



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**ENVIROMENT AND LAND CIVIL CASE NO. 21 OF 2011**

**LN.....PLAINTIFF**

**VERSUS**

**SMM.....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. The Plaintiff moved this court by way of a Plaint dated 18<sup>th</sup> March 2011 and filed in court on 21<sup>st</sup> March, 2011. The Plaint was amended 19<sup>th</sup> September 2011 and was filed on the same day. The amended Plaint seeks the following reliefs:

**(a) A declaration that the Plaintiff solely is entitled to ownership and possession of the sub-division number [particulars withheld] (original No. [particulars withheld]) registered as CR. [particulars withheld], the suit property herein;**

**b) A declaration that the Defendant was holding the suit property sub division number [particulars withheld](original number [particulars withheld] ) registered as CR. [particulars withheld]in trust for the Plaintiff.**

**c) A mandatory order directing the Defendant to transfer the suit property to the Plaintiff failure of which the Deputy Registrar of the High Court do sign the transfer forms in favour of the Plaintiff.**

**d) A permanent injunction to restrain the Defendant from interfering with the Plaintiff's quiet enjoyment and occupation of the suit property subdivision number [particulars withheld] (original number [particulars withheld]) registered as C.R. [particulars withheld]**

**e) Costs of and incidental to this suit.**

**f) Any other relief or remedy that this court may deem just to grant.**

The Plaintiff's case

2. The Plaintiff's case is that on or about the month of December 1998, during a holiday visit to [particulars withheld] in Malindi with her family, the Plaintiff, a spinster, met with the Defendant. An intimate relationship developed between the two of them and in January 2003, they started staying together at the Giriama residence in [particulars withheld]. The Plaintiff then actively started to plan to be a resident in Kenya.

3. The Plaintiff avers in her Plaint that on 1<sup>st</sup> July 2003, she opened a joint bank account with the Defendant to enable the Defendant to access the funds in the bank account at the Barclays Bank limited in Malindi in which account she remitted substantial funds of her own money from England.

4. In the year 2003, the Plaintiff avers that the Defendant identified the suit property and immediately informed her. Upon being informed about the suit property, the Plaintiff remitted 11,000 Sterling Pounds and 18,000 Sterling Pounds on 19<sup>th</sup> August 2003 and on 1<sup>st</sup> September 2003 respectively to the joint account number [particulars withheld], Barclays Bank, Malindi for the purchase of the suit property.

5. The Plaintiff states in her Plaint that they started developing the suit property towards the end of 2003 and she catered for all the building costs as confirmed from her bank statements which shows the transfer of money from her bank account in the UK to the joint account in

Kenya. In addition to the 11,000 and 18,000 Sterling Pounds that the Plaintiff sent to the Defendant to buy the suit property, the Plaintiff avers that she sent the following sums on diverse dates for the development of the suit property.

DATE	STERLING POUND	ACCOUNT
31/10/2006	1,000	[particulars withheld]
9/10/2006	1,500	[particulars withheld]
30/8/2006	1,200	[particulars withheld]
17/5/2006	1,500	[particulars withheld]
19/4/2006	2,000	[particulars withheld]
15/9/2005	100	[particulars withheld]
28/9/2005	1,000	[particulars withheld]
29/9/2004	10,000	[particulars withheld]
19/8/2003	11,000	[particulars withheld]
1/9/2003	18,000	[particulars withheld]
22/2/2008	8,000	[particulars withheld]
28/8/2007	3,500	[particulars withheld]
27/2/2007	800	[particulars withheld]
7/9/2007	1,000	[particulars withheld]
19/11/2007	10,000	[particulars withheld]
3/8/2009	1,000	WESTERN UNION
18/11/2008	1,999	WESTERN UNION
9/6/2009	1,000	WESTERN UNION
8/9/2009	1,300	WESTERN UNION
19/11/2010	500	WESTERN UNION
8/10/2010	1,800	WESTERN UNION
29/9/2010	1,000	WESTERN UNION
9/9/2010	1,999	WESTERN UNION
10/8/2010	1,500	WESTERN UNION
29/3/2010	1,999	WESTERN UNION
20/3/2010	1,000	WESTERN UNION
8/3/2010	1,999	WESTERN UNION
9/2/2010	500	WESTERN UNION
14/1/2010	650	WESTERN UNION
16/9/2009	500	WESTERN UNION

6. The Plaintiff avers that in the year 2010, the Defendant's attitude towards her changed and when she checked with the land registry, she was shocked to learn that the Defendant had on 18th September 2003 fraudulently transferred the suit property to himself. The Plaintiff has particularized the fraud and misrepresentation that she claims was perpetuated by the Defendant.

7. The Plaintiff claims that she is the rightful sole legal and or equitable owner of the suit property and seeks for the declaratory order to that effect.

#### **The Defendant's case**

8. The Defendant filed his defence on 18<sup>th</sup> April 2011 through the firm of Mouko & Company advocates. During the hearing, and after the Plaintiff had closed her case, the Defendant's advocate informed the court that they shall be relying on a Defence that was dated 18<sup>th</sup> October, 2011 and filed on 19<sup>th</sup> October 2011. The Plaintiff's advocate raised an objection and argued that the Defence dated 18<sup>th</sup> October 2011 and filed on 19<sup>th</sup> October 2011 was never served on her. The said defence, counsel argued, did not indicate if it was an "**amended defence**" and considering that the Plaintiff had all along considered the defence of 18th April 2011 as the only Defence on record, the introduction of the Defence filed on 19<sup>th</sup> October 2011 after the closure of the Plaintiff's case was prejudicial to the Plaintiff. After hearing the objection and the response from the Defendant's advocate,

I made the following order:

***"The Defendant's advocate has admitted that the Defence of 19/10/2011, according to his records was not served on the***

***Plaintiff's advocates. The Plaintiff has all along relied on the Defence of 18/04/2011 which was served on her and not the Defence of 19/10/2011 which appears to have been filed after the amended Plaintiff was filed in court. The Defence filed on 19/10/2011 does not indicate that it is an amended Defence and one wonders why it was filed. In the circumstances and considering that the Plaintiff has already closed her case, I direct that the Defence which was filed on 18/04/2011 and served on the Plaintiff be the one to be used in these proceedings. In any event, the defence filed on 19/10/2011 is not, on the face of it, a response to the amended Plaintiff. The Defendants prayer that the unserved Defence filed on 19/10/2011 be considered by the court is hereby rejected. The valid Defence is the one that was filed on 18/04/2011."***

9. In his Defence, the Defendant admitted that indeed the Plaintiff opened a joint bank account with him so that he could be able to access the funds in the bank account at the Barclays Bank, Malindi. The Defendant further admitted and that the Plaintiff remitted substantial funds of her own from the UK to the said joint account. The Defendant however stated in his defence that the money he received from the Plaintiff was a gift from the Plaintiff to himself owing to their friendship at the time. The Defendant denied that the sum received from the Plaintiff was for the purpose of purchasing the suit plot as alleged by the Plaintiff.

10. The Defendant further admitted the receipt of the funds particularized at paragraphs 8 and 9 of the amended Plaintiff (which are the same paragraphs in the original Plaintiff) but denied that the said sums were for development of the suit property as alleged by the Plaintiff.

11. When the matter came up for hearing on 22<sup>nd</sup> November 2012 and 23<sup>rd</sup> November 2012, the Plaintiff was represented by Ms. Chepkwony while the Defendant was represented by Mr. Oddiaga. However, Ms Njuguna held Mr. Oddiaga's brief on 22<sup>nd</sup> November, 2012.

### **The Plaintiff's evidence**

12. The Plaintiff (PW 1) informed the court that she is currently staying in [particulars withheld] having retired. She testified that she had a boyfriend/girlfriend relationship with the Defendant for several years having met in 1998 when she was on holiday in Kenya with her family.

13. PW1 stated that in the year 2003, she started looking for land in Kenya so that she could invest in it. It was her evidence that she managed to identify the suit property being plot number [particulars withheld] (hereinafter the suit property) in [particulars withheld], Malindi. In September 2003, while in the United Kingdom (UK), she transferred money to the Defendant for the purchase of the plot and for the development of the same. She testified that she re-mortgaged her plot in England for a sum of 18,000 Sterling Pounds which she sent to the joint account in Kenya. She sent a further sum of 11,000 Sterling Pounds for the purchase of land in Kenya. The Plaintiff informed the court that she is the one who opened joint bank account numbers [particulars withheld] and [particulars withheld] both at Barclays Bank Malindi. The joint accounts were in her name and that of the Defendant. The Defendant was authorised to withdraw any amount of money from the two joint accounts. The Plaintiff produced as **Plaintiff Exhibit 1** the document from Bristol and West plc. showing the re-mortgaging of her house in the UK.

14. The Plaintiff also produced in evidence the bank transfer documents in support of the transfers of 18,000 Sterling Pounds, 11,000 Sterling Pounds, 1000 Sterling Pounds, 1500 Sterling Pounds, 1200 Sterling Pounds, 1500 Sterling Pounds, 2000 Sterling Pounds, 10,000 Sterling Pounds, 1000 Sterling Pounds, 100 Sterling Pounds, 8,000 Sterling Pounds, 3,500 Sterling Pounds, 800 Sterling Pounds, 10,000 Sterling Pounds and 1000 Sterling Pounds from her bank account number [particulars withheld], Lloydes TSB, UK to the joint account numbers [particulars withheld] and [particulars withheld] held at Barclays Bank, Malindi. The total bank transfer was 70,600 Sterling Pounds (approximately Kshs. 8,472,000 using the exchange rate of Kshs. 120). The bank transfer documents were produced by PW1 as **Plaintiff's Exhibit 2**.

15. The Plaintiff also produced in court documents from Western Union showing the money that was sent by herself to the Defendant. The money that was sent to the Defendant vide Western Union was 1,999 Sterling Pounds, 1000 Sterling Pounds, 180 Sterling Pounds, 1300 Sterling Pounds, 1000 Sterling Pounds, 500 Sterling Pounds, 650 Sterling Pounds, 500 Sterling Pounds, 1999.99 Sterling Pounds, 1000 Sterling Pounds, 1999.99 Sterling Pounds, 1500 Sterling Pounds, 1000 Sterling Pounds, 1999.99 Sterling Pounds, 1,800 Sterling Pounds and 500 Sterling Pounds all totaling to 18,926 Sterling Pounds (approximately Kshs. 2,271,120 using the exchange rate of kshs. 120).

16. The Plaintiff stated that this money was sent to the Defendant for the purpose of constructing the "Giriama residence" on the suit property. The Plaintiff produced the original documents from Western Union as a bundle together with the bank transfers mentioned in the preceding paragraph as **Plaintiff's Exhibit 2**.

17. The Plaintiff also produced as **Plaintiff's Exhibit 3** the statements from her bank in the UK showing the withdrawals she made while in Kenya totaling to approximately 30,000 Sterling Pounds. According to the Plaintiff, the amount was also used for the development of the suit property.

18. The Plaintiff testified that she stayed in Kenya between 2003-2004, and by the end of the year 2004, she had used all her overdraft facilities and she was heavily in debt. Her friends, T.R and J.S had to advance to her a loan of 7000 Sterling Pounds. The Plaintiff stated that she is refunding the money that she was loaned by the two friends by way of a Standing Order and that she will continue repaying the loan until the year 2019. The Plaintiff produced her bank statement to show the monthly repayments that she is making to T.R which shows a repayment of 183.57 Sterling Pounds per month. The bank statement and the standing order were produced as **Plaintiff's Exhibit 4**.

19. In addition to the money she borrowed from her friend and the re-mortgaging of her house in the UK, the Plaintiff testified that she borrowed a further 5,000 Sterling Pounds from her bank which she has since finished repaying. She produced a statement from Lloyds TSB Bank which shows that she borrowed 5,000 Sterling Pounds on 27<sup>th</sup> May 2009 which she repaid until 22<sup>nd</sup> December 2009. The bank statement was produced as **Plaintiff Exhibit 5**.

20. The Plaintiff informed the court that in 2007, she took an early retirement package from her place of employment so as to raise money

for the completion of the “*Giriama residence*” (the suit property). She was given a lump sum of 50% of her retirement pension which amounted to 21,916 Sterling Pounds and 47 pence. The Pensions Department’s letter dated 11<sup>th</sup> February 2009 was produced as **Plaintiff’s Exhibit 6**.

21. The Plaintiff testified that the construction of the suit property was completed up to a point where it could be opened as a bar and restaurant while the construction of the rooms was ongoing. The Plaintiff returned to Kenya in 2008 and she stayed in the house that had been constructed on the suit property until 2009 when again she ran out of money.

22. It was the Plaintiff’s testimony that she went back to England to work and while there continued to send money to Kenya for the completion of the construction of the “*Giriama Residence*” on the suit property. She returned to Kenya in December 2010, by which time her relationship with the Defendant had deteriorated. It is around that time that the Defendant informed her that he would never agree to transfer the developed suit property to her.

23. It was the Plaintiff’s testimony that the Defendant was supposed to buy the suit property on her behalf. It was the Defendant’s father who showed the Plaintiff the Title document which showed that the property was registered in the name of the Defendant.

24. In response to the Defendant’s assertion that she used to send to the Defendant money as a gift, the Plaintiff testified that she could not get into debts and rent her property in England so as to raise money to send to the Plaintiff as a gift. It was her evidence that she never made such a suggestion to the Defendant and further that the money was meant to buy and develop the suit property.

25. In addition to the “*Giriama residence*” which was constructed on the suit property, the Plaintiff stated that she built another house at the Defendant’s rural home a three bed roomed home at [particulars withheld] and fully furnished it. The Plaintiff produced the brochure and the photographs showing the houses at [particulars withheld] as **Plaintiff Exhibit 7**. That is where the Defendant currently lives.

26. The Plaintiff finalized her testimony by stating that she moved this court in 2011 after the Defendant persistently insulted her together with the fundis who were on the suit property and at one point assaulted her.

27. The Plaintiff was cross-examined by Ms Njuguna. The Plaintiff reinstated that she was in an intimate relationship with the Defendant and that she informed the Defendant to buy the suit property on her behalf. She informed the court that she did not have any document to show the agreement on the purchase of the property between herself and the Defendant.

28. The Plaintiff confirmed in cross-examination that in 2003, she only sent 29,000 Sterling Pounds and that there was no other transaction between 2003-2005. The Plaintiff further stated that she did not have any evidence to show that the money she withdrew while in Kenya was given to the Defendant. She however clarified that though she had her own expenses she always lived in the incomplete house on the suit property while in Kenya.

29. In response to the transactions indicated in Plaintiff’s exhibit 4, the Plaintiff stated that the statement shows the movement of money from her bank account to her friend’s bank account which was the repayment of the money she had borrowed.

30. The Plaintiff admitted that there was no agreement to show that she built the house at [particulars withheld] where the Defendant and his family live. She also admitted that she was aware that the Defendant had affairs with other women and that she wrote letters to the Defendant complaining about the said affairs.

31. The Plaintiff informed the court that she was not aware if the Defendant used to receive money from the other women. All she knows is that she had spent over Kshs. 20 million on the property; that she was in Kenya when the foundation of the house on the suit property was being laid down by the fundis and that the Defendant’s German girlfriend came into the picture before the suit property was purchased.

32. It was the Plaintiff’s testimony in cross-examination that the Defendant’s English girlfriend stayed with the Defendant as from the year 2010 by which time the construction of the building on the suit property was complete. She stated that when she met the Defendant, he was an animator at [particulars withheld] Beach Hotel. The Defendant started selling chicken in 2004 and it was the Plaintiff who was supporting him in this business.

33. The Plaintiff admitted in cross examination that she did not have documentary evidence to show that she made payments to the fundis and that she is the one who purchased the building materials. She did not have any evidence showing her expenditure while staying in Kenya.

34. The Plaintiff admitted that she was hurt when she found out that the Defendant was having affairs with other women to the extent that she fell ill. The Plaintiff informed the court that though the Defendant assaulted her on 19<sup>th</sup> October 2010, she did not report the incident to the police.

35. The Plaintiff further stated in cross-examination that when she met the Defendant, she knew that he was married. She insisted that the money she sent to the Defendant was for the purchase of the suit property and the construction of the *Giriama residence*. She now wants the property to revert to her.

36. It was her testimony that she used to provide everything for the Defendant including paying the school fees for the Defendant’s children. The Defendant’s sole responsibility was to run the business on the suit property. However, in 2009, the Plaintiff left the property and the business in the hands of a Manager and the Defendant’s father who have been supportive and friendly.

37. In re-examination, the Plaintiff reiterated that the chicken business that the Defendant got involved in at one point was her idea. She stated that she was the one who financed the business and not the Defendant.

38. It was the Plaintiff's testimony that the Defendant was not employed between 2003-2010. He only worked for 3 months at [particulars withheld] Beach Hotel in the year 2004. She stated that she has been in possession of the suit property since 2011 to date.

### **The Defendant's evidence**

39. The Defendant testified on 23<sup>rd</sup> November 2012 and stated that he stays in [particulars withheld] in Malindi. The Defendant informed the court that he sells chicken, he is a tour guide and he is involved in other businesses. As a tour guide, he procures accommodation for clients and takes them on safaris and excursions. He stated that he is paid for all these.

40. The Defendant testified that in 1998, he was working with [particulars withheld] in [particulars withheld] Beach Hotel as a sport attendant and his salary was Kshs. 6,000/= exclusive of tips. If he was to include tips, his total earnings per month was Kshs. 50,000/=.

41. It was the Defendant's evidence that he first met the Plaintiff in November 1998 while working at [particulars withheld] Beach Hotel. The Plaintiff had come to Kenya with friends as a tourist. The two became friends for almost 8 years, within which time, the Plaintiff would go to England and come back to Kenya. The Plaintiff introduced to the Defendant all her family members who would accompany her during her trips to Kenya. The Plaintiff's family members included her father, mother, son, sisters and sister in law.

42. During that period, the Defendant testified that he worked at various places which included [particulars withheld] Beach Hotel, [particulars withheld] Safaris, [particulars withheld] Aviation, [particulars withheld] Hotel, [particulars withheld] Safaris Tours and [particulars withheld] Hotel all in Malindi within Kilifi county. He used to work in the mentioned places as a private tour guide. The Defendant at one point was also engaged in the business of breeding and selling chicken. He did this business for almost six years.

43. The Defendant further testified that he was also involved in the building and construction industry and was also a sales agent for real property. He stated that he used to receive financial assistance from the Plaintiff.

44. According to the Defendant, the money that the Plaintiff used to send to him was not for investment. The two did not have any agreement to that effect. It was the Defendant's evidence that during the Plaintiff's visit to Kenya, he used to host her and take her for trips and excursions. The Plaintiff was his girlfriend and he would spend time with her while she was in Kenya. They used to stay together at his family's place in [particulars withheld] and sometimes where the Defendant was renting. However, when he started building on the suit property, they started staying in the house that he was constructing. It was the Defendant's testimony that he has never demanded for payment for the entire period he used to host the Plaintiff.

45. The Defendant testified that he has never had an agreement with the Plaintiff to buy land for her as claimed. He stated that the suit property is registered in his name and it was registered as such in September 2003. It was his evidence that by the time the Plaintiff was filing the suit in 2011, they were still staying together.

46. On the issue of the money that the Plaintiff used to send to the Defendant, the Defendant stated that the money was meant for his personal use and for the holiday expenses that they would incur when the Plaintiff visited Kenya. The Defendant stated that the suit property has been developed. It has a residential house of four bedrooms, two triple rooms and two self-catering apartments with a bar and restaurant. It was meant to be a business entity.

47. It was the Defendant's evidence that he is the one who supervised the construction of the building and yet the Plaintiff has never paid him for the supervision and construction of the house on the suit property. The Defendant clarified this statement by adding that the Plaintiff did not pay him for the supervision and construction of the house on the suit property because he was constructing his own house. He stated that he completed the construction in January 2011 though he moved in the house in the year 2006. The Plaintiff was in the country when he moved in the house and that is where they have been staying.

48. The Defendant admitted that he is no longer staying in the house because the Plaintiff started causing problems and he was thereafter served with the court order barring him from entering the suit property.

49. It was the Defendant's evidence in chief that when the Plaintiff asked him to transfer the title in her name, he refused because it is his property. It was his testimony that he no longer goes to the suit property and the same is being managed by one S. K. He stated that it is the Plaintiff who sources for clients from the UK and all over the world and she gets paid for the rooms. According to the Defendant, the Plaintiff is conducting the business of renting the rooms on the suit property without a permit from the relevant authorities.

50. In cross-examination, the Defendant stated that he started working in 1998 and he was earning Kshs. 6,000/= per month. However, he did not have a pay slip to prove the assertion. The Defendant did not have a certificate or certificates to show his profession. When asked about his affairs with other women, the Defendant admitted that prior to 1998, he had an affair with a Kenyan woman and in 2002, he had another affair with a German woman who used to fund him. He stated that he used part of the money that he was given by the German woman to fend for his family and to buy the suit property.

51. The Defendant admitted that according to Plaintiff Exhibit 1, the first payment that he received from the Plaintiff was in September 2003 by which time he had already purchased the suit property. It was his testimony that he bought the suit property in the year 2003. He admitted that he did not have a copy of the Sale Agreement to show that he bought the suit property in prior to the receipt of the money from the Plaintiff. The Defendant further admitted that the suit property was registered in 18/09/2003 and that he received 18,000 Sterling Pounds from the Plaintiff on 1st September 2003. On being asked why he had not registered the suit property before he received the 18,000 Sterling Pounds, he stated that he was not under any pressure to register the property.

52. The Defendant denied that he was a fraudster. The Defendant admitted that the Plaintiff trusted him very much and refuted the claim that he was married when he met the Plaintiff. He however admitted that he has children who are in his custody and staying with his parents. The

Defendant admitted that he was doing the business of selling chicken which he started in 2002 with the Plaintiff.

53. The Defendant admitted that according to his defence, it was true that he received the money pleaded in the plaint from the Plaintiff but denied that the money was meant for the purchase and the construction of “*Giriama residence*” on the suit premises.

54. On re-examination, the Defendant stated that he was enjoined in the running of a bar and restaurant business on the suit property and that he used to deposit the proceeds of the business to the account that was held between the Plaintiff and himself. The Defendant further testified that his salary used to increase from time to time as he advanced in his carrier.

55. It was the Defendant’s evidence that he indeed trusted the Plaintiff and the Plaintiff also trusted him; that he has never informed the Plaintiff that he intends to sell the suit property; that he started the process of buying the suit property in December 2002 and that the transfer was effected in 2003.

56. The Defendant finalised his testimony by stating that he moved out of the premises on the suit property in March 2011 after he was served with an injunctive order barring him from interfering with the Plaintiff’s possession, occupation and quiet enjoyment of the suit property.

57. The parties in this matter filed written submissions. The Plaintiff counsel reiterated the Plaintiff’s case which I do not wish to repeat. According to the Plaintiff’s counsel, the Plaintiff’s claim is founded on the following three principles:

**a) The presumption of a trust;**

**b) Unjust enrichment and restitution and**

**c) Other available remedies at common law and equity.**

49. On the first principle, Ms. Chepkwony, counsel for the Plaintiff, submitted that the common law incorporates the doctrine of trust where the purchase price of a property is contributed by one person and given to another person who then buys property with that money.

50. It is presumed, counsel argued, that the Defendant is holding the suit property in trust for the Plaintiff as the person who paid the purchase price. On this point, the Plaintiff’s counsel relied on the case of **Calley -vs- Green 56** ALR 483 which was an except in **Yogandra Pushuttem Patel -vs- Pascele Mireille Baksh Nea Patel and 2 Others** reported in [2006] eKLR.

51. It was the Plaintiff’s advocate’s submissions that in this particular case, an implied and resulting trusts were created because the Plaintiff expressly instructed the Defendant to buy the suit property on her behalf after she identified one in 2003.

50. Ms. Chepkwony, counsel for the Plaintiff submitted that a trust can be created without using the word “*trust*”. The question that the court ought to ask itself is whether in the circumstances of the case, a trust was intended. She relied on the case of **Carreras Rothmans Vs Freeman Mathews Treasure** (1985) Ch. 207 in which it was held as that:

***“Equity fastens on the conscience of the person who receives property from another”***

51. The Plaintiff counsel submitted that this court should be guided by the principle that where a person has provided purchase money, it is her or his intention that must be ascertained. In this case, counsel submitted, the Plaintiff has sufficiently demonstrated that she provided the funds to purchase the suit property.

52. The Plaintiff’s counsel also relied on the legal principle of Restitution and Tracing. Counsel submitted that under the restitutionary principles, the receipt of money is enrichment, and in a claim of money, the payer always claims the payment of a sum paid in an ineffective contract.

53. According to the Plaintiff’s counsel, the rule under common law is that the Plaintiff can only recover money if the consideration for his payment has totally failed. The Plaintiff’s counsel quoted extensively “***The Law of Restitution***” by Lord Goff in which the author argues that in unconscionable bargains, there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting.

54. According to the Plaintiff’s counsel, the Defendant should be prevented from possessing and retaining the suit property because that would amount to enriching the Defendant unjustly. The Defendant, counsel urged, Defendant misrepresented to the Plaintiff that he had bought the suit property for her but proceeded to transfer the property to himself.

55. On his part, the Defendant’s advocate submitted that the Defendant is the legal owner of Plot sub-division number 815 (original number 814/2) and that he acquired the property from a third party who is not a party to the suit.

56. The Defendant’s advocates submitted that pursuant to the provisions of the Registration of Titles Act, Cap 281 a certificate of ownership is conclusive evidence of proprietorship and the law gives the Defendant’s title absolute protection.

57. According to the Defendant’s advocate, the issue for determination is whether this court has powers to cancel the Defendants’ title on the basis of fraud as alleged by the Plaintiff. The Plaintiff, according to counsel, has not proved fraud as against the Defendant. The Plaintiff’s claim, at best, is for money advanced to the Defendant and not for the suit property.

58. Consequently, counsel submitted, the Plaintiff can only have access to the Defendant's property as part of an execution of a decree for recovery of a liquidated amount that she had advanced to the Defendant.

59. The Defendant's advocate further submitted that even if there was fraud on the part of the Defendant in the acquisition of the suit property, by virtue of section 24 of the Registration of Titles Act, cap 281, this court cannot cancel the Defendant's title. What the Plaintiff is entitled to, according to the Defendant's advocate, is to prosecute the Plaintiff in an action for recovery of damages. There is no provision in law for cancellation of a title on grounds of fraud.

60. Finally, counsel submitted that it is not for this court to write agreements for parties neither can the court presume the existence of such an agreement; that the court has not been shown any evidence of communication between the Plaintiff and the registered owner of the suit property before the Defendant bought the same and that there are no grounds to enable the court to presume the creation of a trust.

61. From the filed pleadings, the issues that arise for determination, as I see them are as follows:

1) **Did the Plaintiff remit money to the Plaintiff?**

2) **If the answer to the above is in the affirmative, was the money remitted to the Defendant meant to purchase and develop the suit property or was it a gift to the Defendant?**

3) **Is there a presumption of trust between the Plaintiff and the Defendant viz a viz the suit property?**

**Did the Plaintiff remit money to the Defendant?**

62. The Plaintiff has pleaded in his Complaint that between 19<sup>th</sup> August 2003 to 19<sup>th</sup> November 2007, she remitted to the joint account that was being held by herself and the Defendant a total of 70,600 Sterling Pounds (*approximately Kshs. 8,472,000 using the exchange rate of Kshs. 120*) The money was sent to Barclays Bank account number [particulars withheld] and [particulars withheld] in Malindi from the Plaintiff's account held at Lloyds TSB Bank, London. The Plaintiff produced the foreign transfer documents as Plaintiff's Exhibit 2. The Plaintiff also produced in evidence documents to show that she sent the Defendant via Western Union 18,746 Sterling Pounds (*approximately Kshs. 2,271,120 using the exchange rate of kshs. 120*) This money was sent by the Plaintiff while in the United Kingdom between 18<sup>th</sup> November 2008 to 19<sup>th</sup> November 2010.

63. The total amount which was sent by the Plaintiff while in the United Kingdom amounted to 89,346 Sterling Pounds (*approximately Kshs. 10,721,520 using the exchange rate of Kshs. 120*). It was the Plaintiff's testimony that this money was sent to Defendant for the purpose of purchasing the suit property and developing the same.

64. In his Defence filed on 18<sup>th</sup> April, 2011, the Defendant admitted the receipt of the money pleaded in paragraphs 5 and 6 of the Complaint but denied that the money was meant for the purchase of and the development of the suit property. The Defendant has pleaded that the money that was sent to him by the Plaintiff was a gift to him owing to the friendship the two had. This is the same position that the Defendant took in his evidence in chief. Consequently, the receipt of the money as itemized in the Complaint and as proved in court by the Plaintiff is not denied by the Defendant.

65. The Plaintiff produced as Exhibit No. 3 the bank statement showing that while in Kenya, she used to withdraw a substantial amount of money from her own personal account. She informed the court that she withdrew from her account over 30,000 Sterling Pounds for the purpose of developing the suit property.

66. The receipt of over Kshs. 10,000,000 by the Defendant has been admitted by the Defendant. Consequently the 1<sup>st</sup> issue is answered in the affirmative.

**Was the money remitted to the Defendant meant to purchase and develop the suit property or it was a gift to the Defendant?**

**Is there a presumption of trust between the Plaintiff and the Defendant viz a viz the suit property?**

67. Trusts are part of the law of property and arise where one person gives his or her assets to another person for safe custody or to manage the same for him or her. Express trusts occur because of a consent where a settlor has consented for his property to be handed to somebody else under the stewardship of a trustee.

68. By contrast, the two main types of imposed or implied trusts, known as "*resulting*" and "*constructive*" trusts arise to reverse unjust enrichment or to correct a wrong. *Resulting* trusts are trusts created where property is not properly disposed of.

69. Where property passes between individuals, English law presumes that the relationship between them makes it an outright gift, and thus not subject to a resulting trust in the event of a failure; this is the "presumption of advancement."

70. *Resulting* trusts are normally imposed by the courts when a person receives property but the person who transfers the property did not have the intention of transferring his beneficial interest in the property unless there is some objective manifestation of consent to do so.

71. As was held by the House of Lords in the case of Gissing -Vs- Gissing (1971) AC 886, a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that "results" back to the person who provided

the money.

72. To understand the principle of a resulting trust in the present context, it would be necessary that I reproduce the holding of the House of Lords in the case of Oxley Vs Hiscock (2005) 3 WLR 715 where it was held as follows:

***“When money is provided by two or more parties on the basis that they should have a shared interest in the property, and if there is an agreement on how much each party should have in the property, that is conclusive. But if there is no agreement their beneficial interest is based on the parties contributions to the purchase price and the whole course of dealing between them in relation to the property”.***

72. Resulting trusts are legal presumptions where an intent to create a trust is presumed by the person who buys the property in the name of another. The property is deemed to be held in trust for the purchaser. This presumption is applicable to both personal property and real estate. Being a presumption, it can be rebutted if the Defendant shows that the money was a *gift* or a *loan*.

73. Indeed, “**resulting**” and “**constructive**” trusts have been imposed by the courts the world over to cure injustices where someone has benefited or has been enriched at the expense of another and the enrichment is unjust and without legal justification. In the case of Lipkin Garma Vs Karpanale Ltd (1992) 4 ALL ER 512, the House of Lords held that the concept of unjust enrichment lies at the heart and is the principle underlying the individual instances in which the law does give a right of recovery.

74. The legal solution available to a court of law for unjust enrichment is to impose the twin doctrines of resulting or constructive trusts. Lord Denning in Hussey -Vs- Palmer (1972) 3 ALL ER 744. In his usual flair defined a constructive trust as follows:

***“Is a trust imposed by law whenever justice and good conscience requires it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”***

76. In establishing constructive trust to prevent unjust enrichment, the courts create no fiduciary relationship between the parties. It is not a requirement, in other words, for there to be a fiduciary relationship. It is not a “**trust strictu sense**.”

77. In the case of Arumba -Vs- Mbega & Another (1988) KLR 121, the Court of Appeal held that a resulting or constructive trust proportionate to the appellant’s expenditure was created where such person spends his money on building and improvements on another person’s land with the agreement of that person but without the intention of a gift or loan.

78. The English doctrines of equity are parts of our law and are applicable to land registered under the Registration of Titles Act, cap 281 (now repealed). In Bilous -Vs- Bilous (1957) EA 961, the defunct Court of Appeal for East Africa subjected the legal estate of land to equitable doctrine of trust and held as follows:

***“It was stated that the system of registration of deeds such as apply in Kenya are in some way incompatible with the recognition of trusts or at least of trusts arising from the inception of the Torrens System in Australia. This view has consistently been rejected wherever the trust is one which affects the registered proprietor directly and not merely by virtue of his having notice of its existence.”***

79. The equitable presumption of a resulting trust that arises when the purchase price is contributed by one person was stated in the case which I have quoted in the preceding paragraph. That position was further reinstated in the case of Calverley =Vs- Green 56 ALR where it was held as follows:

***“Where a person pays the purchase price of a property and causes it to be transferred to another, the property is presumed to be held by the transferee upon trust for the person who provided the purchase price.”***

80. As was held by Justice Githinji, as he then was in the case of Yogendra Pusshotahn Patel -Vs- Pascale Mireilla Baksh & 2 others (2006) e KLR, parole evidence is admissible to show the purchase price of a property and if provided by several people to show their proportionate share of contribution. Parole evidence is also admissible to rebut the presumptions whenever they arise.

81. The court in Yogendra (supra) further held that the doctrine of resulting trust is said to be based on the unexpressed but presumed intention of the true purchaser or purchasers of the property. The purpose of parole evidence is to show the intention of the purchasers that they intended to create a trust.

82. Consequently, I do not agree with the Defendant’s counsel’s submissions that the Plaintiff’s claim as against the Defendant should be for the money advanced and not for the suit property as she has done. What this court ought to do while considering the evidence is the unexpressed but presumed intention of the true purchaser of the property.

83. Justice Waki, as he then was, was faced with a situation which is similar to this case in Walter Blasius -Vs- Emily Wanyoike e klr had no hesitation in holding as

***“I accept the evidence on record that she was a woman around Malindi town with no known or legal source of income and was staying in one room in Majengo before she met Walter. She never even told her mother what she did for a living although the mother assisted her in looking after the children. I find no sufficient or any evidence from Emily to displace the findings which I now make that Walter was the sole financier of the purchase of the undeveloped plot number 2032, 2033, 2034 and 2035 in***

***Malindi. She never contributed financially and was not in a position to contribute the money for such purchase.”***

82. The Plaintiff in this case has shown by way of parole and documentary evidence that she sent to the Defendant 11,000 Sterling Pounds and 18,000 Sterling Pounds on 19<sup>th</sup> August 2003 and on 1<sup>st</sup> September 2003 for the purchase of the suit property. The Defendant admitted that indeed the said amount was sent to him though the money was not meant for the purchase of the suit.
83. The Defendant claimed in his testimony that he purchased the suit property in the year 2002 way before the Plaintiff sent the 11,000 and 18,000 Sterling Pounds. The Defendant did not produce the Sale Agreement to show that he paid for the suit property before the Plaintiff started sending money to him in August, 2003.
84. Indeed, the conveyance document which is in the Plaintiff's bundle of documents indicate that the suit property was registered in the name of the Defendant on 18<sup>th</sup> September 2003, one month after the Plaintiff remitted to the Defendant 11,000 Sterling Pounds.
85. In addition to the 11,000 Sterling Pounds that the Plaintiff sent for the purchase of the suit property, the Plaintiff produced documents to show that she sent to the Defendant accumulative amount of 78,346 Sterling Pounds to develop the property.
86. The Plaintiff testified that she would stay in the incomplete house on the suit premises wherever she visited the country. The Defendant did not deny this assertion. The Plaintiff denied herself the luxury of staying in luxurious hotels as most tourists would do with a view of saving every single pound to finish what she considered her home.
87. The Plaintiff informed the court how she had to re-mortgage her house in the United Kingdom with a view of raising the money for the purchase and development of the suit property. The Plaintiff produced as Exhibit 1 the documents which showed the re-mortgage facility that she was given to her by Bristol and West Plc.
88. The Plaintiff further informed the court that other than re-mortgaging her house to raise money, she borrowed a further 7000 Sterling pound from friends, T.R and J.S which loan she is still repaying by way of a standing order. The said standing order was produced as Exhibit 4 which she says that the Plaintiff is making monthly payments of 183.57 Sterling Pounds to T. R.
89. As if that was not enough, and determined to complete the premises on the suit property, the Plaintiff took an early retirement package from her place of employment where upon she was paid a lump sum amount of 50% of her retirement pension amounting to 21,916 Sterling Pounds. She produced as Exhibit number 6 the letter from the Pension Department to prove this fact. This was after she ran out of money while in Kenya between 2008 and 2009.
90. The Plaintiff further took a personal loan of 5,000 Sterling Pounds from her bank. She produced documents to show that she finished repaying the loan on 22<sup>nd</sup> December, 2009.
91. I entirely agree with the Plaintiff's testimony that it was not her intention to re-mortgage her house in England, borrow money from friends, take a personal loan from her bank and take an early retirement with a view of showering the Defendant with financial gifts running into millions of shillings.
92. While the defence of **“a gift”** is available to the Defendant, the Defendant did not attempt to rebut the presumption that a resulting trust was created when the Plaintiff sent to him the money to purchase and develop the suit property.
93. The Defendant did not produce any document to show that he was employed. He only stated in his testimony that before he met the Plaintiff in 1998, he was working at African Safari club as a sport attendant and his salary was Kshs.6,000 exclusive of tips. He would earn up to Kshs. 50,000 per month if tips were to be included. The Defendant did not produce any letter of appointment or a bank statement showing the flow of cash while working at [particulars withheld] Beach Hotel. A bank statement from the Defendant would have gone a long way to show that indeed he was capable of purchasing the suit property or that indeed he contributed in the purchase of the same.
94. The Defendant also testified that other than working at [particulars withheld]Beach Hotel, he also worked at [particulars withheld]Safaris, [particulars withheld]Aviation, [particulars withheld]Hotel, [particulars withheld]Safaris Tours, [particulars withheld]Hotel all in Malindi. Again, no evidence was placed before the court to show that the Defendant worked at these places and his remuneration. There was no evidence that the Defendant was later on engaged in the business of breeding and selling chicken as claimed in his testimony.
95. In the absence of evidence on the source of the Defendants income between the year 2003 when the suit property was purchased and the year 2011 when the Plaintiff filed this suit, I find and hold that the Defendant did not purchase and develop the suit property neither did he contribute in the purchase and development of the same. The suit property was purchased and developed using the money that the Plaintiff sent to the Defendant. The Plaintiff was the sole financier for the purchase and development of the suit property.
96. The Defendant's case that the money that the Plaintiff sent to him and which has been pleaded and proved by the Plaintiff was a gift cannot hold. A gift is defined as a voluntary transfer of ones property to another without consideration.
97. It is a cardinal principle that restitution will not be granted where the Plaintiff has officiously conferred a benefit on a Defendant. It is true that a Plaintiff may not have a right of restitution if the Defendant reasonably believed that the benefit conferred to him was a gift and consumed it in that belief.
98. Further the **“presumption of advancement”** is available as a defence where a person, due to the relationship he/she has with another person **“gifts”** property to that other person. In **Mutiso -Vs- Mutiso (1988) KLR 846**, the Court of Appeal took cognizance of the fact that

the strength of this presumption may be dismissed in modern times and the presumptions to be drawn ought to accord with the social conditions which prevail so as to confirm the most likely intentions of couples in Kenya.

99. The defence of officious gift or payments is not regarded as officious where it is made under a mistake or compulsion, or at the request of the Defendant or in anticipation that a transaction will result.

95. As I have stated in the preceding paragraphs, the Defendant was well aware that the Plaintiff intended to settle on the suit property. It is for this reason that the Plaintiff went out of her way to re-mortgage her house in the United Kingdom, borrowed money from friends and took an early retirement so that she could be paid her pension. These, using the Plaintiff's own words, cannot be actions of a party who intends to advance monies to another party. I therefore do not agree that the defence of a *gift* or the *presumption of advancement* is available to the Defendant.

96. The Defendant's counsel submitted that the only remedy available to the Plaintiff is to recover the money he advanced to the Defendant. That scenario is only possible if the consideration for the Plaintiff's payment had totally failed. That is not what happened in this particular case. The money which was sent by the Plaintiff was used by the Defendant to buy and develop the suit property. Consequently, the consideration for the payment crystallised and the Plaintiff's claim for the recovery of the suit property is properly before this court.

97. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's claim in the following terms.

**(a) I declare that the Plaintiff solely is entitled to ownership and possession of the sub-division number [particulars withheld] (original No. [particulars withheld]) registered as CR. [particulars withheld], the suit property herein;**

**b) I declare that the Defendant is holding the suit property sub division number [particulars withheld] (original number [particulars withheld]) registered as CR. [particulars withheld] in trust for the Plaintiff.**

**c) I hereby grant a mandatory order directing the Defendant to transfer the suit property to the Plaintiff failure of which the Deputy Registrar of this court do sign the transfer forms in favour of the Plaintiff.**

**d) A permanent injunction is hereby issued restraining the Defendant or his agents from interfering with the Plaintiff's quiet enjoyment and occupation of the suit property subdivision number [particulars withheld] (original number [particulars withheld]) registered as C.R. [particulars withheld].**

**e) The Defendant to pay to the Plaintiff the Costs of and incidental to this suit.**

**Dated and delivered at Malindi this 19<sup>th</sup> day of April, 2013.**

**O. A. Angote  
JUDGE**