



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rabe v Gude (Environment & Land Case 237 of 2021)  
[2023] KEELC 19347 (KLR) (8 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 237 OF 2021  
AE DENA, J  
AUGUST 8, 2023  
FORMERLY ELC NO. 68 OF 2018**

**BETWEEN**

**MARINA GISELA RABE ..... PLAINTIFF**

**AND**

**HAMADI SALIM GUDE ..... DEFENDANT**

**JUDGMENT**

**Pleadings**

**Plaint**

1. By a plaint dated 26<sup>th</sup> March 2018 the plaintiff who is a Germany National averred that she is the registered owner of the property Title No. Kwale/Diani S.S./ 3032. She developed an interest in having a holiday home in Ukunda after visiting the region repeatedly. That while residing in Baobab Hotel-Diani she came to know the defendant Hamadi Salim Gude who acted as her tour guide and later as her agent and interpreter in local transactions. The defendant then introduced her to Juma Ali Mwaraoone who together with his family agreed to sell the property Title No. Kwale/Diani S.S./ 3032 at a consideration of Kshs.Three Million (3,000,000.00) which sum she transferred to the defendants account for onward transmission to the vendors. That she instructed the defendant to have an agreement and transfer executed in her favour by the vendors and hold the documents so that she could execute them when she returned from Germany. That later to her surprise both the agreement and a copy of a title deed showed she was jointly registered as a proprietor together with the defendant.
2. The Plaintiff further averred that she returned to Ukunda in September 2013, took possession of the plot, commenced construction of a holiday home which she supervised and when not in the country she was assisted by the defendant whom she rewarded with a four-bedroom bungalow. That her efforts to obtain from the defendant the original title to apply for rectification had been futile.



3. It is the plaintiff's case that she did not authorize the defendant to execute the sale agreement and transfer on her behalf breaching the trust bestowed upon him. The particulars of breach of trust are contained at paragraph 11 of the plaint. She seeks for the following verbatim reliefs; -
  - a. Permanent injunction restraining the Defendant by himself/servants/agents from encroaching upon/ trespassing/occupying the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the Plaintiff over the suit property No. Kwale/Diani S.S./ 3032.
  - b. A mandatory injunction compelling the Defendant to unconditionally release/hand over the title deed of the property Kwale/Diani S.S./ 3032 to the Plaintiff.
  - c. An order compelling the registrar of Lands, Kwale Land registry to amend the title deed Kwale/Diani S.S./ 3032 by deleting the Defendant's name from the title deed.
  - d. An order compelling the registrar of Lands, Kwale Land registry to lift the restriction placed on the title deed Kwale/Diani S.S./3032 by the Defendant.
  - e. Any other order that the honourable court may deem fit to grant.
  - f. Costs of this suit.

#### **Defence**

4. The defendant filed a Statement of Defence & Counterclaim on 30/5/2018. It is averred that the plaintiff co-owns Title No. Kwale/Diani S.S./ 3032 (suit property) with the defendant. The defendant denied being a tour guide and states the plaintiff is his common law wife by cohabitation. Together they decided to build a matrimonial home in Ukunda after he helped in sourcing for the suit property which was paid for through funds received from the plaintiff.
5. That due to his involvement with the plaintiff the management of Boabab Hotel where he used to operate a curio shop evicted him whereupon he dedicated his time to supervising the construction of the home whose perimeter wall was engraved with the initials HM depicting Hamadi and Marina. That the letter H was later deleted by the plaintiff.
6. The defendant also averred that before he met the plaintiff he had built a five-bedroom house in Ukunda where his mother resides. The particulars of breach of trust are denied and it stated that it is the plaintiffs who breached the trust by forcefully evicting the defendant from the matrimonial home in the year 2016 where they had been cohabiting following his refusal to write a will.
7. It was further averred that the plaintiff had no legal capacity as a foreigner on a tourist visa to own land on absolute proprietorship basis. He termed the eviction and filing of this suit as a ploy to defraud both the defendant and the government of Kenya of the suit property. That since his eviction the plaintiff has not allowed the defendant access to the home, brought another man therein which has caused the defendant loss of use and damages. The defendant admits lodging a restriction against the title but which he stated was a safeguard and adds that he has always kept all their legal documents and to date all utility accounts for the home are in the defendant's name.
8. The defendants reiterate the contents of his defence herein and maintained that the plaintiff was guilty of fraudulent acquisition of the suit property without complying to due process. Particulars of fraud are listed under paragraph 23 of the Defence & Counterclaim and they are
  - a. Fraudulently obtaining land jointly/commonly with the defendant when she knew that she intends to ultimately disposes the defendant thereof.



- b. Falsely and willfully misrepresenting to the defendant that she intended to build a matrimonial house with him when she knew she had ulterior motives
  - c. Fraudulently acquiring land in absolute ownership tenure contrary to the laws of Kenya
  - d. Fraudulently entering Kenya on tourist visa and duping the defendant into a union whose sole purpose was to enable the plaintiff acquire land in Kenya without complying with the Kenya Laws of land ownership by foreigners.
  - e. Fraudulently misrepresenting to this court that the defendant was his agent and interpreter which facts the plaintiff knows to be false.
9. The defendant averred that as a common registered proprietor of the suit property he was entitled to equal rights of use and abuse thereof. The defendant counter-claim against the Plaintiff for the following orders:
- a. General damages for unlawful eviction.
  - b. Mandatory injunction to compel the Plaintiff to allow the Defendant access and possession of the parcel Kwale/Diani SS/3032 and all developments therein.
  - c. Mesne profit and division of parcel No. Kwale/Diani SS/3032 and all other matrimonial property.
  - d. Costs and interest at court rates and any further relief that this Court may deem fit.
10. The plaintiff did not file defence to the defendant's counter-claim.
- 11.. On 21/11/22 this court dismissed the plaintiffs suit for want of prosecution following failure on the part of the plaintiff to attend and show cause why the suit had not been set down for hearing. The suit was heard on 2/2/23 in the absence of counsel for the plaintiff the defendant in the counterclaim who failed to attend despite service. The defendant who is the plaintiff in the counterclaim gave evidence on his behalf and called one witness.

## **Evidence**

12. PW1 Hamadi Salim Gude (the defendant in the earlier suit and the plaintiff in the counterclaim) testified on 2/2/23 and adopted his Witness Statement filed on 12/3/2020. The same reiterates the averments in the Statement of Defence & Counterclaim. His testified that the plaintiff was a fraud and had unlawfully chased him from the suit property. That she did not fulfil what they had agreed and she was doing business on the plot and while he was not benefitting from the plot. In support of his case the defendant produced several documents which were marked as exhibits and are referred to elsewhere in this judgement.
13. Referring to PEXB1, PW1 told the court his name and that of the plaintiff appeared as having bought the suit property as joint owners. Referring the court to PEXB5 he stated his photo and ID card number appeared on the face of the transfer. That he had proof he was paying for the amenities such as electricity bills. He prayed that the reliefs in the counterclaim be granted as prayed.
14. DW2 Asha Ramadhan Matata stated she is the biological mother of PW1. She adopted her written Witness statement dated 7/8/2018 as her evidence-in-chief. She testified that the defendant and plaintiff were married as husband and wife. That the land belongs to both of them but her son did not live there because Marina had chased her away. Her evidence in the witness statement reiterated most of what is contained in the defence and PW1 statement in respect of the loss of her sons curio business



at baobab hotel as well as the purchase of the suit property by Hamadi and Marina. It is stated she related very well with plaintiff who at times gifted her items. That shortly after moving into their newly constructed house the plaintiff and defendant differed resulting into the eviction of PW1 from the matrimonial home. That the family now lives in a five bedroomed house constructed by PW1 before he met Marina.

15. With the above the defendant closed his case.

## Submissions

### Plaintiffs Submissions

16. The submissions of the defendant and who is the plaintiff in the counterclaim were filed on 1 July 1, 2023 by the firm of M.S. Shariff & Company Advocates. It was submitted the defendant's counterclaim stood unopposed. Counsel identified the following verbatim issues for determination
- a. Whether the Defendant has proved his case (counter-claim) and therefore, he is entitled to the order of mandatory injunction to compel the Plaintiff to allow him access and possession of the suit property and whether the suit property should be divided for the benefit of both the Plaintiff and the Defendant;
  - b. Whether the Defendant is entitled to mesne profit;
  - c. Whether the Defendant is entitled to general damages;
  - d. Who should pay costs of this suit.
17. Citing the provisions of Section 26(1) of the Land Registration Act 2012 it was argued that the title deed produced and which was supported by all the conveyancing documents that passed title to the parties as produced by the defendant was prima facie evidence of joint ownership of the plaintiff and the defendant to the suit property. That upon such proof the burden shifted to the plaintiff who alleged fraud to counter the documents/exhibits produced, which she failed to do. Reliance was placed in *Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor* [2000] eKLR, and *Ndolo Vs Ndolo* [2008] 1 KLR (G& F) 742 on the requirement to specifically plead and particularise fraud as well as its higher standard of proof.
18. On the claim for subdivision of the suit property as a matrimonial property counsel's view was firstly being a joint proprietor, the defendant was by operation of law entitled to half its share. Secondly that the defendant had proved presumption of marriage as envisaged under the provisions of Section 119 of the Evidence Act as well as Article 45 (3) of the Constitution of Kenya, 2010 on equal rights of parties to a marriage at the time of the marriage, during subsistence of the marriage and at the dissolution of the marriage. That the defendant was thus entitled to 50% of all the property acquired during the cohabitation. To buttress this point reference was made to Supreme Court of Kenya decision in: *MNK Vs POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021)* [2023] KESC 2(KLR).
19. It was contended that the defendant, having been wrongfully and forcefully evicted by the plaintiff, forced to rent, leaving his own house and matrimonial property to which his right to possession accrued, was entitled to mesne profits, quantified at Kshs. 1,760,000 being the total rent paid since March of 2016 to July, 2023 at the rate of Kshs. 20,000/= per month. The provisions of Section 2 of the Civil Procedure Act as to definition of mesne profits, the Court of Appeal in *Attorney General Vs Hala Meat Products Limited* [2016] eKLR on when the same was payable and *Rajan Shah T/A Rajan S. Shah & Partners Vs Bipin P. Shah* [2016] eKLR were cited.



20. It was stated that due to the forceful and wrongful eviction the defendant was rendered homeless, underwent mental torture, pain, suffering and was entitled to award of general damages. Relying on the case of Beatrice Ndungwa Kamau Vs Nairobi City Council & Another [2012]eKLR, where the Court, in 2012, awarded Kshs. 200,000.00 for wrongful eviction, factoring inflationary trends the court was urged to award Kshs. 1,000,000.00 in the present case.
21. That having successfully proved the counterclaim it was submitted that costs should follow the event.

### **Defendants Submissions**

22. The firm of Kupalia Fondo Mwangunya & Associates filed submissions on behalf of the plaintiff on 24/04/23 and submitted that the plaintiff was the sole owner of the title No. Kwale/Diani S.S/3032 having bought it from the vendors herein. That the defendant did not contribute any money to purchase of the land and which is admitted by the defendant in his pleadings. That he did not have any proprietary rights to the property but had fraudulently registered the suit property jointly in his name and the plaintiff. The plaintiff's signature on the sale agreement, sale, transfer was forged. That the said joint registration having been undertaken fraudulently the defendant cannot be said to be a joint owner by dint of the provisions of section 26 (1) of the *Land Registration Act*. That the burden of proof shifted to the defendant to prove that the plaintiff signed the conveyancing documents. That failure to call the advocate who undertook the conveyancing as well as document examiner was fatal. Reference was made to the case of Peter Muiruri Kamau Vs. Mary Mwihaki Kamau (2017) eKLR and Serpei Sanja Siromo Vs. Republic (2020) eKLR.
23. As to the defendant's prayers in the counterclaim it was submitted that non-citizens are entitled to own land in Kenya under Article 65 of *the Constitution* of Kenya 2010. That the defendant had not proved ill motive on the part of the plaintiff to acquire the land without following due process. That to the contrary it is the defendant who did not follow the right process. There was no evidence produced to corroborate fraud on the part of the plaintiff.
24. On whether the suit property is matrimonial property capable of being divided between the parties, it was contended that the plaintiff and the defendant were never married under Kenyan law, thus the suit property cannot be termed as matrimonial property. That no presumption of marriage arose as envisaged in the case of CNG Vs. DMN (2018)eKLR as no proof was tendered to establish long cohabitation. Citing section 6(3) it was submitted that there was no sufficient evidence to show how the defendant contributed towards the purchase of the property neither was there a marriage between the two capable of being dissolved.
25. It was submitted that the defendant did not prove wrongful possession on the part of the plaintiff and the profits that could have been received. That this was a claim for special damages which ought to have been specifically pleaded and strictly proved as and which was not. Reference was made to the holding in Gilbert Muteshi Vs. William Samoei Ruto & 4 Others (2013) and Registrar of Buildings Vs. Bwogi (1986-1989) 1 EA 487
26. The court was urged to dismiss the defendant's counterclaim with costs to the plaintiff.

### **Analysis and Determination**

27. To avoid confusion in my discussions the court shall retain the reference to plaintiff and defendant as referred to in the main suit but with the understanding that the party's roles were reversed on lodging of the counterclaim. In my view the issues that commend for determination are; -
  1. Whether the defendant has proved the counterclaim to the required standard.



2. Whether the defendant is entitled to the orders sought.
  3. Who bears the costs of the counterclaim.
28. The Defendants Statement of Defence and Counterclaim filed on 30/5/2018 was not responded to by the plaintiff. it is not in doubt that uncontroverted evidence is not automatic evidence and the defendant still had an obligation to prove his claim to the required standard. Section 107 and 108 of the Evidence Act is to the effect that he who asserts or pleads must support the same by way of evidence. This court associates with the dictum in the case of Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC No. 332 of 1993) where Justice J. V Juma stated: -
- "The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial." (emphasis is mine)
29. It is trite that a party is bound by his pleadings and the court shall be guided accordingly. Based on the reliefs craved by the defendant, it was incumbent upon the defendant to prove that he had a proprietary or beneficial interest in the suit property. PW1 during his oral testimony referred the court to an Acknowledgment dated 21/7/2015 and Transfer of Land dated 17/07/15 which he produced as part of his evidence. He drew the courts attention to the fact that he appeared in the said documents as having jointly bought the property with the plaintiff as well as one of the transferees of the property. He also alluded that he held electricity accounts which he had produced as evidence and proof of payment thereof.
30. A close review of the Acknowledgement above appeared as a sale agreement where Juma Ali Mwaraoone, Saidi Ali Mwaraoone, Binti Mohamed Ali Mwaraoone and Salim Ali Mwaraoone were acknowledging receipt of Kshs 2million being full and final payment as vendors in respect of a portion of Plot No. Kwale Diani SS/3032 from Hamadi Salim Gude and Gisela Marina Rabe the defendant and plaintiff respectively. It is noteworthy the fact that the suit property was bought from the said vendors was not in dispute.
31. The Transfer of Land is dated 10/3/2015 and shows the vendors above-mentioned transferring Title No. Kwale/Diani SS 3190 to Hamadi Salim Gude and Gisela Marina Rabe and whose photos are affixed. The document further shows that the signatures of the transferors and transferees were certified/authenticated by Vincent K. Mogaka Advocate. It was lodged on 17/7/2015 and registered on the same day. An Application for Consent of Land Control Board (undated) and the attendant Letter of Consent pursuant to a meeting of the Msambweni LCB held on 24/6/15. Also produced was a Stamp Duty Declaration Assessment dated 18/6/2015 and attendant pay in slip.
32. The authenticity of the above documents was questioned by the plaintiff on the basis of fraud, misrepresentation including forgery. However, during the hearing of the suit, the plaintiff did not call any witness and therefore failed to substantiate these allegations and produce any documents that would be able to counter the defendant's testimony. The plaintiff did also not respond to the Statement of Defence & Counterclaim. It is trite that if no evidence is tendered to support an averment in a pleading such averment stands as mere statement. See the case of Kenya Power & Lighting Co Ltd Vs... Rassul Nzembe Mwadzaya [2020] eKLR where several Court of Appeal decisions are referred to in support.
33. But having stated the above the defendant referred this court to the provisions of Section 26 (1) of the Land Registration Act which provides that: -



26(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

34. The plaintiff also referred to the above provisions but as I have earlier stated no evidence was adduced against the defendant counter claimer in proof of any fraud or misrepresentation for which he was a party to defeat the title under the provisions of section 26(1)(a) above.
35. The other ground upon which the title would be defeated is if the same has been acquired illegally, un-procedurally or through a corrupt scheme. It is trite that under this head, proof that the claimant had knowledge or was party to the illegality is not required. It behoved the court to review the legality of the conveyancing documents presented by the defendant and to determine their probative value in proof of the allegation of the 'joint/common' ownership.
36. The Acknowledgement dated 21/7/2015 was expected to meet the requirements of a valid agreement. Section 3 (3) of the *Law of Contract Act* CAP 23 provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the same is founded is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. It is clear the first two criteria were indeed met. What about the rest of the criteria?
37. The Acknowledgement was purportedly signed by the plaintiff and the defendant by appending on its face their first names Hamadi & Marina by hand. However, from a plain observation it appeared to me that the two names were inserted by the same person. The court then proceeded to compare how the defendant ordinarily executed his documents with the other documents produced by the defendant. The Transfer of Land bears the defendant signature and he did not sign as Hamadi, again in the Application for Consent of Land Control Board the defendant signs in the same manner as in the transfer. Curiously the signature of the plaintiff is inserted but this time round as 'Gisela' by hand and not Marina. In the transfer dated 17<sup>th</sup> July 2015 the plaintiff has purportedly signed the document by a signature and not by either the name Marina or Gisela. While this court does not profess expertise at signatures, to the plain eye the plaintiff's signature in the transfer as well as the defendants appear to be of one person and that is the defendant. As part of the court record was the plaintiffs Supporting Affidavit in respect of the plaintiffs Notice of Motion dated 26/3/2018 sworn by the plaintiff and where her signature is appended. A close scrutiny did not reveal the remotest resemblance of this signature and that appended in the transfer.
38. The above cast a doubt on whether the plaintiff actually signed the documents and before Kemosi K. Mogaka Advocate. Nothing would have been easier than for the defendant to have obtained a Power of Attorney and this would have been the only document that would have authorized him to execute the documents on the plaintiff's behalf. The inconsistency to me left a lot to be desired and diminished the probative value of the documents. Based on these documents the subdivision was registered for plot 3190 on 2/7/2015 to Hamadi Salim Gude & Gisela Marina Rabe and title issued the same day



(see 'GMR 1' in the supporting affidavit of the plaintiff which forms part of the court record). And I do not think this court should be used to rubber stamp a title obtained illegally and corruptly.

39. The defendant also produced a bundle of receipts for the years 2017 and 2018 for the payment of electricity. Upon review of the same I noted that they were for accounts 60190836, 60190952, 6019095-01, 6019083-01. These were different accounts and no explanation was advanced for the same. There was no evidence or any way for the court to connect any or all of them to the suit property. Additionally, it did not make sense that the defendant continued paying for utilities for a house he had been evicted from in the year 2016.
40. What about beneficiary interest in the property on the part of the defendant? It is not in dispute that the proceeds for the entire transaction were availed by the plaintiff and which is admitted by the defendant at paragraph 8 of the Defence & Counterclaim as follows; -
- The Defendant admits receiving funds from the plaintiff .....as a lover and life partner and the defendant utilised the said funds for their agreed purpose of purchasing land.....'
41. It was the defendant's case that the parties were married and therefore his entitlement to the property. On the other hand, the plaintiff's case according to the plaintiff was that she intended to build a holiday home. I have already stated the plaintiff did not tender any evidence in proof of her allegations. It was the defendant's testimony that upon completion of construction the two moved into the house and cohabited therein as husband and wife. It was incumbent upon the defendant therefore to prove that the suit property was matrimonial property. For the same to be deemed a matrimonial property there had to be *inter alia* a marriage between the two parties presumed or otherwise.
42. The above necessitated a discussion of the legal requirements for a presumption of marriage and specifically marriage by cohabitation and thereafter the ingredients of a matrimonial property. The latter would of course depend with whether the threshold for the former is met in the circumstances of this case.
43. In the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) Neutral citation: [2023] KESC 2 (KLR)* the Supreme Court of Kenya laid out the parameters to which a court may presume the existence of a marriage. The court emphasized that these were limited and held that a presumption of a marriage is the exception rather than the rule. That the presumption must be used sparingly where there was cogent evidence to buttress it. The strict parameters set out were namely the parties must have lived together for a long period of time, had the legal right or capacity to marry, had intended to marry, had both consented, they must have held themselves out to the outside world as being a married couple, the onus of proving the presumption was on the party who alleged it, the evidence to rebut the presumption had to be strong, distinct, satisfactory and conclusive and the balance of proof was on a balance of probability.
44. The defendant oral testimony was that they cohabited with the plaintiff as husband and wife for a period of at least three years, 2013 to 2016. In proof of the cohabitation PW1 produced Shipment Waybills for parcels to Marina Rabe, Letters dated 21/4/2015, 2/5/2015 and Receipt for baobab hotel and Pride Inn Hotel. PW2 who told this court she was the defendant's mother testified that the plaintiff and her son were married. In her witness statement which she adopted as her evidence PW2 gave a narration of how the two lived in the alleged matrimonial house as a couple and how the plaintiff and PW2 related as mother and daughter-in-law. Applying the above test, the question to be answered is whether this is cogent evidence to buttress a presumption of marriage between the plaintiff and the defendant.



45. Upon the court's scrutiny of the above documents there were two shipment waybills dated 21/08/15. I could not fathom how a shipment of bracelet, lessos and 7 pairs of sandals would go to prove marriage. This court noted the letters dated 21/4/15 and 2/05/2015 were addressed to the Germany Embassy and which stated the defendant, 'Through invitation of his friends wishes to travel to Germany during his holidays...' I pondered why the invitation did not emanate from the plaintiff but this was clarified where PW1 stated in his witness statement that previously the plaintiff had sent him three invitation letters but that his visa applications were disallowed. These documents were not presented to the court.
46. About the invoice from Pride Inn Hotels it revealed it was for a short term showing arrival of 2/11/2016 & departure of 2/20/2016, the other was an official receipt dated 5/6/2015 for a four days Safari attributed to the plaintiff and the defendant. Subsequent visits are mentioned in PW1 statement where they stayed in cottages but no documentation was availed. I did not see how these documents helped the defendant in cementing his claim of marriage by cohabitation both in terms of content and the required threshold for very long cohabitation.
47. This court also reviewed the evidence given by PW2 the defendants mother. She explained how the two parties herein stayed in the alleged matrimonial home yet from the invoice from Pride Inn hotel it is not clear to the court why the parties were not staying in the alleged matrimonial home if they were husband and wife. According to PW2 witness statement which she adopted as her evidence the court observed PW2 attributed her evidence to information she was told by her son. At no time in her evidence did she allude to her visiting the matrimonial home where the couple is alleged to have cohabited. It was not convincing that she would confidently attest to cohabitation when she was not near the said home as she resided in a five bedroomed house he the defendant had allegedly built in Diani. In this courts view further evidence from members outside the defendant's family (being the outside world) around the alleged matrimonial home should have been presented to corroborate the fact that the parties herein had presented themselves as married. I did not find PW2 evidence compelling.
48. In the submissions filed on behalf of the defendant, Counsel invited the court to adopt the sworn statement of one Salim Hamad Gude as part of the defendant's evidence in support of the counterclaim. It is noteworthy that Salim Hamadi Gude was listed as one of the defendant's witness but was not called to give evidence. It would be to me very irregular to admit this as part of the evidence when the party never appeared in court. I find support in the Court of Appeal dictum in *Kenneth Nyaga Mwingi v Austin Kiguta & 2 others* [2015] eKLR. In any event the issue never arose during PW1 evidence in chief. It cannot be introduced in submissions. Submissions can never take the place of evidence a position taken by the court in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. The court thus declined to entertain this invitation.
49. Section 119 of the *Evidence Act* states as follows:
- The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case"
- Applying the criteria enumerated by the Supreme Court as well as the provisions above there was no compelling evidence and reasoning to warrant the drawing of a presumption of marriage between the plaintiff and the defendant in the circumstances of this case.
50. Having made the above finding then the suit property cannot be held out as a matrimonial property.
51. Was the defendant then entitled to the prayers sought in the Counterclaim? The reliefs craved by the defendant have already been stated elsewhere in this judgement and based on the discussions and findings a foregoing this court further finds that the defendant is not entitled to the reliefs sought.



52. The court is inclined to revisit the issue of the legality of the title issued herein and the courts finding that the same was obtained and registered illegally through corrupt means by the defendant as being owned commonly by the plaintiff and defendant. It would be appropriate that the title is vitiated under the provisions of section 26(1)(b) of the *Land Registration Act*.
53. Should this court close its eyes to the admission by the defendant that the proceeds for purchase of the land were remitted by the plaintiff? This court, being a court of justice, has a duty to ensure that justice is not only done but seen to be done. That which belongs to Caesar must be given to Caesar. The defendant's further case was that the plaintiff fraudulently obtained ownership of land by duping him into a relationship which did not resonate with the court him being a consenting adult. According to the defendant the plaintiff came to Kenya on a tourist visa and as an investor and cannot also legally own land absolutely in Kenya. This is also stated as one on the instances of fraud committed by the plaintiff. Didn't the defendant remember this legal requirement when he procured the registration of the land in both his name and that of the plaintiff? No evidence was led that he had reported this matter to the relevant authorities. In any event this is an issue for the relevant authorities to deal with. I have already pointed if there was irregularity then it is the defendant who obtained the registration of the land illegally and corruptly to ensure his name was included as proprietor.
54. Indeed, the correct legal position is that Kenya restricts foreigners from owning land, but allows them to lease land. As per Article 65(1) and (2) of *the Constitution*, a "person who is not a citizen may hold land on basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years".
55. Section 80 (1) of the *Land Registration Act* empowers the court to make an order of rectification of a register directing that any registration be cancelled if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. I have already made a finding that the title was obtained illegally. I find support in the Court of Appeal dictum in the case of *Wambui Vs Mwangi & 3 Others (Civil Appeal 465 of 2019) (2021) KECA 144 (KLR)* where it was held that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.
56. The upshot of the foregoing is that the defendant has failed to prove the Counterclaim to the required standard of proof. The following orders shall and hereby issue; -
- i. That the defendant's counterclaim is hereby dismissed.
  - ii. That the Chief Land Registrar to cancel the title deed Kwale /Diani S.S./ 3190 issued to the Plaintiff and the Defendant and in its stead Marina Gisela RABE be registered as the Sole owner as lessee and a title deed do issue.
  - iii. II above shall be subject to compliance with other legal requirements as to ownership of land by foreigners.
  - iv. There shall be no orders as to costs.

Orders accordingly.

**DELIVERED AND DATED THIS 8<sup>TH</sup> DAY OF AUGUST, 2023**

**A.E. DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



Mr. Fondo for the Plaintiff

No Appearance for the Defendant.

Mr. Daniel Disii Court Assistant.

