



NWK & 3 others (All suing as legal representatives of the Estate of BKK (Deceased) while the 1st Plaintiff partly sues on her own behalf) v DWK (Environment and Land Case Civil Suit 388 of 2012) [2022] KEELC 106 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEELC 106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 388 OF 2012
SO OKONG'O, J
APRIL 26, 2022**

BETWEEN

**NWK 1ST PLAINTIFF
AWK 2ND PLAINTIFF
KK 3RD PLAINTIFF
WMK 4TH PLAINTIFF
ALL SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF BKK
(DECEASED) WHILE THE 1ST PLAINTIFF PARTLY SUES ON HER OWN
BEHALF**

AND

DWK DEFENDANT

JUDGMENT

1. The plaintiffs brought this suit on July 5, 2012 by way of a plaint of the same date seeking the following reliefs against the defendant;
 - a. A declaration that the defendant is a constructive trustee in respect of all those properties known as Umoja Inner Core-Sector V Plot No. xxx and Umoja Inner Core-Sector V Plot No. xxx (hereinafter together referred to as “the suit properties” and separately as “Plot No. xxx” and “Plot No. xxx” respectively).
 - b. A declaration that the defendant holds the suit properties upon trust for the 1st plaintiff and the estate of BKK, deceased (hereinafter referred to as “the deceased”).
 - c. An order that the defendant transfers the suit properties to the plaintiffs forthwith.



- d. A permanent injunction restraining the defendant from interfering with the plaintiffs' management of the suit properties.
 - e. The costs of the suit.
2. The plaintiffs averred that the 1st plaintiff is the widow of the deceased while the 2nd to 4th plaintiffs are the children of the deceased with the 1st plaintiff. The plaintiffs averred that they were holders of a limited grant of letters of administration in respect of the estate of the deceased. The plaintiffs averred that as the duly appointed legal representatives of the estate of the deceased, they were the ones who were entitled to take possession of the suit properties and other assets of the deceased. The plaintiffs averred that the defendant was a sister of the deceased, a sister in law to the 1st plaintiff and an aunt to the 2nd to 4th plaintiffs.
 3. The plaintiffs averred that the 1st plaintiff brought this suit on her own behalf and partly as a joint legal representative of the estate of the deceased along with her children, the 2nd to 4th plaintiffs. The plaintiffs averred that at all material times, the 1st plaintiff and the deceased were the owners of the suit properties. The plaintiffs averred that the suit properties were acquired by the 1st plaintiff and the deceased during the period when they were married. The plaintiffs averred that the 1st plaintiff and the deceased were beneficial owners of the property according to their contributions towards the acquisition of thereof. The plaintiffs averred that the suit properties were developed with two residential buildings constructed by the 1st plaintiff and the deceased which buildings were let to 78 tenants. The plaintiffs averred that on Plot No. xxx, there was a two storey building with 26 rooms while on Plot No. xxx there was a four storey building with 52 rooms and a pub. The plaintiffs averred that a company known as Lavender Properties Limited managed the suit properties on behalf of the 1st plaintiff and the deceased.
 4. The plaintiffs averred that the 1st plaintiff married the deceased on 14th August 1982 while she was working as a clerk in the Office of the [particulars withheld] in Nairobi while the deceased was also working in Nairobi as a civil engineer with the Ministry of [particulars withheld]. The plaintiffs averred that in 1985 while the 1st plaintiff and the deceased were working in Nyeri where they had been transferred, the 1st plaintiff invested in a restaurant business that was being managed on her behalf by employees. The plaintiffs averred that thereafter, the 1st plaintiff and the deceased ran a business of manufacturing and selling paints by the name [particulars withheld] Paints, a road construction company known as [particulars withheld] Construction Company registered in 1991 and converted into a limited liability company in 1999 and a hardware business at Ridgeways known as [particulars withheld] Paints and Hardware.
 5. The plaintiffs averred that the 1st plaintiff and the deceased purchased Plot No. xxx on which they intended to construct a residential building from one, CGK in 1995 and Plot No. xxx from JKM in 1999. The plaintiffs averred that the 1st plaintiff and the deceased constructed the buildings on the two plots between 1995 and 2001 and thereafter let the same to tenants. The plaintiffs averred that to enable the 1st plaintiff and the deceased purchase and develop the suit properties, the 1st plaintiff and the deceased; sold their parcel of land in Nyeri, sold their house in Nairobi Dam Estate, used savings from their hardware shop, used income from their road construction business and borrowed money from Co-operative Bank Ltd. Kiambu branch.
 6. The plaintiffs averred that the suit properties were registered in the name of the deceased as the sole proprietor thereof. The plaintiffs contended that; upon purchase of the suit properties, the 1st plaintiff and the deceased became equitable tenants in common and co-owners of the said properties. The plaintiffs contended further that the deceased became a trustee of the legal estate in the suit



properties which he held upon trust for himself and the 1st plaintiff. The plaintiffs averred further that as co-owners of the suit properties, the 1st plaintiff and the deceased had a right to possession and management of the same. The plaintiffs averred further that the 1st plaintiff and the deceased as co-owners of the suit properties had equal rights in respect thereof and that the suit properties could not be disposed of by one of them without the consent of the other. The plaintiffs averred that the 1st plaintiff and the deceased were also entitled to share the rent paid by the tenants occupying the suit properties. The plaintiffs averred that upon the death of the deceased, his share in the suit properties became part of his estate.

7. The plaintiffs averred that in 2002 the deceased had a stroke that paralyzed one side of his body. The plaintiffs averred that this development made it necessary for the plaintiff to have a nurse to assist him. The plaintiffs averred that in contemplation that the deceased would die soon, the defendant who was the deceased's sister and her other siblings started to position themselves to take control of the deceased's properties with a view to inherit the same upon the deceased's death.
8. The plaintiffs averred that the defendant and her siblings brought the husband and wife relationship between the deceased and the 1st plaintiff to an end, chased the 1st plaintiff away from their matrimonial bedroom and moved in. The plaintiffs averred further that the defendant and her siblings also changed the business relationship between the deceased and the 1st plaintiff. The plaintiffs averred that, the deceased closed the joint bank accounts that he held with the 1st plaintiff and opened new ones in his sole name and removed the 1st plaintiff from the management of the suit properties. The plaintiffs averred further that the deceased also dissolved the partnership between the deceased and the 1st plaintiff that was running the hardware shop and denied the 1st plaintiff income from the joint investments that she had made with the deceased.
9. The plaintiffs averred that in 2011, the 1st plaintiff learnt that the deceased had transferred the suit properties to the defendant in December 2002 and had also donated a power of attorney to the defendant in respect thereof. The plaintiffs averred that despite the existence of the said transfer and power of attorney in favour of the defendant, the deceased continued to manage the suit properties as his assets. The plaintiffs averred that between December 2002 when he purported to transfer the suit properties to the defendant and May 16, 2012 when he died, the deceased treated the suit properties as his.
10. The plaintiffs averred that the purported transfer of the suit properties to the defendant offended the doctrine of co-ownership of property. The plaintiffs averred that upon transfer of the suit properties to her, the defendant became a constructive trustee and held the properties upon trust for the 1st plaintiff and the deceased. The plaintiffs averred that upon the death of the deceased on May 16, 2012, the defendant held the suit properties in trust for the 1st plaintiff and the estate of the deceased.
11. The plaintiffs averred that due to the difficulties that she went through between 2002 and 2004 in the hands of the deceased and his siblings that threatened her life, the 1st plaintiff moved out of the matrimonial home at Ridgeways and relocated to the USA where she got employment. The plaintiffs averred that the 1st plaintiff subsequently arranged for the 2nd to 4th plaintiffs to join her. The plaintiffs averred that as at the time of his death, the deceased had engaged an estate agent by the name Lavender Properties Limited to manage the suit properties. The plaintiffs averred that the said estate agents would collect rent from the tenants, deduct their commission and would pay the balance to the deceased's bank account at either Kenya Commercial Bank, Cooperative Bank or Equity Bank as directed by the deceased.



12. The plaintiffs averred when she learnt in 2011 that the deceased had transferred the suit properties to the defendant in 2002 but maintained control of the same, the 1st plaintiff brought proceedings against the deceased in the High Court under the Married Women Matrimonial Properties Act 1882 namely; Nairobi High Court Civil Suit No. xx of 2011 (O.S), NWK v BKK (hereinafter referred to only as “the High Court suit”). The plaintiffs averred that after the death of the deceased, the defendant who all along had not taken possession of the suit properties started making arrangement to take possession claiming to be the owner of the said properties.
13. The plaintiffs averred that the defendant purported to change the management agents for the suit properties and gave directions to the tenants to make payment of rent to a particular account at Equity Bank in her name. The plaintiffs averred that the defendant could not give directions in respect of or deal with the suit properties until she obtained grant of letters of administration. The plaintiffs averred further that under the terms of the trust in which the defendant held the suit properties, she was not supposed to manage the suit properties or to benefit from the rent therefrom. The plaintiffs averred that the defendant’s attempt to take possession of the suit properties amounted to intermeddling in the estate of the deceased. The plaintiffs averred that despite their demand that the defendant stops interfering with the 1st plaintiff’s management of the suit properties, the defendant refused to do so rendering the filing of this suit necessary.
14. The defendant filed a statement of defence on 20th June 2016. The defendant denied that the 1st plaintiff was a co-owner of the suit properties together with the deceased and that the 1st plaintiff was involved in the construction of the buildings on the suit properties. The defendant averred that the business that the plaintiffs have referred to in the plaint to have been run by the 1st plaintiff jointly with the deceased was financed solely by the deceased and that the 1st plaintiff made no contribution in respect thereof.
15. The defendant averred that the suit properties were wholly acquired and developed by the deceased with no contribution from the 1st plaintiff and as such the 1st plaintiff had no beneficial interest in the same as claimed or at all. The defendant denied that the 1st plaintiff and the deceased were co-owners of the suit properties or tenants in common in respect thereof. The defendant denied further that the deceased was a trustee of the 1st plaintiff in respect of part of the suit properties and that the deceased could not dispose of the same without the consent of the 1st plaintiff. The defendant denied further that the 1st plaintiff had a right to possession of the suit properties or management thereof.
16. The defendant admitted that the deceased suffered a stroke in 2002. The defendant contended however that the 1st plaintiff was responsible for the breakup of the relationship between her and the deceased. The defendant averred that the 1st plaintiff mistreated the deceased after he suffered a stroke. The defendant averred that as a result of the mistreatment from the 1st plaintiff, the deceased’s brother who was also a brother to the defendant, one, PWK moved into the 1st plaintiff and the deceased’s home to assist the deceased. The defendant averred that the 1st plaintiff attempted to chase away the said Peter WK from the home.
17. The defendant averred that as a result of the mistreatment the deceased was being subjected to by the 1st plaintiff and subsequent abandonment of the deceased by the 1st plaintiff, the defendant resigned from her employment in order to look after the deceased. The defendant averred that she used to visit the deceased at least 2 days a week to take care of him. The defendant averred that on account of the care and attention that the defendant gave to the deceased who was sick, the deceased informed the defendant that he will transfer the suit properties to her as a gift. The defendant averred that in 2002, the deceased lawfully transferred the suit properties to the defendant as the sole and absolute owner thereof in consideration of the assistance that the defendant had accorded to him during his sickness.



18. The defendant averred that it was agreed between the defendant and the deceased that the income from the suit properties would go towards the treatment of the deceased. The defendant denied that she was a constructive trustee with respect to the suit properties. The defendant averred that the 1st plaintiff abandoned the deceased and sought asylum in the USA at a time when the deceased was battling serious health complications. The defendant averred that the 1st plaintiff was not involved in the management of the suit properties since she left for the USA in 2004 and only came back after the death of the deceased.
19. The defendant averred that in response to the High Court suit that the 1st plaintiff had filed against the deceased; the deceased had denied that the 1st plaintiff had made any contribution towards the acquisition of the suit properties. The defendant averred that her takeover of the suit properties was in line with the agreement that she entered into with the deceased under which she was to benefit from the rental income from the suit properties after the deceased's death; the deceased having transferred the suit properties to her.
20. The defendant averred that the suit properties having been transferred to her by the deceased, the same did not form part of the deceased's estate. The defendant averred that as the lawful owner of the suit properties, she had a right to appoint anyone she deemed fit to manage the same and that the directions that the plaintiffs gave to the tenants on the suit properties with regard to rent payment were illegal. The defendant urged the court to dismiss the plaintiffs' suit with costs.
21. At the trial, the plaintiff's advocate made a brief opening address after which he called four (4) witnesses in proof of the plaintiffs' case. On her part, the defendant gave evidence as the sole witness. In her evidence, the 1st plaintiff (PW1) adopted the contents of her witness statement and supplementary witness statement dated July 5, 2012 and June 22, 2016 respectively as her evidence in chief. The 1st plaintiff produced the documents attached to the plaintiffs' list of documents dated 5th July 2012 as Plaintiffs' Exhibit 1 and the documents attached to her supplementary witness statement dated 22nd June 2016 as Plaintiffs' Exhibit 2. In her two statements, the 1st plaintiff explained how she contributed to the acquisition of the suit properties and the circumstances under which the deceased transferred the properties to the defendant. The 1st plaintiff also explained why she left the country for the USA. The Plaintiffs' second witness was Beatrice Wambeti Njoka (PW2). PW2 was the proprietor of Lavender Properties that was engaged by the deceased to manage the suit properties. PW2 explained to the court the terms of the management agreement between her company and the deceased and how she used to pay the rent collected from the suit properties to the deceased. PW2 told the court that she did not make any payment to the defendant between 2006 and 2012 when the deceased died and that the deceased did not direct her to make any payment to the defendant neither did the defendant demand any payment. PW2 stated that she saw the defendant for the first time at the funeral of the deceased and that the defendant subsequently came to her office and told her that she was the owner of the suit properties.
22. The plaintiffs' third witness was the 1st plaintiff's sister, JNM (PW3). PW3 adopted her witness statement dated June 22, 2016 as her evidence in chief. PW3 stated that the defendant was well known to her. She stated that when the 1st plaintiff got married to the deceased, the defendant was still in school. PW3 stated that after the deceased had a stroke, she used to visit the family. She stated that she did not see the defendant assisting the deceased. She stated that her visit to the family reduced with time when the relationship between the deceased and the 1st plaintiff turned sour.
23. The plaintiffs' last witness was the 2nd plaintiff, AWK (PW4). PW4 adopted her witness statement dated October 1, 2016 as her evidence in chief. PW4 told the court that she was 19 and was in High School when the deceased suffered from a stroke. PW4 described the condition of the deceased after the stroke;



- the kind of assistance he needed and how the same was attended to. PW4 stated that the deceased's siblings and extended family used to visit him but she did not see any assistance that they were giving to the deceased. She stated that the deceased's said extended family incited the deceased against the 1st plaintiff and this strained the relationship between the two.
24. The defendant adopted her witness statement dated June 17, 2016 as her evidence in chief. She told the court that she was the owner of the suit properties the same having been transferred to her by the deceased. She stated that the suit properties were given to her by the deceased as a gift. She stated that after he suffered stroke, the deceased was confined to a wheel chair and that she used to accompany him from time to time while he was attending to his businesses. She stated that she used to take the deceased to the bank and to the ATMs. She stated that she used to assist the deceased together with the deceased's nurse. She stated that she assisted the deceased with his personal matters.
 25. The defendant stated that the deceased suffered from neglect because the 1st plaintiff used to leave the house in the morning and would not come back until evening. She stated that the 1st plaintiff did not bother with how the deceased was fairing during the day and that she used to abuse the deceased. She stated that her brother PW moved to the deceased's house with the 1st plaintiff to assist the deceased. She stated that she did not benefit from the suit properties immediately and that the deceased continued to collect rent from the same. She stated that the deceased however used to give her some money. She stated that the deceased transferred the suit properties to her in consideration of the assistance that she rendered to him.
 26. The defendant denied that the 1st plaintiff contributed to the acquisition of the suit properties. She stated that the business that the deceased started for the 1st plaintiff after the 1st plaintiff resigned from her job as a copy typist did not generate any income. She stated that the 1st plaintiff left for the USA in 2004 without the deceased's knowledge and only came back after the death of the deceased. The defendant stated that she was not holding the suit properties in trust for the plaintiffs. She stated that in the Originating Summons that the 1st plaintiff filed against the deceased in the High Court for division of matrimonial property, the deceased denied that the 1st plaintiff had made any contribution towards the purchase of the suit properties. The defendant produced the documents attached to her list of documents dated June 17, 2016 as Defence Exhibit 1.
 27. After the close of evidence, the advocates for the parties made closing submissions in writing. The plaintiffs framed fifteen (15) issues on which they made submissions. The plaintiffs submitted that they had proved on a balance of probabilities that the 1st plaintiff and the deceased acquired the suit properties during their marriage between August 14, 1982 and May 12, 2012. The plaintiffs submitted that determination of this suit calls for the application of the general land law, the doctrines of equity such as constrictive trust and resulting trust and the law governing the property rights of spouses during marriage. The plaintiffs submitted that the 1st plaintiff had acquired interest in the suit properties through financial contribution in the acquisition and development of the same.
 28. The plaintiffs invited the court to apply the principles laid down in *Strong v Strong* [2002] 2 KLR 631 in determining the rights of spouses over the properties acquired during marriage. The plaintiffs submitted that they had proved on a balance of probabilities that between 1982 and 2002 when the deceased and the 1st plaintiff's marriage broke up, the 1st plaintiff and the deceased ran businesses as partners side by side with the civil service jobs that they held until 1991 when the 1st plaintiff resigned from her employment to concentrate on business. The plaintiffs submitted that after the 1st plaintiff resigned from her employment to concentrate on family businesses, the deceased became a silent partner in the said businesses.



29. The plaintiffs submitted that the 1st plaintiff and the deceased operated joint accounts at Cooperative Bank of Kenya Ltd. and Barclays Bank Ltd. because of the businesses that they ran together. The plaintiffs submitted that because the couple held joint accounts, it was difficult if not impossible to determine each party's contribution to the acquisition and development of the suit properties. The plaintiffs cited Snell's Principles of Equity and submitted that where several parties have contributed to the acquisition of a property and it is impossible to determine each party's contribution, the maxim equality is equity should be applied.
30. The plaintiffs submitted that if the 1st plaintiff and the deceased did not have businesses, the deceased's contribution towards the acquisition of the suit properties would have been higher since the deceased was a civil engineer while the 1st plaintiff was a clerical officer. The plaintiffs submitted however that the returns from the businesses were higher than those from the salaries that the couple earned and that it was not possible to tell what each party contributed towards the acquisition of the suit properties.
31. The plaintiffs submitted that in the circumstances, the maxim equality is equity is applicable. The plaintiffs submitted that the acquisition and development of the suit properties were on the basis of equal contribution. The plaintiffs submitted that in the circumstances, the deceased who was registered as the owner of the suit properties held the legal estate therein in trust for himself and the 1st plaintiff in equal shares.
32. The plaintiffs submitted that the doctrine of resulting trust as it applies to property acquired during marriage and the general land law applies to this case. In support of this submission, the plaintiffs cited *Echaria v Echaria* [2007] eKLR. The plaintiffs submitted that they had proved on a balance of probabilities that the suit properties were purchased and developed with the proceeds of sale of two Nyeri plots, Nairobi Dam Estate house, Njiru plot, two Githurai plots and savings from the hardware and road construction businesses that were owned by the 1st plaintiff and the deceased. The plaintiffs submitted that the suit properties were registered in the name of the deceased for family convenience.
33. The plaintiffs reiterated that upon the purchase of the suit properties, the 1st plaintiff and the deceased became equitable tenants of the suit properties in equal shares. In support of this submission, the plaintiffs cited *Bull v Bull* [1955] 1 ALL ER 232. The plaintiffs submitted that the defendant was a constructive trustee in respect of the suit properties and as such she had no beneficial interest in the suit properties. The plaintiffs submitted that the special powers of attorney that were donated to the defendant by the deceased made her a mere attorney or agent of the deceased and not the owner of the suit properties. The plaintiffs averred that the defendant was supposed to act merely as an attorney of the deceased and that it was not necessary for letters of allotment to be issued in her favour in respect of the suit properties by the City Council of Nairobi. The plaintiffs submitted that the defendant and her advocate one, Mary Ngechi misused the said powers of attorney and procured the registration of the defendant as the owner of the suit properties in the records of the City Council of Nairobi. In support of this submission, the plaintiffs cited *The Modern Law of Trusts 9th Edition* page 442. The plaintiffs contended that the conduct of the defendant was fraudulent and unconscionable and as such it was necessary to impose a constructive trust in respect of the interest that the defendant obtained in the suit properties.
34. The plaintiffs submitted that the defendant and her advocate aforesaid must be deemed to have known that they were dealing with properties acquired during the marriage between the deceased and the 1st plaintiff.
35. The plaintiffs submitted that the defendant's case was based on misapprehension of the principles of law. The plaintiffs submitted that the doctrine of co-ownership barred the deceased from dealing with



- the suit properties without the consent of the 1st plaintiff. The plaintiffs submitted that the deceased lacked the power to give a power of attorney to the defendant in respect of the suit properties leave alone giving out the properties to her as a gift. In support of this submission, the plaintiffs cited section 91(6) of the [Land Registration Act, 2012](#). The plaintiffs submitted that the purported transfer of the suit properties by the deceased to the defendant was null and void. The plaintiffs submitted that they were entitled to the reliefs sought in the plaint. The plaintiffs submitted that they were also entitled to consequential orders in relation to the rent collected from the suit properties.
36. The plaintiffs submitted that they were the legal representatives of the deceased upon whom vest all the properties of the deceased including his share in the suit properties. The plaintiffs submitted that the estate of the deceased holds the 1st plaintiff's share of the suit properties in trust for her. The plaintiffs submitted that they had a duty in law to gather all the assets of the deceased in preparation for the distribution of the same to the beneficiaries of the estate.
37. In her submission in reply, the defendant submitted that the plaintiffs' suit must fail for a number of reasons. The defendant submitted that the 1st plaintiff who based her claim on trust failed to demonstrate at the hearing of the suit that she contributed to the acquisition and development of the suit properties. The defendant submitted that the 1st plaintiff admitted that she was a receptionist at the time of her marriage and could not remember her salary. The defendant submitted that the 1st plaintiff did not produce any documentary evidence showing that she was capable of contributing financially towards the purchase of the suit properties between 1982 when she was married by the deceased and 1991 when she left employment with the Government. The defendant submitted that the 1st plaintiff did not produce a single pay slip in evidence to show her earnings.
38. The defendant submitted that the 1st plaintiff and the deceased were not of the same economic status. The defendant submitted that the 1st plaintiff did not produce any evidence in proof of the restaurant businesses she claimed to have been running. The defendant submitted further that the 1st plaintiff has no training in management or construction and as such her claim that she was running a construction company was unbelievable.
39. The defendant submitted that the 1st plaintiff's claim about the properties that she allegedly acquired together with the deceased in Nyeri and Dam Estate in Nairobi which they subsequently sold were not supported by any evidence. The defendant submitted that the 1st plaintiff's claim was sufficiently responded to by the deceased in his replying affidavit that was sworn in response to the 1st plaintiff's Originating Summons in the High Court seeking division of matrimonial property.
40. The defendant submitted that the deceased was categorical that he purchased and developed the suit properties without any contribution from the 1st plaintiff and that the paints and hardware business was solely financed by the deceased. The defendant submitted that the deceased stated in the said affidavit that the 1st plaintiff mismanaged and ran down the said business and sold its assets which she did not account for to the deceased.
41. The defendant submitted that all the bank statements for the joint accounts that the deceased held with the 1st plaintiff covers the period after the purchase of the suit properties. The defendant submitted that the documents added no weight to the 1st plaintiff's case. The defendant submitted further that the evidence of PW2 was not helpful since the witness did not know how the suit properties were acquired and further her testimony did not rule out the possibility that the suit properties were owned by someone else other than the deceased. The defendant submitted that the evidence of PW3 should be treated with caution. The defendant submitted that as the 1st plaintiff's elder sister, PW3 was expected to naturally lean towards assisting the 1st plaintiff's cause.



42. With regard to the evidence of PW4, the defendant submitted that the same was irrelevant. The defendant submitted PW4's evidence could not help the court determine if at all the 1st plaintiff made any contribution towards the purchase of the suit properties and the extent of such contribution. The defendant submitted that PW4 admitted that the defendant would visit the deceased from time to time and that she was not privy to the discussions that the deceased had with the defendant. The defendant submitted that she proved that the suit properties were transferred to her by the deceased as a gift. The defendant submitted that she took care of the deceased in the absence of the 1st plaintiff.
43. The defendant submitted that in order for the 1st plaintiff to establish the existence of a trust on which her case was based, the 1st plaintiff had to prove that she had an interest in the suit properties through contribution to their acquisition. In support of this submission, the defendant cited *Stack v Dowden* [2007] UKHL17. The defendant submitted that the 1st plaintiff failed to prove that she made any contribution towards the acquisition of the suit properties. The defendant submitted further that the estate of the deceased also had no claim over the suit properties since the same were transferred to the defendant before the death of the deceased. The defendant urged the court to note that of his many siblings, the deceased transferred properties only to the defendant. The defendant submitted that the deceased must have had a good reason for doing so.
44. The defendant relied on *PNN v ZWN* [2017] eKLR and urged the court to find that the 1st plaintiff made negative contribution towards the acquisition of the suit properties. The defendant submitted that the marriage between the 1st plaintiff and the deceased had fallen apart in 2002 and in 2004, the 1st plaintiff relocated to the USA. The defendant submitted that the picture of the 1st plaintiff created by the deceased in his affidavit in response to the Originating Summons that had been filed against him by the 1st plaintiff in the High Court is not that of a person who was adding value to the assets that had been acquired by the family but one who was dissipating the same.
45. The defendant urged the court to find that the 1st plaintiff did not make any contribution towards the purchase of the suit properties and as such she has no beneficial interest in the same. The defendant submitted that the authorities relied on by the plaintiffs did not support their case. The defendant submitted that the said cases were to the effect that; the issue of trust is a question of fact that must be proved; financial contribution towards acquisition of matrimonial property must be proved and that before a spouse is found to hold property in trust for the other, contribution must be proved and contribution is a question of fact. The defendant urged the court to dismiss the plaintiffs' suit with costs.
46. I have considered the plaintiffs' claim, the defence by the defendant, the evidence tendered by the parties and the submissions by the advocates for the parties. In my view the issues arising for determination in this suit are the following;
- a. Whether the 1st plaintiff contributed to the acquisition and development of the suit properties.
 - b. Whether the 1st plaintiff was a co-owner of the suit properties with the deceased.
 - c. Whether the deceased had capacity or power to transfer the suit properties to the defendant without the consent of the 1st plaintiff.
 - d. Whether the defendant holds the suit properties in trust for the 1st plaintiff and the estate of the deceased.
 - e. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
 - f. Who is liable for costs of the suit?



47. Whether the 1st plaintiff contributed to the acquisition and development of the suit properties:

It is not disputed that the 1st plaintiff and the deceased got married in 1982 and lived together until 2004 when the 1st plaintiff moved to the USA. It is also not in dispute that the suit properties were acquired and developed during the period of the marriage between the 1st plaintiff and the deceased and that the same were registered in the sole name of the deceased.

48. In *R.M.M v T.S.M* [2015] eKLR, the court stated the law on distribution of matrimonial property follows:

“Starting with the applicable law that guides distribution of matrimonial properties, we do not agree that the learned judge did not consider the relevant principles as submitted by the appellant’s counsel. The learned judge was alive to the fact that the matter before her was filed in 2002, long before the *Constitution of Kenya, 2010* came into being. The learned judge stated:

“It is now an established principle that a spouse’s contribution in a marriage can be in any of 3 forms:

Direct financial contribution

Indirect financial contribution

Non-financial contribution.”

24. The learned judge observed that under the new *Constitution*, Article 45(3) now provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The court could not have applied the provisions of the new *Constitution* since the case was filed in 2002, long before the new *Constitution* was promulgated.

25. The *Matrimonial Property Act, 2013*, stipulates that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. As this Act had not been enacted when the matter was heard and determined in the High Court, its provisions were inapplicable to this case.

26. In the circumstances aforesaid, the learned judge was right in applying the provisions of section 17 of the Married Women’s Property Act, 1882, under which the originating summons had been brought. The principles set out by this Court in *Echaria v Echaria* [2007] eKLR were the applicable ones in guiding the trial court in its determination of the matter before it. Those principles were summarized by this Court in *Francis Njoroge v Virginia Wanjiku Njoroge* [2013] eKLR as follows;

“a) A wife’s non-monetary contribution cannot be considered in determining the amount of contribution of the wife towards the acquisition of the property. The performance of domestic duties would also not be considered as contribution towards acquiring the property.



- b) Where the property in dispute is not registered in the joint names of the parties, then they have no joint legal interest. It is erroneous to presume that they have an equal beneficial interest in the property.
- c) Joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute to the purchase price of property in equal shares, they are in equity joint tenants. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution.
- d) Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim 'equality is equity'.
- e) A court has jurisdiction to allocate a portion of the disputed property as it deems just. It may also order a transfer of the share to the rightful beneficial owner."

27. We reiterate that under the repealed Constitution, the above principles were the applicable ones in dividing matrimonial property after divorce. It is against the background of the said principles that we turn to the issue of the parties' contribution towards acquisition of the matrimonial properties. We would agree with the learned trial judge that the appellant failed to tender any credible evidence to show that she had made any direct financial contribution towards acquisition of the properties in dispute so as to entitle her to half share of the same. That notwithstanding, we cannot say that she did not make any indirect financial contribution. The appellant ceased to be in formal employment on 12th day of July, 1991. By 1996 the parties were no longer staying together as husband and wife. Although the appellant may have participated in running a family business, there was no evidence that the said business generated reasonable profits, if any, that could have been used to finance the acquisition of the properties in contention.

With great respect to the learned judge, she did not state what the proven direct or indirect financial contribution of the appellant amounted to. On the basis of the evidence on record, the learned judge ought to have exercised her discretion and assess the respective proportions of financial contribution (direct or indirect) of each spouse. In the absence of such assessment, the learned judge's finding that the appellant is entitled to 30% of the rental income is without firm legal basis.



In the circumstances, we are inclined to interfere with the exercise of the trial judge’s discretion. In our view, the appellant’s indirect financial contribution towards acquisition and development of plot No. [particulars withheld] can be assessed at no more than 30%. Instead of awarding her a percentage of the rental income therefrom, we order that the property be valued by a reputable valuer, to be agreed upon by the parties within 45 days from the date hereof, and failing agreement, by such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya. The valuation costs shall be shared between the appellant and the defendant in the ratio 30:70 respectively. Thereafter the defendant shall pay to The appellant 30% of the assessed value of the property within 6 months from the date of the valuation, failing which the appellant shall be at liberty to institute execution proceedings to recover the sum due to her in terms of this judgment.”

49. The suit properties were acquired and developed between 1995 and 1999 while the cause of action herein arose in 2002 when the deceased transferred the suit properties to the defendant. The Matrimonial Property Act, 2013 was not in force when the suit properties were acquired or when the cause of action arose. The same applies to the Constitution of Kenya 2010. The Matrimonial Property Act, 2013 is in the circumstances not applicable to the dispute before the court. With regard to the applicability of the Constitution of Kenya 2010 to the dispute before the court, I will adopt the opinion of the Court of Appeal in *PNN v ZWN* [2017] eKLR in which the court observed that whether the Constitution can be applied retrospectively depends on the facts of a particular case. The court while citing the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd. & 2 others* [2012] eKLR was of the view that where the provisions of the Constitution do not expressly provide for retrospective application, the same should not be interpreted to apply retrospectively where such interpretation would have the effect of divesting an individual of rights legitimately obtained before the commencement of the Constitution.
50. In the same case, the court noted that the right to equality in marriage contained in Article 45(3) of the Constitution that provides that “Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage” is inherent and indefeasible to all human beings and as such was applicable irrespective of whether the cause of action accrued before the promulgation of the current Constitution or not. The court was of the opinion however (as per Kiage, JA) that the marital equality captured in Article 45(3) of the Constitution does not mean that matrimonial property should be divided equally amongst the spouses upon the dissolution of the marriage. The court observed further that save for the narrow conception of contribution espoused in the *Echaria case (supra)* that recognized only direct and indirect financial contribution, the thrust of that case which was that division of matrimonial property must be based on actual quantifiable contribution which must be proved does not violate Article 45 (3) of the Constitution on marital equality.
51. The 1st plaintiff’s case is based on section 17 of the *Married Women’s Property Act of 1882* and the law of trust. The 1st plaintiff has claimed that she made direct contribution to the acquisition and development of the suit properties and as such she was a co-owner thereof as at the time the deceased purported to transfer the same to the defendant. The 1st plaintiff has contended that since it is not possible to determine with certainty the extent of each party’s contribution towards the acquisition of the suit properties, the court should apply the equitable principle that provides that equality is equity and find that the contribution of the deceased and the 1st plaintiff were equal. The plaintiffs have urged the court to hold that the deceased held half share in the suit properties in trust for the 1st plaintiff and



that the transfer of the suit properties to the defendant was in breach of that trust and the principle of co-ownership. The plaintiffs have contended further that the defendant having acquired the suit properties in breach of trust held the same in trust for the deceased and the 1st plaintiff and upon the death of the deceased, held half share of the same in trust for the 1st plaintiff and the other half in trust for the estate of the deceased.

52. I have carefully considered and evaluated the evidence tendered by the parties. I am convinced that the plaintiffs have proved on a balance of probabilities that the 1st plaintiff made direct and indirect financial contribution to the acquisition of the suit properties. Plot No. xxx was purchased from Charles Gathari Kaniaru at a consideration of Ksh. 290,000/- on 2nd November 1995 while Plot No. xxx was purchased from John Kenneth Macharia on or about 27th August 1999 at a consideration of Kshs. 50,000/-. The 1st plaintiff led evidence that was not contested by the defendant in any material respect that; when she was married by the deceased, she was employed in the civil service as a clerk in the Office of the [particulars withheld] while the deceased was employed as civil engineer in the Ministry of [particulars withheld]. This means that both the 1st plaintiff and the deceased were earning salaries. The 1st plaintiff led evidence that she was business minded and that in Nyeri and Nairobi where they worked as civil servants, she ran restaurant businesses where she employed others as managers. The 1st plaintiff led evidence that using the income from her restaurant business in Nyeri and from their salaries, the deceased and she purchased two plots near Nyeri town. The 1st plaintiff led evidence that they were both transferred to Nairobi in 1987 where they lived until 2004 when they separated.
53. The 1st plaintiff led evidence that she resigned from civil service in 1991. The 1st plaintiff led evidence that after resigning from her civil service job, she was engaged in the businesses of a restaurant, manufacturing and selling of paints, hardware shop and road construction. The 1st plaintiff led evidence that she was the one who was the active partner in these businesses that they ran together with the deceased. In his response to the Originating Summons application for division of matrimonial property that was filed in the High Court by the 1st plaintiff, the deceased did not deny that the 1st plaintiff was involved in these businesses. The defendant did not also challenge the 1st plaintiff's evidence regarding her role in these businesses apart from claiming that the 1st plaintiff ran down the businesses and that since she was not trained in management and construction, she could not run the construction firm.
54. The 1st plaintiff placed evidence before the court showing that she was a partner in [particulars withheld] Construction Company and subsequently a shareholder in [particulars withheld] Construction Limited. The 1st plaintiff also placed evidence before the court showing that the deceased and she operated a joint account at Co-operative Bank of Kenya Ltd. and that they obtained a loan jointly from the said bank to purchase stock and other materials for their hardware shop. The 1st plaintiff also placed evidence before the court showing that they operated another joint account with the deceased at Barclays Bank of Kenya Limited where they deposited monies from their businesses and investments. Neither the deceased nor the defendant denied the existence of these accounts.
55. I am persuaded that these businesses existed and that the 1st plaintiff was the one managing the same since the deceased was in full time employment as a civil engineer. The 1st plaintiff led evidence that through the income from these businesses and the deceased employment, they acquired and sold several properties in Nairobi. The 1st plaintiff led evidence that from the proceeds of the sale of these properties and the income from the businesses that they were undertaking, they managed to purchase and develop the suit properties.
56. I am persuaded by the 1st plaintiff that the suit properties were to a large extent acquired and developed through the income from the businesses that were being ran by the 1st plaintiff and the deceased and



the proceeds from the sale of the properties that the couple had acquired earlier. According to the letter dated October 6, 2004 that was addressed to Agricultural Finance Corporation by the deceased in which he applied for a loan of Kshs. 495,000/- (See page 97 of PEXH. 1), the deceased gave his net salary as Kshs. 30,000/-. This shows that the deceased could not have purchased the suit properties from his salary. In his affidavit in response to the Originating Summons that had been filed in the High Court for the division of matrimonial properties, the deceased did not explain the source of the monies that he used to purchase and develop the suit properties. He stated merely that he acquired the suit properties together with others through “sheer hard work”.

57. Having found that the suit properties were acquired partly from the income from the businesses that were ran by the 1st plaintiff and the deceased jointly, I hold that the 1st plaintiff contributed to the acquisition of the suit properties. I am unable to determine with certainty from the evidence on record, the extent of or percentage of the 1st plaintiff’s contribution to the acquisition and development of the suit properties. The 1st plaintiff had submitted that in the circumstances, the court should hold that the contribution by the 1st plaintiff and the deceased were equal. The defendant on the other hand urged the court to find that the 1st plaintiff made negative contribution to the acquisition and development of the suit properties. I find the submission by the 1st plaintiff fair and reasonable in the circumstances, and in accordance with the law. I will assess the 1st plaintiff’s contribution to the acquisition and development of the suit properties at 50% and that of the deceased at 50%.

58. Whether the 1st plaintiff was a co-owner of the suit properties with the deceased.

I have held that the 1st plaintiff contributed towards the acquisition and development of the suit properties. I have assessed her contribution at 50%. What this means is that the 1st plaintiff owned ½ share in each of the suit properties while the deceased owned the remaining ½ share. I therefore hold that the 1st plaintiff was a co-owner of the suit properties to the extent of her share in the same.

59. Whether the deceased had capacity or power to transfer the suit properties to the defendant without the consent of the 1st plaintiff.

I am in agreement with the 1st plaintiff that the deceased and the 1st plaintiff were tenants in common in respect of the suit properties. In Megarry & Wade, *The Law of Real Property, 17th Edition* at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as follows regarding the nature of a tenancy in common:

1. “The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.
2. There is no right of survivorship. The size of each tenant’s share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...
3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the



unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one –fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple”.

In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated that:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. Black’s Law Dictionary, 9th Edn and Thomas F. Bergin & Paul G. Haskell, ‘Preface to Estates in Land and Future interests 54 2nd Edn, 1984)’”.

60. Section 44 of the *Transfer of Property Act of 1882 (now repealed)* provides as follows:

“Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor’s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

61. In *Yogendra Pursbottam Patel v Pascale Mireille Baksh (nee Patel) & 2 others* [2006] eKLR where the court was dealing with a dispute over among others properties held by tenants in common, the court stated as follows:

“The first defendant as a tenant in common in equal shares has a right to deal with her share of the Nairobi West house and Kigwa estate without the permission of the court. She can sell her undivided share without the authority of the court. However, it is not easy for her to sell her undivided shares particularly to third parties seeing that the other co-owners are her relatives. I can see a lot of problems particularly in selling her 1/3 share of Kigwa estate to strangers. In my view, it is just that the first defendant should offer her share for sale. In the disputed properties to one or both co-owners as first priority and if they decline to buy or fail to offer acceptable price then offer her shares for sale to other close family members. If that fails, then she can sell her shares to any interested purchaser.”

62. This decision by the High Court was confirmed by the Court of Appeal in *Nishith Yogendra Patel Legal Representative of the Deceased Plaintiff Yogendra Pursbottam Patel v Pascale Mireille Baksh (Nee Patel) & another* [2019] eKLR.

63. From the evidence on record, the suit properties have no titles. It appears however that the same are leasehold from the Government of Kenya to the defunct City Council of Nairobi for a term of 99 years and that the same were sublet to the deceased for the remainder of the same period less 3 days. From the valuation reports submitted in evidence by the plaintiffs, the leases in respect of the suit properties were issued under the *Government Lands Act*, Chapter 280 Laws of Kenya.



64. From the authorities that I have cited above, the deceased who was a tenant in common with the 1st plaintiff in respect of the suit properties could only deal with his 50% interest in the said properties. The deceased could not dispose of the 1st plaintiff's share in the suit properties without the 1st plaintiff's consent. It is my finding therefore that the deceased had no capacity to transfer the suit properties to the defendant without the 1st plaintiff's consent save for his share therein.
65. Whether the defendant holds the suit properties in trust for the 1st plaintiff and the estate of the deceased.

In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, the Court of Appeal stated as follows on trusts:

“27. In *Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & others* [2015] eKLR, this Court examined and stated the law on trusts as follows:

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

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

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

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



is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).” Emphasis added

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also *Charles K. Kandie v Mary Kimoi Sang* [2017] eKLR.”
66. In Parker & Mellows, *The Modern Law of Trust, 9th Edition* at page 442 that was cited by the plaintiffs in their submissions, the authors stated as follows:
- “From its earliest days, equity has always been prepared to grant relief against fraudulent and unconscionable conduct and one aspect of these relief is the imposition of a constructive trust on any person who has obtained an advantage as a result of such conduct.”
67. I have made a finding that the 1st plaintiff contributed to the acquisition and development of the suit properties and on that account, the 1st plaintiff was a co-owner of the suit properties. Since the suit properties were registered in the sole name of the deceased, the 1st plaintiff had beneficial interest in the same to the extent of her contribution aforesaid. That beneficial interest imposed a constructive trust on the deceased in favour of the 1st plaintiff in respect of the 1st plaintiff’s share in the suit properties. It follows therefore that the deceased held the 1st plaintiff’s share in the suit properties in trust for the 1st plaintiff. As I have stated earlier, the deceased had no power to transfer the whole of the suit properties to the defendant without the consent of the 1st plaintiff who was a co-owner thereof. The purported transfer was therefore unlawful and was made in breach of the trust upon which the property was held by the deceased to the extent that it purported to convey the 1st plaintiff’s interest in the suit properties to the defendant.
68. Since the defendant acquired the 1st plaintiff’s share in the suit properties unlawfully and in breach of trust, it is my finding that the defendant holds the suit properties in trust for the 1st plaintiff to the extent of her share in the said properties. As for the deceased’s share in the suit properties, I am of the view as mentioned earlier that the deceased was free to deal with his share in the suit properties and since he disposed of the same to the defendant during his life time, the same does not form part of the deceased’s estate. It is my finding therefore that the defendant does not hold the deceased’s share in the suit properties in trust for the estate of the deceased.
69. The plaintiffs had argued I believe in the alternative that the powers of attorney that were donated by the deceased to the defendant were not intended to be used to transfer the suit properties to the defendant and that the subsequent transfer of the suit properties to the defendant was as a result of the misuse of the said powers of attorney and fraud on the part of the defendant and her advocate, Ms. Mary Ngechi. I am not in agreement with the plaintiffs in this alternative claim for two reasons, first, fraud is not pleaded against the defendant in the plaint with the necessary particulars. It is not open for the plaintiffs to come up with a cause of action based on fraud at the submissions stage. Secondly, the special powers of attorney that were donated by the deceased to the defendant gave the defendant a free hand to deal with the suit properties. They did not limit the power of the defendant to deal with the suit properties. The powers donated by the deceased to the defendant included “power to sell or



transfer to himself the said property”. Using the said powers of attorney, the defendant caused the suit properties to be transferred to her name in the records held by the City Council of Nairobi and fresh letters of allotment issued in respect thereof in her favour. I have also noted that the two powers of attorney were irrevocable and were in any event used to transfer the suit properties before the death of the deceased. I do not agree with the plaintiffs therefore that the deceased did not intend to transfer the suit properties to the defendant or that the transfer was carried out fraudulently.

70. I am in agreement with the plaintiffs however that the deceased continued to treat the suit properties as if the same were still owned by him even after the defendant had transferred the same to her name. This is clear from a copy of the deceased’s Wealth Declaration for the year 2003 and the instructions he continued to give to the property managing agents. The defendant explained that they had an agreement with the deceased that she would not benefit from the suit properties while he was alive. I have noted that the 1st plaintiff raised the issue of the transfer of the suit properties by the deceased to the defendant in the Originating Summons that she filed against the deceased in the High Court while the deceased was still alive for the division of the matrimonial property. The deceased did not deny in his replying affidavit filed in that suit that he had transferred the suit properties to the defendant. This lends credence to the explanation given by the defendant as to what they had agreed with the deceased as to when her interest in the suit properties would crystalize. In any event, the fact that the deceased continued to consider the suit properties as owned by him even after the same were transferred to the defendant alone is not sufficient for the court to make a finding of fraud in the transfer of the said properties to the defendant.

71. Whether the plaintiffs are entitled to the reliefs sought in the plaint.

I have set out earlier in this judgment the reliefs sought by the plaintiffs. From the findings and holdings I have made above, the plaintiffs’ suit succeeds only in respect of the 1st plaintiff’s claim. The plaintiffs are entitled to the declarations and orders sought in the plaint limited only the 1st plaintiff’s share in the suit properties.

72. Who is liable for the costs of the suit?

Costs is at the discretion of the court. In this case, the plaintiffs have not wholly succeeded in their claim. In the circumstances, a fair order on costs would be for each party to bear its own costs of the suit.

73 Conclusion

I hereby enter judgment for the plaintiffs against the defendant as follows;

- a) I declare that the defendant holds 50% share in Umoja Inner Core –Sector V Plot No. xxx and 50% share in Umoja Inner Core –Sector V Plot No. xxx as a constructive trustee.
- b) I declare that the defendant holds 50% share in Umoja Inner Core –Sector V Plot No. xxx and 50% share in Umoja Inner Core –Sector V Plot No. xxx in trust for the 1st plaintiff.
- c) The defendant shall transfer to the 1st plaintiff forthwith and in any event within 30 days from the date hereof 50% share in Umoja Inner Core –Sector V Plot No. xxx and 50% share in Umoja Inner Core –Sector V Plot No. xxx.
- d) Since the 1st plaintiff and the defendant shall hold Umoja Inner Core –Sector V Plot No. xxx and Umoja Inner Core –Sector V Plot No. xxx as tenants in common in equal undivided shares, they shall agree on how to manage the properties failure to which either party shall be at liberty to institute proceedings for the severance of the tenancy.
- e) Each party shall bear its own costs of the suit.



DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 2022

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nduta Kamau h/b for Dr. Kuria for the Plaintiffs

Mr. Karoki h/b for Mr. Maina for the Defendant

Ms. C. Nyokabi-Court Assistant

