Act. It is argued that the agreement comprised at age 49 of the Plaintiff's bundle of documents dated 16 .4.2019 created a constructive trust by expressly containing provisions that entrench the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs' beneficial/equitable interest in the suit property as they paid the purchase price, thus they are entitled to sue as trustees. In addition,



- the suit property was to revert to them (3<sup>rd</sup> and 4<sup>th</sup> plaintiffs) as their retirement home even if it was transferred to Stars for Jesus Ministries Trustees.
64. It is also submitted that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not validly elected as Trustees of Stars for Jesus Ministry as provided by clause 8 (b) (ii) of *the Constitution* and that the process preceding acquisition of property must be lawful.
  65. That the transfer which the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants claim is in the process of being completed in their favour understates consideration as ksh.2.7 million whereas the agreement for sale says that the sale price is ksh.5,250,000/=.
  66. It is also submitted that this court has jurisdiction to adjudicate this matter including the question of legality of the persons claiming rights of ownership.
  67. The submissions of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are dated 29.11.2023, where it is argued that PW1 raised money which she channeled to the trustees of Stars for Jesus Ministry and that her later claim that the suit property was meant to be her private residence is baffling.
  68. That since the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were not party to the sale agreement signed on 28.9.2005, they cannot in any way purport to draw a benefit from it as they would be estopped by the doctrine of privity of contract and that the same applies to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs who were not parties to the sale agreement in their personal capacity but were trustees of Stars for Jesus Ministry. The case of Africa Fund Endangered Wildlife (USA) incorporated v Januaris Mutisya [2021] eKLR and the case of Savings and loans Kenya Ltd v Kanyenje Karangaita Gakombe & Another [2015] eKLR are relied upon.
  69. It is submitted that the transfer document drawn on 17.1.2012 clearly shows that the suit property was being transferred to the names of the trustees of stars for Jesus Ministry and not any of the Plaintiffs. The case of Helene Margaretha Van Der Roest & 2 Others v James Mwangi Gacheru & 2 Others [2021] eKLR is relied upon.
  70. It is submitted that the Plaintiffs' did not plead or in any way allege that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not the bonafide officials of Stars for Jesus Ministry in their amended plaint, yet the issue as to who the bonafide officials of Stars for Jesus are only came up at the hearing.
  71. It is argued that the evidence placed before the court shows that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the bonafide registered officials of Stars for Jesus Ministry and if the Plaintiffs have an issue with how the officials were elected, then this court is not the proper forum to ventilate the said issue.

### **Determination**

72. The Plaintiffs' contend that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs came to Kenya and met one Philip Githaiga (now deceased). That they joined him as donors in his initiative registered as Stars for Jesus Ministry which helped rehabilitate and house orphaned boys. PW1 and PW2 led evidence that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs have never been trustees/officials of Stars for Jesus Ministry. Their claim is that Philip and the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were the initial trustees of that society.
73. The plaintiffs argue that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs financed the purchase of the suit parcel from the 2<sup>nd</sup> Defendant to the tune of USD 75,000/= which money they allege that they personally raised through mortgaging their home in the United States of America and that the same was held for them by the initial trustees of Stars for Jesus as their retirement home. The plaintiffs are claiming the suit property through the doctrine of resulting or constructive trust or as the owners of the said property.



74. On the other hand, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants contend that the society is the one entitled to ownership of the suit land, hence the transfer ought to be effected in favour of the trustees.
75. The questions falling for determination are;
1. Whether the claim of the plaintiffs should be allowed as set out in the amended plaint for the suit property to be transferred to the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs or in the alternative should the transfer be in favour of 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs or still another alternative, should the 1<sup>st</sup> and 2<sup>nd</sup> defendants be ordered to refund the sum of USD 70 000 to the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs.
  2. Whether an order should be issued for the 1<sup>st</sup>, 3<sup>rd</sup>-7<sup>th</sup> defendants to vacate the suit land and for a permanent injunction to be issued restraining the said defendants from interfering with the suit property.
  3. Whether the claim of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants should be allowed as set out in the plaint in Case No. 206 of 2012 for eviction of the defendants in that suit and for an order of mandatory injunction preventing the said defendants from trespassing on the suit land.
  4. Are the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants entitled to special damages of ksh.962,000 as well a General Damages.
76. The undisputed facts are that the 2<sup>nd</sup> defendant is the registered owner of the suit property identified in the title document as Grant No. 57288 LR No. 15460 and that he had embarked on selling the said land. To whom he was selling the land to appears to be the elephant in the room. There is no evidence to indicate that he neglected to effectuate the sale. Indeed during the course of the trial, the advocate who was handling the transaction for the sale of that land deposited the said title in court, and he was thereafter discharged from these proceedings. It follows that the transaction stalled not because of the vendor, but because of the purchaser.
77. That being the case, the court will have to interrogate the evidence tendered to discern who the purchaser was. Needless to say that parties are bound by the terms of their contract. In the case of National Bank of Kenya vs. Pipeplastic Samkolit (k) Ltd & Another (2001) eKLR, it was held that;
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
78. The opening contents in the agreement for the sale of the suit land reads as follows;
- “An agreement made on 28.9.2005 between John Ngumba of P.O. Box 60776 Nairobi in the Republic of Kenya (hereinafter called the “Vendor” which expression shall where the context so admits include his personal representatives and assigns) of the first part and Philip Wanjohi Githaiga, Veronica W. Ngibuini and Irene W. Kageni of P.O. Box 70153 Nairobi as trustees of Stars for Jesus aforesaid (hereinafter called “The Purchaser” which expression shall where the context so admits include their personal representatives and/or nominees and assigns) of the second part
1. The property sold is all that piece of land known as Land Reference Number L.R. 15460 Nairobi measuring 0.2024 hectares.
  2. The interest sold is leasehold for a term of Ninety-Nine 99 years with effected from 1<sup>st</sup> August 1992.



3. The sale price is kshs. 70,000 U.S. Dollars @ Kshs.75 payable to the vendor as follows;
  - a. Kshs. 1,750,000 already paid
  - b. Kshs. 3,500,000 on execution of this agreement.”

79. It is clear beyond peradventure that the purchaser and the soon to be beneficial owner of the suit land was the STARS FOR JESUS, where the trustees were Philip Githaiga, Veronica Ngibuini and Irene Kageni. There is no mention of any interests reversionary or otherwise being held by the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs in respect of the “soon to be bought property”. The 3<sup>rd</sup> and 4<sup>th</sup> plaintiff are therefore ousted from bringing any claims over the suit property under the doctrine of privity of contract. See; Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 Others [2018] eKLR.
80. The cheque for USD 65,000 availed at page 57 of plaintiff’s documents indicate that the same was drawn by 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs in favour of Stars for Jesus Ministries. The said document hence buttresses the sale agreement that the purchaser was the society. The plaintiffs affirmed this position during the trial when PW1 in cross examination stated that “the buyer from the agreement was Philip Githaiga, Veronica Ngibuini and Irene Kageni as trustees for Stars for Jesus”. Similarly in cross examination, PW2 stated that they were signing the sale agreement as trustees. This far, it is clear that the purchaser of the land was the society and not any individual as claimed by PW1.
81. On the same breadth, none of the defendants can claim the suit property in their individual capacity.
82. As for the Contract agreement dated 13.6.2005 at page 49 of the same bundle, PW1 claims to be the owner of the suit house and that it is a retirement home for herself and the 4<sup>th</sup> plaintiff. However, that contract does not stand for the reasons that it is purportedly made between PW1 and Philip, parties who are not the seller and purchaser of the suit property as per the sale agreement. Only trustees of Stars for Jesus could enter into such an agreement and not Philip Githaiga in his personal capacity.
83. What clearly came out during the trial is that cracks appear to have emerged at Stars for Jesus Ministry following allegations that its founder, Philip Githaiga (deceased) was abusing boys hosted at the institution and when the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs started demanding the suit property.
84. The Plaintiffs argued that following abuse allegations against Philip, Stars for Jesus Ministry was closed, thus it is non-existent. However, an order alleged to have closed the society at page 41 of the Plaintiff’s bundle issued in P & C 47 of 2009 did not close Stars for Jesus Ministry.
85. Philip Githaiga passed away on 20.6.2009. As per the letter dated 11.4.2012 (found at page 104 of plaintiffs bundle) from the Registrar General, Stars for Jesus Ministries is registered under the [societies Act](#) and its chairperson is the 1<sup>st</sup> Defendant, the 3<sup>rd</sup> Defendant is its secretary while the 4<sup>th</sup> Defendant is its Treasurer.
86. At this juncture, it is worthy to note that none of the plaintiffs are claiming the suit land as trustees of the society. For PW2, She stated that PW1 was not a trustee of the society. As at the time of the agreement for sale, the officials were PW2, Irene and Philip. PW2 stated as follows during cross examination; “After I left, I am not aware that your clients became officials. When Philip passed on, I have no idea as to who became chairman, and after I left, I don’t know who became secretary and I also don’t know who became treasurer”.
87. There is no evidence that the plaintiffs have challenged the registration status of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as the current officials of the society, whether, by the name; Stars for Jesus, Stars for Jesus



Ministries or Stars for Jesus Ministries International. The end result is that the plaintiffs do not have the capacity to poke holes on the validity/ legality of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the society. It follows that the claim of ownership of the suit land by the plaintiffs must fall.

88. Can the plaintiffs' claim succeed on the basis of a resulting or constructive trust?. In the case of *Mbiti v Adalja & 3 others (Environment & Land Case 576 of 2016)* [2023] KEELC 21155 (KLR) (26 October 2023) (Judgment), this court cited the case of *Julebati African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, where the Court of Appeal held that;

“The existence of a trust is a question of evidence and went on to state that; “The law never implies, the court never presumes a trust, but (only) in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied”.

89. In *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggat Ahmed Al-Heidy & Others* (2015) eKLR, the Court of Appeal expounded on the law on trusts as follows:

“... A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...”

90. It is trite law that issues for determination are intricately rooted into the pleadings. In the case at hand, the plaintiffs did not plead Trust of whichever kind.

91. Nevertheless, even if the same had been pleaded, the case would still have fallen by the way side for the reasons which the court will expound on. Firstly on constructive trust, the plaintiffs have not tabulated the wrong doing of either the seller or the society which could be construed as the wrong doing. It is pertinent to note that the issue of abuse of the children at the children's home has been heaped on an individual (Philip) and not the society.

92. On resulting trust, I find that a cheque drawn by the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs is in favour for Stars for Jesus Ministry for \$65,000/= at page 57 of the Plaintiffs bundle. PW1 did not establish the nexus between this cheque and the alleged mortgage documents which could not even be authenticated and have no account of PW1. Thus PW1 did not establish that the funds came from her personal efforts.

93. Paragraph 33 of the amended plaint identifies the sum of USD 70,000 as a donation, a fact confirmed by PW2 during cross examination. In respect of the monies given out by PW1, PW2 stated as follows in cross examination;

“I can't tell where she was getting the money but she used to send us monies and clothing. At times she would come with teams of people from USA but they would bring money. By team I mean she used to bring missionary teams.”

94. She further stated that;

“I am aware that money paid to Ngumbo was paid from funds drawn from account of Stars for Jesus. The money drawn from that account was ksh. 3,500,000.”



95. What emerges is that PW1 was mobilizing for funds which were given to the society as donations. In the case of William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees & Another [2017] eKLR, the court had this to say on donor funds;

“I take it that any serious donor would wish to know who would eventually own the project that he/she is giving to.”

96. In light of the foregoing analysis, the claim of the plaintiff on trust which was advanced at the platform of submissions must fail.

97. What are the reliefs available herein?. I find that this case has some uncanny resemblance to the case of; Helene Margaretha van der Roest & 2 Others v James Mwangi Gacheru & 2 Others [2021] eKLR cited by the defendants where Stars for Jesus Ministries was embroiled in a more or less similar tussle as the current dispute. The court rendered a verdict that the sale of the land should be completed in favour of the society’s officials.

98. In the current dispute, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are not claiming the suit land in their individual capacity. They are officials of the society and as such, they are entitled to have the suit land on behalf of the society. Their claim on special damages was however not proved. On general damages, it appears that the court gave orders for the preservation of the suit property on 31.7.2012. None of the protagonist was to have a better claim on use and management of the property against the other. But apparently, the 3<sup>rd</sup> plaintiff evicted the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants. That notwithstanding, I find that PW1 was supportive of the society and it would be rather unjust to condemn her to pay any damages. I therefore decline to give any award on damages to 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

99. In the end, the suit in the case ELC 198 of 2012 is hereby dismissed. The suit in the case ELC 206 of 2012 is allowed to the extent that an order of eviction of defendants in that case is hereby issued as well as a permanent injunction restraining any such defendants from trespassing upon the suit land.

100. On costs, the court has considered that all the protagonists were apparently doing missionary work even though greed appears to have tainted the noble work. It is also pertinent to note that indeed, the society in which the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are officials has been the beneficiary of the donations given by PW1. In the circumstances, I direct that each party shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Koki Mbulu for Plaintiff

Karwanda holding brief for Wachira Maina for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Court assistant: Eddel

