REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT N0. 821 OF 1996

METCHEM EAST AFRICA LIMITED.....1ST PLAINTIFF

ANDRES HOLZHEIMER.....2ND PLAINTIFF

-VERSUS-

JOSEPH KARUGA KOINANGE.....1ST DEFENDANT

JULIE KOINANGE.....2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide a plaint dated 2nd April 1996 and amended on 25th June 1997, seeking for judgment against the 1st and 2nd Defendants separately as stated in the plaint. They plead that, the 2nd Plaintiff and the 1st Defendant are shareholders and directors of the 1st Plaintiff's company (herein "the company"). That the 2nd Plaintiff holds eighty per cent (80%) shareholding therein whereas the 1st Defendant holds twenty per cent (20%).

2. That the 2nd Plaintiff and the 1st Defendant entered into an agreement to purchase all that piece or parcel of land, known as L.R. No. 214/562 (previously L.R. No. 214/344/2) (hereinafter "the suit property") situate along Muthaiga Road, in Nairobi. The property was purchased from Mrs. Epifania Facta (hereinafter "the Seller") at a total consideration of; Kenya Shillings Two Million, Four Hundred and Fifty Thousand (Ksh. 2,450,000) paid by the 1st Plaintiff. That a sum of; Kenya Shillings One Million Four Hundred and Fifty Thousand (Ksh. 1,450,000) was payable forthwith.

3. The 1st Plaintiff consequently made the following direct payments:

a) on or about the month of February, 1984, a down payment of; Kenya Shillings Two Hundred and Fifty Thousand (Ksh. 250,000.00) was paid to the seller's Advocates, M/s Kaplan & Stratton Advocates, through the purchasers' Advocates M/s Hamilton, Harrison and Matthews Advocates;

b) on or about 28th March, 1984, the 1st Plaintiff, made a further payment of; Kenya Shillings One Million Two Hundred and Five Thousand (Ksh. 1,205,000.00) through the seller's and purchasers' Advocates as aforesaid;

c) on or about 29th March, 1984, the 1st Plaintiff paid a sum of; Kenya Shillings Eighty-Six Thousand (Ksh. 86,000.00) to J. J. Patel Advocates, acting for Kenindia Assurance Company

Limited, on account of legal charges;

d) on or about 25th June 1984, the 1st Plaintiff paid the firm of M/s Hamilton Harrison & Mathews Advocates a sum of; Kenya Shillings Seventeen Thousand, Seven Hundred and Twenty-One (Ksh. 17,721) on account of the legal charges and incidentals.

4. It is averred that, the balance of the purchase price of; Kenya Shillings One Million (Kshs 1,000,000.00) was raised through a loan from Kenindia Assurance Company Limited, advanced in the name of the 1st Defendant, but secured by a mortgage over the suit property and a collateral Life Policy in favour of the 2nd Defendant who is a daughter of the 1st Defendant.

5. However, due to the prevailing political situation, deemed to be unfavourable to non-indigenous investors, the 2nd plaintiff not being a Kenyan, and in consideration of the mortgage being taken out in the name of the 1st Defendant, it was agreed that the suit property would be registered in the name of the 1st Defendant instead of the company and that it be held by the 1st Defendant as a trustee and/or in trust for himself and the 2nd Plaintiff, in proportion to their respective shareholdings in the company. That it was also agreed that the 2nd Plaintiff and his family would occupy and reside in the suit property.

6. Subsequently, the loan repayment and the Life Insurance Policy premiums were made by the 1st Plaintiff on regular monthly repayments of; Kenya Shillings Twenty-three Thousand Seven Hundred and Seventy-Two (Ksh. 23,772.00). That it was agreed that, on the maturity of the life policy on 30th April 1996, and the termination of the mortgage, the 2nd Plaintiff would have the option to continue residing on the suit property, in consideration of paying rent from 30th April 1996 at the prevailing market value and the rent payable was to be apportioned between the 2nd Plaintiff and the 1st Defendant.

7. Further, in accordance with the agreement between the 2nd Plaintiff and the 1st Defendant, the 1st Defendant took out a Life Assurance Policy No. 2797, in the name of the 2nd Defendant and the 1st Plaintiff issued standing instructions to its Bankers to remit the requisite premium. The 1st Plaintiff then paid a total of; Kenya shillings one million two hundred and sixty-three one hundred and sixty-eight (Ksh.1,263,168.00), towards the premiums over the period between 1st April 1984 to 30th April 1996.

8. However, despite the 1st Plaintiff paying for the premium and mortgage instalments, on or about the 5th December 1995, the 1st Defendant, in breach and violation of the agreement between him and the Plaintiffs and with fraudulent intent and without the knowledge, authority or consent of the Plaintiffs, paid off the outstanding balance of the mortgage and the life policy in the sum of Kenya Shillings Ninety-Five Thousand and eighty-eight (Ksh. 95, 088), whereupon the mortgage became liable to immediate discharge.

9. That in furtherance of the breach, the 1st Defendant took possession of the title documents to the suit property and the net proceeds of the Life Assurance Policy amounting to Kenya Shillings Nine hundred and seventy-seven Thousand, and twenty-five (Ksh. 977,025), paid over to the 2nd Defendant by way of banker's cheque No. 1531986, dated 20th May 1996.

10. The cheque was sent to the 1st Defendant through his Advocates, Messrs Ndungu, Njoroge and Kwach Advocates under cover of a letter dated 31st May 1996, from Messrs Inamdar and Inamdar Advocates for Kenindia Assurance Company Limited. The letter was copied only to the 1st Defendant but not to either the Plaintiffs or the 2nd Defendant. However, the 1st Defendant handed the same over to the 2nd Defendant, who in turn cashed it and utilised the proceeds thereof.

11. The Plaintiffs aver that, proceeds from the policy were justly due and payable to the 1st Plaintiff, which paid the premium. Thus the continued retention thereof has no basis in fact and/or in law, is

unwarranted and unjustifiable in the circumstances. As such the 2nd Defendant has converted the said proceeds, thereby wrongfully deprived the 1st Plaintiff of the said proceeds. By reasons whereof, the 1st Plaintiff has suffered loss and damage.

12. The Plaintiffs aver that, the agreement entered into between the 2nd Plaintiff and the 1st Defendant was made orally and with the specific mutual trust and understanding that the same would subsequently be reduced into writing before the maturity of the mortgage and the respective Life Insurance Policy, to wit, before 30th April 1996. However, the request to have the meeting with the 1st Defendant with a view to formalising the matter was not honoured, as the 1st Defendant without any justifiable and/or reasonable cause whatsoever failed, neglected, refused and/or ignored to cooperate and/or to have the meeting with the 2nd Plaintiff to resolve the issue.

13. That in the circumstances, the 1st Defendant, has wrongfully and unlawfully breached the agreement and trust to act diligent, fairly and in good faith, by inter alia; unilaterally terminating, rescinding or renegading on the oral agreement and/or failing, refusing, neglecting and/or ignoring to cooperate to resolve the issue in dispute.

14. Further, by threatening to evict the 2nd Plaintiff and obtain sole possession and control of the suit property and generally disregarding the Plaintiffs' rights and interest under the agreement thus, claiming sole beneficial and/or absolute ownership of the suit property, the 1st Defendant's actions are malicious and totally unjustified and are done with mere intention to defraud the Plaintiffs of their rights and interest under the said agreement and trust in the suit property.

15. The Plaintiffs aver that, without prejudice to the foregoing, all other expenses and outgoings for maintenance, rates, décor, additions and gardening relating to the suit property have always been jointly and severally paid for by the Plaintiffs.

16. That by reason of the matters aforesaid, the 1st Defendant has subjected the 2nd Plaintiff to great mental anguish and stress exposing the Plaintiffs to grave loss and damage. In the circumstances, the Plaintiffs' prayed for judgment against the 1st Defendant as here below reproduced:

a) *That pending the hearing and final determination of this suit, the 1st Defendant by himself, his servant and/or agents be restrained from alienating, disposing of, selling, transferring, evicting the 2nd Plaintiff from the suit property, wasting, leasing, charging, pledging, interfering and/or in any manner whatsoever and howsoever, dealing with the suit property, namely, the Property situate on Muthaiga Road, Nairobi and known as Plot No. L.R. No. 214/562(previously 214/344/2) and/or the title obtaining there-under;*

b) *A declaration that the 1st Defendant holds the suit property in trust for the 2nd Plaintiff and himself in proportion to the 2nd Plaintiff's and the 1st Defendant's respective shareholding in the company as aforesaid;*

c) *A declaration that the 2nd Plaintiff is entitled to the suit property in proportion to his shareholding in the company as aforesaid;*

d) *A mandatory injunction compelling the 1st Defendant to comply with the said agreement and trust and to specifically perform his duties there-under;*

e) *General damages for breach of agreement;*

f) *General damages on the footing of aggravated damages as set out in paragraphs 10, 8 hereinabove;*

g) *Costs of this suit;*

h) *Interest on (d), (e), (f) above at Court rates; and*

i) *Any such other or further relief as this Honourable Court may deem fit and just to grant.*

17. The Plaintiffs' also pray for judgment as against the 2nd Defendant as here below stated: -

a) *A declaration that the said proceeds of the Life Assurance Policy No. 2797 taken out with Kenindia Assurance Limited are justly due and payable to the 1st Plaintiff and that the 2nd Defendant is not entitled to the same;*

b) *Spent.*

c) *An order for the payment of the said sum of Kshs. 977,025,00 by the 2nd Defendant to the 1st Plaintiff as money had and received to the use of the 1st Plaintiff together with interest accrued thereon at the commercial rates prevailing from time to time (currently 36% per annum) with effect from 20th May 1996 until payment in full;*

d) *Damages for conversion of the aforesaid amount;*

e) *Costs of this suit; and*

f) *Interest on (d) and (e) above at such rates and such periods of time as this Honourable Court may deem appropriate.*

18. However, the Defendants filed a joined statement of defence dated 27th June 1997, denying the Plaintiffs' claim. The 1st Defendant averred that, as at 9th April 1996, the 1st Defendant Joseph Karuga Koinange held, 32,123 shares in the 1st Plaintiff's company while the 2nd Plaintiff; Andres Holzheimer held 30,373 shares.

19. That at the material time, the property was offered to the 1st Plaintiff, it was unable to raise the purchase price of the suit property therefore the 1st Defendant raised the purchase price and purchased the suit property alone. Thus, no sum of money was paid on his behalf by the 1st Plaintiff from its resources in respect of the suit property.

20. Similarly, there was no decision or agreement between the Plaintiffs and the 1st Defendant to purchase the suit property in the 1st Defendant's name. They held it in trust for the 1st Plaintiff due to the prevailing political situation. However, the 1st Defendant averred, on without prejudice, that, if any money was paid by the company on his account, such monies were rightfully due to him as shareholders.

21. He denied the allegation that any insurance policy was taken out in the name of the 2nd Defendant, on behalf of the 1st Plaintiff and averred that, there was no privity of contract between the 2nd Defendant and the Plaintiffs. That in any event, any monies paid were due to her as a beneficiary of the policy taken out against her life by the 1st Defendant as the Plaintiffs have no insurable interest in her life, either under common law or under section 94 of the Insurance Act. Therefore, the Plaintiffs are not entitled to the reliefs sought or at all, and the Plaintiffs' case should be dismissed with costs.

22. At the hearing of the case, the Plaintiffs called two witnesses, Andres Holzheimer, (PW1) and Abdul Shakoor (PW2), while the Defendants' case was supported by the evidence of; Joseph Karuga Koinange (DW1). Basically, the witnesses adopted the evidence as recorded in their respective statements filed in court.

23. However, in a nutshell Mr Holzheimer testified that, in the year 1974, the Kenya Government Regulations required that, a foreign owned company should have an African shareholder and the shareholding should be at least 20%. He then teamed up with the 1st Defendant and incorporated the 1st Plaintiff as an *"indenting"* company. The company was acting on behalf of overseas suppliers and was an active trader in chemical products.

24. That at the inception of the company, he held 80% majority shareholding cum managing director, whereas, the 1st Defendant held 20% shareholding and played two roles; the official role of the chairman attending board and annual general meetings and the unofficial role of facilitating meetings with government officials at least twice in a year.

25. In the year 1982, following divorce and remarriage, his second wife wanted a new residence and as they sourced for one, they learnt of the suit property in Muthaiga, whereupon he negotiated for the same with him and his wife. The 1st Defendant was not involved in the negotiations. However, due to the factors already stated herein, he could not purchase the suit property in his name and it was agreed that the 1st Plaintiff would purchase the property. The property was being sold for a sum of Kenya Shillings Two Million Four Hundred and Forty Thousand (Kshs. 2,440,000) inclusive of furniture.

26. As the negotiations of the purchase advanced, the company Auditors recommended that, the company should not be involved, therefore, the 1st Defendant was nominated to purchase the suit property and hold it in trust for Plaintiffs. The property was bought and the 1st Plaintiff, paid mortgage instalments including all; rates, décor, maintenance and premiums for the policy for a period of 12 years and 4 months. The first payment instalment of Kenya Shillings One Million Five Hundred Thousand (Ksh.1, 500,000), was initially paid into; Pan African Bank Limited, earning interest of Kenya Shillings Thirty-Two Thousand Two Hundred and Seventy Seven Hundred and Seventy Seven Cents (Kshs. 32,277.77). The balance was to come from Kenindia Assurance Company Limited.

27. Mr. Holzheimer stated that, the property was leased to the 1st Plaintiff albeit informally. He faulted the lease document produced by the 1st Defendant and termed it as falsified, in that, it did not contain rental amount, nor quarterly payments in advance, the Landlord's bank details, or payment of security deposit equivalent to two month's rent and the period for review after every two years. Further the lease was not signed by the Tenant and the signature by Pandya was falsified, hence a forgery.

28. That subsequently, the suit property was at one time, rented out to Kencell Ltd in April 2006 at Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000) per month with an option to renew, but he was kept in the dark as to rental arrangements and was not aware whether rental proceeds were deposited into the escrow account opened although no rent was paid.

29. He told the court that, amicable settlement of the differences between him and the 1st Defendant did not bear fruits, as the 1st Defendant wanted nothing less than 50% shareholding and subsequently, the 1st Defendant filed a winding up Petition against the company and served him on 22nd September 1997. The Petition was gazetted on 28th January 2000 and published in the East African Standard on 18th May 2000. However, one and a half years later, the Petition was still pending, as it was filed to intimidate him and further delay the hearing of this suit.

30. During cross examination the witness stated that, although initially there were three directors; himself holding 791 shares, the 1st Defendant holding 200 shares and Mr. B. J. Robson holding 1 share, he was always the majority shareholder of the 1st Plaintiff. However, in the year 1978, the shareholding changed when he transferred 302 shares to the 1st Defendant, leaving him with 489 shares. The 1st Defendant was further allocated 8 unallocated, and therefore held 510 shares making him the majority shareholder as of 1978. However, in 1982 the shareholding changed again, when the share capital was increased to 11,500 shares. The 2nd Plaintiff held 5,635 shares and the 1st Defendant held 5,865 shares.

31. That in the year 1987, there was a further increase in the share capital to 50,000 shares, with the 2nd Plaintiff holding 18,375 shares and the 1st Defendant 19,125 shares. Subsequently, in the month of; September 1994, there was a resolution of new allotment of shares by 37,500; he held 33,875 shares, while the 1st Defendant held 3,625 shares.

32. The witness conceded in further cross examination that, there was no evidence that, he gave the 1st Defendant a sum of; Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000) in cash for the purchase of the suit property nor the board's resolution showing the decision by the company to have the 1st Defendant purchase the property as the company's nominee. In further cross examination, he told the court that he had no contract with the 2nd Defendant regarding the life policy or anything else.

33. Finally, the 2nd Plaintiff told the court that, in the year 1987, he instructed the firm of Lloyd Masika to value the suit property and the valuation report confirmed that, the suit property is registered in the name of the 1st Defendant. He forwarded the valuation report to the 1st Defendant through a note dated 13th April 1987, titled *"RE: Your house in Muthaiga"*.

34. The plaintiffs' second witness was Mr. Abdul Shakoor, he testified that, he joined the 1st Plaintiff's company on 1st April 1984 as an accountant and appointed as a director in the month of April 1996. That the 1st Plaintiff was incorporated in September 1974, with three directors, the 2nd Plaintiff, the 1st Defendant and one Brian Robson. It had share capital of Kenya Shillings Twenty Thousand (Ksh. 20,000) divided into 1000 shares of Ksh.20 each. That the 2nd Plaintiff held 791 shares while the 1st Defendant held 200 shares and Brian Robson 1 share. The shareholding of the 1st Plaintiff changed over the years, as shareholding increased and allocated to the directors.

35. In the year 1982, the share capital of the company was increased to Kenya shillings Two hundred and fifty thousand (Kshs. 250,000) by creating an additional 11,500 shares, and the shares were distributed, whereby the 2nd Plaintiff held 5,635 shares and the 1st Defendant 5,865 shares. The 1st Defendant's shares rose to 6,375 shares and the 2nd Plaintiff 6,124 shares. In the year 1987, the share capital was increased to 50,000 shares, with the creation of 37,500 shares. The 2nd Plaintiff held 24,499 shares and the 1st Defendant had 25,500 shares. In the year 1994, it was resolved at the annual general meeting that the 37,500 shares be allocated, and the 2nd Plaintiff got 33,875 shares and the 1st Defendant 3,625 shares, Mr. Robson's 1 share was allocated to the 2nd Plaintiff whose shareholding stood at 40,000 shares and the 1st Defendant at 10,000 shares.

36. He testified that; the money utilised to pay for the deposit of the suit property belonged to the company. That the company gave it to the 1st Defendant to deposit it in his own name in a fixed deposit account earning interest. Thereafter, the bank gave the 1st Defendant the money in form of cheque, which the 1st Defendant endorsed to the company and the company used the cheque to pay for the property, because the suit property would not be registered in the company's name.

37. That from 1984–1996, the 1st Plaintiff made payments on the mortgage and the life insurance policy amounting to Kenya shillings Three million three hundred and seventy-three thousand six hundred and twenty-two and ninety cents (Kshs.3,373,622.90). Although the company's books of accounts recorded it as rent for the 2nd Plaintiff, the managing director, since it could not be recorded as mortgage and insurance premiums payments for the reason that the suit property was not officially part of the company's assets.

38. The witness faulted the lease agreement produced by the 1st Defendant by saying that, the document was not a lease at all, as it was not signed by the tenant and did not give the rental payments. That, the letter by the 1st Defendant alluding to the lease of the suit property was done for purposes of attaining the loan from Kenindia Assurance Company Limited. Further, the suit property did not form part of the asset portfolio of the 1st Plaintiff, and that, both the 2nd Plaintiff and the 1st Defendant used to be paid by the

company but the amounts would vary.

39. However, the witness conceded in cross examination, that he was not able to produce any minutes or resolutions of the 1st Plaintiff on how he was appointed. He also confirmed that the receipts for the mortgage payments were issued in the name of the 1st Defendant for the reason that he was the one who took the loan. He further confirmed that the firm of M/S Hamilton Harrison & Mathews Advocates, wrote a letter dated 16th February 1984, which show that the 1st Defendant and not the 1st Plaintiff Company purchased the suit property.

40. Mr. Joseph Karuga Koinange testified on his own behalf and the 2nd Defendant. He stated that, he met the 2nd Plaintiff through his neighbour, and subsequently they formed the 1st Plaintiff company in the year 1974. He was the chairman thereof while the 2nd Plaintiff was involved in the day to day running of the company.

41. In the month of January 1984, he learnt of the sale of the suit property from a storekeeper who was working for a company called Facta Construction. He informed the 1st Plaintiff of the sale. The property was then offered to the company and a sale agreement prepared to that effect. However, the sale agreement was never executed.

42. He then decided to personally purchase and executed a sale agreement on his own behalf not as a nominee of the 1st Plaintiff and paid the purchase price by paying a deposit of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000) and thereafter by using his salary from East Africa Spinners which was about Kenya shillings six hundred thousand (Kshs. 600,000), and the money he had put in a fixed deposit account and finally a loan from Kenindia Assurance company Limited.

43. He denied that, the 1st Plaintiff had given him money to hold for it and stated that he endorsed the cheque to the 1st Plaintiff to make payments on his behalf, as he was travelling out of town and that there was nothing unusual about the 1st Plaintiff making payments on his behalf, being the chairman of the company, and that the 1st Plaintiff used to do personal things for him.

44. He testified that, the 2nd Plaintiff wrote to him inquiring about renting the suit property once he purchased the same. He agreed and the suit premise was rented to the 1st Plaintiff, for use by its managing director. The 1st Plaintiff gave instructions to its bank to make standing order payments to the 1st Defendant in respect of house rent. He conceded that the rent was not at market rate, and stated that he had good relationship with the 2nd Plaintiff and was not interested in making money from his friend but in clearing his mortgage. That he was also renting out another property in Malindi at a low rate and therefore it was not unusual for the 1st Plaintiff to pay the rent, electricity and other expenses for the house, since its managing director was residing therein. Further the expenses for maintenance of the suit property and Rates were met by the 1st Plaintiff and himself. However, he could not comment on receipts issued in the name of 1st Plaintiff showing it paid for these utilities.

45. He testified that, one of the conditions for the approval of the loan by Kenindia Assurance Company Limited was for him to take life insurance policy on the life of his daughter, the 2nd Defendant. He acceded to that condition.

46. That after he paid off the mortgage, the property was re-conveyed back to him vide a deed of Re-conveyance of Mortgage forwarded to his Advocates vide letter dated 31st May 1996. The letter also forwarded a cheque in favour of the 2nd Defendant in the sum of; Kenya Shillings Nine Hundred and Seventy-Seven Thousand and Twenty-Five (Ksh. 977,025), as proceeds from the life policy, which matured on 1st April 1996. He termed the allegation by the Plaintiffs that, the money paid to the 2nd Defendant should have been paid to them, as fallacious in that, he was the one who paid for all the premiums, either directly or through money owed to him as rent for the suit property. Further the money

was rightfully paid to the 2nd Defendant because it was her life that was insured and not the 1st Plaintiff.

47. However, in cross examination he admitted that at the time of purchasing the suit property, the government's policy was that, where there was a company with foreign shareholders, then the locals should have a majority of the shares, as advised by the lawyers. This was soon after the 1982 coup in Kenya. He further admitted that, the 2nd Plaintiff negotiated all the matters for the purchase of the suit property and was to decide on the name of the buyer and nominated the 1st Defendant to be the buyer, vide a letter dated 26th January 1984.

48. He conceded in cross examination that, although the receipts were issued in his name, the money came from the company. The 1st Defendant was referred to several documents, where the 1st Plaintiff is referred to as the client in the sale transaction, in relation to the purchase of the suit property but he had no response, why the company was referred to as such. It further emerged in cross examination that in the year 1983, the 1st Defendant had a loan with the National Bank of Kenya, that was in arrears, yet he alleged that in the following year, he was able to pay part of the purchase price for the suit property in the sum of Kenya shillings One Million (Kshs. 1,000,000).

49. The parties filed their final submissions after the hearing. The Plaintiffs submissions dated 19th March 2010 were filed on the same date, while the Defendants submissions dated 6th May 2010 were filed on 7th May 2010. The Plaintiffs also filed a reply submission dated 17th May 2010 and filed on 18th May 2010.

50. The parties agreed on the following issues for determination: -

a) *Are the parties, more specifically the 2nd plaintiff and the 1st defendant the only shareholders and directors of the 1st plaintiff Metchem East Africa Ltd (hereinafter the company) and what is their respective shareholding in the said company?*

b) *Was the purchase of the suit property made solely by the 1st defendant as the sole beneficiary to and absolute owner of the suit property or was the purchase made by the company upon agreement between the parties jointly for the 2nd plaintiff and the 1st defendant to devolve to the 2nd plaintiff and the 1st defendant upon completion in proportion with their respective shareholding in the company?*

c) *What were the reasons/circumstances for purchasing and registering the suit property in the name of the 1st defendant, more particularly was the prevailing political situation of any significance/factor?*

d) *If the answer to (b) above is that the purchase was made by the company, in what capacity did the company pay the money?*

e) *Who were the parties and what were the terms and conditions of the aforesaid agreement if any, to purchase the suit property/*

f) *(a) Are the particulars of the agreement allegedly made between the 2nd plaintiff and the 1st defendant as set out in paragraph 9(a) to (i) of the plaint true? (b) if the answer to (a) above is the affirmative, did the parties discharge their respective duties and obligations under the agreement?*

g) *In what capacity did the 1st defendant hold the suit property, more particularly did he hold the suit property as trustee for the 1st plaintiff?*

h) *What party or parties is/are entitled to the suit property?*

i) *Was a loan taken out from Kenindia Assurance Company Ltd in the name of the 1st defendant*

which loan was secured by a mortgage over the suit property and a collateral life policy taken out in the name of the 2nd defendant?

j) *Was the 2nd defendant nominated for the life assurance policy taken out on her life allegedly on behalf of the 1st plaintiff?*

k) *Did the 1st plaintiff assume responsibility for the payment of the premiums on the aforesaid life assurance police over the period of the tenor of the policy, more particularly from 1st April 1984 to 30th April 1996 and did it in fact pay in discharge of this responsibility?*

l) *If the answer to Nos. (j) to (k) above are in the affirmative, did the 1st plaintiff then not have an insurance interest in the life of the 2nd defendant during the subsistence of the life assurance policy and was there not privity of contract between the 1st plaintiff and the 2nd defendant?*

m) *Further, if the answer to (l) above is in the affirmative, then was the 1st plaintiff the rightful beneficiary of the life assurance policy and therefore entitled to the use of the proceeds of the said policy?*

n) *Did the 1st defendant pay off the mortgagor the sum of Kshs 95,088 on the outstanding loan and life policy accounts with fraudulent intent and without the knowledge, authority or consent of the plaintiffs the said mortgage becoming liable thereof to immediate discharge and was the same not in breach and violation of the agreement, if any, between the plaintiffs and the 1st defendant?*

o) *If the answer to (n) above is in the affirmative, then does the payment of the life assurance proceeds amounting to Kshs. 977,025 and their continued retention by the defendant's amount to conversion? In any event, is the said sum payable to the 1st plaintiff as money had and received by the defendants jointly and/or severally to the use of the 1st plaintiff?*

p) *Did the 2nd plaintiff take possession of the suit property free from any rent in the capacity of the company's managing director and shareholder in the company with the knowledge and/or consent of the 1st defendant or is the 1st defendant the absolute owner and sole beneficiary of the suit property and has he thus been a landlord and been paid rent?*

q) *In what proportion would the shareholders of the company be interested in the property?*

r) *Was there an oral agreement between the 2nd plaintiff and the 1st defendant on the basis of trust and good faith to be later reduced into writing whose terms, inter alia, were that the suit property was to be registered in the name of the 1st defendant and that the 1st defendant was to hold title to the suit property in trust for the 1st plaintiff on the basis of contract and/or respective shareholding?*

s) *Has there been breach of the said oral agreement, if any, and of trust, if any, the same being actuated by malice and fraud, if any, by the 1st defendant?*

t) *Are the particulars of breach of trust and contract as alleged in paragraphs 15 and 16 of the further amended plaint true?*

u) *What orders should be made as regards to the funds lying in the escrow fixed term deposit certificate account No. 1/77440(641640) opened with Housing Finance Company of Kenya in the joint names of the parties advocates?*

v) *What orders should be made as regards costs and interest? and;*

w) *If the finding be in favour of the plaintiffs, are they entitled to the prayers sought in the plaint? In the alternative, are the defendants entitled to dismissal of the suit?*

52. I have considered the evidence and submissions herein and I find that, the following issues have arisen for determination: -

a) *Who are shareholders and/or directors of the 1st Plaintiff company;*

b) *If it is the 2nd Plaintiff and the 1st Defendant, what is the percentage of their respective shareholdings;*

c) *Who between the 1st Plaintiff and the 1st Defendant purchased the suit property and/or who paid for the purchase price thereof;*

d) *Where was the purchase price sourced from and/or was the balance of the purchase price raised through a loan with Kenindia Assurance company as alleged; if so who repaid the loan?*

e) *Was the life insurance policy taken out, if so, who paid the premium; and/or did the 1st Plaintiff have an insurable interest in the 2nd Defendant's life?*

f) *Did the 1st Defendant pay off the outstanding mortgage in the sum of Ksh. 95,088 and/or took the title to the suit property;*

g) *Did the 1st Defendant receive the proceeds of the life insurance policy and/or were these proceeds utilized by the 2nd Defendant and/or did she give it to the 1st Defendant.*

h) In whose name is and/or was the suit property registered;

i) *Was it the term of the agreement that the 1st Defendant would hold the suit property in trust for the 1st Plaintiff and/or the 2nd plaintiff;*

j) *Should the court grant the prayers sought for; and*

k) *Who should bear the cost of the suit?*

53. I have considered the issues above and the first issue to determine is the shareholding of the company. The evidence of the respective parties in relation to the same is already analysed above, therefore I shall analyse the documentary evidence produced in support thereof. The Plaintiffs' documents reveal the minutes of 12th May 1977, where 302 shares were transferred by the 2nd Plaintiff to the 1st Defendant and 8 shares not issued allocated to the 1st Defendant and minutes of 2nd April 1980, reveal that the share capital increased to 250,000, where the 2nd Plaintiff held 5635 and the 1st Defendant 5865.

54. On 6th October 1983, the company directors held a board meeting, attended by the 2nd Plaintiff and the 1st Defendant and as per the minutes thereof, it was resolved that, the company share capital be increased to, Kenya Shillings Two Hundred and fifty Thousand (Ksh 250,000), thus creating 11,500 shares valued at Ksh.20 each. Consequently the 2nd Plaintiff was allotted 6,375 shares and the 1st Defendant allotted 6,124 shares.

55. As per the minutes of the meeting held on 20th August 1987 attended by the 2nd Plaintiff and the 1st Defendant, it was resolved that, the share capital be increased from, Kenya Shillings Twelve Thousand and Five Hundred (Kshs. 12,500) to Kenya Shillings Fifty Thousand (Kshs, 50,0000), by the creation of 37,500 shares of Ksh.20 each. Consequently, the 2nd Plaintiff was allotted 33,875 shares and the 1st Defendant got 3,625 shares.

56. On 8th September 1994, the 2nd Plaintiff and the 1st Defendant held a board meeting and Min/Bod/10/94 thereof, states as follows: -

> *"It was observed that by a Resolution passed at its Annual General Meeting held on 20th August 1987, the nominal capital of the company has been increased from the sum of Kshs 12,500 to Kshs 50,000 by the creation of 37,500 shares of Ksh.20/- each.*
>
> *It was noted that applications for allotment of new shares for cash at par had been received as follows:-*
>
> *Mr. J.K. Koinange – 3,625*
>
> *Mr. A. Holzheimer – 33,875*
>
> *It was resolved that the applications be accepted and allotments made forthwith accordingly."*

57. Further, the 1st Plaintiff's annual returns dated 31st December 1994, indicates that the 2nd Plaintiff held 40,000 shares while the 1st Defendant has 10,000 shares. The same information is indicated in the 1st Plaintiff's annual returns dated 31st December 1995. Finally, a letter dated 22nd March 1996 from the firm of Robson Harris & Co Advocates to Mr. Justice Emukule writing to confirm that the shareholding by the 2nd Plaintiff was 40,000 shares while the 1st Defendant held 10,000 shares.

58. The 1st Defendant on his part produced the annual returns of the company for the year 1993, showing that the nominal share capital is 1,000,000 divided into 50,000 shares of Ksh.20 divided whereby the 2nd Plaintiff has 24,499 shares while the 1st Defendant has 25,500 shares. He also produced the statement of increase of nominal capital for the year 1987, showing an increase of share capital to 50,000 and creation of 37,500 allotted as aforesaid.

59. However, I find that, there is a letter dated 22nd march 1996, from Robson Harris & Co. Advocates addressed "to whom it may concern" which states that, in or about June 1994, both the 2nd Plaintiff and the 1st Defendant decided that, the 15,500 ordinary share held by the 1st Defendant and one (1) share held by the late Brian John Robson be transferred to the 2nd Plaintiff, as a result the 2nd Plaintiff held 40,000 ordinary shares in the company and the 1st Defendant held 10,000 ordinary shares therein. This position is confirmed by the affidavit dated 23rd May 1996, sworn by Matthew J.A Emukhule, the Secretary of the 1st plaintiff.

60. The details of the letter dated 22nd December 1997, clearly shows the shareholding of the 1st Plaintiff's company as follows: -

Date	2nd plaintiff	1st defendant
8/7/74	791 (79.1%)	208 (20.8%)
30/6/78	489 (48.9%)	510 (51%)
24/8/82	6,124 (48.99%)	6,375 (51%)
20/8/87	24,499 (48.99%)	25,500 (51%)
9/8/94	40,000 (80%)	10,000 (10%)

61. The further evidence on the shareholding was led by Abdul Shakoor (PW2), who corroborated the evidence of the 2nd Plaintiff as to the annual returns and the directors' shareholding.

62. Having taken into account the evidence on the shareholding and the documents produced, I find that from the last record availed by the Plaintiffs; being the 1st Plaintiff's annual returns dated 31st December 1994, and 31st December 1995, the 2nd Plaintiff hold 40,000 shares while the 1st Defendant has 10,000 shares and in the absence of any other evidence to the contrary, I hold that, the 2nd Plaintiff hold 40,000 while the 1st Defendant hold 10,000 shares.

63. I shall now move to the issue as to who between the 1st Plaintiff and the 1st Defendant purchased the house. Again the evidence adduced in relation to the same is already summarised herein. I shall therefore consider the documents produced by the respective parties, starting with the Plaintiffs documents. In that regard, I note in a letter dated 31st January 1984, the sellers of the suit property wrote to the 2nd Plaintiff and stated at paragraph 9 as follows: -

> *"Through a copy of this letter I am requesting my lawyers to draft an agreement for sale as a matter of urgency for the approval and execution by both parties and I shall request my lawyer to leave blank the name of the purchaser which, I understand, will be decided by you within the next couple of days."*

64. I also note another letter dated, 1st February 1984 written by the firm of; Hamilton Harrison & Mathews Advocates to the firm of; Kaplan & Stratton requesting for a draft agreement of sale. This letter is referenced: "Sale of L.R. No. 214/562 by Mrs Facta to Metchem East Africa Limited or its Nominee or Nominees" and is copied to the 1st Plaintiff. In a further letter dated 4th February 1984 from the sellers of the suit property to their Advocates and copied to the 2nd Plaintiff, the seller gives an inventory of the house furniture, household goods and writes as follows: -

> *"Enclosed herewith please find two copies of the inventory relevant to the house furniture, house hold etc. contained in the above property, as already viewed and checked by Mr. A. Holzheimer, as being part of the property subject of Agreement of Sale."*

65. Subsequently, the firm of; Kaplan & Stratton Advocates wrote a letter dated 10th February 1984, to the firm of Hamilton Harrison & Mathews Advocates forwarding the draft sale agreement. The reference thereof reads: - "Sale of L.R. No. 214/562 by Mrs Facta to Metchem East Africa Limited or its Nominee or Nominees." The letter is copied to the 1st Defendant. The firm of; Kaplan & Stratton Advocates replied to the letter and indicated the suggested amendments to the draft sale agreement.

66. I also note a document described as "Internal attendance note" from the firm of; Hamilton Harrison & Mathews Advocates, which refers to a meeting held on 22nd February 1984. The 1st Plaintiff is referred to therein as the client. The meeting was also attended by the 2nd Plaintiff, vendor and her Advocates. During the meeting, the agreement for sale was considered and revised accordingly. The "note" indicates that, the 1st Defendant would execute the agreement and pay the deposit, on the 27th February 1984.

67. The firm of Kaplan & Stratton Advocates responded to this mail vide an "internal attendance note" dated 22nd February 1984, referring to a meeting attended by the vendor, the 2nd Plaintiff and their Advocates. It was agreed that, the agreement of sale would indicate the 1st Defendant as the purchaser and give time up to 2nd March 1984, to get a loan from Kenindia Assurance Limited. The "note" reads in part as follows, "the matter of fixtures and fittings and furniture would now be dealt with separately by Mr. Facta and Mr. Holzheimer and we would not be involved further in this." The meeting of 22nd February 1984 was confirmed by a letter dated 23rd February 1984, from Kaplan & Stratton Advocates to Hamilton Harrison & Mathews Advocates. Eventually the firm of; Hamilton Harrison & Mathews Advocates wrote a letter to Kaplan & Stratton Advocates dated 28th February 1984, forwarding the executed copies of the sale agreement, with a promise to forward the deposit. The letter is entitled; "sale of L.R. No. 214/562 by Mrs Facta to Metchem East Africa Limited or its Nominee or Nominees." The final duly executed sale agreement is produced page 84 to 88 of the Plaintiff's volume 1 of the bundle of documents.

68. Further correspondence between the parties, reveal that the firm of; Kaplan and Stratton Advocates wrote to the firm of Messrs Hamilton Harrison & Mathews Advocates dated 8th March 1984, under the heading of; "sale of L.R. No. 214/562 by Mrs E. Facta to Metchem East Africa Limited", informing the vendor's Advocates that the vendor is proceeding to the next stage of preparation of the conveyance. The abstract title by way of copies of conveyances was forwarded by a letter dated 8th March 1984, from Kaplan and Stratton Advocates to Hamilton Harrison & Mathews Advocates who returned the deed of conveyance for approval by a letter dated 14th March 1984; similarly, that letter makes reference to the "sale of L.R. No. 214/562 by Mrs E. Facta to Metchem East Africa Limited".

69. On 27th March 1984, the firm of; Kaplan & Stratton Advocates wrote a letter to the firm of Hamilton Harrison & Mathews Advocates forwarding the completed documents for the registration of the conveyance and requesting for a professional undertaking for payment. The letter is entitled; "sale of L.R. No. 214/562 by Mrs Facta to Metchem East Africa Limited". It is noteworthy that the conveyance though in favour of the 1st defendant, the address used therein is the 1st Plaintiff's postal address.

70. The firm of; Kaplan & Stratton Advocates then wrote a letter to Hamilton Harrison & Mathews Advocates dated 6th April 1984 confirming that the documents had been registered and called for a cheque for the loan proceeds in fulfilment of the professional undertaking. The letter refers to; "sale of L.R. No. 214/562 Nairobi by Mrs Facta to Metchem East Africa Limited." Subsequently the firm of; Hamilton Harrison & Mathews Advocates wrote to the 2nd Plaintiff, in his capacity as general manager of the 1st Plaintiff a letter dated 20th June 1984, for payment of the legal fees for the sale transaction that was outstanding.

71. It suffices to note that, all the correspondence referred to above, exchanged by the parties thereto from the 31st day of January to 20th April 1984 make reference to; "sale of L.R. No. 214/562 Nairobi by Mrs Facta to Metchem East Africa Limited". Therefore, from the face value these documents indicate that the sale transaction was between the vendor and the 1st Plaintiff.

72. However, the 1st Defendant maintains he was the purchaser of the property and that he paid for it. He relied on the sale agreement produced, which he signed. To reconcile these positions, it is important to establish who paid for the property. The 2nd Plaintiff alleges that it is the 1st Plaintiff who did but the 1st defendant alleges he made the payments. I have considered the documents produced by the parties and I have found a letter from Kaplan & Stratton Advocates to the firm of Hamilton Harrison & Mathews Advocates, forwarding a receipt, in the sum of; Kenya shillings Two Hundred and fifty Thousand (Kshs. 250,000) and the agreement for sale duly signed and stamped. The letter is headed; "Sale of LR 214/562 Metcem EA Ltd".

73. I further find that, the Defendants have produced a letter dated 27th March 1984, written by the 1st Plaintiff to Hamilton Harrison & Mathews Advocates forwarding two postdated cheques, dated 29th March 1984, in the sum of; Kenya Shillings One Million Two Hundred and Five Thousand (Kshs 1,205,000). The cheque is issued to Kaplan and Stratton Advocates and another for Kenya Shillings Eighty-Six Thousand (Kshs 86,000) issued to J.J. Patel & Co. Advocates, in relation to the purchase of the house L.R No. 214/562 Nairobi by Mr. J.K. Koinange. Subsequently, a receipt was issued dated 5th April 1984, from Kaplan and Stratton Advocates for that payment of Kenya Shillings One Million Two Hundred and Five Thousand; (Kshs. 1,205,000) received from Metchem E.A Limited, being a balance of the purchase price.

74. The Plaintiff also produced the company's statement of account dated 29th June 1984, showing an entry for a sum of Kenya Shillings Seventeen Thousand Seven Hundred and Twenty-one (Kshs 17,721), being a cheque No. 152422 issued to Hamilton Harrison & Mathews Advocates. The payment is also supported by a letter dated 25th June, 1984, produced by the Defendants and which is referenced LR No. 214/562 Nairobi. The letter is addressed to the 1st Plaintiff and acknowledges receipt of that sum of money. An official receipt is enclosed.

75. The Plaintiff also produced a letter dated 27th March 1984 written by the 1st Plaintiff addressed to Banque de Suez Bank giving standing instructions to pay; Kenindia Assurance Company Limited, interest on mortgage loan to the account No. 1101826 held at Barclays Bank in the sum of; Kenya Shillings Fourteen Thousand Five Hundred and Eighty-three and Thirty-five cents (Ksh 14, 583.35) on the 1st day of every months commencing 1st may 1984, and debit the company account.

76. The Plaintiffs have referred the court to the 1st Plaintiff's bank statements at pages 511 to 660 of its bundle of documents as evidence that the company made payments for the suit property over a period of Twelve (12) years, with the first interest payment made on 11th April 1984, in the sum of; Kenya shillings twelve thousand one hundred and fifty-two and seventy-five cents (Kshs. 12,152.75). The same statements show payment for the insurance policy in the sum of; Kenya Shillings Eight Thousand and Seven Hundred and seventy-two (Kshs. 8,772) as reflected on the statement of the 13th April, 1984.

77. The standing order instructions are confirmed through a letter dated 20th May 1996, written by the Banque Indosuez "to whom it may concern" and in reference to standing order by; Metchem E.A Co. Limited stating: -

"This is to certify that we have since 1st May 1984 executed the following:

> *a) Kshs 14,583.35 per month (until July 1, 1989) and Kshs 15,000.00 per month (August 1, 1989 to April 1996) towards interest on mortgage loan as per Metchem East Africa Ltd. Standing order instruction of March 27,198.40.*
>
> b) *Kshs 8,772 per month towards life insurance premium for Miss. Julie Koinange as per Metchem East Africa Ltd. Standing order instruction of April 2nd 1984."*

78. Similarly, there is a letter dated 22nd March 1996, written by Kenindia Assurance Company Limited, addressed to the managing director of the 1st Plaintiff, confirming particulars of payments received from the company between April 1984 to the date of the letter.

79. These sums of money are broken down as follows: -

Year	Amount
1984	122,569.30
1985	189,583.55
1986	175,000.20
1987	175,000.20
1988	175,000.20
1989	177, 083.45
1990	165,000.00
1991	180,000.00
1992	180,000.20
1993	180.000.00

1994 180,000.00

1995 180.000.20

1996 45,000.00

2,124,236.90

(b) Towards life premiums:

From 1.4.84-31.3.96 1,254,396.00

3,378,396.90

80. However, the 1st defendant rebutted this evidence by arguing that, the cheque produced of; Kenya Shillings One Million Two Hundred and Eighty-Two Thousand, Two Hundred and Seventy-Seven (Ksh 1,282,277), was his own money which he used to purchase the suit property. That he forwarded the cheque to the 2nd Plaintiff, as he was out of the office on duty and he wanted the 2nd plaintiff to know what he was doing. He testified that he was employed by E.A Spinners Ltd and was earning Kenya shillings six hundred thousand (Kshs 600,000) as per a letter dated 10th February 1984, to that effect, from the company signed by Mr. H.B Padya. The 1st Defendant produced documents to show he applied for the balance of the purchase price from Kenindia Assurance Company Ltd and was granted a loan of Kenya shillings one million (Kshs 1,000,000).

81. The 1st Defendant also relied on the receipts from Kenindia Assurance Company Ltd, issued in his name as the registered owner of the property and the one who applied for the loan of Kenya shillings One million two hundred and ninety-five thousand (Kshs, 1,295,000) on 26th March 1984. He termed the evidence by the 2nd plaintiff that the company gave him money as “rubbish” and argued that the company had no money to purchase the property.

82. However, the 2nd Plaintiff rebutted the 1st Defendant’s evidence that the company did not have money to purchase the property by producing documents showing the company had;

a) Kshs 1,229,531.45 at National Bank of Kenya Limited,

b) Kshs 86,054.45 at the Standard Chartered Bank Limited,

c) Kshs 1,282,227 and a fixed deposit of Kshs 150,00 at Banque Indosuez.

Total Kshs 3,083,226.47

83. The 2nd plaintiff stated that the company then made the following payments therefrom: -

a) Ksh 1,205,000; towards the purchase of the property;

b) Ksh 86,000; for J.J Patel &Company’s legal fees’

c) Kshs 17,721; payment of the fee note from; HHM Advocates

Total Ksh 1,308,721

84. Therefore, from the sum of; Ksh 3,083,226.47, less Kshs 1,308,721, the balance was Ksh 1,774 505.47. The witness then explained that, the alleged sum of Ksh 1,282,277.00, which the 1st Defendant is laying claim thereto was not his money. That the money was deposited by the company in its account at

Banque Indosuez on 27th March 1984. This was part of the money given to the 1st Defendant by the company to put on a fixed deposit in the sum of Kshs 1,500,000 and had earned interest of Kshs 32,277 giving rise to a figure of Ksh 1,532,277 less Ksh 250,000 paid as deposit for the property. The balance of Kshs 1,282,277.00, was returned to the company by the 1st Defendant.

85. In addition to the documentary evidence produced, I have also considered the oral evidence adduced and I note from the record that during the cross examination, the 1st Defendant was taken through various payments made by the company to Kenindia Assurance Company Limited and it confirmed the payments were from the company, including Kenya shillings Two Hundred and fifty Thousand (Kshs. 250,000) paid as deposit for the property and the standing orders issued by the 1st Plaintiff. The 1st Defendant also acknowledged that the company paid for the rates.

86. Based on the evidence analysed above I find that, there is adequate evidence that the 1st Plaintiff and/or the company made the payments towards the loan advanced by Kenindia Assurance Co. Limited, which loan was utilised to purchase the suit property. The only payments made by the 1st Defendant was the last sum of Kenya shillings ninety-five thousand and eighty-eight (Kshs, 95,088) he paid to redeem the property. In fact, there is evidence from the 1st Plaintiff's bank statements that, payments were made even after the 1st Defendant cleared the last four (4) installments of the loan repayment, and a credit refund for overpayment of mortgage given to the 1st Plaintiff.

87. The main question remains as to who then is the owner of the property in the circumstances? I have considered several documents filed by the parties and found a letter dated 20th March 1995, written by Mr. Holzheimer to Mr. S. Dhanji of Salim Dhanji & Co. Advocates, copied to Mr J.K.Koinange, in which he seeks for Mr Dhanji's advise on the following issues;-

> a) *drawing up a long time lease for the house to cover the periods of 1st April, 1984 to 1st April 1996 and thereafter;*
>
> b) *how to secure his interest in the suit property registered in the name of the 1st defendant?*

88. It is noteworthy that, the 2nd Plaintiff states in the said letter as follows: -

> *"As I had explained to you, the above property is a mutual investment in as much as it had at the time, been bought with funds belonging to Mr K as well as myself and I had as well told you why the house was at the time been put into Mr Koinange's name. That is, the property and for that matter the mortgage and respective insurance are both in the names of Mr Koinange, with all expenses for the mortgage loan, relating life insurance for Mr. Koinange and the maintenance of the property etc always having been financed by Metchem which as you know, is the company owned by Mr. Koinange and myself"*

He went on to write that: -

> *"I may in this context perhaps reiterate that, as far as I am concerned, I would have no problem if the house would remain, in the name of Mr Koinange provided that my title and for that matter, and after my death, my family's/heir's title for 50% of the property would be secured" (emphasis mine)*

89. Mr. Salim Dhanji replied to the letter, through a letter dated 16th May 1995 and recommended that: -

> a) *an agreement be drawn up between the 2nd plaintiff, the 1st defendant and the company regarding rental and mortgage terms; a lease agreement be drawn up between the 2nd plaintiff and the company in respect of his renting the premises from 1st April 1996 at a market rental; and*

b) *the 2nd plaintiff's interest in 50% of the property be noted at that point in time on the Title Deed.*

90. Mr. Dhanji went on to expound on the recommendation and stated as follows: -

> *"In this context, it will be necessary for Mr Koinange to transfer one half of his interest to you. We will have to place a value on the one half of the property and stamp duty of 6% must be paid on this value. I am not in favour of Trust Deed (which is another way of noting your interest), as, in my experience, Trust Deeds are often the subject of court litigation. The more effective method would be to transfer one half of the interest in the property in your name. In future no question can or will arise as to your or your heirs interest in the property"*

91. As a result of the advice given, the 2nd Plaintiff wrote to the 1st Defendant a long letter dated 12th January 1996 complaining that, the 1st Defendant was not taking the issue of securing his interest in the property seriously and demanded that the

1st Defendant promptly sign and forward to him a statement as per attached draft.

92. The attached draft reads in as follows: -

DRAFT

J.K Koinange P.O. Box -----

Nairobi

TO WHOM IT MAY CONCERN

House on Muthaiga, Road, Nairobi

Plot No. L R 214/562.

I hereby certify that half=50% of the value of the above property belongs to;

Mr. Andres Holzheimer

P.O.Box 21235

Nairobi

and my heirs to be bound by this.

There is no charge on the property other than mortgage loan from Kenindia Assurance Ref. HL: 098 which will have been repaid in entirety April 1996.

Nairobi……(date) J.K Koinange

93. It is not clear from the evidence whether, the 1st Defendant ever signed that draft agreement. However, the correspondence thereafter indicate that the parties agreed they would get a neutral person to facilitate a consent settlement on the issue but that does not seem to have borne fruits. However, what is clear is that the 2nd plaintiff was claiming 50% ownership of the property. I shall revert back to the finding of ownership of the house when I consider the specific prayers in the plaint.

94. Be that as it were, closely related to the issue of ownership is the issue of the lease of the property. The 2nd plaintiff submitted that there was no formal lease agreement and that the oral agreement between him and the 1st Defendant was on the basis of trust, good faith and mutual understanding that the property

would be let out for a sum of Kenya shillings twenty three thousand five hundred (Kshs. 23, 500). The 2nd Plaintiff faulted the lease agreement produced by the 1st Defendant and argued that the purported lease did not contain the rent payable, expiry date/renewal date and was not executed by any party. That the rent was not paid quarterly in advance. Further although the 1st Defendant alleged that the rent payable was Kenya shillings twenty-five thousand (Ksh. 25,000), he was not able to explain the difference or why the Plaintiffs did not pay the Kenya shillings twenty-five thousand (Ksh. 25,000) alleged rent.

95. Further, there is a letter dated 15th February 1984, written by the 1st defendant to Mr. Khares an employee of the 1st Plaintiff, instructing him to release the house, to the 2nd defendant, who was the company's managing director. Upon occupation of the property, by the 2nd Plaintiff, the company wrote a letter dated 26th March 1984, to its bank to pay Kenindia Assurance Co. Ltd a sum of Kenya shillings twenty-four thousand four hundred and seventy nine (Kshs 24,479) with effect from 1st April, 1984 as rent. There is evidence that the payments were effected.

96. However, the 1st Defendant maintained that, the house is his property that he leased to the company once he had purchased it. He produced a lease agreement and a letter to that effect written by the 1st Plaintiff confirming agreement to rent the house. That by virtue of the fact that the 1st Plaintiff instructed their bank to effect standing order payments confirms the house was let to the 1st Plaintiff by the 1st Defendant. That the 2nd Plaintiff confirmed that the 1st Plaintiff's bank statements of accounts reflected payment of rent by the company on behalf of their managing director, the 2nd Plaintiff. Therefore, the Plaintiffs are precluded from stating that the payments were for anything other than rent to the 1st Defendant. The Defendants relied on the case of; *Jonah Mwololo Nzau Vs. James Musyoka Waita (2008) e KLR.* They further argued that the Plaintiffs as tenants were obliged to take care of the premises and maintain it in habitable condition and that it was normal for tenants to incur such costs. They relied on the case of; *Pettit Vs. Pettit All E.R. 1969 Vol. 2, 385*.

97. I have considered the issue of the leasing of the property and found that, there is no dispute that upon purchase of the property, it was occupied by the 2nd plaintiff and his family. A letter written by the 2nd plaintiff to the firm of Lloyd Masika, to carry out open market valuation of the suit property was produced by the plaintiff. The valuation was for the bank's purpose, and in compliance with the requirement of Kenindia Assurance Company Ltd that was financing the property. Thus, the initial lease drawn to lease the property to the 1st Plaintiff was for the purpose of the bank to grant the loan and the same had to be in favour of the 1st Defendant as the borrower and/or the registered owner of the property. There is no clear evidence that another lease was executed for any other purpose. Indeed, as can be noted from the correspondence between the 2nd Plaintiff and Mr Dhanji above, he was seeking for formalisation of the lease agreement. Even then, there is no prayer in the plaint relating to rent and/or the leasing of the property.

98. I shall now deal with the issue of the life policy. The Defendants submitted that; the life insurance policy taken out on the 2nd Defendant's life was not done on behalf of the 1st Plaintiff as alleged. That there was no privity of contract between the 1st Plaintiff and the 2nd Defendant. The Defendants relied on the case of; *Kenindia Assurance Company Limited Vs. Otiende (1991) KLR 38*, where the Court of Appeal held that a third party cannot sue on a contract if he is not a party to it.

99. However, as observed herein, there is evidence that the 1st Plaintiff paid the premiums for the life insurance cover taken by the 1st Defendant over the life of the 2nd defendant. There is further evidence that, the firm of Inamdar & Co. Advocates, through a letter dated 31st May 1996, referenced; sale of L.R number 214/562 Nairobi; forwarded a cheque No. N/A 1531986, drawn from the Bank of India, in favour of Julie Koinange for a sum of; Kenya shillings nine hundred and seventy seven thousand and twenty five (Kshs 977, 025), being the balance of proceeds from the policy that matured on 1st April, 1996. The 2nd Defendant has sworn an affidavit dated 2nd July, (it does not show the year) in which she avers that she forwarded the said cheque in the sum of Kenya shillings nine hundred and seventy seven thousand and

twenty five (Ksh 977, 025) to the 2nd Defendant, as the beneficiary of the policy and who was entitled to that sum of money.

100. The subject funds were deposited in the escrow fixed term deposit vide certificate account no. 1/77440(641640) opened with Housing Finance company of Kenya in the joint names of the parties' Advocates. The Plaintiffs argue that it should be shared between the 2nd Plaintiff and the 1st Defendant, according to their shareholding in the company, and that this can only be done after taking into account the proceeds of the life insurance policy and the rent, that the 1st Defendant has continued to directly or indirectly receive, contrary to a court order.

101. The critical issue however is whether the 1st Plaintiff who paid for the premiums for the life insurance policy herein had an insurable interest in the life of the 2nd Defendant. The law on insurable interest is governed by Section 94 of the Insurance Act, Cap 487 which provides as follows: -

"*94. Insurable interest essential for all policies*

a) *Subject to this Act, no policy of insurance shall be issued on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no insurable interest.*

b) An insurable interest shall be deemed to be had by—

i. a parent of a child under eighteen years of age, or a person in loco parentis of such a child, in the life of the child to the extent of funeral expenses which may be incurred by him on the death of the child;

ii. a husband, in the life of his wife;

iii. a wife, in the life of her husband;

iv. any person, in the life of another upon whom he is wholly or in part dependent for support or education;

v. a corporation or other person, in the life of an officer or employee thereof; and

vi. a person who has a pecuniary interest in the duration of the life of another person, in the life of that person.

c) A child's advancement policy effected either before, on, or after the appointed date shall not be void by reason only that the person effecting the policy had not at the time the policy was effected an insurable interest in the life of the child".

102. Lawrence J, in the case of; Lucena vs. Crawford 1806 2 BOS PNR 269 at 302, defined insurable interest as the interest that the insured stands to lose if the risk attaches. That, it is essentially the pecuniary or proprietary interest, which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. Thus as a general rule, insurable interest must have a pecuniary value. A right to a future interest of possession is insurable. (See the case of Halford Vs. Kymer (1930) 10 B.C. 724.)

103. Indeed, Insurable interest is one of the main principles of the contract of insurance, and as was held in the case of; *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR*, it is a basic requirement of any contract of insurance, unless it can be and is lawfully waived. Thus, a party to the insurance contract, who is the insured or policy holder, must have a particular relationship with the subject matter with the insurance whether that be "a life or property or a liability to which he might be

exposed. Thus, an insurance contract not supported by an insurable interest is, otherwise invalid (see; Anctol Vs. Manufacture Life Insurance Company (1899) AC 604).

104. The principles enumerated above, have been summed up to the essential elements of insurable interest as: -

a) a direct relationship between the insured and the subject matter;

b) the relationship must have arisen out of a legal or equitable right or interest in the subject matter;

c) the interest bears any loss or liability arising in the event the loss or risk attaches; and

d) The insured's right or interest in the subject matter must be capable of pecuniary estimation or quantification.

105. Based on the above legal principles and applying the facts herein thereto, I find that the 1st Plaintiff had no insurable interest in the life of the 2nd defendant. She was not its employee. Therefore, it could not effect a valid contract with the insurer over her life. An invalid contract is void ab initio and cannot confer any rights to the parties thereto. As such the proceeds of Life policy herein are not available to the 1st Plaintiff.

106. I shall now revert back to the issue of the ownership of the property and in particular the issue of trusts. As already established, the property is registered in the name of the 1st Defendant but was paid for by the 1st Plaintiff save for the last instalments made by the 1st Defendant. The Plaintiff submitted that, the 1st Defendant holds the property on trust for himself and the plaintiffs, and relied on several cases, inter alia, the case of; *Mumo Vs. Makau (2002) 1 EA 170* where the courts held that, trusts are an issue of fact to be proved by evidence.

107. Further that, the Registered Land Act, does not preclude the declaration of a trust in respect of registered land, even where it was a first registration and as contemplated by Section 28 therein. The Plaintiffs relied on the case of; *Peter Mushila Mboyi Vs. Joseph Musoi Amboyi (2006) e KLR*, where the courts outlined how a trust comes into existence, mode of its proof and held that, it is a question of fact to be proved by evidence. Further reliance was placed on the Halsbury's Laws of England, which describes the nature of a resulting trust. The treatise John McGee (2000) Snell's Equity, 13th Edition) and the case of; *Marie Ayoib & Others Vs. The Standard Bank of South Africa Ltd & Anor (1963) EA 619*, were also cited and relied on. The Plaintiffs further submitted that, the intention of the parties was to create a trust, as pleaded and proved in evidence, hence the Plaintiffs have a claim resulting in trust.

108. The Plaintiffs also argued that they have a claim in estoppel and relied on the treatise; "Principles and Digest of the Estoppel by Chief Justice Monir and A.C. Moitra" where it is written: -

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing."

109. The Plaintiffs averred that, the circumstances of this case, point to antecedent negotiations that are admissible and which assist the Honourable court to understand the nature of the intention of both parties, which is clear from the documents availed and the evidence adduced in court. The Plaintiffs further relied on the treatise by; Gross on Evidence, 5th edition, page 609 where it is stated:-

"Evidence of antecedent negotiations is relevant and admissible if they retain their contractual effect of existence. Such evidence is always admissible if tendered to establish the existence of a contract collateral to the writing or the conclusion of a contract which is partly oral and partly in

writing."

110. However, the Defendants submitted, that there was no documentary evidence produced by the Plaintiffs that mentioned a trust agreement or even a suggestion of such an agreement. The Plaintiffs relied on the case of; Wanjihia vs. Wanjihia & 4 Others Civil Appeal No. 569 of 1999 (2004) e KLR where the court: -

> *"Trust" is an issue both fact and law. It is a serious issue, and needs to be demonstrated through proper evidence and verification of evidence."*

111. The Defendants revisited the issue of the purchase of the property and referred to a letter at page 70 of the Plaintiff's bundle of documents, from Hamilton Harrison & Advocates to Kaplan & Stratton Advocates informing the seller that the purchase would be done by the 1st Defendant and not the 1st Plaintiff. Thus it was argued that nothing would have been easier than to state at that point that, the 1st Defendant was coming in as a trustee or nominee of the 1st Plaintiff. The Defendants relied on the case of; *Kiruga Vs. Kiruga & Another (1988) KLR 348*.

112. The Defendants further argued that, the documents of conveyance are very clear, that the 1st Defendant held and still holds the suit property as the owner, there is no issue of trusteeship. Reliance was placed on the cases of; *Lloyd Bank Plc Vs. Rosset (1990) 1 All ER 111* and *Marie Ayoub & Others Vs. Standard Bank of South Africa Ltd & Another (1963) 1 EA 619; Yogendra Purshottam Patel Vs Pascale Mireille Baksh(nee Patel) & 2 Others (2006) e KLR* where the courts held that, a trust will be implied in order to give effect to the intention of the parties. Thus the intention of the parties to create a trust must be clearly determined before a trust will be implied.

113. Finally, the Defendants submitted that the Plaintiffs have not adduced any evidence, nor availed any witnesses to corroborate the evidence of the 2nd Plaintiff, that the alleged oral agreements lack the basic requirements for an oral agreement, as there is no indication of when the oral agreement was entered into, the place where the agreement was entered into and more importantly no witness to the alleged oral agreement. Further, the evidence of Shakoor (PW1), is hearsay from the evidence of the 2nd Plaintiff, hence it cannot be relied on. The Defendants relied on the case of; *Jonah Mwololo Nzau Vs. James Musyoka Waita (2008) e KLR*, and submitted that there cannot be breach of a non-existent agreement.

114. I have considered the submissions by the parties on the issue of ownership of the property and the concept of trust as submitted by the parties. The Court of Appeal in the case of; *Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR* considering the issue held that: -

> *"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied."*

115. Similarly, the Court of Appeal in the case of; *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*, stated that: -

> *"According to the Black's Law Dictionary, 9th Edition; a trust is defined as*
>
> *"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."*
>
> *Under the Trustee Act, "… the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property…"*
>
> *In the absence of an express trust, we have trusts created by operation of the law. These fall within*

two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. … It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. …

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)." (*Emphasis added)*

116. Finally, Butler-Sloss, J in the Court of Appeal case of; *Njoroge v. Ngari [1985] KLR 480* observed: -

"If property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interests in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person." (emphasis mine)

117. It is evident herein as already stated that the 1st Plaintiff paid the purchase price for the suit property based on the legal principle enumerated above. Therefore, the 1st Defendant is holding the suit property on the basis of resulting trust in favour of the 1st Plaintiff. Not in favour of the 2nd Plaintiff.

118. Finally, before I consider the prayers in the plaint, I note that the Plaintiffs have sought for general damages for inter alia breach of agreement and conversion. The law on the award of general damages is settled. In the case of; *Provincial Insurance Co. East Africa Ltd vs Nandwa Mwaga and Securicor Courier (K) Ltd vs Benson Onyango & Another [2008] eKLR* , the court held that general damages cannot be awarded for breach of contract, because damages arising from breach of contract are usually quantifiable and are not at large, and where damages are quantifiable, they cease for being general damages.

119. Similarly, the Court of Appeal held in the case of; *Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR* as follows:-

"As a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi Vs. Karsan [1974] EA 41, the former Court of Appeal held that, general damages are not allowable in addition to quantified damages, with Mustafa J.A, expressing the view that such an award would amount to duplication. (See also Securicor (K) Vs. Benson David Onyango & Anor [2008] eKLR."

120. However, in the case of; *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (2016) eKLR*, the Court of Appeal held that;

"On the second issue, the appellant conceded that whereas the general legal principle is that

courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive"

121. In conclusion I find that, the 2nd Plaintiff and the 1st Defendant are the two shareholders and/or the directors of the 1st Plaintiff, holding shares as follows; 2nd Plaintiff 40,000 ordinary shares and the 1st Defendant; 10,000 ordinary shares. That, although the suit property is registered in the name of the 1st Defendant, he is holding it on trust for the 1st Plaintiff. The suit property belongs to the company and it is a general principle of law that an incorporated company can own property in its own name, independent of the shareholders. It is a legal entity separate from the shareholders; (see *Salmon Vs Salmon & Co. Ltd (1896) UKHL 1, (1897) AC 22*.

122. In that case, the 1st Plaintiff will refund the last instalments paid by the 1st Defendant towards the purchase of the property although it was done in bad faith. In the same vein any rent received from the property from the date of purchase to date, belongs to the company and should be distributed in proposition to the shareholding of the parties as stated above.

123. I shall now deal with the main prayers in the plaint as against the 1st Defendant: -

a) The first prayer is seeking for an order restraining the Defendant from disposing of the suit property pending the hearing of the suit. That prayer has been overtaken by events; in that it was sought "for pending the hearing of the suit". Even then, with final orders on the ownership of the suit property, the same is determined;

b) *The second prayer seeks for order declaring that, the 1st Defendant is holding the suit property in trust for himself and the 2nd Plaintiff in proportion to their shareholding. I have ruled that the resulting trust is in favour of the 1st. Plaintiff and not the second Plaintiff or the 1st Defendant, none of whom paid for the property. Therefore, the declaration order sought for cannot be granted and is declined.*

c) *Similarly, the third prayer is seeking for a declaration order that, the 2nd Defendant is entitled to the suit property in proportion to the shareholding in the company. This prayer too is not allowed. This is partly due to the reasons stated in (b) above and mainly due on the ground that; based on the evidence herein and in particular; the evidence of the letters written to S. Dhanji and copied to the 1st Defendant, (referred to above and the draft agreement annexed thereto) the 2nd Plaintiff was claiming for only 50% legal ownership in the suit property. He did not seek for the same in proportion to his holding in the company.*

d) *The next prayer relates to a mandatory injunction to compel the 1st Defendant to comply with the agreement and perform duties thereunder. If the oral agreement relates to the trust in favour of the 1st Plaintiff, then it is well founded. If it is an alleged agreement in favour of the 2nd Plaintiff, then t does not arise as there was no agreement to hold the property for him. Therefore, the 1st Defendant should facilitate the transfer of the property to the 1st Plaintiff and an order of specific performance is issued to that effect.*

e) *The following orders are seeking for general damages for breach of agreement and/or on the footing of aggravated damages as set out in the paragraph 10, and 8 of the plaint. However, I find that both parties herein acted on the basis of trust, and personally contributed towards the suit property. The 1st Defendant used his personal property as security and took a plocicy over the life of the 2nd Defendant, his own daughter. The 2nd Plaintiff managed the company on the day to day basis and generated income that paid for the property. Therefore, one cannot claim that he suffered anguish at the instant of the other. Similarly, as stated above damages that are capable of quantification cannot be deemed to be general damages. I decline to grant those prayers.*

f) *Had the 2nd defendant not opted for 50% share in the suit property their shareholding would have guided the ownership ratio in the suit property. In that case I make a declaration order that the 2nd plaintiff is entitled to 50% right of legal ownership in the suit property.*

124. In summation I enter judgment in favour of the 1st Plaintiff in the terms that and/or issue a declaration order that, the 1st Defendant holds the suit property in trust for it. I also enter judgment in favour of the 2nd Plaintiff as against the 1st Defendant in the terms that; the 2nd Plaintiff is entitled to 50% legal ownership in the suit property, subject to a refund of the sums paid by the 1st Defendant upon valuation and/or determination of the market value of the suit property and before or after disposal whatever the case may be.

125. I shall now consider the prayers against the 2nd Defendant: -

a) *The first prayer seeks for a declaration order that; the proceeds of the life insurance in the sum of; Kshs 977,025 are justly due and payable to the 1st Plaintiff. I have ruled that the 1st Plaintiff had no insurable interest in the life of the 2nd Defendant. Therefore, it cannot benefit from an invalid contract. However, it is not in dispute that the premiums for cover were paid for by the 1st Defendant. Therefore, if the 1st Plaintiff cannot benefit from an invalid contract then the 2nd Defendant too cannot, the law is clear he who goes to Equity must go with clean hands;*

b) *Thus in the same vein; it will be unjust enrichment to allow the 2nd Defendant to reap from where she did not sow. In that case, justice can only be served in one way, that the 2nd Defendant refunds to the 1st Plaintiff all the sums of money paid by the 1st Defendant as premiums, being Ksh 1,254,396.00, (based on the records of Kenindia Assurance Co. Ltd). This sum forms part of the assets of the company and will be distributed in the ratio of sharing indicated herein;*

c) In the alternative, the funds held in the joint escrow account be deemed as a refund of the premium paid by the company and/or the profit accruing therefrom and be distributed in the proportion to the shareholding above;

d) In view of the finding above, the prayer for damages for conversion does not arise and it is not granted.

126. Finally based on the entire evidence herein, the proper Plaintiff in relation to the claim over the suit property and the proceeds of the insurance policy is the 1st Plaintiff. That company is owned by both the 2nd Plaintiff and 1st Defendant. It will not be in the interest of justice to order for any of these shareholders to pay interest or costs to the other. Even then, both have partially won and lost in the matter. I make no orders as to costs and interest.

127. Those then are the orders of the court.

Dated, signed and delivered this 24th day of June 2019, in an open court at Nairobi.

GRACE. L. NZIOKA

JUDGE

<u>In the presence of:</u>

Mr Munyalo for the Plaintiff

Mr Saende for the Defendant

Mr Otieno the Court Assistance