



**Mbiti v Adalja & 3 others (Environment & Land Case 576 of 2016)  
[2023] KEELC 21155 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21155 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 576 OF 2016  
LN MBUGUA, J  
OCTOBER 26, 2023**

**BETWEEN**

**SOPHINAH KALONDU MBITI ..... PLAINTIFF**

**AND**

**ARUN MAHENDRA ADALJA ..... 1<sup>ST</sup> DEFENDANT**

**KIRAN HIRJI SHAH ..... 2<sup>ND</sup> DEFENDANT**

**HIRJI LALJI SHAH ..... 3<sup>RD</sup> DEFENDANT**

**RAJNI SHAH ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The Background**

1. At the heart of the dispute are numerous properties whose acquisition and ownership is associated with one Dr. Mahendra Krishnalal Adalja (hereinafter, Adalja) who died on 14.1.2016. The plaintiff claims to be the wife of Adalja. The 1<sup>st</sup> defendant is his son. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are executors of the will of Adalja.
2. At the outset, it is pertinent to set out the registration and management status of the suit properties.  
Properties registered in plaintiff's name
  - i. Horombo Villa Number 19 Rosslyn Gardens L.R 28431 (Original 18/31), hereinafter Rosslyn Garden property.
  - ii. Town House No. 22 Jambo Prestige L.R. No. 1870/111/550 Westlands, hereinafter Jambo Prestige property.Properties in the name of the Plaintiff and Adalja



- iii. Town House Number 6 L.R. No. 7158/505 Marble valley, hereinafter, Marble Valley property.
  - iv. Clifton Villas (K111) L.R.7158 /608 House no. 10, hereinafter, Clifton Villas no.10. (Amalgamation of L.R. No. 7158/365 and L.R. No. 7158/366).  
Properties in the name of the 1<sup>st</sup> defendant and Adalja
  - v. L.R. No. 1870/III/447 Shanzu hereinafter, Shanzu property.
  - vi. Clifton Villas L.R.7158/237 (Original 7158/103/02) hereinafter, Clifton Villas 237.
  - vii. Clifton Villas L.R.7158/238 (Original 7158/103/3) hereinafter, Clifton Villas 238.  
Properties in the name of the Deceased (Adalja)
  - viii. Flat No. 4 Block “A” L.R.1870/VI/61 (East Church), herein after Flat 4 “A”.
3. The properties listed as numbers i-iv are under the management of Lloyed Masika property managers who were so appointed through a court order. No evidence was adduced relating to the management of the properties listed as number v-vii, but presumably, these properties are in the hands of the 1<sup>st</sup> defendant.
  4. For the property listed as number viii (Flat 4”A”), there is no dispute that this was the residence of Adalja. That sometime in December 2015 or thereabout, the property was locked up by the 1<sup>st</sup> defendant. It appears that no one uses the said house since then.
  5. The plaintiff wants all the properties to herself, and in the same measure, the 1<sup>st</sup> defendant wants all the properties to himself.

### **The Pleadings**

6. The suit was commenced through a plaint dated 13.5.2016, where the plaintiff avers that she was the wife of Adalja, and she recognizes the 1<sup>st</sup> defendant as the son of the deceased-Adalja.
7. She avers that while her husband was in hospital at the ICU on 13.11.2015, the 2<sup>nd</sup> and 4<sup>th</sup> Defendants accessed his house and took custody and possession of all title documents to the deceased’s properties. Thereafter, Adalja passed on at M.P Shah Hospital on 14.1.2016. That the deceased left a valid will dated 2.9.2015 appointing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the trustees, executors and administrators of his estate. However, around February 2016, the Defendants produced a fraudulent and forged will of the deceased dated 9.11.2015 which purported to appoint the 4 defendants as trustees and executors of the said will.
8. The plaintiff seeks orders that judgment be entered against the Defendants for;
  - i. A declaration that the Plaintiff is the registered proprietor and beneficiary of all those parcels of land known as Horombo Villa Number 19 Rosslyn Gardens LR No. 28431 (Original 18/31) and Town House Number 22 Jambo Prestige LR No.1870/III/550 Westlands.
  - ii. A declaration that the Plaintiff is a joint proprietor/tenant together with Dr. Mahendra Krishnalal Adalja (deceased) of the following parcels of land;
    - a. Town House Number 6 LR No. 7158/505 Marble Valley.
    - b. Clifton villas LR 7158/365.
    - c. Clifton villas LR 7158/366.



- d. Type “C” Flat Number 4 Block A LR 1870/VI/61 (I.R 92435/1).
  - e. Clifton Villas (KIII) LR 7158/608.
  - f. Clifton villas LR 7158/237.
  - g. Clifton Villas LR 7158/238.
  - h. LR 1870/III/447 Shanzu Villas.
- iii. A permanent mandatory injunction directed to the Defendants to produce and deliver to the Plaintiff all the original documents of the above mentioned properties.
  - iv. A permanent injunction restraining the Defendants from in anyway alienating the above mentioned properties.
9. The suit is opposed by the 1<sup>st</sup> Defendant vide his statement of defence and counterclaim dated 15.7.2016 and amended on 5.2.2018. He avers that he is the son of the late Dr. Mahendra Krishnalal Adalja and the sole beneficiary of his estate and denies that the Plaintiff is a wife of Adalja.
  10. He contends that the deceased inherited a substantial family estate comprising of immovable properties and shares in companies as well as cash held in several bank accounts which were held in their joint names, thus Adalja was a trustee of the said assets for the benefit of the 1<sup>st</sup> Defendant.
  11. He avers that the deceased lived in Flat 4A East Church while he provided housing for the Plaintiff on the ground floor at Flat No.1A.
  12. He avers that when his father was ailing, the plaintiff pressured the deceased to transfer some properties to her namely; ½ shares in parcel 7158/505 (Marble Valley) and L.R. 7158/365 and 7158/366 which was consolidated into Land Reference No. 7158/608 (Clifton villas).
  13. The 1<sup>st</sup> defendant further contends that parcel L.R. No. 1870/III/500 Westlands (Jambo Prestige) and L. R. No. 28431 (Rosslyn Garden Villa Number 19) were purchased in the name of the plaintiff, but with monies held by the deceased in an account he jointly held with the 1<sup>st</sup> Defendant. Adding that the conversion of the monies from the aforementioned joint account was done with the knowledge and at the prompting and connivance of the plaintiff.
  14. In his Counterclaim, the 1<sup>st</sup> defendant seeks orders that the properties in the joint names of the deceased and the Plaintiff, as well as those registered in the sole name of the plaintiff are held by the Plaintiff in an implied/constructive trust for the benefit of the 1<sup>st</sup> Defendant, and an order to strike out the name of the plaintiff and replace the same with his name on all the suit titles where the name of the plaintiff appears.
  15. He also seeks orders that the Plaintiff accounts for rent and income from the said properties, an order to pay the 1<sup>st</sup> Defendant income and profit from the said properties from the date of purchase to the date when possession and control are vested in him with interest, and he also prays for exemplary and punitive damages as well as costs.
  16. The 2<sup>nd</sup> Defendant opposed the suit vide a statement of defence dated 9.10.2017, where he avers that the plaintiff was a house help and not a wife of the deceased, and that the plaint does not disclose any cause of action against him.
  17. The 3<sup>rd</sup> Defendant opposes the suit vide his statement of defence dated 24.8.2016. He avers that the deceased, Adalja was his friend and that to the best of his knowledge, he was not married to the Plaintiff.



Similarly, he avers that no cause action against him has been disclosed, adding that he does not admit the jurisdiction of this court.

18. The 4<sup>th</sup> Defendant filed a statement of defence dated 15.7.2016, where he equally avers that to the best of his knowledge, the Plaintiff was not a wife to the deceased, that no cause of action is disclosed against him and that this court has no jurisdiction on the matter.

### **The Interested Party**

19. On 15.12.2021, the matter was being mentioned in the virtual platform when someone by the name Adalja Rajesh addressed the court as follows; “I am a family member of Arun (read 1<sup>st</sup> defendant). I want to be enjoined in this suit as an interested party as we need to know what is happening in this case...”. The oral application was allowed of which the new party was directed to file and serve his pleadings and documents by 14.1.2022. That was the last the court heard from this person. He did not file any pleadings and or any kind of documents in this matter. Later during the trial, the 1<sup>st</sup> defendant identified the interested party as his brother who had no right to speak for 1<sup>st</sup> defendant’s mother. I will say no more about the said Interested party.

### **The Management of the properties**

20. During the initial stages of the suit, there were a plethora of applications in which the main protagonists (the plaintiff and the 1<sup>st</sup> defendant) were seeking orders restraining each other from dealing with the suit properties. In a ruling delivered by this court (Judge Obaga sitting) on 1.2.2018, the court issued orders interalia;
- i. An injunction restraining the two parties (plaintiff and 1<sup>st</sup> defendant) from alienating, selling, transferring or charging the 4 properties namely; Horombo Villa no.9 Rosslyn Garden, Jambo prestige house. No.22, Marble valley house no.6 and Clifton Villa LR. 7158/608.
  - ii. The plaintiff and the 1<sup>st</sup> defendant to identify and appoint a property manager to manage the above mentioned properties, receive rent and pay out all outgoings like land rates and service charge.
  - iii. The plaintiff was restrained from interfering with the quiet possession of the 1<sup>st</sup> defendant in respect of Flat 4A.
21. On 31.10.2019, the parties through their advocates entered into a consent appointing M/S Lloyed Masika as receivers and managers of the 4 properties in question.

### **The Evidence**

#### **Case for the Plaintiff**

22. The Plaintiff’s case was advanced by 2 witnesses, herself SOPHINA KALONDU MBITI testifying as PW1. She adopted her witness statement dated 9.6.2022 as her evidence. She also produced 52 items running from page 48-353 of her bundle as P. Exhibit 1-52.
23. Her case is that she was married to Dr. Mahendra Kirishnalal Adalja and that they lived together as husband and wife for a period of 25 years in Flat No. 4 Block A that as evidence of their spousal relationship, they opened 5 joint and financial accounts in various banks.
24. She also states that the deceased was previously married to one Madhia, mother to the 1<sup>st</sup> Defendant in 1981 but the said marriage was dissolved on 28.9.1986 in High Court Divorce Cause No. 73 of



- 1985, adding that the 1<sup>st</sup> Defendant was born out of wedlock and lived with his mother throughout his young life. That the 1<sup>st</sup> Defendant visited them once at their matrimonial home and that he left for Australia when he was 22 years. He only visited Kenya in 2011 and in 2015.
25. PW1 avers that during the subsistence of their marriage, the Rosslyn Garden and Jambo prestige properties were purchased by the couple and registered in her name. Similarly, the Marble valley property house no. 9 and Clifton villas no. 10 were purchased in a similar manner, where the plaintiff was registered as a joint proprietor with Adalja. She avers that Adalja was in good health, thus the allegation by the 1<sup>st</sup> defendant that Adalja was under pressure in the various property transactions was incorrect.
  26. Pw1 further states that while the deceased was admitted in hospital, the 2<sup>nd</sup> and 4<sup>th</sup> Defendants carried away all the deceased's personal documents including all the original title documents to the suit properties. That on 6.12.2015, she was evicted from their matrimonial home Flat 4A by the 1<sup>st</sup> Defendant.
  27. She states that she does not hold the suit properties herein in trust for anyone since the source of purchase prices were from the deceased income and her spousal support and not from Adalja's father who passed on in year 1963 when Adalja was 26 years old.
  28. The cross examination upon PW1 by counsel for the defendants generally revolved on the question as to whether PW1 was married to Adalja.
  29. When cross examined by counsel for the 1<sup>st</sup> defendant, PW1 stated that she stays at Flat 1A of their church road apartment after their Flat 4A where she lived for 25 years was locked by the 1<sup>st</sup> Defendant on 6.12.2015. She stated that all the documents regarding the suit properties as well as documents evidencing her marriage to Adalja were in that flat, thus all what she has are the copies of documents kept by Adalja when he was alive at Flat 1A. She is not aware that the original titles to the suit properties were kept by Adalja's lawyer Ramesh Manek and that Dr. Adalja had deposited them with him with the intention to reverse transactions.
  30. She also stated that the 1<sup>st</sup> Defendant stays at the high ridge property which was bought by Adalja himself, but she is not claiming it and other properties which are in Australia, all totalling to 5.
  31. On the issue of shares, she stated that Adalja did put shares in the Nairobi Stock Exchange in joint names of the 1<sup>st</sup> Defendant and himself, but there was no transfer of properties to the 1<sup>st</sup> Defendant. That before she got married, she found Adalja with plot number 53 and 51 located in Loresho, Casket villas as well as Shanzu villas.
  32. Referred to page 18 of her bundle, she stated that properties 718/237, 718/238 both in Spring Valley and LR 1870 Shanzu villas were with the deceased when she married him, but she is not aware that he had transferred the same to the 1<sup>st</sup> Defendant. That for casket property, they bought it, but it was sold by the 1<sup>st</sup> Defendant through Ramesh.
  33. PW1 denied taking advantage of her husband's illness and or taking large sums of money. Referred to page 154 of volume 3 of the 1<sup>st</sup> Defendant's bundle of documents, she could see a letter dated 10.9.2015 and she can recognize the handwriting as that of her deceased husband, by then he was ill.
  34. Upon cross-examination by counsel for the 2<sup>nd</sup>- 4<sup>th</sup> Defendants, she stated that she has sued the 2<sup>nd</sup>-4<sup>th</sup> Defendants since they are trustees and executors of Adalja's will. She added that documents from the apartment where she stayed with Adalja were picked from that house in a bag by the 4<sup>th</sup> Defendant when Adalja was in hospital.



35. Upon re-examination, PW1 stated that at page 58, 60 and 69 of her bundle, there are documents evidencing joint investments between her and Mr. Adalja which include fixed bank accounts, treasury bills, AAR Insurance policy taken out by Adalja for her, himself and all her 3 children as well as joint investments that she was a signatory to.
36. She also stated that there are 2 properties in her name being Rosslyn Garden House No. 19 and Jambo prestige house no. 22, while Marble House valley house No. 6 and Clifton Villas House No. 10 are in the joint names of herself and her husband and upon his death, the properties became hers automatically.
37. PW2, one Mbiti Nyolo Ngao is the Plaintiff's father. He adopted the contents of his witness statement dated 9.6.2022 at page 45 of the Plaintiff's bundle as his evidence. His evidence relates to how his daughter introduced a man of Hindu origin as the one she was in love with and that the suitor later paid dowry.
38. The cross-examination of Pw1 by the defendants basically related to the nature of the alleged marriage between the plaintiff and Adalja.

### **The case of the 1<sup>st</sup> Defendant**

39. The case of the 1<sup>st</sup> Defendant was advanced by 4 witnesses, himself Arun Mahendra Adalja testifying as DW1. He adopted his witness statement dated 25.3.2022 to be found at page 14 of his Vol.2 bundle as his evidence, along with affidavits sworn on 27.3.2017, 6.9.2017 and 15.1.2019. He produced documents contained at page 1-226 of Vol 3 of his bundle of documents as D. Exhibit 1-48. He further produced 17 documents in his bundle identified as Vol 3 A (page 1-256) as Exhibit 49-65 as well as documents in an addendum list of the same volume running from page 257 to the end as Exhibits 66-69.
40. However the production of the following items was objected by plaintiff's counsel;
  - i. Item 21 in Vol 3 which is the affidavit of V. Goswami. The deponent did turn up later to give his testimony.
  - ii. The document at page 193 of the same Vol 3 (a letter from Ramesh Manek advocates). Dw4, Salman Khanbhi, a lawyer from Ramesh Manek did not produce this document when he took to the stand.
  - iii. The Trust Deed at page 247 of Vol 3A. The original document was availed by Dw4, Salman Khanbil who stated that they had all the original documents. He however went back with this document after his testimony.
41. DW1 testified that his father, the late Adalja had transferred shares to him in October 2010 as the sole beneficiary. To this end, Adalja wrote a letter informing him that he was the sole beneficial owner of shares at Nairobi Stock exchange. However, Adalja began to sell the said shares without his consent.
42. He denies that the Plaintiff was married to his father. Rather, he is aware that plaintiff lived at Flat 1A which was leased below his father's house as he needed someone close to take care of him.
43. He avers that his father transferred to him the properties known as; L.R. 7158/237 & 238 as well as 1870/111/447 and they agreed that the father was to manage the properties for him as a trustee as the 1<sup>st</sup> defendant was living in Australia. He contends that his father intended to sell Flat 4A in order to migrate to India.



44. He further avers that the property known as Marble valley House No. 9 belonged to his father which was used for rental income with the understanding that Adalja would use that income for his personal expenses.
45. Dw1 also stated that he came to Kenya on 15.10.2015, and his father handed over to him the management of his properties. In the course of reconciling the bank accounts, he discovered that large payments were transferred from his bank account No. 0101504708000 held at Standard Chartered bank on 29.3.2012 and on 10.4.2012 to Raffman Dhanji Virdee Advocates as is evident from the documents at page 125 of his bundle. He then traced the said transactions to the purchase of the properties in the name of the Plaintiff and Adalja, the same being Clifton Villas No 10 of L.R. 7158/365 and 366.
46. Another discovery was withdrawal of funds on 21.8.2013 and 26.9.2013 from his aforementioned account for purchase of the property known as Jambo Prestige House no. 22 registered in the name of the plaintiff.
47. Yet another discovery was that on 31.10.2014, and on 28.11.2014, monies were transferred from his account for purchase of the Rosslyn Gardens house 19 registered in the name of the plaintiff.
48. Dw1 further states that the aforementioned properties were purchased with monies taken from the sale of his shares without his knowledge and consent resulting in a loss of Ksh.161 338 000.
49. Dw1 avers that when he questioned his father about these transactions, the father appeared not to know about them. He states that his father had no right to sell his shares without his consent and for the benefit of the plaintiff.
50. He contends that his father was weak and vulnerable. That his father confided in him that he was duped and tricked by the plaintiff into taking monies out of the account of the 1<sup>st</sup> defendant under unbearable pressure on an almost daily basis. Thus the transfer of properties to the plaintiff was through duress, fraud and misrepresentation by the plaintiff.
51. Upon cross-examination by the plaintiff's advocate, DW1 stated that he had gone to study in Australia and when he finished his degree in late 2004, he returned to Nairobi and spent about 2 years with his father, then he went back to Australia and he is now an Australian national. He was also in Kenya in 2011 and 2015 so in total, he came back to Kenya 3 times.
52. Referred to page 117, Vol 3 of his documents, he stated that parcel LR 7158 /505 Marble Valley is registered to the Plaintiff and his father to hold as joint tenants, meaning the survivor gets the property. That at page 162 of the same bundle, the document shows that parcel LR 1870/iii/550 Jambo Prestige is registered to the Plaintiff solely. For LR No. 28431 Roselyn Gardens No. 9 as per documents at page 171 of the same bundle, it was transferred to the Plaintiff. At page 132 of the same bundle, the document shows that LR No. 7158/608 Clifton villas is registered jointly to his late father and the Plaintiff while LR No. 1870/vi/61 East Church Flat No. 4A is registered in the name of his father as per documents at page 108 of the same bundle.
53. He avers that there is a petition for grant of probate that he filed with Dr. Rajni Shah in Succession Cause No. 315 of 2018, where he is contesting the will of the deceased.
54. He further stated that his grandfather was a prominent doctor in Nairobi, who was quite wealthy. When he died in 1964, he left a sizable estate, worth over ksh.6000/= in 1964. His father and his grandmother became trustees of his estate, but his grandmother also passed on, leaving his father as



- the sole trustee of all the family assets. That Flat No.4 'A' was purchased from monies from his grand father's estate whose beneficiaries were his father and his uncle.
55. He stated that for the Marble property, it was purchased from the assets derived from the family assets, while Jambo Prestige, Roselyn and Clifton properties were purchased with monies from his account, that is why he is claiming them. His father was a trustee of the family wealth and held the assets in his name including shares at Nairobi Stock Exchange and he transferred the shares to him in October 2010 as per document at page 76 of Vol 3 of his bundle. He admits that the letter is not addressed to him, it is not registered anywhere and neither is it a will, but it is the basis upon which he is saying that all the shares belong to him.
  56. He adds that though his father owned the shares, the money to buy them came from his grandfather's wealth and it is out of the proceeds of those shares that the properties were purchased.
  57. He stated that shares that were sold were credited into his account and the money was then withdrawn from his account to buy the 3 properties. So at some point, monies left his grandfather's estate to buy shares but he has no evidence to that effect.
  58. When referred to page 58 of the Plaintiff's bundle, he stated that his father gave the Plaintiff access to his standard chattered account just as a precautionary measure, and though she is an approved signatory of his father's bank accounts, she was not his father's wife, she was a maid.
  59. Referred to page 60 and 61 of plaintiff's bundle of documents, he stated that these are visa card for bank account No. 0100434395201 under his father's name and the other in Plaintiff's name. He further identified the joint account of his father and the Plaintiff at page 64 of plaintiff's bundle from Stanlib, a financial institution. That there are also two credit advice from Central Bank of Kenya in the joint names of his father and the plaintiff at page 66 and 67 of the same bundle, while at page 68, there is a deposit advice for Standard Chartered in the joint names of the plaintiff and Adalja with a principle amount of ksh.50 million. Further at page 69 of the same bundle, there is an AAR insurance receipt taken out for the Plaintiff by his father.
  60. He stated that his father lived at Flat 4 'A' and treated it as his home and in his wills, he left this property to the Plaintiff.
  61. He pointed out that at page 120 of volume 3A of his bundle, there is a statement from Reinessance Capital and it has an account number in his name and that of his father and that funds were withdrawn from the said account to purchase some of the suit properties, of which, his father was represented by an Advocate.
  62. Referred to Vol 3 "A" page 250 of his bundle, DW1 stated that it is a trust deed for the Jambo Prestige property, where the Plaintiff is the trustee. The same provides that, the trustee holds all the property under the lease in trust for beneficiary during beneficiary's lifetime and shall account on income derived or accruing therefrom, and in the event the beneficiary decides to sell the said property, the beneficiary shall be entitled to all proceeds and ... after the death of the beneficiary the property becomes the property of trustee. DW1 owned up to the fact that, that was his document whose import was that the property belonged to his father during his lifetime, but after his death, the property belonged to the Plaintiff.
  63. DW1 further identified the trust deed in respect of Roselyn Garden as the one at page 254 of Vol 3A of his bundle. He states that the trustee is the Plaintiff, while his father is the beneficiary. The document states that; " Trustee holds all the property...for the beneficiary during beneficiary's lifetime...in the event the beneficiary decides to sell the property, beneficiary is entitled to proceeds." It also states that if beneficiary dies, the property reverts to the trustee.



64. DW1 avers that he still has a problem with the plaintiff being the owner of the aforementioned suit parcels, since she had no interest during his father's lifetime.
65. Upon re-examination, Dw1 stated that when his father was hospitalized, the Plaintiff had keys to his father's flat and access to his documents.
66. He also stated that for the Trust deed at page 247 of Vol 3A of his documents, the stamp duty was paid.
67. He reiterated that the properties which were transferred to him by his father were LR 7158/237, 7158/238 and LR 1870/3/447 and that the Plaintiff conceded that she had no interest in these properties.
68. That in addition, his father transferred to him his shares in Nairobi Stock Exchange worth Ksh. 300-350million in 2010 and he has traced the transactions indicating that some shares were sold to buy the suit properties.
69. DW2, one V.GOSWAMI is an Advocate and a partner with Sobat H. Shah Advocates. He is the 2<sup>nd</sup> witness for the 1<sup>st</sup> defendant. He gave his evidence in chief in the virtual platform, but by consent of the advocates for the parties, the cross examination and re-examination was conducted physically in open court.
70. Dw2 produced his affidavit sworn on 18.3.2022 to identify the signature of his partner Sobhag H shah made on 23.8.2010 on the document at page 84 of Vol 3 of the 1<sup>st</sup> Defendant's list of documents. The same is a note by the late Adalja stating his wish to convert his shares in companies quoted at Nairobi Stock Exchange from his sole name to joint names with the 1<sup>st</sup> Defendant.
71. Upon cross-examination, Dw2 stated that he had vague knowledge of the transactions of Adalja, as the latter was primarily a client of his partner in the firm of Sobhag H. Shah & V Goswami.
72. For the document at page 70 of plaintiff's bundle, he confirms to having witnessed the signature of Adalja where the deceased was giving the property known as Flat 4 A East Church to the plaintiff. Dw2 does not think that Mr. Adalja signed this document under duress. That Adalja had a very strong personality so he would not work under duress.
73. Upon re-examination, Dw2 stated that Dr. Adalja used to buy a lot of properties through his partner, but he does not know if he bought more properties after 23.10.2009. He also stated that the document at page 140 of plaintiff's bundle looks like a will.
74. The 3<sup>rd</sup> witness for the 1<sup>st</sup> defendant is Shailesh Krishnalal Adalja DW3. He gave his testimony virtually while in Greater Manchester in the United Kingdom (UK). He adopted his witness statements dated 27.5.2022, affidavit sworn on 4.9.2017 and further affidavit sworn on 9.2.2023 as his evidence. The first 2 documents can be traced in Vol 2 bundle of 1<sup>st</sup> defendant as the very last documents.
75. DW2 identifies the 1<sup>st</sup> Defendant as his nephew, son of his late brother Adalja. He knows and has met all the Defendants, but has never met the Plaintiff. His father passed away on 19.7.1964 when he was 9 years, and was survived by his mother and his late brother.
76. His late brother Adalja was a qualified doctor and had taken over their father's medical practice, but he became successful and made money from the family estate developed from fixed assets and shares in stock exchange and treasuries. He avers that the estate which comprised of properties in his father's name including stocks in shares was never divided up formerly and they agreed that the estate would go to the 1<sup>st</sup> Defendant. The agreement was given effect by a letter dated 10.10.2020 at page 76 of Vol



3 of the 1<sup>st</sup> Defendant's documents and the same is consistent with the letter dated 23.8.2010 at page 80 of the same bundle.

77. Upon cross-examination by counsel for the plaintiff, DW3 stated that he left Kenya 37 years ago in 1986, he was required to leave on technicalities. He reiterated that his father left a significant estate which was used to buy Plaintiff's properties. However, his father's immovable property was parcel LR 209/3430. The said property is occupied by his late brother's ex-wife and her son. He is however not familiar with his father's will as he was seeing the same for the first time.
78. Upon re-examination, Dw3 stated that other properties of his father included securities like bonds and treasury bills worth ksh.316,636.44.
79. The 4<sup>th</sup> witness for the 1<sup>st</sup> defendant is one Salman Khanbhi (DW4) a lawyer who has not been admitted as an advocate. He told the court that he worked for Ramesh Manek Advocate (now deceased) for a period of 10 years. He produced the original Trust deed for amalgamated parcels LR 7158/365 and 366, a copy of which is at page 247 of the 1<sup>st</sup> Defendant's Vol 3A.
80. Dw4 is now working for Mr. Khakhad who instructed him to look for the document in respect of the suit parcels; and to this end, he had original documents for all the 5 suit properties which he got from Mr. Ramesh Manek's office. He stated that Mr. Khakhad is the administrator of the office of the late Ramesh Manek Advocates. He added that all documents relating to the suit properties are as stated at page 191-192 of the 1<sup>st</sup> Defendant's bundle of documents Vol 3 and are all available, he could produce them if so required.
81. Upon cross-examination, DW4 stated that he does not know how Mr. Manek came to be in custody of the aforementioned documents relating to the suit properties. He found them in the cabinet labelled Dr. Adalja and they were in a box, not a bag.

### **Case for the 2<sup>nd</sup> Defendant**

82. The 2<sup>nd</sup> Defendant Kiran Hirji Shah testified as DW5. His evidence was taken virtually in Kenya by consent. He was 93 years old as at the time of his testimony. He adopted his affidavit sworn on 4.10.2017 as his evidence. He is a close friend of the late Adalja. He avers that on 13.11.2015 when Adalja was in hospital, the latter sent him and the 4<sup>th</sup> defendant to his house to collect a bag and give it to the 1<sup>st</sup> defendant. They found the bag in one of the cupboards.
83. Upon cross-examination, Dw5 stated that the Plaintiff is familiar to him as whenever he went to visit Dr. Mahendra, he would find her there, she would prepare tea and coffee from the lower house and bring it up.
84. He avers that when he went to collect the bag from Adalja's house, he was given the same by the Plaintiff who is the one who opened Flat 4A. The bag was in the sitting room. He does not recall if the Plaintiff had a key to the doctors' bedroom. In the bag, there were documents, perhaps leases of properties, he saw them but he did not read them. The bag was then taken by the 4<sup>th</sup> Defendant. He added that he is an executor of Dr. Mahendra's will.
85. He stated that Dr. Adalja did not at any time complain of any intimidation or threats by anyone not even the Plaintiff.
86. Upon re-examination, DW5 stated he has no interest in Mahendra's properties as he has his own.



### Case for the 3<sup>rd</sup> defendant

87. The 3<sup>rd</sup> defendant Hirji Lalji Shah advanced his own case as DW6 and gave his testimony virtually. He stated that he would be 87 years old by the end of this years (2023). He adopted his witness statement dated 24.8.2016 as his evidence. He avers that he was a friend of Adalja. He doesn't know why he was sued.
88. Upon cross-examination, he stated that he was one of the executors of the will of Dr. Adalja. He cannot remember anything save that he was a trustee. He knows 1<sup>st</sup> Defendant whom he met about 3 times.

### Case for the 4<sup>th</sup> defendant

89. The 4<sup>th</sup> defendant Rajni Shah advanced his own case as DW7. He adopted his witness statements dated 15.7.2016 and 25.6.2022 as his evidence. He is 87 years old. He also testified virtually. He was a close friend of the late Adalja. That in November 2015, he visited Adalja in hospital who instructed him to go to his house and collect a bag from that Flat. He did so, though he had to wait for 15 minutes for the plaintiff to arrive. He gave the bag to the 1<sup>st</sup> defendant as instructed by Adalja.
90. Upon cross-examination, DW7 stated that on arrival at Adalja's house, they found the bag in one of the rooms. He then stated that the plaintiff is the one who gave them the bag.
91. He further stated that though he is an executor of Adalja's will, it is wrong for the Plaintiff to sue him.
92. Upon re-examination, DW7 stated that he has no interest in the suit properties.

### Submissions

#### Submissions of the plaintiff

93. The submissions of the plaintiff are dated 9.6.2023 and address the following issues;
  - a. Whether the Plaintiff was a wife to Dr. Mahendra Adalja, (deceased).
  - b. Whether the Plaintiff has sole and exclusive interest over parcels of land LR No. 28431 (original 18/31); LR No. 1870/111/550; LR No. 7158/505 and LR No. 7158/608.
  - c. Whether the issue of ownership and beneficial interest in parcel of land LR No. 1870/VI/61 (I.R 92435/1) ought to be determined in Nairobi High Court Succession Cause No. 315 of 2018.
  - d. Whether the Plaintiff holds parcel of land known as LR No. 28431 (Original 18/31); 1870/111/550; 7158/505 and 7158/608 in trust for the 1<sup>st</sup> Defendant.
  - e. Whether the Plaintiff is entitled to the prayers in the plaint.
94. On the 1<sup>st</sup> issue, the Plaintiff submits that she has proved that she was a wife to the deceased by either customary marriage or by presumption of marriage. She relies on the case of BKG V NWT [2022] eKLR, the case of M.W.G V E.W.K [2010] eKLR as well as the case of MNK v POM; Initiative for strategic Litigation in Africa (ISLA) (Amicus Curiae) KESC2 (KLR).
95. On the 2<sup>nd</sup> issue, the Plaintiff submits that the parcel of land known as LR No. 7158/505 (original No. 7158/42/13)-Marble valley was registered in her name and the deceased's name "to hold as joint tenants" on 2.8.2010. That under the Registered Land Act (repealed), a joint tenancy could not be severed and it carried with it the right of survivorship and that Section 91(8) of the Land Registration



Act, 2012 does not apply to the property. She relies on the case of Diana Muchiri v Lydia Wariara Njenga & another [2022] eKLR.

96. She also argues that the 1<sup>st</sup> Defendant's contention that the suit properties were purchased from monies belonging to his grandfather and that the said monies were held in trust for him by his father were not proven. She points out that there is no evidence that the sale of 6.6.2008 (Marble valley- page 118 of Vol 3 of 1<sup>st</sup> defendant's bundle) was sourced from sale of any share portfolio or from any bank account belonging to the 1<sup>st</sup> Defendant's grandfather and even assuming the funds came from there, the 1<sup>st</sup> Defendant did not have an interest in the estate of his grandfather as per the probate and administration Cause No.171 of 1964.
97. She adds that at the time she was gifted the property by the deceased, Adalja also gifted LR No. 1870/111/447 to the 1<sup>st</sup> Defendant on 2.8.2010 by having it registered in their joint names which presupposes that contrary to allegations of duress, the deceased was alive to his surroundings. She cites the case of Cleopa Amutala Namayi v Judith Were [2015] e KLR as well as the case of Archer & another v Archer & 2 others [2023] KECA 293 (KLR) to buttress that point.
98. She relies on the case of Twalib Hatayan Twalib Hatayan & Anor v Said Saggat Ahmed Al –Heidy & others [2015] eKLR as well as the case of Ben Duke Omwenga v Abigael Bonareri Omwenga & Another [2021] eKLR to submit that a resulting trust is not applicable in the circumstances of this case.
99. She argues that whereas the register entry for registration of the lease is silent as to whether the property is held in joint tenancy or tenancy in common, the trust deed dated 22.8.2012 confirms that the Clifton villa 608 property was granted to herself and the deceased as joint tenants.
100. She argues that whereas it is shown that a sum of ksh.4,000,000 and ksh.37,920,000/= were withdrawn on 20.3.2012 and 10.4.2012 respectively towards purchase of a property, particulars of the property are not disclosed. That though there was a bank account in joint names of the deceased and the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant does not show that the proceeds of the funds were from the sale of any shares.
101. As for the Jambo Prestige Property, she argues that she was gifted by the deceased on 13.11.2013 and the law allows a person to gift his property to a 3<sup>rd</sup> party whether such 3<sup>rd</sup> party is a relative or not. She puts forward the case of Kagina v Kagina & 2 others [2021] KECA 242 (KLR) as well as the case of Re estate of Godana Songor Guyo (deceased) [2020] eKLR to support her arguments.
102. She also submits that even the Rosslyn gardens property was registered in her favour and there is no evidence to the effect that the funds used to purchase it were either paid by the 1<sup>st</sup> Defendant or from the 1<sup>st</sup> Defendant's grandfather's estate.
103. On the 3<sup>rd</sup> issue, the Plaintiff submits that the property known as LR No. 1870/vi/61 Flat No. 4 Block A East Church, she lived in the said property with the deceased. However, that parcel should be left for determination by the family division of the High Court.
104. It is also the Plaintiff's submission that the 1<sup>st</sup> Defendants two notes allegedly written by the deceased namely a letter dated 10.10.2010 do not meet the threshold of an express trust. She cites the case of Re estate of Chandrankat Devchand Meghji Shah (Decesad) [2017] eKLR.

### **Submissions of the 1<sup>st</sup> Defendant**

105. The submissions of the 1<sup>st</sup> defendant are dated 11.7.2023 and address the following issues;
  - a. Was the deceased in breach of his fiduciary duty to the 1<sup>st</sup> Defendant?.



- b. Did monies flow from the 1<sup>st</sup> Defendant's accounts to purchase the suit properties?.
  - c. Has the 1<sup>st</sup> Defendant made out a case for the vesting of Marble Valley and/or Flat 4"A" in the 1<sup>st</sup> Defendant?.
  - d. Has the 1<sup>st</sup> defendant made out a case for a declaration of a constructive trust with plaintiff as the Trustee of the said three properties?.
  - e. What consequential orders are appropriate in the circumstances of this suit?
106. It was submitted that there was a fiduciary relationship between the 1<sup>st</sup> defendant and Adalja, whereby on 9.8.2010, on the instructions of the deceased, Standard Chartered account No. 0101XXXXXXXX00 was opened for the purpose of receiving income from a share portfolio which was irrevocably vested in him as a sole owner. That at his request, the deceased was added to the account to enable him manage the same as the 1<sup>st</sup> defendant lived in Australia. That there was transfer of monies from the said account to purchase the properties known as Clifton villas No.10, Jambo Prestige and house No. 9 Horombo Rosslyn Gardens.
107. He submits that the breach of a fiduciary duty by conversion of monies or property of whatsoever nature cannot be justified or excused on the ground that the beneficiary of the unlawful acts was the spouse of the defaulter. That the innocent beneficiary of a gift funded unlawfully will be compelled to yield up the property so obtained.
108. He also argues that the Plaintiff put herself in a position where she was in complete control and in charge of the well-being of the deceased and began to extract assets from him. He reiterates that the plaintiff was not a wife of Adalja.

#### **The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' submissions**

109. The submissions of the above mentioned defendants are dated 2.7.2023, where they address the following issues;
- a. Whether the Plaintiff was a wife to Dr. Mahendra Adalja (deceased).
  - b. Liability of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  - c. Who should bear the cost of this suit?
110. On the 1<sup>st</sup> issue, these Defendants submit that the Plaintiff's allegation of marriage is entirely false. On the 2<sup>nd</sup> issue, they submit that they are yet to be confirmed or appointed as trustees, executors and administrators or personal representatives of the deceased's estate by the court and neither one of them has any capacity to be sued in this suit or at all.

#### **Determination**

111. Whereas there is no dispute as to the relationship between Adalja (Deceased) and the 1<sup>st</sup> defendant, the relationship between the deceased and the plaintiff is hotly contested, with the plaintiff stating that she was a wife, while the defendants claim that the plaintiff was an employee of the deceased. The proceedings herein by and large revolved around that question of the status of the plaintiff.

#### **Jurisdiction**

112. The jurisdiction of this court is clearly set out under Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* to the effect that the mandate of this court is limited to



Environment, use and Occupation of and title to land. Way back in a ruling dated 1.2.2018, this court (Judge Obaga sitting) stated that the issue as to “whether the plaintiff was a wife of the deceased or not ....cannot be decided by this court as that is outside the jurisdiction of this court. ....The relationship between her and the deceased is yet to be determined by the proper court”.

113. The question of jurisdiction of this court was again revisited by this court vide its ruling of 20.1.2021 (Judge Eboso Sitting). In the said ruling, the court appreciated that some of the suit properties herein do not form part of the estate of Dr. Mahendra Krishanalal Adalja (deceased), hence the court had declined to transfer this suit to the probate court.
114. Despite the above pronouncements by the court, and knowing well that there is a Probate Cause no. 315 of 2018 before the High court relating to the estate of Dr. Adalja, the parties herein, as if buoyed by unseen mysteries have persistently displayed frenetic attitude towards this question as to whether the plaintiff was or was not a wife of Adalja. They were simply unstoppable, so much so, that during the trial, that issue as to whether the plaintiff was a wife of the deceased or not took center stage. In the process, the element of brevity was lost in these proceedings.
115. What resonates from the foregoing analysis is that despite the grand display of pleadings, evidence and voluminous documents surmounted by the parties relating to the question as to whether the plaintiff was a wife of Adalja or not, that issue shall not be a subject of determination before this court. Simply put, this court does not have jurisdiction to determine the said question and the court had duly expressed its position early enough in that ruling of 1.2.2018. On the same breadth, this court cannot and will not deal with issues appertaining to the WILL of Adalja.
116. What then are the questions falling for determination by this court?. As earlier observed by Judge Eboso in his ruling of 20.1.2021, there are disputes relating to property ownership hence, that shall form the issue for determination.
117. In her pleadings, the plaintiff is claiming ownership of 10 properties listed at page 4 of her bundle. The 1<sup>st</sup> defendant is similarly staking a claim in all the aforementioned suit properties. It emerged during the trial that the property known as L.R. 7158/608 is an amalgamation of L.R No.s 7158/365 and 366, of which this is the property known as Clifton Villa House No.10. The properties in question are therefore 8 and not 10.
118. However, during the trial and even during submissions, the plaintiff did not contest the properties held in the joint names of the 1<sup>st</sup> defendant and Adalja. Thus by and large the issues for determination revolves around the 4 properties where the plaintiff is mentioned as a proprietor or one of the proprietors, as well as Flat 4 “A”.
119. The questions falling for determination are;
  - a. Whether there is an express and or implied trust in favour of the 1<sup>st</sup> Defendant arising out of the manner in which the suit properties were acquired.
  - b. Whether the deceased was unduly influenced to transfer the suit properties to the Plaintiff through duress, fraud or misrepresentation.
  - c. What are the nature of rights and interests held by the plaintiff and the 1<sup>st</sup> defendant in the suit properties.
  - d. What reliefs are available to the parties.



## Trust

120. Although in her pleadings, the plaintiff is claiming all the 8 properties, her evidence was largely confined to the 4 properties either registered in her name or in her name and that of Adalja. Similarly in his evidence, the 1<sup>st</sup> defendant was claiming the said properties through trust. Thus the crux of the dispute relates to the 4 properties namely; House no.19. Rosslyn Garden and Jambo Prestige which are in the name of the plaintiff as well Marble valley no.6 and Clifton Villa no. 10 in the names of the Plaintiff and Adalja.
121. The 1<sup>st</sup> Defendant's argument is that the above mentioned properties were purchased through the family wealth of his grand father and or from monies withdrawn from his Standard Chartered account No.0101504708000 opened for purposes of receiving income from a share portfolio which was irrevocably vested in him as the sole owner. Additionally, the 1<sup>st</sup> defendant has availed trust deeds to show that some of these contested properties were held by the plaintiff in trust for Adalja. That in the circumstances, there was a fiduciary relationship in which Adalja held the family wealth and the share portfolios in trust for the 1<sup>st</sup> defendant. This is the basis upon which the 1<sup>st</sup> defendant is counterclaiming the 4 properties.
122. The Court of Appeal extensively expounded on the doctrine of trusts in Archer & another v Archer & 2 others (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR) (17 March 2023) (Judgment), the case of Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Centre [2018] eKLR as well as the case of Twalib Hatayan Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & Others (2015) eKLR where it stated thus;

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as:

“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...”

123. In Constance Tunda Vuko v Chairman and Secretary, Peace of Elshadai Temple & 2 others [2021] eKLR, the court found that a title holder does not hold the title absolutely, that a title can be encumbered by a trust. The court stated thus;

“Section 28 of the said Act (*Land Registration Act*) provides for overriding interests which apply even where they are not noted in the register. Under Section 28 (b) trusts are listed as such overriding interests which apply even when not noted in the register.”

124. The courts will however not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. This position has been reiterated in a raft of decisions as in; Yogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & 2 others [2006] eKLR Gichuki vs Gichuki (1982) KLR 285 and Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171.



125. In the case *Julebati African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, the court of Appeal held that; the existence of a trust is a question of evidence and went on to state that;

“The law never implies, the court never presumes a trust, but (ONLY). In case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

126. It follows that the existence of a trust is a question of evidence. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. See- Section 107-109 of the *Evidence Act* and the case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR. To this end, the onus of proving that the 1<sup>st</sup> defendant is entitled to the 4 properties through trust lies squarely upon him. To this end, the 1<sup>st</sup> defendant has advanced 3 platforms upon which, he is claiming the properties through trust – namely: Family wealth, Unlawful conversion of his shares and Trust Deeds.

### **Family Wealth**

127. Both the 1<sup>st</sup> defendant and his uncle, DW3, (Dr. Adalja’s brother) contend that they inherited a substantial estate from the father of deceased. That as a family, they agreed that the family assets must remain in the family.

128. There is no dispute that the father of Adalja, one Krishnalal Vithaldas Adalja died way back in 1964. The grant of probate of his will has been availed by the 1<sup>st</sup> defendant . DW3 stated during cross examination by plaintiff’s counsel that “ in terms of the immovable property left by my father is 209/3430 at Parklands. The same is occupied by my brother’s ex wife and her son...”

129. As for the 1<sup>st</sup> defendant, he stated during cross examination that the shares that were sold were in his name, but the document of probate for his grand father’s estate does not talk about the shares he is referring to. He clarified that; “What I am saying is that at some point in time, proceeds from my Grand Father’s estate were used to buy the shares which were then sold. I don’t have evidence of how such monies left the estate to buy shares”.

130. This far, I find no iota of evidence to indicate that the assets of Adalja’s father were used to purchase the properties in question.

### **Unlawful Conversion and Sale of Shares**

131. The claim of the 1<sup>st</sup> defendant is that the Standard Chartered account No. 0101504708000 was opened for the purpose of receiving income from a share portfolio which was irrevocably vested in him as the sole owner. That at his request, the deceased was added to the account to enable him manage the account as 1<sup>st</sup> defendant lived in Australia. The 1<sup>st</sup> defendant claims that there was transfer of monies from the said account to purchase the properties known as Clifton villaNo.10, Jambo Prestige and Rosslyn Gardens property.

132. The document at page 76 in Vol 3 of 1<sup>st</sup> defendant’s bundle is a letter dated 10.10.2010 in which Adalja had indicated that all the shares at Nairobi stock exchange were to go to the 1<sup>st</sup> defendant. The document at page 77 of the same bundle shows that the 1<sup>st</sup> defendant and the deceased held a joint Central Depository & Settlement (CDS) Account as at the month of October 2010. The document at page 85 thereof indicates that the two opened a joint account with Standard bank no. 0101504708000



- in which future dividends on all the shares were to be remitted. This far, it is apparent that 1<sup>st</sup> defendant owned assets in form of shares.
133. However, there is no clear evidence indicating the sequence of the monies which were to be deposited in the aforementioned Standard Chartered account which in any case did not belong to the 1<sup>st</sup> defendant solely as he claims. The letter at page 85 simply made a request “to remit future dividends on all his shares into his joint account”. There is no indication as to whether the account was restricted to this purpose alone.
  134. On the unlawful withdrawals, the 1<sup>st</sup> defendant contends that he made the discovery in October 2015 when he went through the statements of Renaissance Capital. He had questioned his father as to what the large sums withdrawn were all about of which the father apparently stated that he did not know.
  135. The 1<sup>st</sup> defendant attributes the purchase of three properties namely Clifton Villas no.10, Jambo Prestige and Rosslyn Garden to the withdrawals made from the joint account of himself and his father. As rightly submitted by the plaintiff, there is no concrete evidence that the funds utilized towards purchase of the properties in question were from proceeds of sale of shares.
  136. A keen look at the operations of the Account no. 0101504708000 in standard Chartered shows that it was a vibrant account with many deposits and withdrawals over a long period of time. Since 1<sup>st</sup> defendant was not around, then it follows that his father is the one who was operating this account. The nature and extent of Adalja’s rights and interests in the document (letter) at page 85 of Vol 3 are not spelt out.
  137. In the case of Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others [2019] eKLR, the court (Mbugua J) was dealing with a situation where the plaintiff was claiming the property of his late brother long after his death. I stated that the Latin phrase “Mortui non mordent” which means “dead men don’t tell tales dead men don’t bite” was applicable. Similarly in this case Adalja is no more. It is apparent that Adalja operated this account solely during his lifetime for a period straddling several years. Not once did the 1<sup>st</sup> defendant raise queries until end of year 2015. By then, Adalja was on his death bed. This far, I find no conclusive evidence indicating that the 1<sup>st</sup> defendant’s share capital was used to purchase the 4 properties.

### **Trust Deeds**

138. The 1<sup>st</sup> defendant has availed trust deeds to show that the plaintiff holds the properties in question in trust for him. The same are to be found at page 247, 250 and 254 of Vol 3A of his bundle.
139. Section 27 of the *Registration of Documents Act* provides that the day upon which a document is presented for registration shall be deemed to be the date of registration. In the Court of Appeal case of Queensway Trustees Ltd v Official Receiver & Liquidator Tanneries of Kenya Ltd [1983] eKLR, it was stated that trust deeds will take effect upon registration.
140. On registration, the 1<sup>st</sup> Trust deed is the one at page 247 relating to Clifton Villas (365 and 366) and is the only one in which DW4 availed documents pertaining to its registration for the court’s observation. He then left with the said documents. However, he clarified that he had all the original documents appertaining to the suit properties, of which he was not probed further by any party. The logical conclusion to make is that the deeds in question were duly and properly executed.
141. On the 1<sup>st</sup> page of the Trust deed at page 247, it states that; “the lease was granted to the said Dr. Mehendra Adalja and the Trustee as joint tenants..”. The document continues to indicate that the trustee held the interest in the suit property to Adalja and; “will at the request and the cost of the said



Adalja transfer her interest in the said property to such person or persons at such times and in such manner or otherwise deal with the same as the said Dr. Mahendra Adalja shall direct”. There is no evidence to show that Adalja gave any further directions in relation to the suit property until his demise in January 2016. The principle of survivorship therefore applies in accordance with the provisions of Section 91 of the [Land Registration Act](#). Also see- Re Estate of Johnson Njogu Gichohi (Deceased) [2018] eKLR.

142. The 2<sup>nd</sup> Trust deed is at page 250 for Jambo Prestige property, while the 3<sup>rd</sup> one is at page 254 of the same bundle and is for Rosslyn Garden property, of which these are the properties registered in the name of the plaintiff. The two trust deeds indicate that the plaintiff is a trustee, while the beneficiary is Adalja, but upon the death of the latter, the properties would revert back to the trustee as the sole owner. The language in these two Trust Deeds is plain, hence there is no ambiguity as to who the owner of the two properties is. The properties certainly belong to the registered owner, who is the plaintiff.
143. Thus in the end, I find that there is nothing in the alleged Trust deeds to confer any kind of trust in favour of the 1<sup>st</sup> defendant.
144. In *Heartbeat Limited v Ng’ambwa Heartbeat Community Children’s Home & Rescue Center* [2018] eKLR the court of Appeal cited *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR where the Court stated 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 parties to create a trust must be clearly determined before a trust is implied.”

145. In the case at hand, there is absolutely nothing to indicate that the properties in question were held in trust in favour of the 1<sup>st</sup> defendant. There was no meeting of the mind between Adalja and 1<sup>st</sup> defendant that the latter would ever get the 4 contested properties. Instead, there is a clear intention on the part of the deceased (Adalja) to separate and distinguish his affairs with the plaintiff on one hand, and the 1<sup>st</sup> defendant on the other hand in so far as matters of properties were concerned. See *Kazungu Fondo Shutu & Another –vs- Japhet Noti Charo & Another* [2021] eKLR. *David Ntirika M’baracha v Mutuerandu Mungatia Timothy* [2022] Eklr, *Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others* [2019] eKLR.

### **Undue Influence**

146. The 1<sup>st</sup> defendant claims that his father started ailing in the year 2009, and that is when the plaintiff started pressuring Adalja through duress, fraud and misrepresentation; intimating that she had saved his life. That in his vulnerable state, Adalja transferred properties to the plaintiff.
147. The definition of Duress in *Cheshire & Fifoot’s law of contract* 8<sup>th</sup> Edition page 281 as quoted in the case of *Jayantilala Lalji Gandhi & Another v. Mavji Ruda* [1986] eKLR is that;

“Duress in common law ... means actual violence or threats to violence to the person i.e threats calculated to produce fear of loss of life or bodily harm ...”



148. As for fraud the Blacks Law Dictionary as quoted in Arthi Highway Developers Limited v. West End Butchery Limited & 6 others [2015] eKLR defines the same as follows:
- “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right ....”
149. Misrepresentation has a plain meaning; that is giving false or misleading information.
150. Did the plaintiff commit any of the above allegation? Again the onus is upon the 1<sup>st</sup> defendant to prove that indeed there was duress, fraud and misrepresentation which led to the registration of the suit properties into the name of the plaintiff and in the name of the plaintiff with Adalja.
151. However, the allegations of fraud and misrepresentation were made in the context of the will where the plaintiff was apparently given Flat 4 ”A” as well as in relation to the letters availed by the plaintiff showing that Adalja had recognized her as family. As already spelt out earlier, this court is not determining the family status of the plaintiff or the will of Adalja.
152. It is however worthy to note that the close acquaintances of Adalja some of whom were even appointed as executors of his will do not share the same sentiments with the 1<sup>st</sup> defendant. DW2 an advocate of the High Court told the court that Adalja had a very strong personality and he would not work under any duress. As for the 2<sup>nd</sup> defendant (DW5), a close friend of Adalja, he stated that; “Dr. Adalja did not at any one time complain of any intimidation or threats by any one, not even Sophina..” Thus DW5 contradicted himself when at paragraph 37 of his Affidavit dated 4.10.2017, he stated that Adalja could only have taken monies from his and 1<sup>st</sup> defendants account only under duress, intimidation, coercion or under threats!.
153. Of utmost consideration is the fact that Adalja transferred some properties to his name and that of the plaintiff, and similarly, he transferred other properties to himself and the 1<sup>st</sup> defendant. In one particular day that is 2.8.2010, the Marble Valley property was registered into the names of Adalja and the plaintiff. On the very same date, the property known as 1870/111/447 (Shanzu) was registered into the name of Adalja and the 1<sup>st</sup> defendant. The properties known as Clifton Villas 237 and 238 came into the name of Adalja and the 1<sup>st</sup> defendant on 8.6.2011. Thus all the aforementioned properties came into the joint names of either Adalja and the plaintiff or Adalja and the 1<sup>st</sup> defendant after year 2009 (the year 1<sup>st</sup> defendant claims that his father fell ill). How comes that the man allegedly afflicted by an ailment in year 2009 and was coerced to transfer properties in his weak vulnerable state to the plaintiff still managed to transfer not one, not two but three properties to the 1<sup>st</sup> defendant too, some of which were done on the same day!.
154. It is pertinent to note that the deceased Adalja had a close relationship with the plaintiff, so much so that they even operated joint accounts and investments. To this end, the 1<sup>st</sup> defendant did confirm in cross examination that the Visa card at page 60 in the name of Adalja and the one at page 61 in the name of the plaintiff were in respect of the same bank account. He also recognized the joint investments of the plaintiff and Adalja to be found at page 64 of the same bundle, the credit advice at page 66 and 67, the fixed deposit account in the joint names of Adalja and the plaintiff at page 68 as well as the document at page 69 showing that Adalja had taken out AAR Insurance for the plaintiff. The foregoing evidence is important to dispel any notion as advanced by the 1<sup>st</sup> defendant that Adalja was transferring properties under duress. In converse, the evidence shows that there was a relationship of trust between the two (the plaintiff and Adalja).



155. What more, the 1<sup>st</sup> defendant has admitted that in all the transactions undertaken by Adalja, the deceased was represented by an advocate.
156. This far, I come to the conclusion that there was no duress, fraud, or misrepresentation in the transfer of the properties to the plaintiff or to the plaintiff and Adalja as claimed by the 1<sup>st</sup> defendant.
157. On the contrary, Adalja was giving his properties to both the plaintiff and 1<sup>st</sup> defendant during his life time. As rightly submitted by the plaintiff; the law permits the giving of gifts *inter vivos*: see *Kagina v. Kogina & 2 others* [2021] KECA 242 (KLR); *Re Estate of Gadana Sangaro Guyo (Deceased)* [2020] eKLR. Thus it matters not whether the plaintiff was a spouse or employee of Adalja. As far as this court is concerned what matters is that any gift given to the plaintiff was completed and perfected hence valid see: *Micheni Aphoxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR, *Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge* [2007] eKLR.

### **Nature of Rights and Interests in the Suit Properties**

158. At this juncture it is pertinent to reiterate that the plaintiff is registered as the sole owner of two properties, two other properties are registered in her name and that of Adalja, three properties are registered in joint names of the 1<sup>st</sup> defendant and Adalja while one property is in the name of Adalja.

### **Properties in Joint names**

159. The registration of the Marble Valley property 7158/505 is to be found at page 118 of Vol 3 of the 1<sup>st</sup> defendant's bundle and reads as follows;

“Transfer to Sophina Kalondu Mbiti and Mahendra Krishnalal Adalja all that undivided share to hold as joint tenants.”

160. In *Isabel Chelangat v Samuel Tirop Rotich & 5 others* [2012] eKLR, the court made the distinction between joint tenancy and tenancy in common as follows;

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else, they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (*Jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant .....

In a tenancy in common, the two or more holders hold the property in equal individual shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words they have separate interests only that it remains undivided and they hold the interest together .....

161. What I discern is that upon the death of Adalja, the Marble Valley property passed on to the plaintiff through the doctrine of survivorship.
162. The properties known as 1870/111/447 Shanzu was registered in the name of Adalja and the 1<sup>st</sup> defendant as joint tenants on 2.8.2018. A similar kind of registration can be found at page 138 of plaintiff's bundle for properties known as Clifton Villa 237 and 238. The aforementioned properties similarly revert to the sole ownership of the 1<sup>st</sup> defendant through the doctrine of survivorship. It is not lost to this court that the 1<sup>st</sup> defendant had already commenced the process of reversion of interest into his sole ownership in relation to the Shanzu Property soon after his father's death. This happened on



- 15.2.2016, exactly a month after his father's death when the death certificate of Adalja was registered in the title document of the Shanzu property.
163. The Clifton Villas no.10 was registered in the name of Adalja and the plaintiff on 8.10.2012 to be found at page 135 of Vol 3 of 1<sup>st</sup> defendant's bundle and reads; " Lease to Mahendra Krishnalal Adalja & Sophinah Kalondu Mbiti . All that House no. 10 as shown on the plan.."
164. The aforementioned registration took place just few months after the commencement of the [Land Registration Act](#), one of the statutes born in the new legal regimes in Land laws which came about after the promulgation of the 2010 Constitution of Kenya. Section 91 (2) of the said Act states that;
- "Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares."
165. The registration of the Plaintiff and Adalja as owners of the Clifton property No.10 is silent on the nature of land holding. However, the Trust deed availed by the 1<sup>st</sup> defendant at page 247 of his Vol 3A clarifies the nature of registration as " joint tenants".
166. In Republic v Town Clerk & another Ex-parte Muriithi Murage [2016] eKLR, it was held that;
- "It is not in dispute that since 21st May 2012, the applicant and the interested party are jointly registered as owners of the suit plot. The certificate of lease in respect to that property does not indicate whether their ownership of the suit plot is a joint tenancy or a tenancy in common. Section 91 (1) of the [Land Registration Act](#) recognizes both tenancies i.e. tenancy in common and joint tenancy. As the certificate of lease does not specify the type of tenancy the applicant and interested party hold in the suit plot, then this Court will decide on the authority of Mukazitoni Josephine Vs Attorney General [2015] eKLR that the suit plot is held in a joint tenancy".
167. Going by the overall scheme of things, it is clear that the intent of Adalja was to have joint tenancy in respect of the properties either registered in his name and the plaintiff or in his name and the 1<sup>st</sup> defendant. To this end, the only property that Adalja did not distribute during his life time as far as the suit properties are concerned is the house he lived in, that is Flat 4 "A". I therefore find that Clifton Villa house no. 10 belongs to the plaintiff solely through the doctrine of survivorship.

#### **Properties Registered in the sole name of the plaintiff or 1<sup>st</sup> defendant.**

168. None of the suit properties are registered in the name of the 1<sup>st</sup> defendant alone. The properties registered in the sole name of the plaintiff are the Rosslyn Garden House no. 19 registered on 13.12.2014 and the Jambo Prestige properties on 13.11.2013 (see page 170 and 146 of Vol 3 of the 1<sup>st</sup> defendant's bundle). Pursuant to the provisions of Section 24 and 25 of the [Land Registration Act](#), the interest held by the plaintiff is Absolute ownership; and she holds the same together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

#### **Properties in the name of the deceased - Adalja**

169. The only property in the name of the deceased is Flat 4 "A". There is a Transfer of lease from Adalja to himself and the plaintiff at page 81 of plaintiff's bundle. However, the same doesn't appear to have been formally executed, hence the property is still in the name of the deceased. It follows that this court cannot determine the rights of ownership in the said parcel as the property belongs to the estate of the deceased. The claim thereof ought to be pursued in the probate court.



## Reliefs

170. The standard of proof in civil cases is always that of balance of probabilities, See D.T. Dobie & Co. Ltd. Vs Wanyonyi Wafula Chebukati [2014] eKLR where the court held:

“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged,”

171. It is quite clear that there is no love lost between the plaintiff and the first defendant. It is also clear beyond peradventure that Adalja had tried as much as possible to ascertain the interests of the two protagonists on matters “property” during his lifetime. To this end, I find that the plaintiff has been able to discharge the burden of proof demonstrating that she is entitled to the 4 properties exclusively that is; Rosslyn Garden, Jambo Prestige, Marble Valley and Clifton Villa No.10. The 1<sup>st</sup> defendant has not discharged the burden of proof, indicating that he is entitled to the aforementioned 4 properties through any kind of claim.

## The Interim orders

172. It is noted that vide the ruling delivered by this court on 1.2.2018, the court issued orders pending the determination of the suit for the 4 properties to be managed by a property manager of which parties entered into a consent for LLoyd Masika to be the managers and receivers of the said properties. In light of the determination of this suit, the aforementioned orders are hereby discharged and the appointment of Llyod Masika as managers/receivers is hereby terminated. The plaintiff is at liberty to take over the management of the suit properties. The profits accruing from the suit properties during the subsistence of the court order are to be handed over to the plaintiff forthwith.

173. Any other interim orders issued by the court during the subsistence of the case are hereby discharged. To this end, the court shall not pronounce the rights and interests of the parties in relation to Flat 4A, of which the parties should pursue their claims in the probate cause.

## Documents

174. The 2<sup>nd</sup> and 4<sup>th</sup> defendants have admitted to having gone to the house of Adalja when the latter was hospitalized and they were given the bag containing the documents of Adalja by the plaintiff. Eventually the documents were apparently given to the 1<sup>st</sup> defendant. The documents are therefore not within reach of the plaintiff, yet it is clear that some of the titles to the suit properties are in her name while others are in her name and that of Adalja. It follows that the plaintiff is entitled to have all those documents relating to her properties.

## Costs

175. The court has discretion to award costs. In this case, it is noted that the 1<sup>st</sup> defendant had no justification to claim properties belonging to the plaintiff, since he too was given properties during the lifetime of the deceased. He will bear the costs of the suit.

176. As for the 2<sup>nd</sup> - 4<sup>th</sup> defendants, they have lamented that they were dragged into these proceedings unnecessarily. However, they admit to being the executors of the will(s) of the deceased, yet that is the same will the 1<sup>st</sup> defendant is apparently challenging. And the said defendants (2<sup>nd</sup> – 4<sup>th</sup>) appear to be supporting the 1<sup>st</sup> defendant. Further, the 2<sup>nd</sup> – 4<sup>th</sup> defendants were not in any hurry to file the probate



cause. Further the 2<sup>nd</sup> and 4<sup>th</sup> defendants are the ones who took documents from Adalja's house and plaintiff could not access the ones relating to her interests in the suit properties.

177. Thus the said defendants are not without blemish. That notwithstanding, I have taken into consideration that the 2<sup>nd</sup> -4<sup>th</sup> defendants are octogenarians and nonagenarians who have no interest at all in the suit properties. To this end, the court does not wish to drag them into matters of costs.

### **Rendition**

178. In the final analysis, I proceed to give orders as follows;

- A. The Counterclaim of the 1<sup>st</sup> defendant is hereby dismissed.
- B. The claim of the plaintiff is allowed in the following terms;
  - i. An order is hereby issued declaring the plaintiff to be the sole and exclusive owner of parcels;
    - a. Horombo Villa Number 19 Rosslyn Gardens LR No. 28431 (Original 18/31).
    - b. L.R. No. 1870/111/550 Town House No. 22 Jambo Prestige Westlands.
    - c. L.R. NO. 7158/505 Town House No.6 Marble Valley.
    - d. L.R. No. 7158/608 Clifton Villas (K111) No.10.
  - ii. An order is hereby issued for the plaintiff to be registered the sole owner of the following parcels;
    - i. L.R. NO. 7158/505 Town House No.6 Marble Valley.
    - ii. L.R. No. 7158/608 Clifton Villas (k111) No.10.
    - iii. A permanent order of injunction is hereby issued restraining the defendants their servants and or agents from in any way interfering with plaintiff's quiet possession of the 4 properties mentioned at clause B (i) above.
- C. The defendants are forthwith directed to hand over to the plaintiff all the documents and titles relating to the 4 suit properties mentioned at clause B (i).
- D. Any interim orders issued by the court including the orders of management of the 4 suit properties mentioned at clause B (i) issued on 1.2.2018 are hereby discharged and the plaintiff is at liberty to take over the possession and management thereof.
- E. The 1<sup>st</sup> defendant is condemned to pay costs of the main suit to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

E. Mutua for Plaintiff

Aurelio Rebelo for 1<sup>st</sup> Defendant

Kanguhu holding brief for Mr. Saende for 2<sup>nd</sup> -4<sup>th</sup> Defendants

