

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, M'INOTI, MURGOR, JJ.A.)

CIVIL APPEAL NO. 184 OF 2017

BETWEEN

WILLIAM CHARLES FRYDA.....APPELLANT

AND

**ASSUMPTION OF SISTERS OF NAIROBI
REGISTERED TRUSTEES.....1ST RESPONDENT
ST. MARY'S MISSION HOSPITAL NAIROBI..... 2ND RESPONDENT
REGINA PACIS UNIVERSITY COLLEGE
THROUGH THE BOARD OF TRUSTEES.....3RD RESPONDENT**

*(Being an appeal against the judgment and orders of the Environment and Land
Court at Nakuru, (Sila Munyao J) dated 28 September 2017*

in

Nakuru ELC No. 224 of 2010)

JUDGMENT OF THE COURT

This appeal concerns the legal ownership, control and management of St. Mary's Mission Hospital Langata founded sometimes in 1999 and situate on L.R No. 27228 and LR No. 27229, and St. Mary's Mission Hospital Elementaita situate on L.R No. 9361/10, that was opened in 2007. These hospitals were established to provide competent and affordable medical care for the indigent and less privileged

in our society. Its founders were members of the Catholic church who belonged to different congregations within the church. There is also a dispute over the ownership of an undeveloped property known as Kiine/Rukanga/2846 situate in Sagana, "the Sagana property," which was allegedly bought by the appellant for purposes of constructing St. Mary's Hospital Sagana to serve the Mt. Kenya region. The properties are registered in the name of the 1st respondent, Assumption Sisters of Nairobi Registered Trustees (ASN).

The background to this appeal can be traced to the filing of a civil suit on 8th September 2010, in the High Court of Kenya at Nakuru being Civil Suit No. 224 of 2010 by the appellant, a medical doctor and a citizen of the United States of America (USA). He is a priest by profession and is connected with the Order of the Maryknoll Fathers and Brothers based in New York, USA (Maryknoll). The suit was filed against ASN and St. Mary's Mission Hospital Nairobi (the 2nd respondent). In the suit, the appellant claimed that in 1998 he sought for land in Nairobi specifically for purposes of putting up a hospital to cater for the poor. He ended up purchasing St. Mary's Langata at a consideration of Kshs 38,000,000/=. However, he wanted a body corporate registered in whose name these properties were to be transferred and registered. He therefore paid for the incorporation and Registration of St Mary's Mission Hospital Nairobi as a limited liability company. However,

since the company was yet to be registered when he purchased the property, he agreed with ASN, that the title be registered in their name with the understanding that ASN would later transfer the property to a body corporate that he was to register. He commenced development of the property with his own money, and the money he had solicited from friends and donors. In total he spent about Kshs 553,000,000/= on the project. Later he got the Elementaita land and put up St Mary's Mission Hospital Rift Valley at a cost of about Kshs 365,000,000/=. He pleaded further that he also purchased the property in Sagana at a cost of Ksh 4,800,000/=. While waiting for ASN to transfer these parcels of land as they had previously agreed, he ran the hospitals

After a change of leadership in the ASN in 2009, the new leadership started to claim that they owned the all the parcels of land and the developments thereon in Langata, Elemeintaita and Sagana. He claimed that they also started to interfere with the running of the hospitals by imposing some employees and allocating their duties without consulting him or the management that had been put in place to run the hospitals. He further pleaded that the directors of St. Mary's Mission Hospital were a company that was incorporated in 1999, had never been determined by shareholders, subscribers, and no guarantors were appointed, although the company was limited by guarantee. It was his case that he stood to lose a lot in view of what he

invested in the development of the hospitals, if the affairs of the hospitals were not solved. As far as he was concerned the properties belonged to him or to any other person that he chose to give. He contended that in the circumstances, the ASN were only registered as proprietors of the properties in trust for himself or his nominees and that the trust ought to be terminated. He prayed for a permanent injunction against the respondents, a declaration that ASN held the properties in trust for him, that the trust be terminated and that the properties be transferred to him or his nominees.

ASN and the 2nd respondent filed a joint defense and counterclaim, and pleaded that the setting up of the hospitals was as a result of a collaborative meeting between ASN and Maryknoll, and it was agreed that ASN would be the legal owner of the hospitals and would be responsible for their management. That it was on this basis that the properties were registered in the name of ASN. They denied that the appellant alone paid for the properties. They pleaded that the funds for the purchase of the properties were provided by donors through correspondence initiated by ASN. They also averred that ASN was solely responsible for the formation and incorporation of the company, the 2nd respondent herein which they stated was formed for the purposes of running and managing the day to day activities of the hospitals.

running of the hospitals which should revert to them. That the properties are registered in the name of ASN and that the 2nd respondent had directors contrary to the allegations by the appellant. To them the appellant is unwilling to accept this position and wants to forcefully be involved in the management of the hospitals despite the strained relationship. They further contended that the appellant had no proprietary rights over the properties and that no trust relationship existed in respect of the said properties.

They also pleaded that they operated the 3rd respondent on the properties and that the appellant had jeopardized their efforts to run the hospitals and develop the Sagana property. They also complained that the appellant had failed to disclose and account for the operation of its bank accounts and prayed that he should therefore be enjoined from dealing with the bank accounts of St. Mary's Mission Hospitals and be compelled to sign forms for change of signatories.

In the counterclaim, they prayed for an injunction against the appellant to restrain him from remaining on the properties, interfering with the operations of the

hospitals, soliciting, receiving, collecting, expending and keeping any funds belonging to St Mary's mission hospitals, drawing or dealing with funds held in bank accounts, and to compel him to sign bank forms for change of signatories and for order for accounts to be taken.

The appellant filed a reply and a defence to the counterclaim in which he denied the respondents' averments. He reiterated what he had pleaded in the plaint.

In civil case number 9 of 2011, the 3rd respondent and ASN pleaded that the 3rd respondent was established by a trust deed on 23rd July 2009 with emphasis on the education of less privileged women. It set up on amongst other sites, the land parcels in Langata adjacent to the 2nd respondent which parcels of land are registered in the name of ASN. In the month of August 2010, the appellant was called upon to account and undergo an audit of his services in the management and control of the of the hospitals but he became uncooperative and instead issued threats to interfere with the operations of the 3rd respondent; trespassed and made informal attempts to have the authority given to 3rd respondent revoked. It was averred that unless restrained, the appellant would continue and repeat his unlawful acts. They therefore sought the following prayers against the appellant; an injunction to restrain him from *inter alia* running and managing the 3rd respondent, and a declaration that only the 2nd and 3rd respondents were entitled to the exclusive

had been registered on behalf of the 3rd respondent. He otherwise refuted the other claims.

The two suits were consolidated, with HCC No. 224 of 2010 being the lead file. Parties proceeded by way of *viva voce* evidence before Sila Munyao J. The appellant, the 1st and 2nd respondents each called three witnesses who testified on their behalf. The 3rd Respondent did not call any witnesses. The evidence of each of the witnesses can be summarized as follows;

The appellant testified that as a missionary, doctor and a catholic priest of the Maryknoll order he had worked in Nigeria, Guatemala, Haiti, Tanzania, USA and Kenya. In Kenya he had worked at Nazareth Hospital in Limuru which was being managed by an Italian religious order called the Consolata Sisters. He testified that he had exposure to several medical ministries and he could see that standards were going down in hospitals run by missionaries. In 1995, he stepped down from Nazareth hospital so as to put together a new model of how an effective modern mission hospital should be run. He reflected on the hospital model propounded by European missionaries which were mostly operated by European sisters and was of

trained local doctors and the catholic orders were slowly losing their trained staff. He frowned on this model where nuns ran 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 supervised by nuns. That is what made him leave Nazareth Hospital and come up with the idea of St. Mary's Mission Hospital Langata. He conceptualized it as a hospital that will be run by a limited liability company without shareholding but limited by guarantee. The aim was to give quality healthcare to the poor with the utility of the best of doctors around. He however soon realized that he needed land first before he could approach donors to assist in setting up such a hospital.

In 1997, some land became available and he had money to buy it in his personal mission account as he had been talking to donors for about two years about his hospital model. He explained that a personal mission account held money given to him directly by donors and that such money was to be used for mission work only.

He averred that although he had the money, he had not yet created a legal entity under which the land could be registered, as he did not wish to buy the land in his own name. He stated that he therefore asked Sister Maria Felix Mwikali of

He later learnt that the land would be held in the name of the Catholic church which he was not agreeable to and asked ASN to refund money which was done in October 1998.

In mid - 1998, he found LR No. 27228 which was then vacant. He bought 10 acres out of this land at the price of Kshs. 1,800,000/= an acre. Mr. Macharia Njeru was his lawyer for the transaction. Later, LR No. 27229 adjacent to this land parcel became available and he bought it at the cost of Kshs. 2,800,000/= 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. 6,000,000/=. The fourth piece of land in Elementaita, which was about 40 acres, was donated to him by one, Mr. Joseph Ngera. All the parcels of land were registered in the name of ASN because he had yet to register St. Mary's Mission hospital as a company limited by guarantee. It was eventually incorporated on 16 July 1999 and it is the 2nd respondent herein. However to date the transfer of the properties from ASN to the company has not been effected. He maintained that the money to purchase these properties and develop them came from himself,

friends and donors and that ASN did not contribute a single penny. He testified further that he is the one who oversaw the design of the buildings and the layout as he had experience in designing medical buildings and also oversaw the developments. He also followed up on the registration and licensing of these hospitals and paid the requisite fees, with the ASN playing no role.

He stated that he is unable to allow ASN to run the hospitals since their mission and vision is different from his. He contended that ASN started doing things behind his back, such as having a portion of Langata property assigned to 3rd respondent, without his knowledge, yet this was not why the hospital was set up. He testified that he wanted the properties back from ASN, to be held in an entity that can carry out his vision. He went on to testify that he was in possession of the three title deeds but that ASN had in possession the title deed to one of the Langata properties which he claimed was taken from his advocates by deceit.

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 built for the community either on this land or on another that he owned in Njoro. He is a Catholic and approached Bishop Ndingi, then of the Nakuru Diocese, for the purpose but he declined to set up a hospital for the reason that the diocese was

travelled to Nairobi and after meeting the appellant, the appellant was impressed by the offer. The witness then offered the appellant 58 acres of his Elementaita land. He testified that the appellant then put up a hospital being St. Mary's mission hospital, Elementaita and his wishes as donor were fulfilled. Some years later, he came to learn of differences between the appellant and ASN.

PW-3, Ramechandra Khetshi Shah testified that his family had 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 the appellant by a Sister McClean who was managing some schools under an NGO. He and his lawyer, Mr. Macharia Njeru, then helped the appellant find land in Langata. The land was purchased, although he and his family did not contribute towards its purchase. His family however donated money to the appellant to assist in construction, specifically, construction of X- Ray rooms and equipment. They contributed between Kshs. 25,000,000/= and 30,000,000/= in total. As far as they are concerned, their money was well utilized. He stated that he never met ASN in the course of his dealings with the appellant.

continuing relationship in the management of the 2nd respondent and fulfilling their joint vision together, we do not think an order for costs for any party would be just.

Having disposed the appeal in the above terms, the final orders therefore are as follows;

- (a) That the appeal is partially allowed.
- (b) That the properties LR No. 27228; LR No. 2 7229; LR No.9361/10 and Kiine/Rukanga/28 and the developments thereon are not held in trust for the appellant nor was a charitable trust envisaged by the parties.
- (c) That the properties LR No. 27228; LR No. 2 7229; LR No.9361/10 and Kiine/Rukanga/28 and the developments thereon are held by the Assumption Sisters of Nairobi Registered Trustees on behalf of St. Mary's Mission Hospital Nairobi, the 2nd respondent.
- (d) 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 shall be transferred to 2nd respondent being a company limited by guarantee and be held by the said company for purposes of developing, maintaining and/or operating hospitals constructed thereon specifically aimed for the less privileged members of the society.
- (e) That the appellant, the 1st and 2nd respondents jointly oversee the handover of the hospitals from the 1st respondent to the 2nd respondent and ensure that the 2nd respondent is fully vested with the ownership and management of the properties and the hospitals thereon.
- (f) That 3rd respondent has no claim over the land parcel LR No. 27229, or over any other land parcels in dispute in this appeal and the Trust Deed assigning land to it is void to the said extent.

- (g) 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 ASN is hereby directed to embark on a relocation or discontinuation programme of any such purposes, especially by the 3rd respondent
- (d) That each party to bear their own costs of this appeal.

Dated and delivered in Nairobi this 25th day of September, 2020.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed

DEPUTY REGISTRAR