



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 90 OF 2017

MILAN PRABHULAL HARIA.....PLAINTIFF

-VERSUS-

JITESH PRABHULAL HARIA.....1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

PRABUHLAL TEJPAL HARIA.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Plaintiff dated the 3rd of February 2017, the Plaintiff herein impleaded the Defendants and sought for the following Reliefs;

- i. A Declaration that the transfer to Jitesh Prabhulal Haria of the ½ undivided share of Milan Prabhulal Haria as a gift on 8-1-1996, was effected illegally and it be annulled and the Register be amended accordingly.*
- ii. A Permanent Injunction do issue restraining the 1ST Defendants by himself, their agents, servants, employees or any other person claiming through him from selling off, charging, alienating or disposing off or in any manner dealing with all that parcel of land known as **L.R No. 209/3428/3428 (I.R No. 8235)** (hereinafter referred to as the suit parcel).*
- iii. Half rent collected from **SMART AUTOS LTD** from **January 2014 – January 2017 (KSHS 250, 000/=)** Monthly and/or until date of determination of this suit.*
- iv. General Damages for unlawful Conversion.*
- v. Costs and interest of this suit.*
- vi. Any other order of this suit*

2. Upon being served with the Plaintiff and the Summons to Enter Appearance the 2nd & 3rd Defendants duly entered appearance and thereafter filed a statement of defense, which was filed on the **8th October 2019**, whereby same opposed and/or controverted the claim by the Plaintiff.

3. On the other hand, the 1st Defendant herein filed a Notice of Appointment of Advocate, which was filed on the **14th April 2017**. However, the 1st Defendant never entered appearance nor filed any Pleadings, whatsoever.

4. Other than the foregoing, upon the filing of the subject suit, the 4th Defendant filed an Application dated the **21st January 2019**, in respect of which same, sought to be joined as a 4th Defendant. For clarity, the subject Application was heard and disposed of, culminating into an order being made whereby the 4th Defendant was duly joined into the subject proceedings.

5. Following the joinder of the 4th Defendant as a party in the subject matter, the 4th Defendant proceeded to and thereafter entered

appearance and filed a statement of defense and Counter claim, which was filed on the **19th November 2019**, whereby the 4th Defendant disputed the claim by the Plaintiff and similarly made a Counter claim as pertains to the suit property.

6. Vide the Counter claim dated the **19th of November 2019**, the 4th Defendant sought for the following Reliefs;

- i. A Declaration that upon the transfer of **L.R No. 209/3428 Nairobi** to them in 1991 by the 4th Defendant, the two became Trustees.*
- ii. A Declaration that the purported transfer by the Plaintiff of his purported interest in the said **L.R No. 209/3428 Nairobi** to the 1st Defendant in **1996** was fraudulent, a breach of trust and is null and void.*
- iii. A Declaration that the Plaintiff and the 1st Defendant holds **L.R No. 209/3428 Nairobi** upon trust for the 4th Defendant.*
- iv. An order that the 1st Defendant transfers the said **L.R No. 209/3428 Nairobi** to the 4th Defendant forthwith.*
- v. As an alternative to (iv) above, the registration of the 1st Defendant as the proprietor of the said **L.R No. 209/3428 Nairobi** be cancelled and there be substituted the 4th Defendant as the Proprietor.*
- vi. An Order that the 1st Defendant accounts to the 4th Defendant the rent received by him from the said **L.R No. 209/3428 Nairobi** since **2011**.*
- vii. A Permanent Injunction to restrain the Plaintiff and the 1st Defendant whether by themselves or agents or servants from entering into and in howsoever manner affecting the 4th Defendant's possession of the said **L.R No. 209/3428 Nairobi**.*
- viii. A Permanent Injunction to restrain the Plaintiff and the 1st Defendant whether by themselves or agents or servants from interfering with the Plaintiff's quit enjoyment of the said **L.R No. 209/3428 Nairobi**.*
- ix. General Damages.*
- x. Costs.*

7. It is imperative to note that upon being served with the Statement of Defence and Counter claim by the 4th Defendant, the Plaintiff herein was enjoined to and indeed filed a Reply to the Statement of Defense and Defense to the Counter claim.

8. For coherence, it suffices to note that the Reply to Defense and Defense to Counter claim was filed on the **29th January 2020**.

EVIDENCE BY THE PARTIES:

THE PLAINTIFF'S EVIDENCE:

9. During the hearing, which took place on the **25th October 2021**, the Plaintiff herein adopted his written witness statement dated the **3rd February 2017**, as well as the one dated the **15th January 2019**, respectively.

10. On the other hand, the Plaintiff also adduced in evidence the various Documents which were attached to the List of Documents dated the **3rd February 2015**, but which essentially appears to be an error, insofar as the Suit herein was filed on the **7th February 2017**.

11. Be that as it may, it is important to observe that the Documents which were produced in Evidence, excluded Documents Number 3 & 4, which were objected to and which the Plaintiff ultimately abandoned.

12. Having adopted the witness statements dated the **3rd February 2017** as well as **15th February 2019**, the Plaintiff herein further averred that the 1st Defendant and himself entered into and executed a land Sale Agreement with one **Tanuj Gulabchand Raja**, pertaining to and/or concerning the property otherwise known as **L.R NO. 209/3428 (I.R No. 8235)** which is the suit property herein. In this regard, the Plaintiff adopted and referred to the Sale Agreement dated the **2nd October 1991**. See exhibit 2

13. It was the Plaintiffs further testimony that upon the execution of the Sale Agreement, the 1st Defendant and himself paid to and in favor of the vendor the sum of **Kshs.2, 500, 000/=** only and thereafter the suit property was transferred to and registered in the names of the 1st Defendant and the Plaintiff as Tenants in Common. In this regard, the Plaintiff referred to and produced in evidence a copy of Certificate of Title and specifically entry number 33 thereof.

14. Further, the Plaintiff testified that the other portion of the Purchase price, amounting to **Kenya Shillings 1, 500, 000/=** was procured by way of a Banking facility from M/s Bullion Bank Ltd, in whose favor the suit property was charged.

15. It was the Plaintiff's further testimony that upon obtaining the Banking facility from M/s Bullion Bank Limited, the 1st Defendant and himself variously repaid the loan and same was finalized, culminating into the registration of a Discharge of Charge over the property. For

clarity, the Plaintiff indicated that the Discharge of Charge was entered on the record on the **14th June 1994**.

16. Be that as it may, the Plaintiff further testified that upon the acquisition and registration of the suit property in the names of the 1st Defendant and himself, as tenants in Common, the Certificate of title was handed over to and has been in the custody of the 1st Defendant.

17. On the other hand, the Plaintiff further testified that after the acquisition of the suit property, same left Nairobi and re-located to Kisumu, where same operates own Businesses.

18. Nevertheless, the Plaintiff further testified that on or about **October 2014** and during a Family Meeting the 1st Defendant herein, made utterances, which depicted that the Plaintiff did not have any Rights and/or Interests over and in respect of the suit property.

19. Based on the foregoing, the Plaintiff testified that he was constrained to carryout and/or conduct an official search at the Land registry, Nairobi, to authenticate the registration and ownership status pertaining to the suit property.

20. The Plaintiff further testified that upon carrying out the Official search, same was surprised to find that his name had been removed from the ownership of the suit property and that same was now registered in the name of the 1st Defendant, as the Sole and/or legitimate owner thereof.

21. It was the Plaintiff's further testimony that in the course of the official search, same also authenticated the circumstances under which the suit property was transferred and registered in the name of the 1st Defendant alone.

22. Besides, the Plaintiff testified that he discovered that it was purported that he had executed a Transfer instrument transferring his share in the suit property to the 1st Defendant as a Gift.

23. It was the Plaintiff's further testimony that the transfer of his half share to the 1st Defendant, as a Gift, was unknown to him and in any event, same did not execute any such Transfer Instrument, to warrant the registration of the suit property in the name of the 1st Defendant alone.

24. Further, the Plaintiff testified that the transfer of the suit property to and/or in favor of the 1st Defendant, was therefore actuated by malice.

25. On being cross examined by counsel for the 2nd & 3rd Defendant, the Plaintiff reiterated that he did not execute and/or sign any Transfer Instrument to gift half of his share to and in favor of the 1st Defendant.

26. On the other hand, the Plaintiff further stated that the Documents which was purported to have been executed by him and upon which the transfer in favor of the 1st Defendant was done, dated the **6th December 1996**, was a forgery.

27. Besides, whilst responding to a question by the counsel for the 2nd & 3rd Defendant, the Plaintiff further stated that the transfer in favor of the 1st Defendant was endorsed on the **8th January 1996**, long before the purported Instrument of transfer was signed.

28. The Plaintiff further maintained during cross examination that whereas the Instrument of transfer is said to have been executed on the **6th December 1996**, and presented for registration on the **8th January 1997**, the property was however transferred to and registered in the name of the 1st Defendant on the **8th January 1996**. For clarity, that was long before the execution and presentation of the offensive Instrument.

29. The Plaintiff further maintained on cross examination that the signature contained on the Transfer Instrument dated the **6th December 1996**, was a forgery and that same was subjected to Forensic Document Examination and a Report was prepared to that effect.

30. On the other hand, whilst under cross examination by counsel by the 4th Defendant, the Plaintiff contended that by the year **1991**, both the 1st Defendant and himself had attained the age of majority and that same were in gainful employment and thus the purchase price of the suit property came from the 1st Defendant and himself.

31. Whilst under further Cross examination by the counsel by the 4th Defendant, the Plaintiff further testified that it was also the 1st Defendant and himself, who procured the Loan facility from M/s Bullion Bank Ltd and not the 4th Defendant.

32. Under further Cross examination, the Plaintiff testified that the claim by the 4th Defendant, is a conspiracy between the 1st Defendant and the 4th Defendant, to deprive him (Plaintiff) of his rightful share of the suit property.

33. Finally, the Plaintiff contended that the 4th Defendant herein did not contribute to the Purchase price over and in respect of the suit property, nor, was the suit property purchased by the 4th Defendant at all.

1ST DEFENDANT'S CASE:

34. As was pointed out elsewhere herein before, the 1st Defendant neither entered appearance nor filed a Statement of Defense. For coherence, the only document that was filed by or on behalf of the 1st Defendant was a Notice of Appointment of Advocates, dated the **11th**

April 2017.

35. On the other hand, it is also worthy to note that the 1st Defendant did not attend court and/or participate in the proceedings.

36. Consequently, the 1st Defendant herein did not challenge and/or controvert the allegations which were mounted against him by the Plaintiff.

2ND & 3RD DEFENDANT'S CASE:

37. The 2nd & 3rd Defendants herein filed a Statement of Defense and a List of witnesses, whereby same indicated that one, **Edwin Munoko Wafula**, a Senior Land Officer, would be summoned to testify on behalf of the 2nd & 3rd Defendants.

38. However, at the close of the Plaintiff's case, the 2nd & 3rd Defendants Counsel intimated to the court that same would not be calling any witness.

39. Consequently, the 2nd & 3rd Defendants' case was closed without any evidence being tendered and without any Document being filed or produced.

THE 4TH DEFENDANT'S CASE:

40. It is worthy to note that the 4th Defendant herein, filed a Statement of Defense, as well as Counter claim, against the Plaintiff and the 1ST Defendant, respectively.

41. On the other hand, the 4th Defendant herein also filed and adopted a witness Statement dated the **13th November 2019**. Besides, the 4th Defendant also produced the Bundle of Documents, at the foot of the list and bundle of documents dated the **13th November 2019**.

42. Having adopted the witness Statement dated the **13th November 2019**, the 4th Defendant proceeded to and testified by stating that both the Plaintiff and the 1st Defendant are his sons.

43. The 4th Defendant further testified that on or about the year **1991**, a fellow Asian namely, **Tanuj Gulabchand Raja**, was keen to sell and/or dispose of the suit property and in this regard, he develop an Interest in buying and/or purchasing same.

44. It was the 4th Defendant's further testimony that owing to the foregoing he proceeded to and purchased the suit property by paying cash of **Kshs.2, 500, 000/=** only to the vendor and thereafter procured the balance of **Kshs.1, 500, 000/=** only from M/s Bullion Bank Ltd.

45. Besides, the 4th Defendant further testified that the Plaintiff and the 1st Defendant did not contribute and/or pay any money whatsoever, towards the purchase and/or acquisition of the suit property.

46. In fact, the 4th Defendant added that the only contribution that the Plaintiff and the 1st Defendant made, was to avail their names and to sign the Transfer Instrument and nothing else.

47. It was the 4th Defendant's further testimony that even though the suit property was registered in the names of the Plaintiff and the 1st Defendant, the suit property was held in Trust for himself.

48. On cross examination, the 4th Defendant insisted that it was him who paid the sum of **Kshs.2, 500, 000/= only**, to the vendor of the suit property. For clarity, the Witness added that same was paid in cash.

49. However, when the 4th Defendant was pressed to show any evidence of the payment of the said monies, same saw non-committal. Infact, the Witness became hysterical

50. On the other hand, the 4th Defendant also contended while under cross examination that he is the one who procured the facility from **Bullion Bank Limited**.

51. It is important to note, that similarly when the 4th Defendant was asked for any document to show the Request for the Loan Facility or execution of a Letter of offer, same could not avail and/or put a finger on any.

52. Though the 4th Defendant had testified that the suit property is where same resides, however, under cross examination the 4th Defendant acknowledged that same resides on a different property namely, **L.R No. 1870/iii/324**, which is separate and distinct from the suit property.

53. As concerns the ownership of the suit property, the 4th Defendant maintained that same was transferred and registered in the names of the Plaintiff and the 1st Defendant as tenants in common. However, the 4th Defendant added that such registration did not vests absolute title in the Plaintiff and the 1st Defendant.

54. While under further cross examination by the counsel, the 4th Defendant further stated that the suit property is still registered in the names of the Plaintiff and the 1st Defendant and that is why he has sued both of them vide the Counter claim.

SUBMISSIONS:

55. Upon the conclusion of the hearing, the parties herein agreed to file and exchange written submissions and in this regard the court gave directions for the filing and exchange of such submissions.

56. It is important to note that the Plaintiff herein proceeded to and filed his written submissions on the **22nd November 2021**, whilst on the other hand the 4th Defendant filed his set of written submission on the **6th December 2021**.

57. Suffice it to note, that the written submissions filed by the Plaintiff and the 4th Defendant are quite extensive and/or elaborate on various topical issues that were captured vide the Pleadings.

58. Similarly, I must state that I have had occasion to read the two sets of submissions and I have appreciated the import and tenor of the submissions, as well as the case law, namely, the authorities, referred to.

59. Be that as it may, it may not be possible to refer to and/or adopt all the case law and authorities that have been referred to. Consequently, in the event of non-reference, such failure shall not be informed by contempt.

ISSUES FOR DETERMINATION:

60. Having reviewed the pleadings filed by the parties, namely the Plaint dated the **3rd February 2017**, the Statement of Defence by the 2nd & 3rd Defendants dated the **8th October 2019**, as well as the Statement of Defense and Counter claim by the 4th Defendant dated the **13th November 2019**, on one hand and also the written statements and the Documentary exhibits which were produced, the following issues are germane for determination;

- i. *Whether the suit property was hitherto registered in the names of the Plaintiff and the 1st Defendant and if so, whether the Plaintiff transferred his half share to the 1st Defendant.*
- ii. *Whether the transfer and registration of the suit property in the sole name of the 1st Defendant was illegal and fraudulent.*
- iii. *Whether the claim for trust has been suitably and adequately pleaded.*
- iv. *Whether the suit property was/is held in trust for the 4th Defendant.*

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the suit property was hitherto registered in the names of the Plaintiff and the 1st Defendant and if so, whether the Plaintiff transferred his half share to the 1st Defendant.

61. In respect of the first limb, there is no argument that the suit property was indeed transferred and registered in the names of the Plaintiff and the 1st Defendant, as tenants in common. For clarity, documents abound to confirm that indeed that was the position from the onset.

62. Suffice it to say, that both the Transfer Instrument and the Certificate of title, which were produced as **exhibit P1 & P2**, respectively attest to the fact that on the **11th October 1991**, the suit property was so registered.

63. In any event, the 4th Defendant herein also confirmed that the suit property herein was indeed registered in the names of the plaintiff and the 1st Defendant, save that the 4th Defendant has added a rider to circumstances underlying the said registration in the names of the Plaintiff and the 1ST Defendant.

64. Based on the Documents which were produced and in particular the certificate of title, I have no difficulty in finding and holding that the suit property was duly registered in the names of the Plaintiff and the 1st Defendant as Tenants in common.

65. Be that as it may, the gravamen of the dispute relates to whether the transfer instrument, which transferred the Plaintiff's half share to and in favor of the 1st Defendant, was knowingly and/or voluntarily done by the Plaintiff.

66. According to the Plaintiff, same moved to Kisumu and had been carrying on his business thereat and he was not aware and/or alive to the transaction that divested same of his ownership Rights over the half share of the suit property.

67. For clarity, the Plaintiff contended that his mind and conscious was pricked by a statement made by the 1st Defendant in **October 2014**, concerning the ownership status of the suit property.

68. Besides, it is also worthy to recall that the Plaintiff testified that it is upon being confronted with the 1st Defendant that he carried out an official search and thereby established that indeed the suit property had been transferred and registered in the name of the 1st Defendant.

69. The question as to whether or not, the Plaintiff participated into the execution of the impugned transaction, could only be addressed and/or responded to by the 1st Defendant. However, despite being served with the pleadings herein and despite being aware of the suit proceedings, the 1st Defendant, did not file any pleadings and/or responses.

70. Owing to the foregoing, I am compelled to find and hold that the Plaintiffs testimony, relating to the ignorance of the manner in which the suit property was transferred, remains wholly unchallenged and/or uncontroverted.

71. Consequently, and in the circumstances, it is my finding that the Plaintiff was neither involved in nor informed of the transfer of his half share to and/or in favor of the 1st Defendant.

72. In this regard, I find and hold that the Plaintiff has been able to discharge the burden of proof pertaining to the non-involvement in the transfer of his half share over and in respect of the suit property to the 1st Defendant.

73. To buttress the foregoing observation, I hasten to refer to and adopt the quote in **Halbury's Laws of England, 4th Edition Volume 17 at paragraphs 13 and 14**, where the learned authors have opined as hereunder;

“The legal Burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellants, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

ISSUE NUMBER 2:

Whether the Transfer and registration of the suit property in the sole name of the 1st Defendant was illegal and fraudulent.

74. Other than the contention by the Plaintiff that he was neither aware nor involved in the transfer of the half share to and/or in favor of the 1st Defendant, the Plaintiff also averred that the entire transaction, was fraudulent and illegal.

75. To this extent, the Plaintiff has pleaded and enumerated various particular of fraud and illegalities at the foot of paragraph 10 of the Statement of claim, namely the Plaintiff.

76. On the other hand, the Plaintiff also, tendered evidence to the fact that the signature which was affixed on the Transfer Instruments dated the **6th December 1996**, which is said to belong to him, is actually a forgery.

77. It was the Plaintiff's further testimony that upon the discovery of the Transfer Instrument and the forged signature, same lodged a complaint with the Police culminating into him recording a Statement with the Police for purposes of appropriate and further Investigations.

78. Other than the issue of forgery of his signature, the Plaintiff also testified that the transfer of his half share to and/or in favor of the 1st Defendant, was minuted and effected on the **8th January 1996**, yet the instrument purporting to have been sign by him was dated on the **6th December 1996**.

79. On the other hand, the Plaintiff also pointed out that the purported Transfer Instrument is stated to have been lodged and presented at the Land Registry on the **8th January 1997**, and same is similarly endorsed with a stamp to that effect.

80. Notwithstanding the foregoing, the Plaintiff has averred that by the time of the transfer and registration of his half share to and/or in favor of the 1st Defendant, there was no legal instrument that could facilitate such transaction, whatsoever.

81. It is imperative to note, that the 2nd & 3rd Defendants herein, who were responsible for the effectuation of the transactions, which is the subject of complaint herein, did not call any evidence, to either controvert the testimony by the Plaintiff and/or otherwise, explain the evident anomalies.

82. At any rate, the anomalies pertaining to and/or concerning the discrepancies between the date of transfer and the date of the purported instrument of transfer, could only have been explained by the Land Registrar, or such officials, from the Land Registry.

83. Owing to the foregoing, the inescapable conclusion, is that the transaction divesting the Plaintiff of his half share in the suit property, was actually informed by fraud on the part of the 1st Defendant, who was responsible for the forgery of the Plaintiff signature.

84. Nevertheless, it is also apparent that the transactions which are being challenged were carried out and/or undertaken, in the absence of the requisite supporting documents. In fact, the purported supporting documents, namely the transfer instrument, was sought to be brought on board a whole one (1) year, after the impugned transaction had been effected. Clearly, that was an illegality.

85. As pertains to the Burden of proof, I beg to state that allegations of fraud and/or illegalities must be established and/or proven to a standard above the balance of probability, but not beyond reasonable doubt.

86. In support of the foregoing position, I can do no better than to adopt the holding in the Decision in the case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, where the honourable Court of Appeal observed as hereunder;

*It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo v Ndolo (2008) 1 KLR (G&F) 742** wherein the Court stated that:*

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

*The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)** Tunoi JA (as he then was) stated as follows:*

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

87. On the other hand, it is also important to take note of the holding of the Court of Appeal in the case of **Kuria Kiaries & 2 Others v Sammy Magera (2018) eKLR**, where the honourable court of appeal adopted a similar stance as in the case of **Kinyanju Kamau**, (Ibid).

88. Suffice it to say, that the evidence tendered by the Plaintiff on the issue of forgery of his own signature and the apparent illegalities, were not challenged. For clarity, the persons against whom the allegations were made chose not to participate in the trial or to tender any evidence, whatsoever.

89. In the premises, I find and hold, that the transaction culminating into the removal of the name of the Plaintiff from the ownership of the suit property, was fraudulent and thus unlawful.

ISSUE NUMBER 3

Whether the claim for trust has been suitably and adequately pleaded.

90. Vide the 4th Defendant’s Statement of Defense and Counterclaim, the 4th Defendant herein has contended that the transfer and registration of the suit property in the names of the Plaintiff and the 1st Defendant and subsequently in the name of the 1st Defendant, were informed by fraud.

91. On the other hand, the 4th Defendant has proceeded to and enumerated particulars of fraud at the foot of paragraph 10 of the Statement of Defense.

92. However, even though the Statement of Defense has alluded to fraud and even having gone down to particularize fraud, the 4th Defendant’s Counter claim, is however neither founded nor anchored on fraud.

93. Nevertheless, it is also important to note that the claim based on fraud, which has not been pursued vide the Counter claim, would obviously have been time barred, taking into account that the transaction complained of, transpired in the year **1991**. See **Section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya**.

94. Notwithstanding the foregoing, the crux of the 4th Defendant’s Counter claim, turns on the issue of the Resultant Trust. Consequently, it

is now the duty of the court to address the legal requirements underpinning a plea for Trust.

95. First and foremost, a plea of Trust is required to specifically pleaded and thereafter the particular of Trust and Breach thereof, must be availed and/or supplied.

96. To buttress the foregoing observation, it is important to take note of the provisions of **Order 2 Rule 10 (1) (a) of the Civil Procedure Rules 2010**, which provides as hereunder;

Particulars of pleading [Order 2, rule 10.]

(1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

97. As pertains to the pleadings before the court, it is important to note that though the 4th Defendant has alluded to Resulting Trust, but same has however, not pleaded the particulars of such Trust and how the trust is said to have arisen.

98. In my view, having failed to properly plead and/or to demarcate the plea of Resulting trust, the 4th Defendant herein cannot now purport to adduce evidence and persuade the court to find and hold that Trust was created, in favor of the 4th Defendant or at all.

99. Parties are bound by their pleadings and in this regard, if the 4th Defendant was keen to propagate his claim on Resulting trust, it was therefore incumbent upon him to comply with the rules of pleadings and to delineate the claim for Resulting trust. In this regard and in the absence of particulars, the claim for Resulting Trust is stillborn.

100. In support of the foregoing holding, I adopt and rely in the Decision in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, where the honourable court held as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

ISSUE NUMBER 4

Whether the suit property was/is held in trust for the 4th Defendant.

101. The 4th Defendant herein had contended that the suit property was bought by himself and that the Plaintiff and the 1st Defendant, contributed nothing towards the purchase and/or acquisition thereof.

102. Perhaps, it maybe necessary to observe that the 4th Defendant contended that the only contribution, if same can be described as such by the Plaintiff and the 1st Defendant, was to merely supply their names and to sign the transaction documents and no more.

103. Having contended that he was the one who bought the suit property and indeed paid the purchase price, part of which, was allegedly paid in cash, then it behooved the 4th Defendant to tender evidence and show unto the court any acknowledgement or otherwise alluding to payments by himself.

104. It is also worthy to note that the 4th Defendant also testified that same is the one who sought for and procured the banking facility from M/s **Bullion Bank Ltd.**

105. In this regard, nothing would have been easier than tendering before the court a copy of the loan Application form or the letter of offer, duly executed by the 4th Defendant.

106. I must point out that in the course of hearing and in particularly, during the cross examination, the 4th Defendant, who is fairly old

would become hysterical and thus evade specific questions.

107. Be that as it may, to the extent that it is the 4th Defendant, who made the claim that he is the one who bought and purchased the suit property, the Burden of proof was therefore cast on his shoulder.

108. Unfortunately, the 4th Defendant herein did not tender and/or adduce any evidence to show, even remotely, any payments that were made by him or at all, in the purchase of the suit property.

109. Notwithstanding the foregoing, the 4th Defendant's advocate has however, chosen to shift the Burden of proof to the Plaintiff to prove that the suit property was bought by himself (Plaintiff) and the 1st Defendant and not otherwise.

110. In my humble view, it is the 4th Defendant who has made the affirmative statement that he purchased and paid for the suit property and thereby allowed same to be registered in the names of the Plaintiff and the 1st Defendant. Consequently, the Burden of proof, lies at the door step of the 4th Defendant and not otherwise.

111. In support of the foregoing observation, it is imperative to take cognizance of the provision of **Section of 107 & 108 of the Evidence Act**, which provides as hereunder;

Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

112. While still on the issue of Burden of proof, I wish to state that where no evidence is tendered, in support of a claim laid by a party, the deficiency arising from the shortage of Evidence cannot be plugged by submissions on behalf of the defaulting party.

113. To buttress the foregoing position, I can do no better than to reproduce the observation by the Court of Appeal in the Decision in the case of **Daniel Torotich Arap Moi v Mwangi Stephen Murithi (2014) eKLR**, where the Court of Appeal stated as hereunder;

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.

Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.”

114. In a nutshell, it was incumbent upon the 4th Defendant to tender evidence in proof of the claim that the suit property was purchased and/or bought by himself, but unfortunately no such evidence was tendered and/or availed.

115. At any rate, the sum total of the Documentary Evidence adduced and/ or tendered by the 4TH Defendant gave the issue a wide berth.

FINAL DISPOSITION

116. Having dealt with the issues highlighted for determination, it is now appropriate to render the final and dispositive orders, in respect of the subject matter.

117. In the premises, I make the following orders;

i. It is hereby declared that the transfer was to Jitesh Prabhulal Haria of the ½ undivided share of Milan Prabhulal Haria as a gift on 8-1-1996 was effected illegally and same be and is hereby annulled and the registrar be amended accordingly.

ii. The Register in respect of the suit property be and is hereby rectified and/or amended to reflect the position that the suit property belongs to and is registered in the names of the Plaintiff and the 1st Defendant as tenants in common.

iii. The chief land registrar, be and is hereby directed to comply with and adhere to the orders herein by effecting the necessary reifications and/or amendments.

iv. An Order of Permanent injunction be and is hereby issued restraining the Defendants by himself, their agents, servants, employees or any other person claiming through him from selling off, charging, alienating or disposing off in any manner all that parcel of land known as **L.R No. 209/3428/3428 (I.R No. 8235)** (hereinafter referred to as the suit parcel).

v. The Claim for half rent collected from **SMART AUTOS LTD** from **January 2014 – January 2017**, as well as the claim for general damages for unlawful conversion, having been abandoned by the Plaintiff same be and is hereby Dismissed.

vi. The Counter claim by the 4th Defendant be and is hereby Dismissed.

118. The suit herein involves and or concerns a dispute between brothers on one hand and their Father, namely the 4th Defendant on the other hand. Consequently, the dispute is more or less an in-house dispute.

119. In view of the foregoing, I am constrained to order and/or direct that Each party shall bear its own costs.

120. It so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

N/A for the Plaintiff

Mr. Allan Kamau for the 2ND and 3RD Defendants.

Mr.Ndungu for the 4TH Defendant .