Maeda v Irungu (Environment and Land Appeal 22 of 2023) [2023] KEELC 21219 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21219 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT OL KALOU

ENVIRONMENT AND LAND APPEAL 22 OF 2023

YM ANGIMA, J

OCTOBER 19, 2023

BETWEEN

HELEN NYAMIRWA MAEDA .... PLAINTIFF

AND

JACINTA WANJIRU IRUNGU .... DEFENDANT

(An appeal against the judgment and decree of Hon. Daffline N. Sure (SRM) dated 11.05.2022 in Engineer SPM ELC No. 26 of 2021)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. Daffline N. Sure (SRM) dated 11.05.2022 in Engineer SPM ELC No. 26 of 2021 – Helen Nyamirwa Maeda –vs- Jacinta Wanjiru Irungu. By the said judgment, the trial court dismissed the Appellant’s claim and allowed the Respondent’s counterclaim. On costs, the trial court ordered that each party shall bear her own costs.

B. Background

2. The record shows that vide a plaint dated 10.08.2021 the Appellant sued the Respondent who is her mother seeking the following reliefs:

    a. A declaration that the Plaintiff and the Defendant are each entitled to half a share in Land Parcel Number Nyandarua/Muruaki/1723 which should be partitioned and/or sub-divided into two (2) equal partitions of 0.605 ha each to be registered separately under the Plaintiff and the Defendant and the register amended accordingly.

    b. That the executive officer of this honourable court be authorized to execute the necessary forms to give effect to (a) above.

c. Costs of the suit together with interest at court's rates.

d. Any other or further relief that this honourable court may deem fit or just to grant.

3. The Plaintiff pleaded that sometime between 1993 and 1994 she and the Respondent contributed Kshs.60,000/= each towards the purchase of Title No. Nyandarua/Muruaki/1723 (the suit property) which was then registered solely in the name of the Respondent.

4. The Appellant contended that as a result of her said contribution she was entitled to half a share of the suit property hence the Respondent was holding the title in trust and not as absolute owner. She further pleaded that the Respondent had sought to sell the suit property without her consent and involvement and that all efforts to resolve the dispute amicably had failed hence the suit.

5. The record shows that the Respondent filed a defence and counterclaim dated 29.09.2021 and amended on 12.11.2021 in response to the Appellant's claim. By her defence, she denied the Appellant's claim in its entirety and put her to strict proof thereof. She pleaded that she solely bought the suit property on 12.09.1991 from one, Ruhi Thuku for a sum of Kshs. 120,000/= which she paid by the instalments of Kshs.60,000/= each.

6. The Respondent denied that the Appellant made any contribution towards the purchase of the suit property and stated that if she ever paid any money, then the same was merely a soft loan which had since been repaid. She, therefore, asserted that she was the absolute proprietor of the suit property hence she did not require to involve the Appellant in any dealings with the property.

7. By her counterclaim, the Respondent reiterated the contents of her defence and stated that upon purchasing the suit property in 1991 she enjoyed quiet and peaceful enjoyment thereof until 2018 when the Appellant suddenly claimed that she had an interest in the property on the basis of Kshs.60,000/= she had lent to her. She further pleaded that on 13.11.2018 whilst she was very sick the Appellant influenced her and forced her to execute a letter purporting to grant her an interest in the suit property on account of the soft loan of the Kshs.60,000/=.

8. It was further pleaded by the Respondent that on or about 10.01.2019 the Appellant irregularly caused a caution to be registered against the suit property to prevent her from dealing with it as the legitimate owner. Consequently, the Respondent sought the following reliefs in her counterclaim:

a. A permanent injunction restraining the Plaintiff/Defendant whether by herself and/or agents from interfering, alienating, trespassing or in any other way dealing with the land parcel known as Nyandarua/Muruaki/1723.

b. An order directed at the Registrar of Lands Nyandarua County to vacate the caution registered on 10th January, 2019 and restriction entered against land parcel Nyandarua/Muruaki/1723.

9. The Appellant filed a reply to defence and defence to counterclaim dated 25.11.2021. By her reply to amended defence, she joined issue upon the defence and reiterated the contents of her plaint. By her defence to counterclaim, she denied all the allegations contained in the counterclaim and put the Respondent to strict proof thereof. In particular, he denied that the amount of Kshs.60,000/= she paid was a refundable soft loan and that the same was ever refunded.

10. The Appellant denied the allegations of coercion and undue influence pleaded in the counterclaim and put the Respondent to strict proof thereof. It was pleaded that the Respondent was mentally and physically fit to comprehend the contents of the letter dated 13.11.2018 and that she was not under improper influence or coercion. She further pleaded that the caution she had placed on the suit property was lawfully registered since it was meant to protect her beneficial interest in the suit property.

C. Trial Court's Decision

11. The material on record shows that upon a full hearing of the suit and counterclaim, the trial court delivered a judgment dated 11.05.2022 holding that the Appellant had failed to prove the existence of a trust to the required standard. The court also found that the Respondent had proved that she was the absolute owner of the suit property. As a consequence, the trial court dismissed the Appellant's claim and allowed the Respondent's counterclaim. It was further ordered that each party shall bear her own costs since they were family members.

D. Grounds of Appeal

12. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 20.05.2022 raising the following 17 grounds of appeal:

    a. The learned trial magistrate erred in law and in fact by determining the suit before her as though it were based on contract yet the same was founded on trust a fact which if she had properly addressed herself to would have led to the success of the Appellant's suit.

    b. The learned trial magistrate erred in law and fact by holding that the Appellant had reported the dispute between herself and the Respondent at a police station where a meeting was to take place yet no such evidence had been adduced by the Appellant or the Respondent a fact which if she had properly addressed herself to would not have led to a finding that the Respondent had been coerced and/or intimidated by the Appellant into acknowledging that she held the title to the suit premises in trust.

    c. The learned trial magistrate erred in law and fact by relying on the evidence of the two (2) Respondent's witnesses in determining the case yet she had already made a finding that the said two (2) witnesses were unreliable and were of no help to the Respondent's case.

    d. The learned trial magistrate erred in law and fact by holding that the Respondent had compensated the Appellant with alternative land yet there was no evidence led as to the actual existence of such land by the Respondent – a fact which if she had properly addressed herself to would have led to the success of the Appellant's suit.

    e. The learned trial magistrate erred in law and fact by holding that the Appellant was not entitled to part of the suit land yet the Respondent had herself admitted that she had received a sum of Kshs.60,000/= from the Appellant which was the latter's contribution to the purchase of the suit land wherein the total consideration was the sum of Kshs.120,000/=.

    f. The learned trial magistrate erred in law and fact by holding that the Respondent did not freely execute the documents relied upon by the Appellant since the Respondent was allegedly sick and bedridden yet no evidence was tendered as proof of the said alleged sickness or incapacity a matter which if she had properly addressed herself to would have led to the success of the Appellant's suit.

    g. The learned trial magistrate erred in law and fact by holding that the Respondent was bitter against the Appellant whom she had educated and is a lecturer but had decided to sue her yet it was the Appellant's evidence that she grew up and received an education through a children's home after being rejected by the Respondent a fact which if she had properly addressed herself to would have led to the success of the Appellant's suit.

h. The learned trial magistrate erred in law and fact by failing to hold that when two (2) or more people contributed to the purchase of land in different shares, it is presumed that the person who holds the legal title does so on a resulting trust in favour of those who provided the purchase price in the share in which they provided it a finding if she had considered would have been applicable to the instant suit leading to the success of the Appellant's suit.

i. The learned trial magistrate erred in law and fact by holding that the Appellant did not avail any evidence to show how she had contributed to the development of the suit land yet it was immaterial to the suit whether or not the suit land was developed.

j. The learned trial magistrate erred in law and fact by failing to find that there existed a resulting trust in the suit land in favour of the Appellant upon the presumed intention of the settlor or upon her informally expressed intention.

k. The learned trial magistrate erred in law and fact by leaving room for the possibilities that the Appellant became aware of the agreement for sale of the suit land after the said agreement was executed and the Respondent was looking for the Kshs.60,000/= to pay before the completion date of 28th February, 1992 yet it was clear from the Appellant's evidence that she gave the Respondent the said money in the year 1992 an issue if she had properly addressed herself to would have led to the success of the Appellant's suit.

l. The learned trial magistrate erred in law and fact by holding that if the Appellant was privy to the transaction and contributed to the purchase price thereof then she ought to have given her contribution by 12th September, 1991 when the agreement was executed yet as a matter of practice there is no legal requirement that the entire contribution towards the purchase of land should be paid as at the date of the Sale Agreement an issue if she had properly addressed herself to would have led to a verdict in favour of the Appellant.

m. The learned trial magistrate erred in law and fact by holding that the Respondent was duped into signing the documents relied upon by the Appellant yet in her own finding she had concluded that both parties appeared literate people who understood land transactions.

n. The learned trial magistrate erred in law and fact by raising questions as to why the Respondent would agree to sell the suit land within three (3) weeks within which she would have found a purchaser and give the Appellant half the purchase price yet it was the Respondent herself who had voluntarily and freely given the undertaking.

o. The learned trial magistrate erred in law and fact by wondering why the author of the agreement dated 17th November, 2019 was not availed yet she in the same vein held that an agreement ought to speak for itself a matter if she had properly addressed herself to would have left no doubt as to the veracity of the trust relationship between the Appellant and the Respondent in respect of the suit land.

p. The learned trial magistrate erred in law and fact by holding that the Appellant was not privy to the transaction towards the acquisition of the suit land until it was signed and that the Respondent was looking for Kshs.60,000/= to pay the balance of the purchase price yet sufficient evidence had been tendered to the fact that the Appellant and the Respondent were acquiring the suit land jointly.

q. The learned trial magistrate erred in law and fact by holding that though she empathized with the Appellant over the Kshs. 60,000/= given to the Respondent, she was not convinced of the Appellant being an equal player in the purchase of the suit land and further that her

relationship with the Respondent turned sour as the basis for the Appellant's suit yet from all the evidence on record there existed a resulting trust in favour of the Appellant which trust ought to have been determined.

13. As a result, the Appellant sought the following reliefs in the appeal:

    a. That the appeal be allowed.

    b. That the judgment and decree of the trial court be set aside and substituted with an order granting judgment for the prayers as prayed in her plaint.

    c. That there be no orders as to costs.

E. Directions on Submissions

14. When the appeal was listed for directions, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 13.06.2023 whereas the Respondent's submissions were filed on 14.07.2023.

F. Issues for Determination

15. Although the Appellant raised 17 grounds in her memorandum of appeal, the court is of the opinion that the appeal may effectively be resolved by determination of the following key issues:

    a. Whether the trial court erred in law and fact in dismissing the Appellant's suit.

    b. Whether the trial court erred in law and fact in allowing the Respondent's counterclaim.

    c. Who shall bear costs of the appeal.

G. Applicable legal principles

16. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at P.126 as follows:

> " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a

jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

19. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether The Trial Court Erred In Law And Fact In Dismissing The Appellant's Suit

20. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for failing to consider and properly appreciate the evidence which was tendered at the trial which was more than adequate to demonstrate the Appellant's contribution towards the acquisition of the suit property and consequently the existence of a trust in her favour. The Appellant relied upon Section 28 of the Registered *Land Act* (Cap. 300) which was in force at the material time and the cases of Yogendra Purshottam Patel –vs- Pascalle M. Bash and 2 Others [2006] eKLR and Kiebia –vs- Isaya [2014] eKLR in support of her appeal on the issue of trust.

21. The Respondent, on the other hand, opposed the appeal and submitted that the trial court was right in holding that there was no evidence of the existence of a trust over the suit property. It was submitted that courts should not lightly infer or presume the existence of a trust except in cases of absolute necessity. The Respondent cited the cases of Juletabi Africa Adventure Ltd & Another –vs- Christopher Michael Lockley [2017] eKLR and Twalib Hayatan & Another –vs- Said Saggar Ahmed Al-Herdy & Others [2015] eKLR in opposition to the appeal.

22. It is evident from the evidence tendered at the trial that the Appellant's claim of trust over the suit property was hinged upon the 2 letters or acknowledgements which were signed by the Respondent. The first was dated 13.11.2018 in which the Respondent acknowledged that the Appellant had made a contribution of Kshs.60,000/= towards the purchase of the suit property. The second was dated 17.11.2019 which was made in the presence of the Senior Chief-Engineer Location in which she acknowledged the Appellant's contribution in the acquisition of the suit property. In the latter acknowledgement, she further stated that the two had agreed to sell the suit property and share the proceeds of sale equally with the option of sub-dividing the land and sharing it equally.

23. There was no doubt from the material before the trial court that the Appellant had paid a sum of Kshs.60,000/= to the Respondent between 1992 and 1994. What the parties were not agreed upon was the purpose of the payment. Whereas the Appellant contended that it was a contribution towards acquisition of the suit property, the Respondent contended that the amount was a refundable soft loan which was ultimately refunded.

24. The court is of the opinion that the two documents dated 13.11.2018 and 17.11.2019 clearly communicated the purpose of the Appellant's payment of Kshs.60,000/= to the Respondent and should be so construed unless there is credible evidence of undue influence or coercion by the Respondent. The court agrees with the trial court's view that the Respondents witnesses, (DW2 and DW3) were not helpful at all in resolving the dispute before court. That would leave the court with the testimony of the parties and their documents.

25. So, what was the evidence of undue influence or coercion before the trial court? At the trial, the Respondent stated as follows:

> "I thought the issue had been settled. In 2018, she came and told me she wanted to update her file. I was sick and swollen. She started frustrating me. She had drafted a note (P.Exb.2). She came to my house very late and we ate supper.
>
> In the morning is when she told me I would remain her mother whatever she did. She started complaining her photo was not in my wall and I told her unless she gave me...
>
> I signed the agreement because she convinced me of updating her files. I was sick and alone. I can't say I signed the agreement out of my free will."

26. During cross-examination by the Appellant's advocate she stated as follows:

> "...I executed the agreement. I was sick and even now I am scheduled for surgery. I have not brought the medical notes in court. I confirm to sign the agreement I also signed the chief's agreement. Hellen is my child. I have not wronged her because I compensated her the money."

27. It was during re-examination that the Respondent disclosed that she was suffering from arthritis even though she did not produce any medical report on the severity of that condition either at the trial or at the time the disputed acknowledgements were executed in 2018 and 2019.

28. In Nabro Properties Limited –vs- Sky Structures Ltd Z R Shah Southfork Investments Ltd [1986] eKLR the Court of Appeal considered the nature of duress as follows:

> " It is perfectly true that duress at common law is confined to violence to the person, or threats of violence, and I am content to adopt, the following extract from Chesire & Fifoot's Law of Contract, 8th Edition at page 281 as a correct statement of legal duress; sufficient to vitiate an agreement one side:-
>
> "Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. It is a part of the law which nowadays seldom raises an issue.
>
> That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be a threat to commit a crime or a tort. Thus to threaten an imprisonment that would be unlawful if coerced constitutes duress, but not if the imprisonment would be lawful. Again a contract procured by a threat to prosecute for a crime that has actually been committed, or to sue for a civil wrong, or to put the member of a trade association on a stop list, is not as a general rule voidable for duress."

29. On the other hand, the doctrine of undue influence was considered by the Court of Appeal in LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & Others [2011] eKLR as hereunder:

> " (45) Undue influence
>
> This is an equitable doctrine intended to prevent a person from retaining the benefit of his own fraud or wrongful act. The scope of the doctrine included cases of coercion such as unlawful threats (which overlaps with the modern principles of duress) and cases where, as a matter of public policy and fair play, a person who has acquired influence or ascendancy over another arising from a special relationship should not be allowed to abuse it.
>
> (46) The distinction of the doctrine from common law duress and its application is succinctly stated in Halsburys laws of England 4th Ed.
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> Re-Issue Vol. 9(1) at page 467 para. 712 thus:-
>
> "A court of equity will set aside a transaction entered into as a result of conduct which, though not amounting to actual fraud or deceit it is contrary to good conscience. Many of the cases in which undue influence arises relate to gifts, but the same principles apply to contracts and unconscionable bargains. Whilst the common law doctrine of duress was originally justified on ground of interference with consent, the equitable doctrine of undue influence has been said to be based on "constructive fraud".
>
> In the field of contract, the doctrine has been defined as the unconscientious use by one person of power possessed by him in order to induce the other to enter into a contract. It applies even where the person benefited by the transaction is a different person from the one who exerted undue influence to bring it about ..."

(47) In Royal Bank of Scotland PLC –Vs- Etridge (No.2) [2002] 2AC 773 on which the Appellants heavily rely, Lord Nicholls undertook an exhaustive analysis and learned exposition of the doctrine.

In that case Lord Nicholls agreed that the test whether undue influence has arisen is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type and continued:-

"Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instances cases where, a vulnerable person has been exploited. Indeed there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endevour to encapsulate the essence; trust and confidence, reliance, dependence, or, vulnerability on one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."

30. On the issue of the burden of proof the Court of Appeal in the latter case of LTI Kisii Safaris Inn Ltd Case held as follows:

" (48) Regarding the burden of proof and presumptions, lord Nicholls stated that whether the transaction was brought about by undue influence is a question of fact the onus being on the person who claims to have been wronged but, that, where it is proved that the complainant placed trust and confidence in the other party coupled with a transaction which calls for explanation, a rebuttable evidential presumption of undue influence arises (presumed undue influence). His lordship distinguished cases of presumed undue influence from special class of relationships examples of which, are, parent and child, guardian and ward, trustee and beneficiary, solicitor and client, medical adviser and patient, where complainant need not prove that he actually reposed trust and confidence in the other party because in such cases "the law presumes irrebuttably; that one party had influence over the other".

31. It is evident from the material on record that even though the Respondent had pleaded coercion or duress and alleged in her witness statement that she was threatened by the Appellant, she did not at the trial give particulars of the actual threats given by the Appellant which forced her to sign the note dated 13.11.2018. She did not specify what threats were given by the Location Chief which made her sign the acknowledgement or agreement dated 17.11.2019. In fact, at the trial she did not allege that any threats were given by the Appellant when they spent the night together on the eve of 13.11.2018.

32. If indeed, the Respondent was threatened by the Appellant on 13.11.2018 then it is difficult to understand why she never reported the threats to the local police station or even to government administration officials. The material on record shows that the Appellant was at all material times working and residing in Nairobi hence the Respondent could not be said to have been living in fear throughout. She had an opportunity of reporting the threats to her close relatives including her own children.

33. It is also incredible that the Respondent could have failed to report the Location Chief for any threats she may have directed to her in 2019. By the time the suit was heard about 3 years later, there was no evidence that she had reported the Chief to her seniors or even to a police station.

34. The Respondent testified at the trial that she was tricked by the Appellant into signing the note dated 13.11.2018 by being misled into believing that the Appellant was simply updating her personal file. The trial court found that both the Respondent and the Appellant were literate and knowledgeable persons. The trial court was satisfied that both parties were well informed on land transactions. The record shows that the Respondent had retired from medical school even though her position there was not disclosed. The court is not satisfied that the Respondent was unable to read or understand the single page note dated 13.11.2018 and that she solely relied on the advice of the Appellant.

35. The court is unable to find any evidence on record to the effect that the Respondent was so sick and so vulnerable that she could not appreciate the nature and import of the note dated 13.11.2018. The material on record shows that she was not in hospital at the material time. It would appear that she had arthritis and that her body parts were swollen. The record further shows that she had some interaction with the Appellant on the eve of 13.11.2018 and even discussed the issue of the Appellant's photograph missing from the wall. The Respondent was not on her death bed so to speak since a person who is seriously ill or so incapacitated cannot possibly engage in matters photographs when they have a more serious issue to contend with.

36. Although it is true that there is a special relationship between the parties as parent and child, it must be borne in mind that the Appellant was the child whereas the Respondent was the parent. In that case, the parent would be presumed to be the dormant party and the person in whom the child may repose some confidence and trust. The child in this case was an adult and she was the one being accused of exerting undue influence upon the parent. The court finds no evidence of such undue influence on record.

37. In the LTI Kisii Safaris Inn Ltd Case, the Court of Appeal considered the basis of granting relief in cases of undue influence as follows:

> (49) The case of National West Minister Bank PLC –Vs- Morgan [1985] IAC 686 is also relevant.
>
> There, the House of Lords held, inter alia ,that the principle that justified the setting aside a transaction on the ground of undue influence was the victimization of one party by another; and that evidence of mere relationship of the parties was not sufficient to raise the presumption of undue influence, without, also, evidence that the transaction itself had been wrongful in that it had constituted an advantage taken of the person subject to the influence, which failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

38. The court is not satisfied that the material before the trial court justified a finding of victimization of the Respondent by the Appellant. There was no credible evidence to demonstrate that the Appellant had taken advantage of the Respondent who was her mother. There was nothing wrong, reprehensible or unconscionable about a parent and child contributing 50% of the purchase price each for the purpose of buying the suit property. The court is not satisfied that duress was exerted upon the Respondent twice (in 2018 and 2019) for her to acknowledge the Appellant's interest in the suit property. The court is also not satisfied that undue influence was applied twice against the Respondent without her taking any steps to protect her interest.

39. As a result, the court is of the opinion that the Appellant had sufficiently proved her claim for an interest in the suit property before the trial court. The court is further of the opinion that the Respondent's registration as proprietor of the suit property was subject to a resulting trust in favour

of the Appellant whom she acknowledged to be a co-owner vide the notes and acknowledgements dated 13.11.2018 and 17.11.2019 respectively. The court is thus in agreement with the Appellant's contention that the trial court erred in law and fact in dismissing her suit.

b. Whether the trial court erred in law and fact in allowing the Respondent's counter counterclaim

40. It is obvious from the pleadings and material on record that the Appellant's claim and the Respondent's counter-claim were mutually exclusive. The Respondent contended that she was the sole and absolute proprietor of the suit property and that the agreements acknowledging the Appellant's interest were obtained through coercion and undue influence. The Appellant, on her part, contended that she was an equal co-owner of the suit property since she had contributed 50% of the purchase price.

41. The court has already found and held that the Appellant has proved her claim to one half of the suit property by virtue of having contributed 50% of the purchase price. The court has further held that the Respondent has failed to prove the allegations of coercion and undue influence which were pleaded in her defence and counterclaim. It would, therefore, follow that the trial court erred in law and fact in allowing the Respondent's counter-claim. In the premises, the court is inclined to allow the appeal and set aside the judgment of the trial court.

d.Who shall bear costs of the appeal

42. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court has noted that in its judgment the trial court ordered that each party shall bear her own costs by reason of being members of the same family. The court is similarly inclined to make an order for each party to bear her own costs.

I. Conclusion and Disposal Orders

43. The upshot of the foregoing is that the court finds merit in the Appellant's appeal and is inclined to allow the same. Consequently, the court makes the following orders for disposal of the appeal:

    a. The appeal be and is hereby allowed.

    b. The judgment and decree of the trial court dated 11.05.2022 in Engineer SPM ELC No. 26 of 2021 is hereby set aside and replaced with the following orders:

        i. Judgment be and is hereby entered for the Appellant in terms of prayers (a) and (b) of the plaint dated 10.08.2021.

        ii. The Respondent's counterclaim amended on 12.11.2021 be and is hereby dismissed.

        iii. Each party shall bear her own costs of the proceedings.

    c. Each party shall bear her own costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT OL KALOU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF OCTOBER, 2023.

In the presence of:

Mr. Njihia for the for the Appellant

Ms. Nyawira Mureithi for the Respondent

C/A - Nyagah

....

Y. M. ANGIMA

JUDGE