

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 3 OF 2020

HOPE STIFTUNG (HOPE FOUNDATION) PLAINTFF

VERSUS

SISTERS OF ST. JOSEPH – KILIMANJARO REGION 1ST DEFENDANT

THE REGISTERED TRUSTEES OF SISTERS OF

ST. JOSEPH-HIMO, MOSHI, KILIMANJARO2ND DEFENDANT

RITALIZA OF MT. CARMEL PRIMARY SCHOOL 3RD DEFENDANT

JUDGMENT

10th Feb. & 7th March 2023

A.P.KILIMI, J.:

This judgment is in respect of a suit which **HOPE STIFTUNG (HOPE FOUNDATION)** the Plaintiff herein, lodged in this Court on the 26th day of May 2020 against the three Defendants, namely; **SISTERS OF ST. JOSEPH - KILIMANJARO REGION**, the first Defendant; **THE REGISTERED TRUSTEES OF THE SISTERS OF ST. JOSEPH-HIMO, MOSHI, KILIMANJARO**, the second Defendant; and **RITALIZA OF MOUNT CARMEL PRIMARY SCHOOL**, being the third Defendant. In this suit the

Plaintiff is praying against all defendants for Judgement and decree in the following orders, namely:

- i) That, this Court be pleased to declare the defendants as being in breach of trust and contracts dully executed in respect of ownership and administration of 3rd defendant, calling for specific performance thereof.
- ii) That, in alternative but without prejudice to the prayer above and in the circumstances of this case, the Court be pleased to declare that the plaintiff's consent to the impugned agreements leading funding of the defendants' projects was induced by frauds, concealments of material facts, undue influences and or misrepresentation on the part of the defendants and thus voidable.
- iii) That, subsequently, this Court be pleased to order reimbursement by the defendants of Tshs. 905,591,778/= being the purchase price of the school, Euro 100,000 at a conversion rate of Tshs. 2,500/=, boarding houses and three teachers' houses construction costs together with other investments thereto as per paragraphs 12, 14 and 18 of the Plaint.
- iv) Payment of Tshs. 50 million or any other sum to be dully assessed by the Court as general damages
- v) Interest on the decree sum at bank rates from 2019 to the date of full satisfaction.
- vi) Interest on the decree sum at court rates from the date of Judgment to the date of full satisfaction.
- vii) Costs of this suit.
- viii) Any other reliefs deemed just and fit by the Court.

According to the plaint, the Plaintiff avers that, she is a Germany based humanitarian organization that inter alia supports orphans and vulnerable

children in Eastern Europe and Africa by providing social economic assistances and support. In 2005 the defendant's superiors and Plaintiff met in German whereas the said Defendants superiors informed the plaintiff their mission of helping orphans and vulnerable children (henceforth "OVC's) in Tanzania and they had primary school construction project at Holili area in Rombo District, Kilimanjaro region (3rd Defendant) which needed financial support to be completed. The plaintiff agreed to support the defendants financially on their mission for the betterment of OVC's which their organization goals was also. This led to completion of construction of the said school and other major infrastructures.

The plaint goes further that, in 2012 the defendants wanted to start a secondary school construction at Holili area within Rombo area but had no initial capital, the two negotiated and then the Defendants agreed to offer to a temporarily disposal of the said primary school (3rd Defendant) to the plaintiff at a consideration of Euro 100,000 in contemplation of additional high investments that were still to be made at the school by the plaintiff. Hence, the sale agreement was executed, then the plaintiff became a Landlord and Defendants agreed to be tenants operating the school until 2060, where after the ownership of the school would revert to the

defendants. The plaintiff further asserts both signed the said arrangement, sale and hire agreements which are attached as annexures to the plaintiff.

In her plaintiff, the plaintiff further avers that, she built boarding houses at the tune of Tshs.332 million, used to donate school fees to the 3rd defendant for an agreed number of OVC's until 2012 and agreed more sponsorship commencing 2016, further the plaintiff initiated and funded the construction of three teachers' houses at the tune of Tshs.80 million. During the same period, the plaintiff and the defendant mutually agreed that in consideration of plaintiff's financial support, at least 30 to 40 selected orphans and needy children from the said primary school would be enrolled and get full financial support within the secondary school budget to the stage of graduation.

The Plaintiff further avers that, in 2018 following some changes in the defendant's board, disturbances started through non fulfillment of the contractual agreed services such as non-inclusion of OVC's at the primary and secondary schools and unauthorized withdrawal of funds as well as change of staff for the worse, therefore the defendants breached trust and contracts relating to the ownership and administration of the said School. Further, the defendants wrote a letter to plaintiff intimating their doubts to

the validity of the contracts they had signed with the plaintiff. The plaintiff also avers that efforts were done to keep the agreement in force, later intervention of the then Roman Catholic Bishop for Moshi diocese without success, hence this suit.

After been served with the plaint, the second defendant filed the written statement of defence, in which almost all facts as posed in the plaint were vehemently disputed. The second defendant then averred that, the Plaint was served to the second defendant, The Registered Trustees of Sisters of St. Joseph – Himo Moshi Kilimanjaro, which is registered under The Trustees Incorporation Act [CAP 318 R.E. 2019] also it is further averred that construction of a secondary school in Holili area owned by The Registered Trustees of Sisters of St. Joseph - Himo Moshi Kilimanjaro was financed by bank loan; donations from benefactors and resources from the second Defendant.

When this case appeared before this court for pre-trial conference, the plaintiff was represented by Mr. Salehe Salehe, learned advocate while the defendant was represented by Mr. Aristides Ngawiliau learned Advocate. Thereupon, six issues for determination were drawn and agreed upon the parties as follows: -

1. Whether there was any legal agreement between the Plaintiff and the Defendants.
2. If the first issue is answered in the affirmative, whether the said agreement was breached by the Defendants.
3. Whether the Plaintiff, the 1st and 3rd Defendants are legal persons.
4. Whether the Plaintiff is eligible to own landed property in the United Republic of Tanzania.
5. Whether the Plaintiff has ever been an investor at Ritaliza of Mount Carmel Primary School in the United Republic of Tanzania.
6. What remedies are the parties entitled to?

In the plaintiff case, four witnesses called to testify namely: first, Mr. Henning Emden, a Germany citizen introduced himself as Director of Hope Foundation; second, Mr. Henry Erasto Lema, Tanzanian, a Director of Hepatic Company Limited and contractor; third, Mrs. Ritha Emden, a Germany citizen introduced herself as Director of Hope Foundation; and fourth, Mr. Thomas Schmeisser, a Germany citizen who introduced as the member of the Board of Trustee of Hope Foundation. These witnesses testified as PW1, PW2, PW3 and PW4 respectively.

Mr. Henning Emden (henceforth "PW1") testified that; Hope Foundation was registered in the year 2007 by the Government of Germany. He is one of the Director of the Foundation, the main objective of Hope Foundation is to support Orphans and Vulnerable Children (OVCs) of Eastern Europe and Tanzania. He knew Sisters of Saint Joseph through his wife who

started friendship with them in 1996. Thereafter Hope Foundation trusted Sisters of Saint Joseph for their mission of helping others and the two agreed and signed hire contract, sale contract and contract of construction two boarding houses. This was the year 2012, 2015 and 2016 respectively. In sale contract Sisters of Saint Joseph sold the school to Hope Foundation at 100,000/= Euros. The document evidencing this was admitted for identification and marked ID1. Also, he tendered a document of Land Officer of Rombo district authorizing the said contract which was admitted and marked P1.

PW1 further testified that, after the said contract, the owner of the school was Hope Foundation. Sisters of St. Joseph became tenants. Then, Hope foundation rented the school to the sisters of St. Joseph at a consideration of 5000/= Euros each year, which was paid from 2012 to 2019. He tendered the Hire Contract document for identification purpose which was admitted as ID2. PW1 also said they also agreed with Sister of St. Joseph in 2015 to support Orphans and Vulnerable Children from primary school to the Secondary School, to support this PW1 tendered that agreement for identification purpose which was admitted as ID3. Another agreement PW1 said is for building two dormitories, the same was admitted for identification

as ID4. Also, PW1 added that, they agreed on a new organization structure but defendants did not comply, and later they received a letter from Sisters of St. Joseph denied all the contracts. The same was tendered for identification purpose and marked ID5. PW1 further said in early 2019 he came in Tanzania with delegation from German and met with Sisters and Board members, they were told it was not possible to purchase the plot and they received a letter informing them, that they were just donors.

In cross examination by the counsel for the Defendants, PW1 said Hope Foundation is a Charitable Institution registered in Munich Germany, after the hire contract, the Foundation earns 5000/= Euros annually from Sisters of St. Joseph as rent, which for four years was paid to the Bank of Hope Foundation which in turn paid liabilities of the school. The parties to the contract are Sisters of St. Joseph and Hope Foundation. The contract was signed by Ritha his wife for Hope Foundation as the Chairman and Board Director, while in other party was executed by the Superior General Sister Jane and Uzula Ilomo. In re-examination PW1 said, Hope Foundation did not generate any income in Tanzania. Hope Foundation was impressed by the intention of the sister to build Secondary School. Their aim was not to do business, rather their interests with the sisters was to support Orphans.

Mr. Henry Erasto Lema (henceforth "PW2"), is a director of Hepatic Company Limited testified to the effect that, He knew Hope Foundation since 12th April, 2018 when his company was called for an interview of construction at Ritaliza of Mount Camel Primary School. Thereat he met with Sisters of Saint Joseph, Director of Hope Foundation, school management led by Sister Juliana and the financial controller Mr. Didas Mbombo. They agreed on construction of two dormitories of Ritaliza School. He also knows the project of designing and construction of underground water tank, water supply systems, waste water system, rain water harvesting system and land scraping. The project which was done in 2019. PW2 further said he was introduced by sister of St. Joseph that the owner of St. Ritaliza of Mount Camel Primary School was Hope Foundation. Sisters showed him the sales Agreement and Hire Agreement indicating consideration at 100,000/= Euros and 5000/= Euros respectively. He also said Hope foundation showed him a letter of approval of the said sale of school written by the District Land Officer of Rombo in 2018. Therefore, he knew the status of Sisters of St. Joseph is just tenants after that sale. PW2 further said, after purchasing of the school, Hope Foundation constructed two dormitories. Each dormitory had the capacity of 150 pupils. The dormitories were built by Interlocking System

Company Limited. Construction of underground tank was done by Hepatic Company Limited.

Ritha Emden (henceforth "PW3") testified that, she lives in German, she is the Director of Hope Foundation registered in German, they are two directors another is her husband Mr. Henning Emden (PW1). PW1 deals with technical issues and negotiate all the contracts. While in her part deals with work in the office of the foundation and organize all the things they planned to do, and the main objectives is to help Orphans and Vulnerable Children in Tanzania and Eastern Europe.

PW3 further testified to the effect that, she knew Sister Betty belong to Sisters of St. Joseph in 1996 in Germany during the weekend for women in monastery. At the end they decided that they will be in contract and that was the beginning of their friendship. In 2005, Sister Betty visited them again together with Sister Usura the General Superior and told them that they wanted to build a school and that they had no money for Orphans and Vulnerable Children. She talked to her husband together they agreed to build the said school in Tanzania. Then they visited Tanzania, after their visit, they were deeply convinced that they could do that work due to the good things

the sisters were doing in this country. Having a goal of building a good school and good place for Orphans and Vulnerable Children. They entered into a Sales, Hire Contract and Sales Agreement. Influenced by the fact that OVCs had to go to secondary school after primary school. They decided the same be built at the same area for purpose of being easier for them and sisters to manage.

PW3 continued to testify in respect to purchase price and hire contract, that in such respect she reiterated what PW1 has said above, further she added Hire Contract was paid from 2015 to 2020, after 2020 sisters stopped from paying rent and denied all contracts. Also, she said after they had bought the school, they built a sports playground, two dormitories and they started to build the water tank. Herself used to visit the school every year during the graduation day. PW3 added by saying, they came to learn that Sister of St. Joseph took the money from the bank account regularly, and did not treat well children at school, they wrote three letters to the bishop to solve these problems. PW3 also said the origin of the name Ritaliza is the combination of her first name and the first name of Sister Betty because that school was the result of their friendship.

When PW3 was cross examined by the defendants' counsel she said, Hope Foundation is a charitable organization register in Germany. It also operates in Tanzania. In respect to rent paid to them, they didn't take the money but gave all the money back to the sisters. In re- examination PW3 said they received rent because Hope Foundation is the owner of the school and the sisters are the tenants, and they never had profit in Tanzania.

Thomas Schmeisser (henceforth "PW4") testified to the effect that, he is the one of the two members of the board of Trustee of Hope Foundation, the other member is Edmond Block. His task is to advise, supervise the foundation and every year to make a report to the lower government, He further said, the Foundation was Registered in Bavaria at lower government, the main objectives of the foundation is to help Orphan and Vulnerable Children, in Eastern Europe and Tanzania. He has visited Tanzania several times, specifically Ritaliza School in Holili, they had some meetings of the construction of the school and also about the future plan, he advised the construction company what to do and they did it, the agenda was about construction of new Dormitories, sports field for football and work on the garden. Then the construction was performed by Hope Foundation, the Dormitories were built by interlocking Building system from Moshi, in total

they had four contracts with sisters of Saint Joseph, first is sale contract, hire contract, agreement for close corporation and agreement to build the dormitories.

PW4 further testified that, after sales contract, the status of Sisters of St. Joseph became tenants, then they did construction on Bakery, Bio gas, Sports field, the Hall and Dormitories. But later the sisters denied all contracts and embezzled funds by Bank Transfer between 2012 to 2020 and also added two more signatory to the account, PW4 tendered a letter directed to the bank to such effect which was admitted as exhibit P2. In the agreement for close cooperation, it entails to admit OVCs when finished Primary School to Secondary School which was also denied by sisters. He also said Hope Foundation decided to sign contract, because the church is an Honorable Organisation and anybody trust the church and foundation wanted to help the children. The effort by Hope Foundation to solve the conflict was done by engaging some meeting between sisters and Directors, and later the bishop but the result was unsuccessful.

In cross examination by the counsel for defendants, PW4 said he believe the school belong to Hope foundation, simply because of the contract. There was a partnership between the sisters and Hope Foundation.

Hope Foundation was responsible to pay for children to go to Secondary. In re- examination PW4 said his duty is to advise the Directors and to make statement to the government, the money paid as rent were sent back as donation for the kids. The relation was based on Trust of each other, Hope Foundation received rent because there was a signed contract. That were all about Plaintiff' case.

The defendant's case started with Sister Elizabeth Shao (henceforth "DW1"), she testified that, she is a religious at the congregation of Sisters of Saint Joseph, they have registered as a Trustees and Society, and they have a certificate of incorporation which bears the name of the Registered Trustees of Saint Joseph Himo, Moshi Kilimanjaro. She tendered the said certificate of Registration which was admitted and marked exhibit D1.

DW1 further said, she is among of the trustees, so she usually signs documents, call meetings for trustees, in such meeting if there is something to be sold, they choose member of the trustees who will sign the transfer form, and they make sure they choose two trustees and if there is transfer are the one responsible to sign. Also, if they want to sell, they must secure consent of the Administrator General. In respect to Ritaliza School they never had meeting as trustees to authorised selling of the school. DW1 also added

and said that, Hope Foundation is the institution resides at German and is the one of the donors of their school Ritaliza of Mount Camel, she also knows Hope Foundation has two Managers, who are Husband and Wife, Henning Emden and Rita Emden, also knows another officer called Thomas Schmeisser.

On how they started, testified that, DW1 it was the year 1995, she went in German, she met with Mrs. Rita Emden (PW3), they talked on the issues of the school, she shared with her family, and then they became ready to help them. The help started by building of their school, and also they paid for scholarship for children who are orphans, vulnerable or in bad condition (OVCs). Sponsorship started while they are in German but later Mr. Henning Emden (PW1) came to their school and in other time they sent Thomas Schmeisser (PW4), but each year Rita Emden and Mr. Henning Emden attended to the school Graduation Ceremony. They came with tourist visa, and their relationship was Donor and Donee.

In respect to donation they received, DW1 said that Hope Foundation's sponsorship was directed to building school, sports field and Bakery, they also gave money for OVCs, which was in form of scholarship. She also added

that they have other sponsor from Austria, German and Italy, others assist on building, example Italy used to sponsor a number of Children, Canada sponsored them Milling machine, and normally these sponsors transfer those aids to their Bank account. They started with CRDB Marangu, later they opened account at Exim Bank Moshi. To show the above DW1 tendered a Bank statement slip which was admitted as exhibit D2.

In respect to the school, DW1 testified that the school is at Holili at Rombo, Kilimanjaro, the school was built on the Land owned by Registered Trustees of Sisters of St. Joseph. They have Registered title of the said Land, the said title is named the Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro, they never sold the school or any land upon the said school is situated, furthermore they used the said Registered title as collateral to take the loan at CRDB Bank, this was done because they wanted to build the Secondary School in the same name of Ritaliza Secondary School. In such regard they took a loan at CRDB Bank at the tune Tshs. 360,000,000/=, the money used for building Ritaliza Secondary School.

In respect to settling of the dispute arose between them and Hope foundation, DW1 told this court that, they met with heads of congregation and trustees, they tried to settle, but Hope Foundation remained with their

standing point, that sisters should take teaching activities, while Hope Foundation to remain with supervision of Finance and properties. They insisted that if sisters agree with that stance they will increase their fund, but sisters saw it is contrary to the wish of the Government and their church, therefore they rejected. DW1 further tendered a draft proposal of Administration chart of Ritaliza, which was admitted for identification purpose and marked ID1 for defence case. DW1 also added that, on how they got children, people came to the school and prayed to be helped because they have orphans and other vulnerable children, then they visit their homes, took photos of them and then sent to Hope Foundation, also sometime Director of Hope Foundation used to come in Tanzania and visit their homes to see if is true are poverty.

The second and last witness of the Defendants was Mr. Arobogast Zakharia Mhumba (henceforth "DW2"), he introduced himself working as Land Officer at Rombo District Council, he knew Plot 1 Block A Holili Rular Service Center. He knew also the said plot is owned by the Registered Trustees of Sister of St. Joseph, DW2 then tendered the Certificate of Occupancy of the said plot which was admitted and marked exhibit D3.

DW2 further said according to Land Registry, the ownership of the said Land has never been transferred to anybody, if it could have been done, as a land officer could have known by seeing form No. 29 signed by both parties, form no. 30 which is notification for disposition, form no. 35 which is Application for Disposition and the deed of contract, which all of them could attract payment after Valuation Report of the area to be sold, then after that they could be issued with Tax Clearance Certificate to see the Government Tax, then Certificate of Approval, and then could have been sent to the Registrar of Title for approval and indorsement. He said all of these were not done.

When DW2 was given to identify exhibit P1 by counsel for defendants, DW1 had this to say; he knew P1 as document, in the year 2012 came one person to his office, who introduced to him to be a servant from Ritaliza Primary School known as Didace Mbombo, he also told him that he works as accountant at Ritaliza Primary School, he explained to him, he is with foreigners, who aimed to make fund raising at Europe for educating children at Ritaliza School. DW1 rejected and told him that foreigner are not allowed to own land unless for investment purpose, so he returned him back to sit with the said foreigners and think of it. DW1 said further, after one-week

Didace Mbombo approached him again with the same document, having the same tune of intention to enable foreigners to make fund rising insisting the said document is necessary. He told them it is well and good, but that document is not a transfer deed because foreigner cannot own land, he told them it will be only for fund raising and nothing else.

In cross examination made by Plaintiff's counsel, DW2 said that, Didace Mbombo came to his office at Rombo District Land Registry in 2012, he came with document exhibit P1, he signed the said document for good will, no law allowed him to do so. He knows Government works on papers, he signed but he had no authority to do so, he knows if one buys a Land unlawful can't get title in law.

At the close of the trial, the learned Counsels for both parties filed their written closing submissions, I will refer to the them in due course whenever necessary. Starting with the first issue which is whether there was any legal agreement between the Plaintiff and the Defendants. I should point out from the outset that, the fact that the plaintiff is alleging that entered the agreement with the defendant in such respect, I have considered the evidence tendered orally, documentary and the plaintiff's pleading. I have

seen there are four agreements alleged to be entered between the two, the first; is Sale of the school, second; The Hire agreement, third; agreement for construction of two dormitory buildings and fourth is the agreement which PW1 said is between Hope Foundation and Sister of St. Joseph to support Orphans and Vulnerable Children from primary school to the Secondary School.

From what could be discerned from the trial as well the submissions by the learned counsel for both sides, the contention by the disputants is centered on the question of validity of the contract between them.

It is a cardinal principle of law that the burden of proof lies on the person alleging existence of any fact. The principle is set out under section 110 and 111 of the Law of Evidence Act [Cap.6 R.E. 2022]. Also, this matter being a civil suit, the standard of proof to be met, is proof on the balance of probabilities which simply implies that the Court will accept evidence which is more credible and probable (see the case of **Al-Karim Shamshudin Habib v. Equity Bank Tanzania Limited & Viovena Company Limited** Commercial Case No. 60 of 2016 (unreported)).

The same stance where discussed by celebrated legal Jurist Authors in the Book of **Sarkar's Laws of Evidence**; 18th Edition, M.C. Sarkar, S.C. Sarkar and P.C. Sarkar; published by Lexis Nexis, at page 1896; and I quote verbatim here under:

" ... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason ... until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party ... "

In contracts, the general principle about the valid contract is that, there must be a party making an offer or proposal and another party accepting that offer. In Tanzania, requisites to a binding contract are provided under section 10 of the Law of Contract Act [Cap. 345 R.E. 2019] (hereinafter "the LCA") which provides that:

*"All agreements are contracts if they are made by the free consent of **parties competent to contract, for a***

lawful consideration and with a lawful object, and are not hereby expressly declared to be void"

[Emphasis added]

The same law explains further on competent to contract under section 11, which provides that;

*"11 (1) Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and **is not disqualified from contracting by any law to which he is subject.** (2) An agreement by a person who is not hereby declared to be competent to contract is void"*

[Emphasis added]

From the above it is undisputed that parties are bound by valid contracts which are signed and entered by competent persons to do so. However, the emphasis supplied above, in my view is very crucial in the impugned contracts entered in this matter at hand. With the above requirements of the law, I now turn to look at the contracts which is being disputed by the disputants in this matter.

In respect to the contract of purchasing land in this matter, in his closing written submissions Mr. Salehe learned Counsel for the Plaintiff argued that, the presence of sale agreement and letter from land officer suffices to prove the transfer of land in dispute from defendants to the plaintiff since the law demands that, disposition of land must be in written form for the same to be enforceable in law. To bolster his observation, he cited section 64 (1) and (b) of the Land Act (CAP 113 R.E. 2019). Also continued to assert that, being the position of law, therefore evidence adduced by PW1, PW2, PW3, PW4 as well as exhibit P1 signed by DW2 a Land Officer of Rombo District Council proved that, the plaintiff bought the land in dispute from the sisters of Saint Joseph.

In his final written submissions Mr. Ngawiliau learned Counsel for the Defendant contended that the competency of other party to the said contract who was mentioned as **Sisters of St. Joseph Kilimanjaro Region** as indicated on ID 1 is not an artificial body capable to enter into contract, to hold and acquire land, to transfer, convey, assign and demise any land as alleged by the Plaintiff, since it is not a body corporate created under the law, to fortify this assertion he referred Section 6 (2) of the Trustees Incorporation Act [CAP 318 R.E. 2019], the learned counsel also

added exhibit ID 1 discloses neither the names nor titles of person who signed the sale agreement in order to recognize their capacity to sign the said contract for and on behalf of the said artificial persons.

As rightly said by the plaintiff counsel that disposition of land must be in written form and the same was evidenced by PW1, PW2, PW3, PW4 as well as exhibit P1 signed by DW2 a Land Officer. According to that regard, two documents were tendered by PW1, first he tendered a document titled sale contract which was admitted for identification purpose and marked ID1 and second, he tendered a sale agreement with covering letter from District Land Office which was admitted and marked P1, further the record reveals its admissibility succumbed with objection then this court admitted and ruled that its authenticity to be determined in the final verdict.

I am mindful, in terms of section 100 (1) of the Evidence Act, Cap. 6 R.E. 2022, oral evidence cannot supersede the documentary evidence. For purpose of this matter, I wish to refer this provision of the law which clearly provides as follows:

"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is

*required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."*

[Emphasis added]

In fact, this provision reinforces parole rule on evidence in our jurisprudence. Therefore, in view thereof, whenever parties to contract enter into agreement duly signed and attested, parties are bound by it and any oral evidence tending to vary or contradict has no place. This also maintains a principle that court of law cannot rewrite a contract, between the parties. Parties must understand that the sole duty of the court is just to enforce what was agreed upon (See the case of **National Bank of Kenya Ltd v Pipeolastic Samkolit (K) Ltd and another** [2002] 2 EA 503. Furthermore, in the case of Lulu **Victor Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited**, Consolidated Civil Appeals No. 22 and 155 of 2020 (unreported) it was held that;

"Documentary evidence reflected repositories and memorial of truth as agreed between the parties and retained the sanctity of their understanding."

Applying my minds to the above principles, the next point to be considered is whether, the said admitted documents proved that plaintiff purchased land from the defendants. Starting with exhibit P1, as said above this document is two in one, the first is the covering letter and second is the sale agreement. I have observed the sale agreement in entirety, parties are The Sisters of St. Joseph- Kilimanjaro Region as **Transferor** and on the other side is The Hope Foundation, Margaretenstr.19 as **Transferee**. According to para (a) of the agreement it provides;

*"THAT the TRANSFEROR is willing to transfer Plot **No.1 Block' A' at Holili Rural Service Centre AND the TRANSFEREE agree to occupy the said property (Ritaliza of Mt.Carmel School) free from all encumbrance- but to give.....only"***

[Emphasis Added]

According to this condition, it is undisputed fact that the transfer is in respect the said mentioned landed plot with its attachment to it, which is a mentioned school. And a transferor as observed above is sisters of St. Joseph- Kilimanjaro Region. In principle courts will presume that when a contract is in written form the parties only intend to contract with the parties named in the contract. Therefore, if the contract turns out to be with anyone

other than the individuals named in the contract, it will be void for mistake.

(See **Cundy v. Lindsay** (1877) App Cas 459)

Now, the question I have asked myself is whether those properties belonged to the said Transferor, if the answer is no or yes, then next question will be whether the said Transferor was competent to sale the said landed property.

In defendant's case DW2 a District Land Officer of Rombo tendered exhibit D3 which is a Certificate of Occupancy of the said land, Plot No.1 Block' A' at Holili Rural Service Centre duly signed on 24th day of September 2009. The occupier written therein is **The Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro**. It is therefore my settled opinion this is a rebuttable presumption that, this is a legal document giving ownership of the said plot to The Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro. I wish to refer the Court of Appeal of this land in the case of **Amina Maulid Ambali & 2 Others v. Ramadhani Juma** Civil Appeal No 35 of 2019 CAT at Mwanza (Unreported) had this to say;

"In our considered view, when two persons have competing interests in a landed property, the person

with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was lawful obtained”

The evidence on record specifically exhibit D3, has undoubtedly established the fact that The Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro possess a Certificate of Title No. 29701 thus is considered as the lawful owner of the suit land. The fact that said title is not rebutted to date, now I proceed with the next step.

From the above, it is apparent that the transferor's name and the occupier's name of the said land property differs. But I am mindful the plaintiff sued three defendants; **First**; Sister of Saint Joseph- Kilimanjaro, **Second**; The Board of Trustees of The Sisters of St. Joseph-Himo, Moshi, Kilimanjaro and **Third**; St. Ritaliza of MT. Calmel Primary School. I have considered them, although they look like of the same generic, in my view these defendants legally are not similar, even their names cannot be used even interchangeably. Consequently, according to contract exhibited P1 the transferor is the first defendant, thus I am settled, the question asked above is answered in negative, that the landed property in that contract is not

owned by Transferor. Next question which was asked above its answer is simple, I reserve it to be given later.

Furthermore, other conditions in the said contract exhibited in P1 are as follows;

- "b. THAT the vendor and the purchaser have agreed that **after full payment.** The said shall be property of the purchaser.*
- c. THAT the TRANSFEROR give warrant that the plot is free from mortgage, lien. Pledge, conflicts or any other encumbrances whatsoever and it shall be upon the TRANSFEREE to make clearance of all outstanding liabilities regarding the property.*
- d. THAT the Sisters of St. Joseph **will rent the Ritaliza of Mt. Carmel School** from Hope Foundation up to 2060."*

[Emphasis Added]

As per evidence adduced, it is undisputed fact the St. Ritaliza of MT. Carmel School is built on the said land in dispute, this means if the contract is valid as by virtue of para (d) above means also Plaintiff by the same contract hired the said school to the first defendant. Now, I am convinced to look on the validity of this contract as follows. First is consideration, mindful consideration must be sufficient but need not be adequate (See **Currie V Misa** (1875) LR 10 Ex 153. The contract exhibited P1 shows the word "to

give....) only” no any amount put as consideration. All Plaintiff witnesses in their testimonials said the said school was sold at 100,000/= Euros and later hired to defendants at 5,000/= per annum. According to the principle of parole evidence enunciated above with the lack of detailing this figure in the said contract, and having regarded the said contract document was pleaded at para eleven of amended plaint and annexed thereto, these oral testimonies is futile. (See **James Funke Ngwagilo v. Attorney General** [2004] TLR 161.)

Second, I concede with learned counsel for defendant when he argued that this sale contract lacks stamp duty. In Tanzania, according to Section 47 (1) of **Stamp Duty Act** (Cap. 189 R.E 2019), provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of party’s authority to receive the evidence or shall be acted upon, registered in evidence authenticated by an such person or by any public officer unless such instrument is duly stamped. However, the section goes further to provide for proviso as exceptions, none were proved by the plaintiff as the law requires, it therefore my settled view this contract lack legal value due to contravention of this law.

Third, competence of the said transferor and transferee to this contract, as settled above, it is clear that transferor was the first defendant, while the Plaintiff is Hope Foundation a transferee in the contract. PW1 testified at the trial that Hope Foundation was registered in the year 2007 by the Government of Germany, have two Directors himself and his wife Ritha Henning. Also, he said the foundation is not registered in Tanzania when he was asked by defence counsel. Furthermore PW4: Thomas Schmeisser testified in this court is a member of the Board of Trustees, there only two, himself and another, he named him as Edmond Block. Also said the main objective of Hope Foundation is to support OVCs of Eastern Europe and Tanzania. From the above it is undisputable that Hope Foundation is foreign organisation having all directors and members of trustee's foreigners. According to the contract the plaintiff alleges that they purchased land at Holili Rombo District Tanzania. Here comes another question, whether this is possible under Tanzania Laws.

The Land Act [Cap. 113 R. E 2019] which was enacted in 1999, provide for restriction to foreigners to be allocated land in Tanzania. The provisions of Section 20 (1) and 20 (2) are clear on how to deal with land for foreigners. For easy reference the law states;

*"20.-(1) For avoidance of doubt, a non-citizen shall not be allocated or granted land **unless it is for investment purposes under the Tanzania Investment Act.***

*(2) Land to be designated for investment purposes under subsection (1), shall be identified, gazetted and allocated to the **Tanzania Investment Center which shall create derivative rights to investors"***

[Emphasis supplied]

The facts that Hope Foundation is registered in German and all the Directors of Hope Foundation and members of Trustees are not citizens of Tanzania, are incapable of buying land in Tanzania under normal way as if they are citizens of Tanzania. Under the above law, foreigners may own land only for investment purposes. However, the same must be owned through a derivative right from the Tanzania Investment Centre, in this case at hand no evidence was adduced to the requirement of this law. In my view the purchaser never exercised due diligence. Therefore, Hope Foundation was not a competent party to enter the said normal agreement of purchasing Land in Tanzania. In regard to this legal resolution, I am of considered opinion also it answers to issue number four which is **whether the Plaintiff is eligible to own landed property in The United Republic of**

Tanzania. That issue is answered that foreigners are eligible upon abiding to the above law, since in this matter at hand the same was not abided in the said alleged purchase, the issue is answered in negative.

Having find that the Transferee was incapable party to contract. Next, is whether the transferor who is the first defendant was capable and competent party to the alleged contract? According to the exhibit P1, the transferor is in the name of Sisters of St. Joseph- Kilimanjaro Region but downward on the transfer deed there are wording showing that who effected the transfer is the second defendant in verbatim I quote;

*"SEALED with the COMMON SEAL of the said **THE REGISTERED TRUSTEES OF SISTERS OF ST. JOSEPH HIMO MOSHI KILIMANJARO** and delivered before us this 4th day of June 2012"*

[Emphasis added]

Then on the right side of the above wording it follows the typed word Vendor and signed, from above declaration which seems was witnessed by District Land Officer of Rombo, it does not show the place where the declaration was made, second not clear how the land officer knew the person who signed as

vendor, because no name stipulated thereon and it is not shown whether the said Land Officer knew the signatory or somebody has identified to him.

I have considered the name of transferor and the name of the person written in that declaration they differ. But be it as it may, no explanation on the said jurat linking between Transferor whether has authorize signatory to be Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro. But not only that, the said Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro being a Registered Trustees needed to authorize her member or members to sign on behalf. Despite no name of signatory, but also no oral or documentary evidence adduced in this court proving that the said person who signed was authorized to do so by Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro as the law requires.

I am mindful that, the cardinal principle of the law of contract is the sanctity of a contract. Once parties competent to contract for a lawful consideration with a lawful object entered into an agreement freely, the contract entered becomes sacrosanct. That is, the parties to the contract become bound by the terms and conditions stipulated and each has to fulfill his/her part of bargain. Thus, neither a third party nor courts should

interpolate or tamper with the terms and condition therein. (See the case of **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 (unreported))

But in this matter, DW1 who is one of the members of Trustees in her testimony in this court, she tendered the certificate of incorporation registered under Registered Trustees of Sisters of St. Joseph – Himo Moshi Kilimanjaro dated 7th February 2008 which was admitted as D1. By so doing I am forced to believe the second defendant is legally registered under the Trustees Act Cap. 318 R.E. 2002.

The effect of this incorporating under the Trustees Act is provided under section 8 (1) and (2) of the same Act, for purpose of clarity I reproduce this provision hereunder: -

*"8 (1) Upon the grant of a certificate under subsection (1) of section 5 the trustee or trustees shall **become a body corporate** by the name described in the certificate, and shall have: -*

(d) Perpetual succession and a common seal;

*(b) **Power to sue and be sued** in such corporate name;*

*(c) Subject to the **conditions and directions contained in the said certificate** to hold and acquire, and, by instrument under such common*

seal, to transfer, convey, assign and demise, any land or any interest therein in such and the like manner, and subject to the like restrictions and provisions, as such trustee or trustees might, without such incorporation, hold or acquire, transfer, convey therein, assign or demise any land or any interest

*(2) All conditions and directions inserted in any certificate of incorporation **shall be binding upon and performed or observed by the trustee or trustees** as trusts of the body or association of persons or under the trust instrument or declaration of trust, as the case may be."*

[Emphasis Added]

In respect to the certificate of Incorporation as exhibited D1 by this court which is made by virtue of above law and signed by Administrator General have conditions and directions inserted therein as follows: -

*"This is to certify that Registered Trustees of Sisters of St. Joseph – Himo Moshi Kilimanjaro **is a body incorporated under the provisions of the Trustees Incorporation Act (CAP. 318 R.E. 2002)**; SUBJECT to the following conditions, that is to say – First that such body corporate **shall not, without first obtaining my consent in writing acquire any estate or interest in land; and secondly, that such body corporate shall not, without like consent, use or permit or suffer to be used any land vested in it otherwise***

than in direct fulfillment of the trusts for which such body corporate is established.”

[Emphasis Added]

Applying my minds to the above legal requirements, the facts as shown above that the impugned contract does not disclose the name, his personal capacity and authority to sign on behalf or approval of members of the above Registered trustees, and the fact that no evidence tendered oral or written in this court that the Administrator General of Trustees consented to such disposal. It is my considered opinion it is apparent on the said contract the signatory has no capacity to enter into contract, consequently I hold the said contract with its entire deed exhibit P1 becomes invalid and illegally enforceable, thus any transaction or disposition through this contract is untenable in the eyes of the law. (See section 10 of the Law of Contract Cap. 345 R.E. 2019)

It is therefore from above my settled view, the transferor or anybody tried to sale the said landed property was not having a good title to it and cannot pass the said title to another. This is the gist of the principle, one cannot give that which he does not have (*nemo dat quod non habet*). (See the cases of **Mathias Erasto Manga v. Simon Group (T) Ltd** [2014]

T.L.R. 518 and **Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another**, Civil Revision No. 6 of 2017; **Kashinde Rajabu Mrisho & Another v. Seleman Ally Madohola**, Land Case No. 361 of 2014, High Court of Tanzania, **Yusuph Juma Sadiki and Another v. Nuru Mohamed Kihyo and 2 Others**, Land Case No. 26 of 2008 (both unreported).

Without prejudice to the above it is also a cardinal principle of law in regard to sale and purchase of any goods including immovable property is that of caveat emptor, that is, let the buyer be aware. The Purchaser is therefore under a general duty to inspect the property to be purchased before enter the contract. This is critical in order to establish if there any defects in title, which could not be discoverable with due diligence. The situation in this matter the plaintiff conducted a due diligence study before executing the Agreement. The evidence reveals the agreement was attended by District Land Officer. Therefore, the alleged fraud, concealments, undue influences and misrepresentation as averred in para four of the amended the plaint, if any ought to have been discovered at the time of conducting the said due diligence.

It is also my view, the way I see the circumstances after analysis above even if the transferee could have been competent to contract, and I find that the plaintiff could have succumbed into a unilateral mistake in the alleged contract. This type of mistake occurs where one party is aware of the mistake and takes advantage of the other party's error. But, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence, as I observed above on part of the plaintiff in this matter at hand, wherein even the other party to contract is unknown to the real owner of subject matter. In my view, this unilateral mistake cannot make the contract voidable as provided under section 22 of the Law of Contract Act, Cap. 345 R.E. 2019.

Now back to the answer of the question reserved hereinabove, having endeavors above, it is settled that the said landed property Plot no.1 Block "A" Holili Rural Service in Rombo District, Tanzania is still legally owned by Registered Trustees of Sisters of St. Joseph – Himo Moshi Kilimanjaro and all sales of the said land purported to be done by Transferor known as The Sisters of St. Joseph – Kilimanjaro Region or any other are void abinitio.

It is also my settled opinion, this void stance proceeds to other contracts or agreements which are; Hire Contract and agreement for construction of two dormitory buildings because they both bears the same party said above, The Sisters of St. Joseph Kilimanjaro Region who is incapable to contract and owned nothing. Nonetheless, the documents tendered to prove these contracts were admitted merely for identification purpose, it is a trite law that, any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence have no evidential value. (See the cases of **Samson Elias @ Michael v. Republic**, Criminal Appeal No. 283 of 2012 and; **Udaghwenga Bayay and 16 Others v. Halmashauri ya Kijiji cha Vilima Vitatu and Another**, Civil Appeal No. 77 of 2012 and **Rashid Amiri Jaba & Another v. Republic**, Criminal Appeal No. 204 of 2008 (both unreported)

In view thereof, the first issue is answered not in affirmative, thus no any legal contract existed between the plaintiff and defendants. Having ruled so on the first issue, it now goes without saying issue number two crumbles, since it depended issue number one to be answered in affirmative. Next is issue number three which is whether the 1st defendant, 3rd defendant and

plaintiff are legal persons? By virtue of requirements under Order 1 rules 1 and 3 of the Civil Procedure Code. Cap. 33. R.E. 2019, there are two kinds of persons in law who can sue and be sued to wit; natural persons and legal or artificial persons. This was also the emphasis of this court in following cases; **The Registered Trustees of the Catholic Diocese of Arusha v. The Board of Trustees of Simanjiro Pastoral Education Trust**, Civil Case No. 3 of 1998, HC. At Arusha; **Unilife Group Investment v. Biafra Secondary School**, Civil Appeal No. 144 (B) of 2008, HC. at Dar es Salaam; and **Registered Trustees of Arusha Hellenic Community and another vs, George Isakiris and 26 others**, Civil Case No, 15 of 1995, HCT, at Arusha (boss unreported).

Starting with the first defendant titled **Sisters of St. Joseph – Kilimanjaro Region**, the plaintiff in his pleading alleged that is religious organizations hence artificial body dully established in accordance with Tanzania laws that inter alia provide spiritual as well as social economic services to the general public with offices in Kilimanjaro Region. This was vehemently refuted by the written statement of defence of the Defendants, as a rule who alleges must prove and in civil case need the prove to the balance of probability. According to the evidence adduced in this court, I am

bold to say the plaintiff has not tender any evidence to prove that the first defendant is the legal person capable to sue.

It is ostensibly that this is a religious institution, according to the laws of this land, religious organizations are required by law to be registered as societies under societies Act Cap 337 R.E 2019. The requirement is under section 12 (1) of the said Act. Upon being issued with a certificate of registration, the organization are required under section 2 of the trustee Incorporation Act [Cap 318 R.E 2002] to be incorporated and be issued with a certificate of incorporation stipulating its name which under section 5 and 6(2) of the same Act shall include the words "Registered Trustees". Once the certificate is issued, the religious organization or association is deemed to have been incorporated, therefore, can sue or be sued in its incorporation name only. (See the case of **Kanisa la Anglikana Ujiji v. Abel Samson Heguye** Labour Revision No. 5 of 2019 High Court Kigoma.

In alternative to the above, the contractual responsibilities relating to an unincorporated association can be undertaken by individual office-bearers or individual association members. However, in the absence of agreement to the contrary the assets of an unincorporated association belong to the

members jointly as the association lacks its own corporate personality separate from its members. (See the case of **The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)**. Civil Appeal No. 2 Of 2020 CAT at Mwanza (unreported))

In this matter at hand no any evidence was adduce to requirement of the above law to qualify the first defendant as religious organization to be capable of suing or being sued. Nevertheless, since as ruled above that, the first defendant does not own the said landed property alleged to be transferred to the plaintiff, even if the members of the first defendant could have existed, no interests accrue to them on the said land alleged to be transferred.

Therefore, taking regard of the above law, and no evidence tendered in this court to show that the first defendant passed the above and became incorporated. I am of settled opinion the first defendant is not a legal person. I wish to highlight the stance in our jurisprudence that is only the Registered Trustees of the church or religious body corporate which has powers to sue and be sued and not otherwise. (See the cases of **Board of Trustee of Good Neighbours Tanzania vs Doreen Augustine Dominic T/A**

Dawson's Water Point Drilling, Commercial Case No 69 of 2019 and **Mariam Makwani v. African Inland Church Tanzania**, Pc. Criminal Appeal No 7 of 2020. (Both unreported).

In respect to the third defendant, titled **Ritaliza of Mt. Carmel Primary School**. There is no dispute that Ritaliza is a school registered, despite the fact the plaintiff did not provide any law creating this school to be a legal entity as a rule that who alleges must prove. It is common knowledge that a school is not a legal entity in the eyes of law. It is a mere an institution owned and managed by a legal entity created by law. This was the position in the case of the akin situation, the case of **Richard I. Sumayi v. Shule ya Msingi Kambarage Labour Revision No. 27 of 2013** , where the court observed that Shule ya Msingi Kambarage is a Public Institution of the United Republic of Tanzania, under the Office of the Prime Minister Regional Administration and Local Government at the Shinyanga Municipality (TAMISEMI) Therefore, the Municipal Council is the immediate corporate entity, which would have been sued by the applicant and not Shule ya Msingi Kambarage.

The different in this matter is slightly, while the above is Public Institution owned by the Government, in this matter Ritaliza School is a Private Institution owned by The Registered Trustees of Sisters of St. Joseph Himo Moshi Kilimanjaro. This is because when analyzing the first issue above, the second defendant who is The Registered Trustees of Sisters of St. Joseph- Himo, Moshi, Kilimanjaro proved by evidence of having certificate of occupancy (exhibit D3) showing the said plot where the school is built belong to her as a trustee, following the fact that the second defendant is incorporated and proved ownership of the suit land and run the management of the school, it is plain clear that, the second defendant is a legal person capable of suing, being sued even owning the school of Ritaliza of Mt. Carmel. Therefore, Ritaliza of Mt. Carmel Primary School cannot be a separate legal entity from her creator. In view thereof, the said Ritaliza School is non-existing legal person hence not capable of being sued or suing.

Therefore, having considered all interests in the said land in dispute and the school attached thereto are placed legally as observed above to the second defendant, it is therefore my considered opinion the Ritaliza of Mt. Carmel Primary School is not a legal entity capable of suing, being sued even

owning a property. (See also the case of **Fort Hall Bakery Supply Company Limited v. Fredrick Mwigai Wangoe** (1959) E.A 474.

Coming to the plaintiff, titled **Hope Foundation (Hope Stiftung)**, it was pleaded that is a Germany based humanitarian organization, that inter alia supports orphans and vulnerable children in Eastern Europe and Africa though inter alia, provision of social economic assistances and support. According to the testimonies of PW1, PW3 and PW3 who are Directors and a member of the Board of Trustees respectively, they said Hope Foundation is an organization registered in German. Despite they did not tender any document to evidence the said registration, I have considered the coherence of their testimonies taken under oath and their demeanors, I am settled they are entitled to credence and believed on this aspect. I think if artificial person is a foreign corporation, our law would look to the law of the country which created the corporation, and finding the organization is incorporated, in my view I need also treat it so. Therefore, having so observed, I can't hesitate to say definitely Hope foundation is a legal person.

The next issue is whether the plaintiff has ever been an investor at St. Ritaliza of Mount Carmel School in the United Republic of Tanzania. In final

submission on this issue the counsel for plaintiff contended that the issue ought to be answered that the plaintiff is owner of the school by virtue of sales contract as well as exhibit P1 which proves on balance of probabilities that the plaintiff managed to prove her case accordingly as provided in section 110 and 111 of the Evidence Act CAP. 6 R.E 2019. He furthermore, said it is a cardinal principle of law that, he who alleges a fact has the duty to prove it solemnly; and referred the case of **Lamshore Limited and J.S. Kiny Anjui v. Bazanje K.U.D.K (1999)** TLR. 330.

While on other party final submission on the same issue, the counsel for second defendant submitted that, PW 1 and PW3 who are directors of the Plaintiff, declared solely during cross examination that the Plaintiff is not an investor at Ritaliza School or where else in the United Republic of Tanzania. Indeed, none of the Plaintiff's witnesses tendered any certificate obtained from Tanzania Investment Centre to prove the same. That means the Plaintiff who is a foreigner by being registered in Germany and not in Tanzania and at the same time is not an investor in Tanzania, cannot acquire land in Tanzania by way of sale pursuant to provisions of **section 20 (1) of the Land Act [Cap. 113 R.E. 2019]**

According to **Black's Law Dictionary Eighth Edition**, investor is defined to mean; 1. A buyer of a security or other property who seeks to profit from it without exhausting the principal, and 2. Broadly, a person who spends money with an expectation of earning a profit.

I think this issue need me not to labor much, I concede with the learned counsel for defendant that it is true PW1 and PW3 said Hope Foundation is a charitable Institution and is not an investor, furthermore PW4 who is one of the trustees said the foundation is not allowed to make profit. The assertion by learned counsel that, plaintiff proved that bought the said school, was well deliberated in the first issue above, and it was concluded that no sale was legally done. This connotes that the plaintiff failed to prove what she alleges to the required standard in law. This is contrary to the principle who alleges must prove. In the case **of Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal 45 of 2017 (unreported) the Court of Appeal of this land held thus: -

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which

simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."

The foregoing said and done; I am of considered opinion the said issue is not answered in affirmative, therefore I hold that that plaintiff has never been an investor at Ritaliza of Mount Carmel in the United Republic of Tanzania.

Moreover, in his final submissions the learned counsel for Plaintiff contended that, since the second defendant was incorporated under Trustees Incorporation Act Cap 318 R.E.2002 and tendered a certificate to such effect, therefore, trustees are owner and they are bossing all transactions of the registered trust hence it was very wrong for the Amended Written Statement of Defence to be signed by a person who is not a member and who had no authority to sign on behalf of trustees. I have entirely scanned the pleadings and the record of this matter, this subject was never pleaded or introduced or argued at the trial anywhere before. Therefore, it is a new matter raised in his submission as an afterthought.

With respect, the learned counsel final submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. (See the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006. (Unreported). This underscore a cherished principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored. This principle emphasizes the function of pleadings being to put notice of the case which the opponent has to make lest he is taken by surprise. (See the cases of **James Funke Ngwagilo v. Attorney General** [2004] TLR 161 and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (unreported).

Without prejudice to the above, in our law, pleadings are regulated by Order VI rule 14 of the Civil Procedure Code [Cap.33. R.E. 2019] which stipulates as follows:

"Every pleading shall be signed by the party and his

advocate (if any); provided that, where a party pleading is by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."

In the present matter, I have entirely considered para two and verification clause of the amended written statement of defence filed in this court on 14th day of March 2022. The advocate for second defendant verified and signed under the instruction of the second respondent, and also having considered the provisions of section 3A and 3B of the Civil Procedure Code [Cap.33 R.E. 2019] which embody the principle of overriding objectives. I see no any violation prejudiced the rights or cause any injustice to any party to this case. Therefore, I am convinced to believe that he was duly appointed and authorized to defend the second defendant; thus, this allegation is meritless.

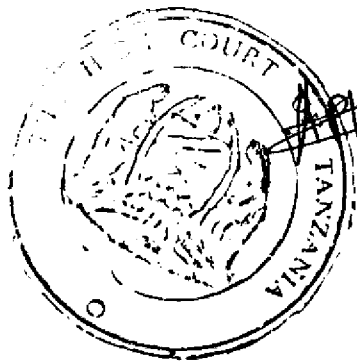
That said and done, I now move to the last issue which was couched that "what remedies are parties entitled to." In the event and for the foregoing reasons, I have no doubt in my mind that the plaintiff completely failed to prove his case on the balance of probabilities as required by law. Consequently, all reliefs sought by plaintiff is hereby dismissed. And, I hold

that the Registered Trustees of Sisters of St. Joseph – Himo Moshi Kilimanjaro, the second defendant herein, remain to be the lawful owner of Plot No.1 Block' A' at Holili Rural Service Centre, Rombo District, Kilimanjaro Region.

Costs to follow the event.

It is so ordered.

DATED at MOSHI this 7th day of March 2023.



A. P. KILIMI
JUDGE
07/03/2023

Court: - Judgment delivered today on 7th day of March, 2023 in the presence Mr. Salehe Salehe counsel for Plaintiff and Aristides Ngawiliau for Defendant. Representative of second defendant also present.

Sgd: A. P. KILIMI
JUDGE
7/3/2023

Court: - Right of Appeal explained.

Sgd: A. P. KILIMI

JUDGE

7/3/2023