



Lakhlani (Suing as the Legal Representative of the Estate of Krishna Kumar Shivalal alias Krishnakumar Shivlal Lakhlani - Deceased) v Lakhlani (Environment & Land Case 32 of 2018) [2022] KEELC 15612 (KLR) (25 January 2022) (Judgment)

Neutral citation: [2022] KEELC 15612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 32 OF 2018
CK NZILI, J
JANUARY 25, 2022**

BETWEEN

NILESH KUMAR KRISHNAKUMAR LAKHLANI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KRISHNA KUMAR SHIVALAL ALIAS KRISHNAKUMAR SHIVLAL LAKHLANI - DECEASED) PLAINTIFF

AND

PRAVIN CHANDRA SHIVALAL LAKHLANI DEFENDANT

JUDGMENT

1. By an amended plaint dated March 11, 2019 the plaintiff suing as the legal representative of the estate of the late Krishna Kumar Shivalal Lakhlani alias Krishna Kumar Shivlal Lakhlani (deceased) sued the defendant, his paternal uncle for breach of resultant trust in failing to surrender LR No Meru Municipality/Block11/35 hereinafter the suit property) which the deceased had entrusted the defendant as his younger brother to process the sale, transfer and its management on his behalf while the deceased and the plaintiff were out of the country in 2000.
2. It was averred that upon returning to the country later in 2000, the deceased implored upon the defendant to transfer the property to him, he promised to do so at a later date initially but eventually declined until the deceased was taken ill and died on May 10, 2018.
3. Therefore, the plaintiff prayed for:
 - a. Declaration that the defendant holds the suit property in trust for the estate of the deceased and his immediate family.
 - b. An order to issue for the Land Registrar Meru Central to rectify the register, cancel the name of the defendant and register it for the deceased's estate.



- c. Permanent injunction restraining the defendant from interfering with the plaintiff's use and occupation of the suit property.
 - d. Costs and interests.
4. The plaint was accompanied by a list of witnesses, witness statements, further statements, list of documents dated March 11, 2019 and additional list of witnesses dated November 18, 2019.
5. Through an amended defence dated March 27, 2019, the defendant denied the claim in its entirety. By way of defence he averred that he solely purchased the said property from Tigania Farmers' Cooperative Society [in liquidation] and was duly registered as the legal beneficial owner with no trust ever ceded, created or intended to be ceded and or created in favor of the plaintiff, his late father or the estate as averred.
6. Further the defendant with respect to paragraphs 10, 11 & 12 of the amended plaint averred that before he migrated to the USA in 2006, he issued a letter of authority to the deceased to enable him to deal with the tenants and collect rent on his behalf and at no time was there any intention to transfer the ownership of the property to the deceased.
7. Additionally, the defendant averred that there were no documents creating a trust ever executed by him in favor of the deceased, the plaintiff or anyone else nor was there any intention to create such a trust over the property. The defendant averred that the deceased did not during his lifetime lay any claim of ownership of the property or allege any creation of the trust as averred or at all.
8. Moreover, the defendant averred that at no time did he ever intend to transfer the property to the deceased or did the deceased make such a demand to him or give him an undertaking to transfer and that any alleged claim by the plaintiff on the property was unknown to him and that his absence from Kenya was inconsequential to this suit.
9. Regarding paragraph 13 of the amended plaint, the defendant averred that as the legal owner and beneficiary of the property, he had acted rightfully as regards notices to the tenants, he did not intend to be the owner of the property but rather he was the duly registered and beneficial owner and that all the leases and tenancy agreements were in his name hence he was legally authorized to demand and direct tenants on where such rent would be made .
10. The defence was accompanied by a list of witnesses and documents dated October 22, 2018 and a supplementary list of witness statements dated June 26, 2019.
11. The plaintiff in his reply to the amended plaint dated March 29, 2019 stated that paragraphs 3,4 (a) & (b), 5 & 6 (a) - (d) of the amended defence were mere denials, reiterated the contents of the amended plaint in paragraphs 4-12 and averred that the defendant never bought the suit property as alleged or at all and therefore remained a mere trustee of the same.
12. Regarding paragraphs 7 (a) – (d) & 8 (a) - (c) of the amended defence, the plaintiff averred that his late father used to ask the defendant to transfer the suit property to him whereas the defendant kept on promising to do so until he met his death. The plaintiff termed the defence as hollow, a sham, replete with mere denials, lacking a reasonable defence known in law, frivolous, vexatious, scandalous and a paragon of abuse of the due process of court which should be dismissed with costs.
13. Following interlocutory applications parties herein executed a consent dated March 7, 2019 to maintain of the status quo and opening of a joint account in the names of the parties advocates so that the tenants could channel all the rents therein regarding the suit property pending hearing and determination of the suit. The parties also committed themselves to expedite the hearing of the suit.



14. The plaintiff testified as PW 1. He adopted his two witnesses' statements dated August 7, 2018 and March 11, 2019 as his evidence in chief. PW 1 further stated that his parents came to Meru in 1958 and established a home at Kianjai village and that his late father worked in Variety Stores for 14 years and later became a tenant in the suit premises after his then employer sold the plot to Tigania Farmers' Cooperative Society herein after the Society. PW 1 said that when the society) fell into financial challenges, the deceased as a loyal customer who was in the USA for a holiday was approached to buy the property. He said that the deceased wired the money from his (plaintiff) Barclays Bank UK Branch account to Kenya which constituted the purchase price.
15. PW 1 told the court that the deceased ventured into a bookshop business in the name of Bhatt Bookshop which was registered in 1980 as a sole proprietor as well as Kenidas Printers Limited. He denied that the defendant was never a partner in the said businesses.
16. PW 1 went on to say that in 1980's the deceased brought the defendant from India to Meru who fell into immigration difficulties for some time, but was being taken care of by the deceased since he was an honest and generous man. PW 1 insisted that the defendant owned no property at all and was merely registered as the owner of the suit property in trust for the plaintiff's family.
17. PW 1 also said that in 2007, the deceased approached the defendant who never denied holding the property in trust, to transfer the same, but agreed to transfer the property at a later stage. PW 1 said his late father used to manage the property, receive rent and issue directions to the tenants which defendant never questioned this during his lifetime. However, after his death the defendant started directing the tenants and or representing himself as the landlord in a dishonest and ungrateful manner.
18. Additionally, PW 1 stated that the property was bought at Kshs 8,000,000/= which his father paid with his assistance while they were in the USA in 2000 and since the defendant was in Meru, he processed the sale and transfer as their trustee.
19. PW 1 denied that the defendant made any contribution towards the acquisition of the property. Therefore, after the deceased came back to Kenya, he took absolute possession, control and management of the property and also relocated Bhatt Bookshop business to the property and has never paid any rent to the defendant till he died. Similarly, PW 1 testified that the deceased also relocated and established his residence at the suit property without consulting the defendant where he lived up to his death. Further to that, PW 1 stated that; it was his father who was paying all the rates and rent for the property and not the defendant. The plaintiff said that the deceased trusted the defendant so much hence the reason he gave him the duty to process the sale and transfer but as a trustee. However, and in breach of the trust the defendant eventually evaded to transfer the same until he died only to start demanding rent from the tenants.
20. In support of his claim, PW 1 produced a copy of the death certificate as P Exh No (1), as limited grant P Exh No (2), certificate of lease dated September 7, 2000 as P Exh No (3), payment for VAT dated January 29, 2009 as P exh (4), withholding tax certificate dated January 29, 2009 as P Exh No (5), VAT payments dated September 2, 2009 and July 5, 2010 as P Exh No (6) and (7) rent by CIC Ltd receipt dated May 19, 2014 as P Exh No (8) certificate of registration for Bhatt Bookshop dated January 8, 1998 as p exh No (9), letter of offer of lease dated November 3, 2007 to CIC Ltd as P Exh No (10) email from B.M Mutie dated May 29, 2018 as P Exh No (11), letter by Leonard K Ondari advocate dated May 29, 2018 to BM Mutie advocate regarding the lease as P Exh No (12), certificate of incorporation for Kenidas Printers Ltd as P Exh No (13), signed page by the directors as P Exh No (14), Bank transfer as P Exh No (15) copy of the deceased passport as P Exh No (16), photo as P Exh No (17) and the rates payment receipts as P Exh No (18) – (22) respectively.



21. In cross examination the plaintiff said that he was not aware of the letter of authorization to the deceased contained in item No 26 in the defendant's list of documents dated October 22, 2018 which documents he termed as unauthentic. He dismissed the particulars contained in paragraph 6 (a) of the amended defense since the deceased always reminded the defendant to transfer the property including when he was very sick in his presence and Dorothy Mutiga at his Nairobi residence who promised to do it.
22. PW 1 said that it was the deceased who undertook the alterations/repairs to the building in 2000 and kept on collecting rent. He denied confiscating the defendant's documents alleged to have been in his father's custody after his death. He said that he only had a certificate of lease which the defendant had willingly shared with his late father.
23. PW 1 said that the Society was in liquidation hence the urgency to dispose the property without waiting for his late father to return from the USA. Further PW 1 said that the defendant had never used the property. Concerning the purchase price, PW 1 said that P Exh. 15 was a Barclays Bank (PLC) ledger showing that he transferred 50,000 GBP on August 4, 2000 to the defendant to purchase the property. PW 1 further said that it was his late father who used to execute tenancy agreements. He however admitted that the deceased and the defendant were very close and used to get along very well out of mutual trust.
24. PW 1 admitted that his father had other properties in Meru, majority of which were under his (deceased) sole name. PW1 said that he left the country in 1975 after his mother passed on but would visit the deceased occasionally. PW 1 also admitted that he was not present in Kenya when Bhatt Bookshop was registered in 1980. Similarly, PW 1 said that he did not know the lawyers his late father used to engage with while he was away in the USA including during the sale of the property in 2000. He said his late father would only call him occasionally when matters arose. Further, he said that he did not know how the purchase of the property occurred including whether a letter of offer or a tender was given by the Society to his late father. He said that his father only gave verbal instructions to the defendant to buy the property on his behalf in 2000. Likewise, PW 1 said that he never came across any correspondence between Mr Mwangi or the Society officials with his late father over the sale.
25. PW 1 admitted that P Exh No 16 lacked travel dates while P. Exh No 17 did not reflect the date it was taken. PW 1 said that it was his late father who requested him to make the payments on his behalf from an account they used to operate. He however admitted that P Exh No (15) lacked the names of the Society and the specific instructions issued to him or the defendant regarding the purpose of the money.
26. PW 1 admitted that Barclays Bank PLC at the time he was testifying had not supplied to him any documents relating to the transaction. He admitted that his late father wrote a will in 2007 by which time the property had been in the defendant's name for 7 years, but the property was not included in the will. Similarly, PW 1 admitted that he never listed the property as one of his late father's assets when he swore an affidavit in the probate cause.
27. In re-examination, PW 1 admitted that the deceased handed over the lease by the defendant in 2000 and or 2001 in its original form. He said that as a brother, there was no need for the deceased to issue written instructions to the defendant over the transfer and the sale. PW 1 said that there was no restriction registered against the property since there was no dispute during the lifetime of his late father over the ownership.
28. PW 2 was Collins Njeru Gerishon Mukangu who adopted a witness statement dated March 8, 2019 as his evidence in chief. He confirmed that between 2006 – 2011, the deceased was his landlord and



- not the defendant who used to receive the rent and manage the property. Referred to the documents by the defendant's counsel, PW 2 admitted that the name of the plaintiff was missing in all the lease documents. PW 2 however said that it was the deceased who used to inspect the building and deal with him regarding the tenancy issues though the defendant was also among the three bank signatories to the account operated at their branch. He clarified he was not testifying as a tenant on behalf of Equity bank.
29. Dorothy Wanja was PW 3. She testified that the defendant was not known to her as at the time she used to be a branch manager of CIC insurance Meru Branch who were tenants of the plaintiff in the suit premises. PW 3 said that it was the deceased whom they used to deal with over tenancy issues since he was also residing within the suit property. She however clarified that she was not testifying on behalf of CIC group as a tenant since she was no longer an employee of the company with effect from 2014.
 30. Peter Muhia Limbua testified as PW 4. He adopted his witness statement dated November 18, 2019. As a former employee of the Society, he told the court that David Mugaa was the official liquidator in 2000 and the custodian of all the legal documents. He said they sold the property to Bhatt in 2000 for Kshs 8 million who paid the sum through the liquidator with the involvement of their lawyers whom he would not remember. He said he was one of the signatories to the sale agreement, Mr.- Bhatt, the liquidator and the lawyers. In his view, the deceased was involved in the initial negotiations but left the process midway to be finalized by the defendant on his behalf in so far as the payment of the money was concerned. PW 4 insisted that the deceased signed several documents including the sale agreement, though he could not remember if he also signed the transfer forms since the rest of the documentation was left with the liquidator to finalize. PW 4 said that the liquidator reported to his committee that the purchase price had been paid but could not tell how the money was paid, since the deceased had told the committee that the process would be completed by the defendant.
 31. PW 4 was however unable to produce any evidence that he was a member of the liquidating committee dealing with that transaction including the production of any documents for the same whose custodian was the liquidator. He however clarified that the defendant was also present during the negotiations and the execution of the transfer documents as the deceased was away.
 32. Dorothy Karimi Mutiga was PW 5. As a former employer of the deceased, she adopted her witness statements dated August 7, 2018 and March 11, 2019 as her evidence in chief. She denied the allegations of forging the signatures of the defendant in the power of attorney and clarified that the bookshop was a sole proprietorship of the deceased which was never operated, controlled or managed by the defendant.
 33. As to the suit property, PW 5 stated that the defendant merely received the money from the deceased to pay for the same and execute the sale agreement as a trustee which money was wired on August 4, 2000. Regarding the renovations to the property, PW 5 told the court that it was the deceased who negotiated with the tenants and oversaw the same as per the correspondence at page 76 of the defendant's bundle.
 34. PW 5 further said that it was also the deceased and not the defendant who used to pay rates, rent and taxes as per documents at pages 25-29 of the plaintiff's bundle of documents.
 35. Regarding the authorization letter dated September 11, 2006 appearing at page 26 of the defendant's bundle, PW 5 denied ever seeing such a document as a co-signatory to the bank accounts. She however confirmed that the deceased had authorized her to sign the leases and the defendant never complained about it.
 36. PW 5 denied that the plaintiff confiscated any documents belonging to the defendant. However, she said that the deceased had severally demanded that the defendant transfers the property to him in vain



- despite several undertakings by the defendant to do so in her presence including soon after coming back from the USA in 2000, 2003 at the time of the lease with Equity Bank and 2018 when the deceased was sickly. PW 5 said that between 1983 and 2018, the deceased and the defendant were in a brotherly cordial relationship with no mistrust or misunderstandings. She disputed the alleged documents over negotiations of tenancy listed in the defendants list of documents at pages 40, 43 & 59.
37. Concerning the rent and the account signatories opened in 2003, PW 5 said the defendant's name was only included therein since the certificate of lease was under his name but nevertheless, the sole beneficiary remained the deceased. She denied that the defendant ever operated the said account(s) nor complained over their operations as the registered owner of the suit premises including the payments of rates and rents which she used to pay on behalf of the deceased as indicated at pages 42-47 of the plaintiff's bundle of documents.
 38. In cross examination, PW 5 admitted that she was employed in 1983 by the deceased in Bhatt Bookshop. Regarding tax obligations, PW 5 stated that the defendant bore the individual responsibility as per law and that their accountant was the one in charge one Japhet Niter. She admitted that she had no documents to show that it was the deceased who used to pay taxes for and on behalf of the defendant. PW 5 also admitted that though her witness statement mentioned a power of attorney, which was relevant to this suit, she had not provided it before the court even though it gave her the mandate to deal with the property in absence of the donor, the defendant and in this case, they could do everything with the property in absence of the defendant including signing the leases, negotiating for them, undertaking any renovation as well as transferring the property to third parties.
 39. On instructions and requests to transfer the property made to the defendant, PW 5 admitted that all of it was orally made and there was nothing put in writing by the deceased except some recording made by the plaintiff which unfortunately though relevant was not before the court. PW 5 said she used to be the personal assistant of the deceased but was not staying at his residence until the deceased became sick in 2018 otherwise prior to this he was always in good health.
 40. Regarding the visit in 2000, PW 5 admitted she was the one left running the business and not the defendant for six months while the deceased was away. PW 5 said that even though the three of them were signatories to the bookshop account and could as well pay the money to the seller in 2000, or liquidator, the deceased sent the money directly to the defendant since he had previously instructed him on what to do which the deceased came to inform her about. She however admitted that P Exh No (15) had a logo for the Barclays Bank PLC Limited and the account number. Similarly, she admitted it was a copy, was not clear, the seal was faint and or certified. PW 5 said that she was not aware if any transfer documents or demand letters were prepared or made by the deceased and sent to the defendant for his execution between 2000 and 2018 by any of the deceased panel of lawyers to transfer the land.
 41. Pw 5 admitted that she used to be the custodian of the deceased documents and could not know where the plaintiff accessed the documents contained at pages 25 – 29 of his bundles including the original lease. Regarding the succession documents, PW 5 admitted that she was a signatory to the will which did not list the property as one of the deceased assets simply because it was still in the defendant's name with a promise to transfer it. PW 5 admitted that she had no documentary evidence over the transaction between the liquidator, the deceased and the defendant, save for the lease.
 42. Asked about the leases, rent and rate payments contained at pages 41-46 of the plaintiff's bundle, PW 5 said that the landlord was already known to the bank though the signatures of the deceased appearing in several documents did not indicate if he was signing for and on behalf of the defendant who had already left the country in 2006.



43. PW 5 admitted that there were other withdrawals in the account since she was an authorized signatory and that some other tax returns were made for the defendant which to her were not relevant to the suit. She however denied being selective in what was availed before the court despite the documents being in their custody. PW 5 admitted seeking for and bringing witness to testify including PW3, one Limbua. She said she was neither involved in the negotiations over the suit property the sale, nor did she come across the sale agreement and the transfer documents.
44. In re-examination PW 5 admitted the existence of the power of attorney though it did not authorize her to transfer the property to the plaintiff. Regarding the proceeds from the suit premises, PW 5 admitted that though the defendant was a signatory to the joint account with effect from 2003 he never operated the account, sought for the rent and that all of it was being appropriated by the deceased. Similarly, PW 5 stated that the defendant had never demanded for vacant possession of the property since 2000.
45. The defendant adopted his witness statement dated October 18, 2018 as his evidence in chief. He confirmed that he was the registered owner of the suit property. He said that they run the Bhatt Bookshop Meru together with the deceased as a family name and was later transformed into a limited liability company.
46. DW 1 said that his driver Batuire introduced him to the then chairman of the Society Mr Mwongo who after several meetings told him that the property was up for sale and he should tender for it, which he did and emerged the highest bidder. He testified that he was eventually sent the letter of offer after which Mr Pabari advocate handled the transaction. Since the property was already charged with the Cooperative Bank, DW1 said that his lawyers arranged that they pay the bank the outstanding amount in exchange of the transfer of the land which was done in his favor. The defendant testified that a contractor by the name Four Star Construction did some alterations to the building to suit the preferences of the tenants.
47. DW 1 went on to say that in 2006 his then lawyers Mbichi Mboroki & Co Advocates negotiated for the lease's renewal with Equity Bank. He also contracted Neoplan (K) Ltd to construct phase II of the property to accommodate the needs of Equity Bank Ltd. DW 1 told the court that since he was relocating to the USA he authorized the deceased to deal with the tenants and collect rent on his behalf through D Exh No 4 Further, DW 1 also opened a bank account where his late brother were signatories with PW 5, the latter to be helping his late brother due to his advanced age.
48. Further, DW 1 said that he left all his transfer and correspondence documents relating to the property and insurance policies with the deceased which immediately after his death, the plaintiff came over, ransacked his house and made away with all of them including the step mother's passport which fact was confirmed by PW 5 in a recorded conversation, so as to conceal evidence to succeed in this suit. Efforts to ask for the return have been futile. The defendant said that the letter of authority gave his brother immense powers who never made any claim over the suit premises during his lifetime or ask him to transfer the land to him for he knew that he was the owner and was only managing it on his behalf due to his absence from the country.
49. The defendant denied ever signing any alleged power of attorney in favor of PW 5 or his late brother. He vehemently denied that there was any intention to create a trust, written or otherwise as the deceased never made any payments for the purchase of the property. Further, the defendant testified that when the lease for Equity Bank was about to expire he negotiated new terms through Leonard Ondari and Co. Advocates as per the correspondence and the law firm received privileged information from him immediately before the law firm was used by the plaintiff to file the suit against him which he objected to leading to the change of advocates as per the court file. The defendant further said that PW 1 & PW



- 5 delayed his rental payments and made him incur penalties for late tax payments with Kenya Revenue Authority (KRA).
50. Consequently, DW 1 said that the deceased is survived by his wife Shasha Krishna Kumar Lakhiani. DW1 said the evidence by PW 1 and PW 5 was not credible, was biased and made by co-conspirators out to embezzle or defraud him of his property and income.
51. Consequently, DW 1 produced a certificate for registration for Bhatt Bookshop a family business as D Exh No (1) whose shareholders were himself, the deceased, a nephew, his brother's wife and a niece which business was currently being run by PW 5. DW 1 produced a copy of the certificate of lease as D.Exh (2). He said he used to reside in the suit property alongside his late brother since 1978 together his own family up to the filing of the suit.
52. Further DW 1 produced the correspondence on the leases with Equity Bank as D Exh No (3), a letter of authority as D Exh No (4) duly signed before his lawyers, tax filings returns as D Exh no 5, renewal for leases correspondence with Leonard Ondari advocates as D Exh No (6), tax penalty payments and Bank statements as D Exh No (7), request for the renewal of lease by Equity Bank as D Exh No (8), certificate of urgency and application for limited grant dated July 16, 2018 in Meru CMC Succession No 146 of 2018 as D Exh No (9), petition for grant for the deceased estate as D Exh No (10), affidavit by the plaintiff as D exh No (11) and a limited grant to the plaintiff as D Exh No (12) respectively. He denied receiving any money from the deceased to pay for the property as alleged in P. Exh No (15) since he used his own savings and income from his business including Kenidas Printers Ltd. DW 1 said that he also owned other properties in Meru and Parklands Nairobi where he had left his late brother to occupy and live in. He said that D Exh No 5 was an in-depth investigation of his income by KRA whose supporting documents were among those taken away by the plaintiff which he had left with his brother for he did not need them while at the USA. He denied any trust or promise to transfer the property or a request for the property from the deceased.
53. DW 1 said that the deceased had a wife since 1980 who in D Exh No (11) has not included the suit property among the assets of the deceased. On the issue of the rent for Bhatt bookshop, DW 1 said they were two sides of the same coin with the deceased so he could not charge him rent for he was like his own father whom they had lived together for 40 years and would even visit him in the USA.
54. In cross examination, DW 1 said he had the letter of offer, sale agreement, transfer forms since it was among the documents confiscated by the plaintiff; or under the custody of the deceased, but was certain that he bought the property in December of 2000 in the presence of witnesses such as Jacob Mwongo, John Batuma and his lawyers. He said this was after tenders were floated, won it and was issued with a letter of offer.
55. DW 1 also said that after he purchased the property he stayed in Kenya for over 6 years by which time, only Equity Bank was a tenant. DW 1 said that the documents he had produced were the only ones that he was able to retrieve from Equity Bank after his brother passed on though prior to his demise he was with him for ninety days. Further DW 1 admitted his documents for tax and rent or rates payments even though he had paid for the same over the years were missing before court. Similarly, DW 1 said that between 2001 – 2006 he used to collect rent from the Equity Corporation manager Mrs. Wamae, though he could not remember the specific amounts or dates of the receipt. Similarly, DW 1 admitted that they would draw out money from their joint account with the deceased and re-invent elsewhere including fixed deposit accounts between 2006 – 2018.
56. Regarding P Exh No's 5, 6, 7, 8, 10 and 12, DW 1 said that he was not privy to them and therefore he did not approve them. On P Exh No (13) DW 1 said he joined the company later on though the amended certificate had not been filed before court. On the payment of Kshs 8 million, DW 1 said he



- used his own sources of income to pay for it and not the money alleged to have been sent to him. He said that all his support documents were left in the custody of the deceased while he was leaving for the USA together with bank statements from Guardian and Paramount Bank.
57. Regarding P Exhs No's 18-23, DW 1 said that he had authorized the deceased to pay for them on his behalf as per D Exh No (4) with effect from June 19, 2006. In addition, DW 1 said that Mr. Pabari advocate was the one who processed the original certificate of lease which was left with his late brother. DW 1 also told the court that he was managing the family business before he left for the USA but realized when he came back that his signature was forged in the power of attorney. Likewise, DW 1 said that the in-depth investigations by KRA related to the purchase of the property since it was under his name for the documents thereof at the top indicate his rent and account audit which was a clear proof of a registered tax payer owning property.
 58. DW 1 further clarified that even the step mother of the plaintiff in her answer to the petition for grant appearing in pages 42 – 53 of the defendant's bundle, had not supported the claim by the plaintiff. On the family business, DW 1 told the court that the email used in page 1 of the 1st bundle of the plaintiffs list of documents belonged to him and that his name was also listed among the shareholders. He admitted that though the leases were signed by his late brother, it was on the strength of D Exh No 4. Lastly, the defendant testified that the general theme by the plaintiff in his evidence was wrong since all what happened after 2006 was out of the letter of authority he had left with is late brother and everything regarding the property had been left under the custody of the deceased.
 59. At the close of evidence, parties were directed to and did file written submissions dated October 26, 2022 and November 28, 2022 respectively.
 60. According to the plaintiff the issues for determination are whether the plaintiff has proved a claim of breach of trust and whether the defendant bought the land through his own income and if the plaintiff is entitled to the reliefs sought plus costs.
 61. On the 1st issue, the plaintiff submitted that the case was based on a resulting trust which is an overriding right under Section 28 (b) of the [Land Registration Act](#). In this case the plaintiff submitted that there existed a mutual trust between the deceased and the defendant as brothers.
 62. On the burden of proof of the trust, the plaintiff cited [Charles K Kandie vs Mary Kimoi Sang \(2017\) eKLR](#) on the proposition that the intention of parties to create a trust must be clearly determined before a trust is implied. In absence of an executed sale agreement between parties the plaintiff invited the court to draw inferences from the conduct of the parties and the surrounding circumstances of the ownership guided by Charles Kandie (supra).
 63. As to the ingredients of a resulting trust which the plaintiff insisted to have proved, it was submitted guided by [Twalib Hatayan and another vs Said Saggat Ahmed AL Herdy & 5 others \(2015\) eKLR](#) on the proposition that a resulting trust will automatically arise in favour of a person who advances the purchase price, regardless of the name the property is registered under. In this suit, the plaintiff submitted that the plaintiff assisted his late father to pay the purchase price through the defendant in mutual trust since all of them were in the USA as pleaded in paragraphs 2, 4, 6 & 7 of the amended plaint, which facts were corroborated by PW 4 and PW 5 and P Exh No 15 admitted as evidence in court.
 64. Concerning the defence, his statements and list of documents, the plaintiff submitted that the defendant had failed to disclose his sources(s) of income which he used to pay for the property unlike P Exh No (15) and its substantiation by PW (4) & (5).



65. On the inferences to be drawn from the surrounding circumstances the plaintiff submitted that the court should find the fact that, since 2000 to present, the deceased has never exclusively occupied or controlled the suit property unlike the deceased until his demise; coupled with the fact that the defendant voluntarily surrendered the original certificate of lease and left all the supporting documents under the custody of the deceased, which two point at the fact that there was a resultant trust.
66. The plaintiff submitted the issue of the alleged confiscation of the said documents by the plaintiff holds no water given it was never pleaded and should therefore be ignored as held in *Samson Emuru vs Suswa Farm Ltd (2006) eKLR*.
67. Further, on other surrounding circumstances which the plaintiff submitted should be taken into account was the evidence by the plaintiff's witnesses that the deceased more than once sought from the defendant for the transfer; together with the exclusive appropriation of the rent and its receipt without any questions being raised by the defendant in addition to the exclusive management and control over the suit property by the deceased; the failure to seek for rent for Bhatt bookshop; the failure to seek for vacant possession; the exclusive payment of taxes and the fact that the deceased passed himself as the sole landlord; his recognition as such by the tenants; the failure to seek for eviction and or rent arrears by way of a counterclaim all be taken into account inferring that there was a resultant trust created. Reliance was placed on *Juletabi African Adventure Ltd & another vs Christopher Michael Lockley (2017) eKLR*.
68. The defendant on the other hand submitted that the four witnesses called by the plaintiff were not present when the property was purchased nor were they involved in the negotiations, the drafting of the agreements and during the payments, yet they have all made allegations of what the deceased allegedly informed them with no documentary evidence to back such allegations. To the contrary, the defendant submitted that he produced documentary evidence that the property was his, including the affidavit by the deceased's own widow in the probate court documents before this court and the will.
69. The defendant submitted that there was no dispute to the facts that; he resided with his late brother in the suit premises with effect from 1970 to 2006; the property remained under his name with effect from 2006 to present; he left his late brother managing the premises; all the leases and correspondences were made and addressed to him; all rent, rates and taxes were issued and paid under his name and lastly that the deceased made a will dated December 14, 2007 leaving out the suit property .
70. Given the undisputed facts, the defendant submitted that P Exh No 15 used to prove any alleged trust was faint, was not legible, bore no logo, lacked certification from its source; account holders were different and had an unexplained address. Further, it was submitted that the payee of the amount was not explained if Pravin Chandra referred to the defendant and that no evidence was tendered that the sum was paid to the defendant's account. Similarly, it was submitted that the currency of the sums and the exchange rate used was not confirmed by the plaintiff and the purpose for which the money was allegedly sent and or paid. Given the foregoing glaring gaps the defendant submitted that P Exh No 15 was unreliable and lacked any probative value since it was not a bank statement issued by Barclays Bank PLC or any other Bank for that matter. Relying on *Twalib Hayatan & another (supra)* the defendant submitted that the plaintiff had to prove that the deceased advanced the defendant the purchase price for the suit property and P Exh No (15) could not be used as a basis to prove that
71. The defendant submitted that the plaintiff had also failed to prove or show the intention of the parties at the time the purchase occurred given none of the witnesses were involved in the exercise or documents tendered which were used during the transaction. The defendant submitted that PW 4 evidence was unreliable since he had nothing to show that he was once working with the Society or the official liquidator, and he could not even tell who signed the agreement for sale. His evidence was



incapable of being acted on as held in *Twalib Hayatan* (supra). Therefore, such a document with no probative value, the defendant submitted should not be used as a basis to infer a resulting trust.

72. On the issue of the common intention between the parties, since no prove has been established over any money advanced to the defendant to purchase the suit property, save the evidence of PW 5, the defendant submitted this condition could not apply to this suit given that no demand or request to transfer the land was exhibited and all the correspondences and payments were done in his name including the renewal of lease, the payments of taxes since the deceased was issued with a letter of authority to deal with all respects of the property as the defendant relocated to the USA who never made a letter of protest and or even in making the will in 2007, identified this property as one of his properties. Reliance was placed on [*Heartbeat Ltd vs Ngambwa Heartbeat Community Children's Home & Rescue Centre & another \(2018\) eKLR*](#) on the circumstances to infer trust based on the intention of the parties.
73. Regarding the request for the court to consider other factors to draw inference from the surrounding circumstances, it was submitted that the defendant testified that all the extended family lived together in the suit property hence to say that the deceased exclusively occupied the suit premises was not only untrue but also misleading on the part of the plaintiff, especially when the deceased would even live and occupy the defendant's apartment in Nairobi till his death. Further, the defendant submitted that the evidence of PW 2 & 3 lacked credibility on the aspect for by the alleged time, the defendant had already relocated (2009 – 2014). Regarding PW 5, it was submitted that she was not a truthful witness due to her differences with the defendant as set out in paragraphs 9, 12 and 18 (a) of his witnesses' statement and her motives to testify against the defendant were rather obvious.
74. On the alleged voluntary surrender of the original lease, the defendant submitted that leaving his property's entire file was explained and rather logical so as to enable the deceased to deal with the property in accordance with the letter of authority the defendant had issued to the deceased which could not in any way amount to a resulting trust.
75. Regarding the aspect that the deceased always asked the defendant to transfer the land to him the defendant submitted that this was never substantiated since the evidence tendered indicated that the deceased was an astute businessman who was always surrounded by lawyers including Mbichi Mboroki Advocates who drew the will in 2007. To the contrary and incidentally, the plaintiff never produced any instrument of transfer which was ever dispatched to the defendant to execute. Further, the deceased's wife before the probate court never included the property as forming part of the estate of the deceased.
76. Regarding the alleged corroboration of the plaintiff's testimony, the defendant submitted that all the witnesses by the plaintiff were biased, unreliable and offered no credible evidence unlike his documentary evidence which was reliable, credible and pointing out that there was no intention to create a resulting trust. Reliance was placed on [*Amina Karama vs Njagi Gachagua & 3 others \(2020\) eKLR*](#) on witnesses whose evidence is not conclusive and unable to override overwhelming evidence produced.
77. Lastly, the defendant urged the court to be guided by the doctrine of laches since the deceased never made a claim during his lifetime for the transfer the property to him but now it was being unbelievably and impossibly sought 18 years afterwards by the plaintiff. Reliance was placed on [*Jonah Mwololo Nzau vs James Musyoka Waita \(2008\) eKLR*](#) on evidence bordering on an impossibility and unbelievability as well as *Amina Karama* (supra) [*Ibrahim Mwogora Mwangi vs Francis Ndegwa Mwangi \(2014\) eKLR*](#).



78. Having gone through the pleadings, evidence tendered written submissions and the law, the issues calling for the court's determination are:
- i. Whether the plaintiff is suing on his own behalf, for the immediate deceased's family or on behalf of the estate of the deceased.
 - ii. If there was need to plead and prove the date, particulars, parties, terms and conditions of the sale agreement, and transfer governing the subject property.
 - iii. If the plaintiff pleaded and proved that he or the deceased solely paid the consideration towards the acquisition of the suit property.
 - iv. If the plaintiff in his pleadings specified the nature and type of the alleged trust capable of being inferred.
 - v. Whether the court can infer any resulting trust relating to the sale, transfer, registration, control and management of the suit property between 2000 and 2018.
 - vi. If the documents produced by the plaintiff relating to the payment of taxes, rates and expenses towards the maintenance of the suit property were solely paid from income from the suit property or other income belonging to the plaintiff or defendant.
 - vii. If the defendant has rebutted any alleged trust relating to the suit property.
 - viii. If the plaintiff is entitled to the orders sought.
79. The primary pleading by the plaintiff in which he brings his claim over LR No Meru Municipality/Block II/35 on account of a resulting trust is the amended plaint dated March 11, 2019 whereas the defendant relied on the amended defense dated March 27, 2019.
80. In the said amended plaint, the plaintiff describes himself as the legal representative of the estate of his late father who passed on May 10, 2018 as per P Exh No 1 and in a limited grant of letters of administration ad litem dated July 19, 2018 produced as P Exh No 2. The plaintiff pleaded at paragraphs 4-5 of the amended plaint that the deceased bought the suit property in 2000 from the Society at Kshs 8,000,000/=, paid the entire amount and instructed the defendant, his younger brother to process the sale and the transfer documents on his behalf since the deceased and the plaintiff were in the USA. Out of the trust he had over his younger brother as the only one in Meru at the time, he processed as directed and registered the property in trust for the deceased and his immediate family.
81. The particulars of the trust are pleaded at paragraph 9 of the amended plaint as holding the suit property in trust for the deceased and his immediate family, promising to transfer it to the deceased, later consequential whereof, levies in respect of the same have always been paid from the deceased Bhatt Bookshop and his other businesses, holding the suit premises in trust for a short time awaiting the return of the deceased from business and family trips abroad and the handing over the original lease to the deceased.
82. At paragraph 11 of the amended plaint, the plaintiff pleaded that having returned to Kenya he assumed absolute ownership, rented the suit property to tenants and was exclusively managing the suit premises by receiving rent, undertaking repairs and basically running the suit premises in all aspects until his demise to the exclusion of the defendant.



83. Regarding the breach of trust, the plaintiff at paragraph 12 of the amended plaint averred that the deceased fell sick and while in hospital, he once again requested the defendant to affect the transfer who shockingly changed tune and maliciously claimed that he was the landlord. The particulars of breach as pleaded are:
- a. Refusing to sign the transfer forms while the deceased was alive.
 - b. Going against the undertaking and understanding that he would transfer the land.
 - c. Taking advantage of the ill health of the deceased.
 - d. Taking advantage of his absence from Kenya.
 - e. Claiming ownership at the time the deceased was sickly.
 - f. Purporting to instruct tenants to pay rent to him.
 - g. Stating that he was the rightful owner.
 - h. Issuing threats to tenants.
84. At paragraph 5 of the amended plaint the plaintiff averred that 'the cause of actions relates to the plaintiff named in the plaint'.
85. In response to the claim the defendant in his primary document the amended defence dated March 27, 2019, denied the contents of paragraph 4 of the amended plaint in its entirety and said that he was the buyer, legal and beneficial owner of the suit property with no intended, created or existing resulting trust; in favour of the plaintiff or his late father. He pleaded at paragraph 7 that when he migrated to the USA, he issued a letter of authority to the deceased in order to enable him deal with the suit property and that at no time did he have an intention of transferring the suit property to the deceased since there was in existence, no document creating a trust or for that matter an intention to do so.
86. Further, the defendant pleaded that during the lifetime of the deceased he never laid a claim to the ownership of the suit property or demanded for it that there was no undertaking to do so; he was not aware of the alleged claim and that the alleged particulars of malice were unfounded.
87. Additionally, at paragraph 8, of the amended defence the defendant averred that he was right to direct the tenants as the legal and duly registered owner of the property and that all leases and tenancy agreements were under his name hence it was in order for him to exercise his rights as a land lord.
88. In reply to the amended defence, the plaintiff filed a reply dated March 29, 2019 in which at paragraph 3 thereof averred that his late father used to ask the defendant to transfer the land who kept making empty promises until he died. He stated that the defence was hollow, frivolous, scandalous and an abuse of the court process without specifying in which manner.
89. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. In *Raila Amollo Odinga vs IEBC (2013) eKLR*, the court held that parties must not be allowed to travel outside their pleadings and or introduce, without an amendment new issues not covered in the pleadings. In *Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi (2014) eKLR*, the court held that written submissions were parties marketing language and do not constitute evidence.
90. Order 2 Rule 10 of the *Civil Procedure Rules* provides that every pleading on breach of trust shall contain particulars and where a party pleads a condition of mind of any person or any malice particulars



- thereof must be pleaded. Order 2 Rule 11 of the Civil Procedure Rules provides that any allegations of facts made by a party in his pleading shall be deemed as admitted by the opposing party unless it was traversed by that party in his pleading. Order 2 Rule 4 (2) of the Civil Procedure Rules provides that a defence to an action for the recovery of land shall plead specifically every ground of defence on which he relies on a plea that he was in possession of the land by himself or his tenants shall not be sufficient.
91. Order 2 Rule 3 (3) of the Civil Procedure Rules provides that the effect of any document or the purport of any conversation referred to the pleading shall, if material, be briefly stated and the precise word of the documents or conversation shall not be stated except in so far as those words are themselves material. Further, under Order 2 Rule 3 (4) thereof a statement that a thing has been done or that an event occurred being a thing or an event the doing occurred of which constitute a condition precedent necessary for the case of a party shall be implied in his pleading.
 92. In this suit, the whole claim by the plaintiff revolves around a thing, process or event which is said to have occurred and in which the plaintiff seeks the court to infer, establish and or determine that there was an intention by the parties herein to found a trust in the manner, nature and circumstances leading towards the acquisition of the suit property.
 93. That thing, process or event was the sale, transfer and the registration of the suit property in the name of the defendant. The onus was on the plaintiff to plead as required under the cited provisions of law on pleadings, the specific and brief facts, particulars of document or conversation, the thing, and the event that preceded or formed the trust pleaded.
 94. Similarly Order 3 and 7 of the Civil Procedure Rules requires that a plaint and a defence be accompanied by the documents and witness statements to be relied upon in support of such a pleading. In this suit, none of the parties filed the specific documents relating to the tender, offer for sale, the sale agreement, approvals, the transfer forms, payments of statutory fees and or any correspondence prior to and after the transaction involving the seller, the purchaser and the key players in the transaction such as the lawyers, the land registrar, the official liquidator to the Society, the District Cooperative officer and the Cooperative Bank of Kenya Ltd in 2000 or thereabout. The said key documents were also not pleaded or produced before court for or against the claim yet they were in my considered view the bedrock of the claim.
 95. The plaintiff described his capacity to the suit that the alleged trust was in favour of the estate of the deceased and the immediate family. In his plaint, the plaintiff said that the suit property belonged to the deceased and the immediate family. This is also confirmed in D Exh No 9 in the plaintiff's affidavit sworn on July 16, 2018. He produced herein a will as P Exh No 10. In the affidavit in support of the application for grant of letters of administration ad litem, the plaintiff listed an inventory of the deceased assets. At paragraph 8 of the amended plaint the plaintiff has clearly mentioned the surviving dependants as including his step mother. So therefore, the plaintiff seeks for the right of not only himself but also his immediate family said to form part of the estate of the deceased father. Consequently, the stepmother was and remains a necessary and relevant party or witness to this suit more so considering that she was the one living and staying with the deceased since the 1980s while the plaintiff was away in the USA since 1975.
 96. The law relating to trust is to be found in Sections 24, 25, 26, 28(b), 66, 67 of the [Land Registration Act 2012](#) as well as the [Trustee Act](#). The nature and manner of seeking and determining trusts has been subject of caselaw. In [Sirma vs Singoei \(Civil Appeal\) 109 of 2018\) 2022\) KECA 708 \(KLR\) \(8 July\) \(Judgment\)](#), the court held that trust must be pleaded as required under Order 2 Rule 4 (2) and 10 of the Civil Procedure Rules with specific details so as to signal the other party as to the case it has to meet or defend. The court cited with approval [Warde vs Slater \(2017\) BSC 274](#) that a resulting trust



describes what happens to the property in question that it results or goes back to the person who is entitled to call for the property. The court also cited *Fulton vs Gunn* (2008) BCSC 1159 where it was held that a party must adduce sufficient evidence to rebut the presumption of trust on a balance of probabilities and that in deciding the issue, the court has to focus on the intention of the parties at the time of the transfer. The court further held that a resulting trust serves the same objective to defeat unjust enrichment and to return property to the true owner.

97. The court stated that resultant trust was an overriding trust by dint of Sections 25 (2) and 28 (b) of the *Land Registration Act* 2012 and Sections 30 (9) of the repealed Registered Land Act and that a party must bring sufficient evidence to imply a trust. The court cited with approval *Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR* where it was held that it was only in a case of absolute necessity that the court may presume a trust so as to give effect to the intention of the parties.
98. In *Sirma* (supra), the court held that the very nature of an implied trust requires courts to take a slow approach to it since it is not normally expressly stated and that the court has to take a careful look at the evidence to discover the intention of the parties. In the *Sirma* case (supra) the testimony of the respondent was that he had used his brother to buy the land, contributed to its purchase and was also in possession of a portion of the land. The source of his money was said to have been from farming and trading. Again, the mother of the two disputants had testified. The trial court had also observed the demeanor of the witnesses.
99. Additionally, documentary evidence that the respondent had given money to his elder brother though they had a lot of mutual trust was missing. The court observed that it was improbable that no documents were kept in respect of the transaction. Further, the court was concerned by an inordinate delay of 15 years and the respondent's credibility.
100. Coming to the critical role of documents in order to infer trust, in the case of *Heartbeat Ltd vs Ng'ambwa Heartbeat Community Children's Home* (supra) the court held that the respondent had failed to establish a clear intention between the parties that the appellants would hold the suit parcels in trust for the respondent. The court looked at the discussions, the meetings and made a finding that there was nothing to show that the said discussions, meetings, or negotiations materialized into an agreement capable of being enforced since the sale agreement did not in any way refer that the parcels were being purchased for the benefit of the respondent.
101. The court said that the evidence on record was all about the respondent's word against the appellants and that more was needed to establish the clear intention to establish a trust.
102. In the case of *Vogendra Purshottam Patel vs Pascale Mireille Baksh (Nee Patel & 2 others (2006) eKLR*, the plaintiff was claiming that he had solely purchased the land and built thereon without any contributions from his deceased brothers and that the registration in the name of his deceased brother was a benami transaction, that his brothers were trustees and benamidars for him. He had sought for a declaration of the resulting trust, in the alternative special damages and or that he was the rightful and true owner.
103. The court considered whether the agreement of sale and the certificate of title contained any express declaration of trust or a benami trust. The question before the court was whether the intention to create a resulting trust could solely be derived from the instruments that were executed or parole evidence could be admissible to infer an intention to found a trust in line with Sections 97 & 98 of the *Evidence Act*.



104. The court cited with approval Chapter 29 of Magness Hindu law & usage 4th Edition;
- ' A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another without indicating his intention to benefit the other. The benami therefore has no beneficial interest in the property or business that stand in his name, he represents in fact the real owner and so far as their relative legal position is concerned he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The general rule and principle of the Indian law as to resulting trusts differs but little if at all from the general rule of English Law upon the same subject'.
105. The court cited also with approval *Bishan Singh Chadha Ltd vs Mohinder Singh and another (1956) 29 KLR* where the court held thus:
- ' Where property is transferred to one person for a consideration paid or provided by another person and that other person did not intend to pay or provide such consideration for the benefit of the transferee the transferee must hold the property for the benefit of the person paying or providing consideration'.
106. The court held that the burden of proving that a particular sale was a benami and that the apparent owner was not the real owner, which must strictly be discharged, rested with the person asserting it to be so which was a rebuttable presumption of fact as held in *Shah & Co vs Maryam (1967) EA 409*.
107. Just like in the *Vogendra* case (supra), the plaintiff herein has not pleaded or given evidence that what they had with the defendant was a benami transaction. His claim is based on a resultant trust. The suit property herein was sold and transferred to the defendant by a third party who is not a party to this suit. It is also admitted both in the pleadings and evidence that the deceased was not a party to the sale agreement and the transfer process. There was therefore no privity of contract between the plaintiff and the transferor, the Society (under liquidation) at the time of the transfer. My finding therefore is that plaintiff did not specify and or plead a benami trust but a resultant trust.
108. The plaintiff has pleaded and testified that there was an intention to create a trust which this court should infer. As indicated above the instruments forming part of the sale and the transfer have not been produced nor pleaded before this court. None of the parties or witnesses to the said instruments of sale and the transfer were called to testify by the plaintiff except PW4. His evidence was not backed by any documentary evidence more so with his admission that the custodian of all the said documents and signatory to both the sale agreement and the transfer was the official liquidator. It is trite law that property belonging to a society under liquidation can only be dealt with through the gazetted liquidator under Section 66 of the *Cooperative Societies Act* as read together with *Sacco Societies Act*. Once a liquidation order is made the mandate of the committee becomes ineffective by operation of law. See *Agricultural Finance Corporation vs Lengetia Ltd & another (1985) eKLR*, and *New Kamwangi Gumba Co Ltd vs Kiambu Coffee Growers Coop Society & others (2015) eKLR*. In the instant suit, the plaintiff and his witnesses in particular PW 3 & 5 have all given circumstantial evidence which is not supported by the primary documents to the transaction. In absence of evidence that the PW4 had mandate from the liquidator and actually signed the sale agreement, his evidence is unreliable and unbelievable to the extend that the actual buyer was the deceased.
109. Similarly, no independent witnesses such as the land registrar, District Cooperative Officer, the liquidator or the lawyers who prepared and executed the sale agreement and transfer forms have been called to corroborate the plaintiff's evidence on his claim.



110. The defendant has pleaded and testified that there was no such intention to create a trust. In Vogendra case (supra) the court held that where the transferor had no intention to create a trust and that such an intention could not be inferred from the circumstances of the case, the resulting trust will not arise. The court cited with approval *Ayoub vs Standard Bank of SA (1963) EA 619* where the Privy Council held thus:

' The court will not imply a trust save in order to give effect to the intention of parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied'.

111. The court underscored the importance of the documents of conveyance or transfer of property to the co-owner in determining the vesting of the beneficial interest in the property as best illustrated in *Petit vs Petit (1969) ALL ER 385* in the words of Lord Upjohn:

' In the first place the beneficial ownership of property in question must depend on the agreement of parties determined at the time of acquisition. If the property in question is land, there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal estate is to vest but in whom the beneficial interest is to vest that necessarily concludes the question of title between spouse, for all time in the absence of fraud or mistake at the time of transaction the parties cannot go behind it at any time thereafter even on death or break up of marriage'.

112. In this suit, while appearing to admit and or show the irrelevance of the documents relating to the transaction, the plaintiff submitted that though the deceased's name did not appear in the sale agreement, the transfer forms and the certificate of title, the deceased was for all intents and purposes the one who was the sole source of the purchase money and that the defendant was a mere trustee. Section 97 of the *Evidence Act* provides that parole evidence is not admissible to prove the terms of a contract or grant any other disposition of property which has been reduced into writing. The terms of such documents can only be proved by the document itself or secondary evidence of the contents of such documents where secondary evidence is admissible. Section 98 thereof bars the use of such evidence or statement for purposes of contradicting, varying, adding or subtracting from its terms except in the exceptions given under the Section. The doctrine of estoppel provides that parties to a deed are estopped from denying the existence of such a deed or denying the consequent status of the other party.

113. In *Mutiso vs Mutiso 1988 KLR 846* the court cited with approval Snell's Equity 29th Ed at page 180 where it provides:

' The act and the declaration of the parties before or at the time of the purchase or so immediately after it has to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declaration are only admissible as evidence against the party who made them and not in his favor'.

114. In my considered view the failure to plead, produce and call evidence on the sale, transfer and registration of the suit property by the plaintiff left a gap which was not bridged or filled by parole evidence of his witnesses who were not party to the transaction.

115. Having found that the plaintiff and his witnesses were not party to the sale and transfer, the only other attempt to connect the deceased with the sale and the transfer of the suit property was P Exh No



- 15, the remittance note for 50,000 (GBP). The document was not supported by any respective bank statements from the plaintiff's forwarding bank or the defendant's receiving bank. The exact account number, code, state and details for the deceased and the plaintiff were not provided, certified and or authenticated as per the *Bills of Exchange Act*, the *National Payment System Act* No 39 of 2011 and the *Cheques Act*. There were no acknowledgement receipts by the receiving bank in an account belonging to the defendant. Similarly, there was no letter written by the plaintiff or the deceased to the defendant or the vendor of the property confirming that he had sent the purchase price following the previous negotiations he had undertaken with the sellers regarding the suit property while in Kenya and which he had authorized or delegated to the defendant to execute the sale agreement or transfer and pay the purchase price on his behalf.
116. In the case of *Faraj Abdalla Idha t/a Safif Trading vs Gulf African Bank (2016) eKLR* the issue before the court was whether the appellant had executed SWIFT/RTGS application form instructing the respondent to transfer the money from his account to the appellant for purposes of purchasing trucks, if there was proper identification of the beneficiary's bank and branch and whether the respondent had acted negligently or recklessly in transferring the money to a wrong account. The court held that, it was material before answering the questions to interrogate and ascertain the nature, details and express instructions given by the appellant to the respondent in relation to the name of the beneficiary, the particulars of the beneficiary bank account and the name of the bank through which the transfer was directed to be made. The court had before it the application form with clear and unmistakable instructions. The court found no fault on the bank since it was the appellant who had given the wrong details.
117. Further the plaintiff did not comply with Sections 65(5), &106B of the *Evidence Act*. The exhibit was not certified by the issuing bank, notarized or verified from Barclays Bank PLC. See *Gilphine Kaleji Muchinyi vs Shikuku Muchinyi & another (2016) eKLR*. Without these details and documentation, the court is unable to connect the purchase price with the deceased so as to imply that it was the deceased and the plaintiff who solely paid for the purchase price of Kshs 8,000,000 to the vendor for the subject property. The finding is that the plaintiff has failed to prove that it was him with the deceased who paid the consideration through the defendant.
118. The next issue to consider is whether the surrounding circumstances after the sale agreement, transfer and registration of the suit property under the circumstances are pointing at an intention to create a trust over the suit property. To establish this, the plaintiff relied on documents from the Kenya Revenue Authority, receipts for rates payments to the County Government of Meru, failure to claim rents from Bhatt bookshop, execution of leases and tenancy agreements with tenants and payment of expenses to maintain the suit property and the exclusive appropriation of the rental income by the deceased. The plaintiff has used documents belonging to Bhatt Bookshop and Kenindas Limited Liability Company to demonstrate that such entities entirely belonged to the deceased and was the one paying the rates, rents and expenses to manage the suit premises. The documents produced were P Exh No's 5, 6, 7, 8, 9 & 10. Neither the plaintiff nor his witnesses were the directors or shareholders of both the Bhatt Bookshop or Kenindas Ltd. No certified, annual returns and books of accounts from the said entities were produced in support of the plaintiff's oral evidence. P Exh No 12 is dated May 29, 2018. This was the first time since 2000 that the plaintiff was formally raising the existence of a trust. P Exh No 11 had raised the issue of the novation of the lease. The relevance of P Exh No 13 was not clarified vis a vis P Exh No 14 which also appeared incomplete and not certified by the company secretary of the alleged company. P Exh No 16 was also incomplete. It did not show the date of entry or exit from the jurisdiction of Kenya by the deceased. P Exh No 17 bore no date or certificate of electronic evidence as required under the provisions of Section 106B of the *Evidence Act*. P Exh No's 18 – 23 had no nexus with the plaintiff. The plaintiff never called witnesses from the County Government of Meru



as the head lessor to the suit property as described in P Exh No 3 to come and clarify that all the rates payments were made by the deceased and not the defendant.

119. During the interlocutory stage of this suit, Equity Bank Ltd as a proposed interested party filed an application dated December 10, 2018. Peter Marigu the Equity Bank Manager Meru branch swore the supporting affidavit in which he attached a copy of a lease duly registered on February 12, 2010 describing the landlord as the defendant of PO Box 11064 Nairobi. Schedule III of the lease set out the rights of the landlord while schedule 4 thereof outlined the tenant's obligations including the review of terms upon expiry of the lease. The signature of the landlord appearing at page 11 thereof and witnessed by Mbichi Mboroki advocate is that of the defendant. The maker of the document is Mary Wangari Wamae advocate. With these documentary evidence obviously, the evidence of Collins Njiru Gerishon Mukangu PW2 falls by the wayside since he cannot competently challenge a duly registered lease in law through parole evidence. PW2 was simply out to mislead the court, contradict, revise and dispute matters, well above his comprehension which fell under the docket of the Director and Company Secretary legal affairs at the Equity Bank (K) Ltd.
120. The lease agreement was accompanied by a letter of consent dated October 23, 2009 from the then Town Clerk Municipal Council of Meru confirming that the defendant as the legal owner of the property, had duly cleared all the outstanding rates leading to the issuance of a Clearance No 1526 dated October 23, 2009.
121. Further to this in the stamp duty Serial No 613052, attached to the affidavit, the payee of the same was the defendant. The application for lease registration dated February 12, 2010 was lodged by Catherine one Mpanda.
122. On the other hand, the defendant in an attempt to counter the plaintiff's evidence on this issue produced official public documents such as D Exh No 1, the pin certificate for Bhatt Bookshop Ltd, D Exh No (3) from Equity Bank Ltd, D Exh No (4) the letter of authority issued to the deceased dated September 19, 2006 and D Exh No (5), the in-depth examination of taxes payments by the Kenya Revenue Authority. The supply payment and income history forming part of D Exh No 5 covered the period between January 2008 and 2018. PW1 & 5 had testified that the defendant was a man with no known source of income and therefore incapable of purchasing the suit property. Given this public document from the tax department it is apparent that the plaintiff's evidence was factually incorrect, and lacking probative weight.
123. Coming to D Exh No's 6 & 8, the plaintiff's initial lawyers to this suit describes the defendant in these exhibits as the landlord. The responses thereto dated 18th and January 22, 2018 and March 29, 2018 and 18.06.2018 confirmed who the tenant was dealing with as the landlord; this was slightly before the deceased passed on May 18, 2018. The plaintiff never protested to the lease dated February 3, 2010 and its subsequent renewal in 2018.
124. Therefore, the evidence by PW 1, PW 2 and PW 3 that it was solely the deceased who was always known as the landlord or paying rates, taxes for the suit premises was vitiated or vanquished by the defense exhibits. At the very least one would have expected the deceased to protest to the documents subsequent to the certificate of lease if at all they were not reflective of the intention of the parties in creating a trust.
125. The defendant told the court that all the documents produced by him were always under the custody of the deceased and by extension the plaintiff herein through PW 5. DW 1 is on record that he retrieved the said documents from the existing tenants in particular Equity Bank (K) Ltd. The plaintiff and his deceased father knew about or were in possession of the said exhibits between 2000 and 2018.



126. The exhibits produced by both the plaintiff and the defendant were in the name of the defendant and not the deceased or the plaintiff. The said exhibits in my considered view are self-explanatory and therefore do not assist the court in discovering the presumed intention of the parties at the time the property was purchased. The plaintiff did not produce any income and expenditure analysis prepared by an accountant to show that the income used to clear the rates and taxes exclusively was generated from other sources apart from the defendant's rental income as indicated in D Exh No 4.
127. Coming to the issue of the exclusive use and the management of the property by the deceased and the failure by the defendant to seek for and appropriate its income, the defendant produced the authority letter D exh No (4) which he had left with the deceased. The letter of authority enabled the deceased to manage the property. The plaintiff did not challenge this letter of authority. This displaced the evidence by the plaintiff and his witnesses that the defendant had abandoned the suit property to the deceased. The letter of authority described the deceased as a caretaker. No evidence was tendered by the plaintiff to indicate that the deceased for the 11 years he was alive ever protested against such a description as a caretaker on account of being the real owner of the property.
128. The defendant tendered evidence that he was investigated by Kenya Revenue Authority on the rental income taxes and which he readily cleared. That by itself indicated that the defendant continued to comply with his constitutional and statutory obligations as a Kenyan, which if he had not met, would have resulted to the forfeiture or the attachment of the suit property by the state. The plaintiff failed to produce any independent or separate bank accounts for either Kenindas Ltd or Bhatt Bookshop if at all the two entities were also the beneficial owners of the suit property.
129. In the case of *Mary Anne Obondo vs Moses Namusasi Chikati (2020) eKLR* the court cited with approval Alistair Hudson Equity & Trust page 379 where it states at page 383:
- ' The reference of common intention in the creation of a resulting trust is a commonly used one. Its meaning is that a resulting trust is a mixture of the intention of the seller and the trustee's own knowledge that she is not the intended to take the property beneficially'.
130. The court in establishing the common intention looked at the correspondence where the intention had been mentioned by the asserting party; as well as the repossession of the property and a lastly sale agreement acknowledging that the previous sum paid in 2003 was by the purchaser and not the plaintiff. The court held that the common intention of the parties should first be discerned from the written agreement or a memorandum and it was only when the common intention of the parties was unclear in the two documents would the court of law be at liberty to rely on parole evidence.
131. In this suit the plaintiff pleaded that the common intention to create a trust started in 2000. Assuming that was the case, then the plaintiff had the onus to prove that the deceased and the defendant sustained the said intention throughout the deceased's lifetime. There is no doubt numerous opportunities were available to the deceased between 2000 and 2018 to express his dissatisfaction of the turn of events not by mere words but through action including mounting a suit against the defendant during his life time.
132. In the case of *Stephen Mararo Karoki vs James Ngonga Njoroge & another (2017) eKLR*, there was an express request for an execution of the transfer forms and evidence of remittances from the USA. The court held that there must have been some mutual understanding between the defendants that it was time to hand over the title to the real owner.
133. The defendant has termed that the claim herein as time barred, the plaintiff guilty of indolence and therefore undeserving court's discretion.



134. In the case of *Joshua Ngatu vs Jane Mpinda & 3 others (2019) eKLR* the court cited with approval *Selbourne LC in the Lindssay Petroleum Co. vs Hurd (1874) LR 5 PC 222* where it was stated thus;
- ' Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has though perhaps not waiving that remedy yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterward to be asserted, in either of these cases lapse of time and delay are most material'.
135. The court stated that the basis of the doctrine of laches was to ensure that legal claims were brought forth within a reasonable and timely period so that evidence and reliable witnesses could be found.
136. The court held thus; 'As pointed out earlier on, the transaction that culminated in alienation of the suit land from the plaintiff to other parties occurred sometime in 1977. The plaintiff was aware of this aged transaction. No plausible explanation has been advanced as to why he is lodging the claim at this time. when the circumstances change and time passes, witness go their ways, evidence disappears, even memories fatter'.
137. In the case of *Maroa Wambura Gatimwa vs Sabina Nyanokwe Gatimwa & 5 others (2010) eKLR* the court cited with approval *Vyas Industries vs Diocese of Meru (1982) KLR 114* on the issue of limitation of the claim which had been raised at the appeal stage. The court held that such a plea should be pleaded specifically under order VI Rule 4 (1) Civil Procedure Rules unless though unpleaded, it had been left for the decision of court after evidence has been led and submission made.
138. In this suit both parties led evidence on the delay and have submitted on it. In the case of *Stephens and 6 others vs Stephens and another (1987) eKLR* the court held that under Section 20 (1) (L) of the *Limitation of Actions Act* there can be no limitation of time in a claim based on trust. My finding is therefore that though there has been inordinate delay the suit herein is not time barred
139. As to whether the defendant produced documentary evidence to dispel any presumption of trust raised by the plaintiff, all the documents relied upon by the plaintiff bear the names of the defendant. The defendant on his part produced documentary evidence to support his defence that there was no trust intended over the suit land. His explanation of the events leading to the running of the family businesses and culminating into the acquisition of the subject property together with the exhibits produced was that he solely procured the suit property and the deceased was a mere caretaker.
140. Both sides herein agree that the deceased and the defendant had cordial relations up to the time of the deceased's death. They trusted each other so much that the defendant unconditionally left the deceased to occupy and use not only the suit property, run the family business but also use or occupy his apartment at Parklands Nairobi. The defendant's evidence was that it was normal for him and in the circumstances obtaining to leave the subject property under the management or use by the deceased just like he had done with his other property in Nairobi.
141. The plaintiff has ingeniously sought to claim for the land as one of the sources of the funds used to purchase it. He took no action even if his late father was sick to assert such rights. He is therefore caught by limitation of time. See Stephen Mararo Karoki (supra) *Milan Prabhulal Haria vs Jitesh Prabhulal Haria and 3 others (2022) eKLR*.
142. The plaintiff strangely called witnesses from the tenants who were no longer working with CIC and Equity Bank to challenge the defence. No explanation was given why the plaintiff had to rely on former employees of the tenants but not the current office holders who presumably had the original documents or copies of the originals and were within his reach yet his evidence was that the tenants



- belonged to the deceased and not the defendant. The inference and the fear was obvious that the current tenants could not contradict the contents of the lease documents which in black and white bore the names of the defendant as the land lord.
143. The court also takes judicial notice of the fact that this suit was brought by the defendant's former lawyers M/s Ondari & Co Advocate. The defendant testified on oath that his former lawyers betrayed him and used some privileged information against him and in tandem with PW5, to wrestle the suit property from him. PW5 did not challenge that evidence. PW5 also witnessed the signing of the will which did not include the suit property as part of the deceased estate. She has turned around to say that the property belonged to the deceased. In other words, PW5 and PW 1 want this court to ignore the written word of the deceased in 2007 and take their version as the truth and credible. PW5 denied that all the taxes, rates payments and the leases though paid in the name of the defendant were paid for by the defendant.
144. PW 5 admitted that she was the custodian of most of the deceased's documents. However she only produced before the court the documents favouring her version of the events. She did not strike the court as a credible, reliable and or a neutral witness. PW 5 withheld vital information during examination in chief as well as during cross examination even when it was obvious that the documents stated otherwise. PW 5 did not deny that PW 1 took away from the house a file and that she had promised the defendant that she will deliver the said file to him. Obviously, there must be a lease from the head lessor of the property which was duly signed by the defendant before the certificate of title was issued. Stamp duty must have been paid in the name of the defendant. The Kenya Revenue Authority would not have been investigating the defendant for non-payment of taxable rental income if he was not the registered owner. There was no evidence tendered that the deceased stepped in to say that he was the true owner of the property at the time and expressly admit that the burden of the tax arrears fell on him. The defendant was left to solely shoulder the tax burden then yet the plaintiff now wants the court to infer that the defendant had surrendered the ownership of the property to the deceased. The defendant in his evidence has rebutted the presumption of trust. See *Yogendra Pushattam supra, IRB vs IMM (2019) eKLR, PNM vs HNN (2017) eKLR*
145. The running of the Bhatt Bookshop was not relevant to the intention of the parties in 2000 during the sale and the transfer. PW 5 admitted that she did not know where, who and under what terms the sale and the transfer was made. Unfortunately, PW 5 contradicted herself since her narrative all along was that the deceased solely used his business income to purchase the suit property. She was not a signatory to the same. If at all she was as trusted by the deceased as she wants the court to believe, it is not clear why she was not authorized to sign or witness the sale agreement, the transfer form and was not involved in the whole transaction for and on behalf of the deceased instead of the defendant.
146. The plaintiff testified that the degree of the deceased in taking part in the negotiations was indicative of his sole ownership of the suit property. Unfortunately, if that was to be taken as true, the deceased for 18 years did not show such vigor by demanding for the property to revert to him. No single letter or demand was made by the deceased in writing to the defendant either in person or through intermediaries to that effect. There was no evidence adduced that the deceased instructed his lawyers to prepare a deed of surrender or transfer forms and send them over to the defendant to execute.
147. Similarly, there was no evidence tendered that the deceased other than mere oral words in the presence of the plaintiff and his witnesses went an extra mile to sue his brother to affect the conveyance, during his lifetime.
148. It cannot therefore be true as the plaintiff's witnesses want the court to believe that the names of the defendant were used for convenience purposes and for no more. The parties remained under the suit



- premises and in the same residence for 5 years until the defendant wrote the letter of authority to the deceased to manage the very same property and which authority the deceased executed for the next 11 years. If it did not prick his mind in 2000 that the suit property was defacto in the defendant's name, for the deceased to change or reclaim it but accepted the facts, that by itself leaves no doubt, in my mind that there was never an intention of a trust in 2000 in the first instance otherwise the deceased would not have acceded to the request and purported to manage for the next eleven years what ideally in law allegedly belonged to him.
149. No evidence was tendered that at the time of the execution of the letter of authority and the will, that the deceased was either mentally impaired or that there was a misrepresentation or undue influence on him by the defendant in light of Section 98 of the [Evidence Act](#).
 150. In the case of [Mombasa Bricks and Tiles Ltd & 5 others vs others vs Arvind Shab and 7 others \(2019\) eKLR](#), the court considered whether an agreement executed by parties reflected their true intention. An imputation of undue influence and the taking advantage by the appellants against one party due to his vulnerability had been made. One of the reliefs sought was to declare a trust, nullify the agreement and the transfer. The respondent had opposed the suit on the basis that the sale agreement and transfer spoke for themselves.
 151. The court had been asked to consider the surrounding circumstances of the dispute to determine what the requisite intention of the parties was. The court cited with approval Twalib Hatayan (supra) that a constructive trust is imposed by the court against one who has acquired property by wrong doing and is automatically imposed where a trustee takes advantage of his position for his own benefit. Additionally, the court cited with approval [Chemely Investment Ltd vs the AG and 2 others \(2018\) eKLR](#), that the [Constitution](#) protects a higher value of the integrity and the rule of law.
 152. The court in establishing the existence of a trust was guided by the core elements that there was indeed a relationship of trust since the party was a close family friend who had offered to help the family restructure its business using his position as a trustee; that the friend had used his position in deceit and misrepresentation; used no fund of his own to purchase the property; he had paid almost nothing for the property and that his actions were clearly irregular, deceitful and in breach of his trust obligations and which resulted in unjust enrichment.
 153. Applying the reasoning in Mombasa Bricks (supra) to the present suit, the plaintiff herein was not party to the sale agreement and the transfer and so was his late father. PW 1 did not attack the sale or transfer on account of illegality, misrepresentation and or undue influence.
 154. In [Patel & another vs MJC & another \(suing as the guardian of PJP \(Civil Appeal\) 182 of 2019 \(2022\) KECA 3 & 4 \(KLB\) \(February 4, 2022\) \[Judgment\]](#) the court held that it was hard for it to believe that the respondents would not have been aware of the sale and the transfer of the suit property unless they had abandoned their mother to her own devices.
 155. The court cited with approval [Royal Bank of Scotland vs Etridge No \(2\) \(2003\) AC 773](#) where undue influence was defined as the taking of unfair advantage, the misuse of influence, abuse of trust or confidence with a connotation of impropriety and where it was said that the law will investigate the manner in which the intention to enter in the transaction was secured. The court cited with approval Mombasa Bricks & Tiles Ltd (supra) on the proposition that the general rule was that he who asserts the wrong bears the burden of proving the same. Further, the court cited with approval [Nabro properties Ltd vs Sky Structures Ltd & 2 others \(2002\) eKLR](#), [South Fork Investment Ltd \(1986\) eKLR](#) quoting with approval [All Card vs Skinner \(1887\) 36 OHJ 145](#), on the proposition that some form of cheating and generally though not always, some personal advantage obtained by a donee placed in some close



and confidential relation to the donor to manage his property for him thus a person abusing his position as forming part of trust.

156. In this suit, the plaintiff failed to call the lawyers who handled with the negotiations leading to the sale and the transfer of the suit property as his witnesses, at the very least, to state if his late father may have disclosed to them the intention to create a trust at the very initial stages of the sale. No evidence tendered that the deceased actualized the said intention through the involvement of any independent third parties and or advisers except the plaintiffs' witnesses before court. No neutral party was called by the plaintiff to give details of the intention to found a resultant trust, bearing in mind that PW 1 was never involved in his late father's day to day affairs at the suit property.
157. In *Sirma* (supra), the case involved two brothers just like in the instant case. It had taken 15 years to raise the claim for eviction. No explanation for inaction had been offered. There was also evidence of a stake both parties on the suit land. The respondent had not raised a counterclaim. The court nevertheless inferred a trust to the extent of one acre of the land which was occupied by the appellant. In this suit, the plaintiff claims for the entire property and not a portion of it. PW 1 has been unable to prove it. What is however evident is that his late father and the defendant had compassion for each other. The same appears lacking between the two parties herein. They have been unable to work out a possible solution. All is however not lost. This being a court of law and not of sympathy it has to do justice to the parties according to law and the *Constitution*. As was stated in *Sirma* (supra), this court hopes that the spirit of compassion prevails upon a nephew and an uncle to work out an amicable solution in honor of the deceased.
158. In sum, the evidence by the plaintiff and his witnesses to sustain the claim of trust is a mere mirage which is not only invisible, unbelievable, an impossibility but a figment of imagination given the circumstances obtaining. See *Daniel T Moi vs Mwangi Stephen Murithi & another* (2014) eKLR.
159. The upshot is that the plaintiff's suit is dismissed with costs. All subsisting orders of the maintenance of status quo are hereby vacated. The rent held in the joint account of the respective lawyers for the parties through an order of this court shall forthwith be released to the defendant. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JANUARY, 2023

In presence of:

C/A: Kananu

Koech for Mbaabu for plaintiff

Michuki for defendant

HON. C.K. NZILI

ELC JUDGE

