



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 74 OF 2005

SILVANA DOMENICA SAROLI.....PLAINTIFF

-VERSUS-

ALCAMO VICENZA.....DEFENDANT

JUDGEMENT

SILVANO DOMENICA SAROLI (the Plaintiff) has filed this suit against **ALCAMO VICENZA** (the Defendant). The Plaintiff`s case is that on or about 30th September 2002, she and the Defendant jointly bought and had transferred in their joint names a piece or parcel of land known as Portion No.5360(Original No.5181/8) Malindi from one **RENATO MARINI** in consideration of the sum of Kshs.2,000,000/- with each party contributing the sum of Kshs.1,000,000/-. The suit property is registered in the joint names of the Plaintiff and Defendant, under the Registration of Titles Act(Cap 281) as CR 21268/13. It was expressly agreed between the Plaintiff and Defendant, that the purposes of the joint acquisition of the property was for development purposes, and in particular for construction of Residential premises with each party contributing equally in financial terms and/or any other material contributions as and when required.

In breach of the agreed terms of the purchase the Defendant abandoned the quest to have the suit property developed and let the Plaintiff undertake the building project solely forcing the Plaintiff to bear the whole financial burden. The Plaintiff has so single handedly financed the construction of the Residential premises on and upon the suit property and has expended a financial capital to the tune and in excess of Kshs.20,000/- and thereby greatly enhanced and increased the value the suit property and which is now partly being used as a Guest House operated by the Plaintiff. It is the Plaintiff`s contention that, the Defendant has by her own conduct clearly demonstrated that she is not interested in the said property and has neglected, failed and/or refused to contribute and/or in any other way participate in the Development of the same, so she has breached the express and main objective of the joint acquisition.

In view of this, the Plaintiff seeks a declaration that all the Development and improvements standing on the suit property are the Plaintiff`s sole investment thus entitling her to enjoy the proceeds and income arising there from in full, to the exclusion of the Defendant. The Plaintiff had approached the Defendant and informed her of the investments in the property and even offered to refund the Defendant what consists of her contribution to the purchase price, in consideration of her executing a transfer of her share in favour of the Plaintiff, but Defendant declined and instead threatened to have the structure constructed

by the Plaintiff demolished to the ground, saying she is the sole owner of the property.

The Plaintiff now prays for judgement against the Defendant for a declaration that the Plaintiff is the sole and legal owner of all the structures standing upon and any other developments carried on the suit property known as portion No.5630 Malindi, hence all incomes and/or earnings derived from them be engorged by the Plaintiff to the exclusion of the Defendant.

The Defendant denies that the Plaintiff contributed or paid the sum of Kshs.1,000,000/- or any other amount at all, towards the purchase price. She also denied that the consideration paid for the property was Kshs.2,000,000 or that she paid Kshs.1,000,000/- towards the purchase price as consideration for the said property. Defendant denies that the property was purchased from **RENATO MARINI** in 2002 or that they bought it jointly for purposes of construction of a residential premises, saying there was already a villa built on the property together with other developments. It is her contention that the only agreement was for the renovation and maintenance of the suit premises in the condition they were in 2002, without altering the character of the premises in any manner either by extending the existing developments or adding on to the existing developments she denies that she agreed to any contribution in financial terms or the alleged material contribution, so the issue of abandoning the Plaintiff to undertake any project does not arise. It is her case that she left Kenya on 13/08/02 and had no intention of living in Malindi.

She admits that Plaintiff has erected or built some structures and made extensions to the villa existing in the suit premises in 2002, but such construction was undertaken by the Plaintiff without the Respondent's consent and Plaintiff did not even obtain approval of building plans from the Municipal Council of Malindi which makes the construction illegal and exposes the Defendant to penalties and other consequences from the Municipal Council of Malindi.

Defendant denies that the said structures have enhanced the value of the property or that Plaintiff spent over Kshs.20,000,000/- for purposes of developing the property. Defendant states that this court has no jurisdiction or power to declare that the alleged developments and improvements standing on the suit property are the Plaintiff's sole investments entitling her to enjoy the proceeds and income arising there from to the exclusion of the Defendant. Further, that excluding the Defendant from any part of the suit premises amounts to evicting her from the same or transferring the same and the profits from the said premises to the Plaintiff/Defendant contends that she acquired the property in 1992 and improved the premises at a cost of more than 300,000,000 Italian Lira which is equivalent to 154,937.07-Euros or Kshs.14,099,273/30cts and that Plaintiff did not contribute towards the purchase price. However, she is ready and willing to transfer her interest to the Plaintiff upon the payment of Kshs.22,750,000 by Plaintiff. As far as she is concerned, the illegal and unauthorized structures on the premises are an eyesore which have greatly reduced the value of the property. In any event the structures and developments are standing on the land purchased by the Defendant and therefore form part of the property.

The Defendant has filed a counterclaim the Defendant states that Plaintiff has altered the character of the premises and subdivision of this plot between them is not a variable option as it would deny the resultant two plots a garden, swimming pool, or garage. She accused Plaintiff of unlawfully and maliciously evicting her and detaining her personal property in the premises. She states that she had purchased the property for purposes of a holiday home in Malindi and now she has to incur extra expenses for alternative accommodation. She pleads that she has lost possession of the suit premises which she purchased, developed and equipped at a cost of more than Kshs.14,000,000/- and she has also lost her personal belongings which are in the suit premises, damage to or diminished value of the villa, damage to the suit premises by construction of a guest house and a perimeter wall. The Defendant is now apprehensive that Plaintiff will turn, the suit premises into a hotel, resort, inn, bar, restaurant or lodging and will carry out commercial services therein. The Defendant therefore prays that (a) the Plaintiff's suit be dismissed with costs.

b) An order against the Plaintiff to give the Defendant or Defendant's agent/valuer, surveyor or assessor unlimited and unrestricted access to Plot No.5630(Original No.5181/8) Malindi and to any building thereon, for purposes of carrying out a full audit or assessment of the damage to the suit property and the Defendant's personal property and in default, the Defendant do have leave to use necessary force to break any and all doors for the said purposes.

- c) An order directed to the plaintiff to demolish all extension, buildings, the perimeter wall as well as the roof to the garage and rebuild at the Plaintiff's costs the villa and garage in a manner that will restore the suit premises to the design and condition prior to the unlawful developments effected by the plaintiff, and in default, the defendant do have leave to hire or engage contractors to do so at the Plaintiff's costs.
- d) Upon restoration of the suit premises to the condition prior to the unlawful and unauthorized developments, the suit premises be sold and the proceeds be paid over to the Plaintiff and Defendant equitably and in considering the proportion of payment – regard be given to the fact that Defendant had identified and paid the full purchase price for the suit premises.
- e) The Plaintiff be restrained by perpetual injunction from continuing any further building or construction or any alteration of any building or structure within the suit premises.
- f) An account be taken of all monies the Plaintiff has received or ought to have received from any guests to the suit premises from 2002 and a suitable order be made as to the distribution of such monies to the Plaintiff and the Defendant.
- g) The Plaintiff be restrained from taking in any paying guests and from operating a hotel, inn, bar , restaurant or lodgings within the suit premises.
- h) Damages for altering the suit premises.
- i) Punitive, aggravated and exempting damages
- J) Interest and costs of the counter claim

At the hearing **SAROLI SILVANA**(Pw 1) testified that she and the Defendant visited a portion of land which was next to the house belonging to **MARINI**. They were accompanied by advocate **BEN OCHIENG** in August 2002. They signed an agreement and transfers so that the Title could pass to them. The plot cost Kshs.2 million, so each paid Kshs.1 million. The money was paid to **MARINI** in the presence of the advocate **BEN OCHIENG** – however they were not issued with any receipt. She produced a copy of the document which was prepared, as exhibit 1. Thereafter Pw 1 remained in Malindi while Defendant **ALCAMO VINCENZA** returned to ITALY. Pw 1 and Defendant had an oral agreement (as they were friends) that Pw 1 was to look for a contractor to build on the plot. She entered into a contract for the construction because the top part of the house was demolished, so the house had no roof and was not habitable at all. So the building contract dated 10th October 2002(exhibit 2) indicated that the construction would cost Kshs.11,000,000(eleven million). They paid 50,000 Euros as deposit and the balance was to be paid in instalments – that deposit was paid directly from Pw1's pocket, and Defendant did not contribute anything. Plaintiff then paid the balance and the contractor gave her a certificate of clearance.(Exhibit 3) to show that she had cleared payment for the balance. Pw 1 then paid the contractor for the construction of the swimming pool and the house. There were building plans which were drawn, and presented to the Municipal Council for approval. On the plot now stands a complete villa with six rooms, a self contained guest house with two rooms. The building plans were produced as Exhibit 4ABC. She received approval from the Municipal Council. It is Pw 1's evidence that she paid not only for the construction, but also the employees, water and electricity. One time in January 2003, she sent requests to the Defendant to pay half the electricity cost but she declined. Pw 1 also informed the Defendant about the expenditures she had incurred and asked for a refund, but Defendant said she was not interested in anything in Kenya so she would not make a refund or contribution. When Pw 1 spoke to the Defendant in the presence of the contractor and manager(one **DAVID**) Defendant made it clear that she would not pay anything. Pw 1 produced several receipts showing expenses she incurred on improving the property – they form a bundle at page 1 to 115 of the list of documents and were produced as exhibit 6.

Upon completion of the premises, Pw 1 received an occupation certificate from the Malindi Municipal Council dated 07/04/05(produced as exhibit 7). Thereafter, the Plaintiff did not rent out the house. When the Defendant came to Kenya in the year 2003, the downstairs rooms were ready but the upstairs rooms were not ready, and Defendant slept in that house at the end of January 2003 even as work was going

on. Defendant left for Italy after a week and did not go back to the house. The next time they met was in 2005 before an advocate named **MARY** because Defendant had caused one **JANE** to go to see Plaintiff several times claiming that the villa was on sale. Pw 1 was annoyed and told them there was nothing to sort out because Defendant had not contributed to the construction of the Villa. Pw 1 explained that at the time of purchasing the property, Valuation was done after entering into the sale agreement and the property was valued @ Kshs.1.3M. A week before the hearing, Pw 1 caused the property to be valued, and now it is worth Kshs.60 million i.e without the buildings and all the improvements plus the expenses for maintenance of the house. She is willing to pay back to Defendant her share of Kshs.1 million which she paid at the time of purchasing the property, so as to remain as the sole owner alternatively she says, if Defendant wants half the property then she should pay Plaintiff Kshs.40million because there is further inside the house which is not included in the valuation.

On cross-examination by **MR KINYUA** for Defendant, the Plaintiff confirmed that some of the receipts relate to furniture and equipment for the house and not construction material, but her contention is that they support her position regarding the improvements she has made. There are also receipts for groceries, beddings, snacks, refreshments such as chocolates and cigarettes and beer which Pw 1 confirms have been erroneously included in the list of documents. Some receipts have also been altered and given inflated value of a receipt for fixing 7 doors, dated 23.05.05 read Kshs.32,100/- but Pw 4 clarified that each door cost Kshs.300/- so for 7 doors it ought to read Kshs.2100/- and Pw 1 stated she did not know who did the alterations – the same for another receipt for an order for windows for 800/- altered to read Kshs.38,000/-. Her evidence is that she paid the contractor, one Eric 50,000 Euro, which was the equivalent of Kshs. 5 million but she was not issued with a receipt, instead she was given Exhibit 2, which to her, was like a receipt. She also sent some of the money to the contractor while she was in Italy and purchases would be done. The contractor **ERIC** and his wife eventually relocated to Arusha and donated the power of attorney to one **DAVID MUIRURI** who was their manager. On further cross-examination Pw 1 states that the house was supposed to be constructed, not repaired, and she eventually turned it into a guest house – although she did not seek the consent of the Defendant before doing so.

Anyway, it was a short lived enterprises because the tourists did not like that kind of thing. She denies any knowledge that in 1994 the property was purchased at 2.5M and transferred to **FRANCESCO DE CESARE** and **VINCENZA ALCAMO**, otherwise she would not have got into the deal with her in 2002. Her parting shot is this;-

“If ALCAMO gives me 50% of what I have spent on the house, I will be willing to share the house with her. I cannot give her 50% value of the plot and house. If she gives me the 40,000,000/-, I will give her just ½ of the house”

Pw 1 was shown an affidavit sworn by **BEN OCHIENG ADVOCATE** filed on 3/10/05, together with a transfer said to be from **RENATO MARINI** to **FRANSCESO DE CESAR** and **ALCAMO VINCENZA**, but she had no knowledge about it and pointed out that the transfer was not registered, and on re-examination she pointed out at paragraph 16 of the same affidavit which stated that **RENATO MARINI** informed **BEN OCHIENG** that the deal had fallen through and the property remained in his (i.e **MARINI**) name.

ELIZABETH GATHONI NDUNGI (Pw 2) told this court that she met the Defendant in the year 2004/2005 and they became close friends. One day in 2005 the Defendant informed her that she had a very good house which she wanted to sell and requested Pw 2 to get her interested buyers. Since Pw 2 was working as a receptionist she advised Defendant to bring an advertisement with the words “House on Sale”, so that Pw 2 could place it at the reception – Defendant did as requested – the house was indicated as selling at Kshs.13 million – many people made queries about it and three months later, Defendant informed her that she had got two clients **MASSIMO AND MARCI**.

Pw 2 once accompanied Defendant to the house but when they got there, the gate was locked and Defendant`s knocks at the gate achieved nothing. That afternoon **MASSIMO** and **MARCO** went to see

Pw 2 at her place of work saying they had been sent to her by the Defendant. Apparently Defendant had told Pw 2 that she would not be available, so Pw 2 accompanied **MASSIMO** and **MARCO** to the house. When they got to the house, a lady opened the gate and introduced herself as **MRS SILVANO** and she inquired as to the purpose of their visit. She spoke in Italian which Pw 2 did not understand, so since **MASSIMO** and **MARCUS** understood the language, they translated the ongoings to Pw 2. When **MASSIMO** said they had gone to see the house and they tried to get in, **MRS SILVANA** objected saying the house was not for sale, pushed them to go away and threatened to call police – so Pw 2 left.

EDWARD MBUGUA(Pw3) worked as a gardener for the Plaintiff from early October 2002. His evidence is that when he begun work at the property, the structure was in a terrible condition and the swimming pool was cracking. The house was full of cracks on the wall and the wall was not painted. The roof was made of makuti and was not in good condition at all that as the roof was down and some of the walls had collapsed. The house eventually fell down, and construction of a new house begun in 2005 under the supervision of a white man named **ERIC**. By the time Pw 3 left employment in 2005, the house had been completed, and he describes it as “*well constructed*”.

On cross-examination he confirmed that he did not witness the construction of the house from October 2002 which was done after the initial structure collapsed and that Pw 1 begun staying in the premises in January 2003. He is categorical that what took place in the premises was construction **NOT** renovation as suggested by defence counsel.

DAVID MWANGI MUIRURI(Pw 4) a businessman in Malindi and Mombasa, recalls that in the year 2002, early October, Plaintiff visited the offices where he was working as a Manager for Mango Inn Investments. They had a meeting with Plaintiff and Directors of Mango Inn Investments i.e **ERICK GERHART ZWECZA**. The reason for her visit was that she wanted **MR ERICK** to construct a house on plot no.5630 situated along Malindi Gold club. **MR ERICK** and Plaintiff could not understand each other because Plaintiff did not know English and **ERICK** did not speak Italian, so since Pw 4 was fluent in both languages, he acted as the interpreter. Thereafter, Plaintiff and **ERICK** and Pw 4 visited the site and they agreed to have construction work begun. Pw 4`s evidence is that what he saw at the site was an abandoned house which was in pieces and had fallen down. On 10th October 2002, they reached an agreement of construction tender @ Kshs.11,000,014/- as the total cost Plaintiff was to pay, Plaintiff immediately paid 50,000 Euros(which was equivalent to Kshs.5 million) in the presence of Pw 4. The balance was to be paid in installments until the house was completed. On 23/1/03, two rooms were ready, and Pw 4, had lunch with Plaintiff and her staff, **ERICK**(the contractor, the Defendant, **EDWARD** (the gardener). The lunch was held at Plaintiff`s residence and was in honour of Defendant who was visiting. During the lunch, the issue of Defendant contributing money towards the construction was raised. However Defendant`s response was that constructing a house was very expensive and she could not pay for the construction she requested Plaintiff to pay her back Ksh.1 million as part of the payment she had made during the purchase of the property saying she was no longer interested in staying in Kenya as she had grown old and wanted to live in Europe. He explains that Plaintiff is the one who raised the issue about Defendant`s contribution for the construction and that her response to Defendant`s demand for a refund was;-

“I am sorry I cannot give you Kshs. 1 million at the time because I have just paid Ksh.5m for construction”

Defendant told Plaintiff that was not a problem since she was her friend, she could finish her matters then pay her the Kshs.1million later. To demonstrate to the Plaintiff her disinterest in the property, Defendant gave the Plaintiff the original transfer document. Pw 4 saw the construction from the beginning until its completion in 2005. **ERICK** left Kenya in October 2005 to go and live in Switzerland and Pw 4 continued as the manager of Mango Investment. Pw 4 was given a power of attorney by Mango Investments whose directors were **ERICK** and **SYLVIA ZWECKAW**. The power of attorney is produced as exhibit 12. Thereafter there was a big fire in Kibaoni and which was feared may have destroyed the power of attorney, so the couple gave Pw 4 another power of attorney dated 17th July 2009

produced as exhibit 13. On cross-examination Pw 4 stated that he was involved in paying the workers who did the construction work for Plaintiff. He denied suggestions by defence counsel that the Power of Attorney was purposely for this case, saying it was made when **ERICK'S** health begun failing and was intended to confirm on behalf of Mango Investments, that the house was completed and he was the man on the ground. He also denied defence counsel's suggestion that he and Pw 1 manufactured evidence so as to show that Plaintiff had spent over Kshs.20m.

The Defendant's testimony is that she had known an Italian contractor by name **RENATO MARINI**, who had a house near the **GOLF CLUB** and she sold to her that house. She paid to him 250,000,000 (Two hundred and fifty million Lira) which at the time (in the nineties) was equivalent to 150,000 Euro. She produced the same agreement as DEX (page 10 in her list of documents – the same is dated. She was issued with a receipt acknowledged deposit paid to **MARINI** in respect of Plot No.5881/8. She also showed this court a copy of the Banker's cheque issued to **MARINI** on 8th January 1983 for Kshs.2.5million Lira. She also had several documents showing payment of running to the same person so that in total she paid 250 million Lira. She sought to rely on a letter sent to her by the late **DON AMOLO** advocate the letter was addressed to her and one **FRANCESCO DE CESARE** and required this to pay a total of Kshs.265816/- for purposes of transfer of the said property. She wanted to show this court a copy of the Banker's cheque at page 49 of the defence list of documents, - the same was issued to **DON AMOLO** advocate. She wanted to bring the house so as to live in Kenya, and **FRANCESCO DE CESARE** was her male friend whom they jointly bought the property with. However **FRANCESCO'S** wife was not willing to stay in Kenya, so he did not pay the 50% as he was supposed to refund her the 50% in Italy. She confirms that by the year 2002, she had entered into an agreement with Plaintiff regarding ownership of the property at 50% each. However she says it is not true that Plaintiff paid **MARINI** Kshs.1m and Defendant too paid Kshs.1million towards ownership of the house. It is Defendant's evidence that in 2002, she did not pay **MARINI** any money towards purchase of the house, she only paid the advocate who had come there for purposes of registering the house. She refer court to D exhibit 1, which was a transfer of funds from her bank to **RENATO MARINI** being 102,52 Euro and the transfer is dated 16/08/02. She explains that she had bought the house in 1993, she wanted to give Plaintiff 50% of the house so as to share the costs – this was for purposes of maintaining the house. She confirms that she and property were good friends. Plaintiff had a son and she desired that Defendant leaves her share of the house to her son, and to this end she requested Defendant to transfer her shares to the son, but Defendant declined. She had referred the court to pictures at page 38 +39 showing the original villa as constructed by **MR MARINI** and confirms that it is currently not in the state it was then. To prove that she owns the property, she refers this court to electricity bills in page 55-57 of the list of documents which are all issued in her names and explains that this was before **MR MARINI** effected the transfer to her and the Plaintiff.

Later on in her evidence Pw 1 says there is a document showing transfer of the property to herself and the Plaintiff and refers to payment of Kshs.2m to **MARINI** –however she says that was payment made for purposes of having the land registered in the name and that of Plaintiff and not the purchase parcel. She confirms visiting Kenya in January 2003 and staying for eight days, but says that during the period, she did not go to the disputed property nor did she offer to refund Plaintiff Kshs.1 million in lieu of ownership of the property, saying that the last time she went to that house was in the year 2002, it is her evidence that she cannot say in the disputed property. Plaintiff warned her not to dare enter it and in any case, Plaintiff has not given her any keys. She urges this court not to declare the Plaintiff as the sole proprietor or be allowed to enjoy the proceeds alone. She says that when she learnt that Plaintiff was carrying out construction on the property, she instructed **GACHIRI KARIUKI** to file an application under certificate of urgency requiring Plaintiff to stop any further construction. She further states that on the plot now stands a Resort whose operations she is not allowed to be involved in. She is not willing to pay Plaintiff Kshs.40m so as to get a portion of the resort, saying they have disagreed and she does not wish to live with the Plaintiff in that house and requests that the same be sold and grounds of sale be divide them equally.

According to Defendant on cross-examination **MARINI** had plot 5630 which was sub-divided and she bought the portion which had a house, garden, garage and pool. Oddly enough the letter of offer referred to Plot No.5851/4 – she also confirms that although she paid money to **MARINI** it does not indicate what

the payment was for. Defendant insists that she is the one who paid the entire amount for property including the Kshs.2m, and because Plaintiff was her friend she consented to being registered because she (Plaintiff) would give her a refund once they got back to Italy.

The Defendant did admit in cross-examination that in her earlier affidavit filed in court in support of an application, she defined to the fact that she had invited the Plaintiff to the property to make minor repairs but not structural adjustments and that what this meant was **RENOVATION** and not **CONSTRUCTION**. There also seem to be nux in the numbers regarding the property transferred to her and Plaintiff, but she says that irrespective of the contradiction in the numbers, on the ground, it is the same property.

RENATO MARINI (pw 3) is a hotelier and land estate agent in Malindi, dealing in building and selling houses. It is his testimony that on 10/10/92 he offered to build a house for his friend **CAROLI JULIO** at a cost of 250 million Italian Lira. He received payment of that sum from **VINCENZA ALCAMO** (defendant) in respect of LR NO. 5881/8. He provided a meter for electricity and he made payment of Kshs.5000/- - this was later refunded to him by Defendant. He referred this court to documents on page 18-24 and 29 supporting his claim that Defendant paid him monies. He explained that **MARINI MARINO** is his son who got some payment from the Defendant as part payment for the house and he banked the money in Dw 3`s account. Dw 3 received payment of the last balance in 1994. A document transferring the money to Defendant and **FRANCESCA DECESARE** was drawn by **DON AMOLO ADVOCATE**.

Eventually the property was transferred to the Plaintiff and the Defendant on 30/09/92 by a document executed in offices of the late advocate, **BEN OCHIENG**. He denied being paid Kshs.1 million. However they could not trace the document which had been drawn by the late advocate **DON AMOLO**, so Defendant requested Dw 3 to sell 50% of the house and they would pay 50% to Dw 3 then transferred the property to Plaintiff and Defendant. He explains that in actual fact he did not receive Kshs. 1 million on that day as he had been fully paid all the money by Defendant, but for purposes of fulfilling the agreement, they recorded that he was paid Kshs.1 million in the year 2002. It is his contention that he could not have received Kshs.1 million in 2002 for the house, as the house had already been fully paid for.

On cross-examination Dw 3 explained that **CAROLI JULIO** to whom the offer was made was actually an intermediary, and once Defendant accepted the offer, he reduced the same into a contract/agreement. He explains that although the plot number reads as 5181/4, that is a mistake because he remembers a different number saying he received payment for property on plot No.5881/4 and that he has sold to the Defendant only one house in Malindi;- Further that the property he transferred to Defendant and **CESAR** in 1994 is the same one transferred to Plaintiff and Defendant in 2002 and if for some reason the number reads 5624, then he does not know how to explain that.

Both counsel filed written submissions and highlighted them MR MUHURI for the Plaintiff pointed out that the main issues are;-

1. Was the subject property jointly purchased by the parties
2. What was the state of the property in the year 2002
3. Was there any agreement between the parties to develop the property jointly
4. Did Defendant honour her part of the agreement

It is **MR MUHURI`S** contention that the evidence gives answers in the Plaintiff`s favour and the Defendant never contributed to the development. On the other hand the issues raised by **MR KINYUA**

are as follows:-

1. The parties cannot live together on the suit property
2. The property is not capable of being sub-divided and the solution lies in the court establishing (a) who paid for the plot he says it's defendant and awarded defendant its value (b) how much the plaintiff spend on improving the property – give her that (c) the current value of the property – and after taking into account (a) and (b), give Plaintiff a maximum of Kshs.5 million for rehabilitation, then whatever is left be divided in the middle.

It is common ground that whatever history the suit property may have, it is currently registered in the names of the Plaintiff and Defendant. It is also apparent that Plaintiff has made some improvements on the suit property. Whether Defendant is the one who gave out the entire sum for the property and was to be refunded later by the Plaintiff or whether each party paid separate amounts does not affect the fact that the property is currently registered in their joint names. Would Defendant claim ownership of the land minus the house? Did they buy the vacant land or land plus whatever structure stood on it.

MR KINYUA'S submission is that the suit premises is registered under the Registration of Titles Act (Cap 281) and the definition of land under that Act is this;- "land" includes land and benefits to arise out of land or things embedded or rooted in the earth or attached to what is embedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so embedded, rooted or attached, or any estate or interest thereon, together with all parties, passages, ways, waters, water courses, liberties, privileges, easements, plantations, and gardens thereon or the render, lying or being, unless specifically excepted.

Further that under the Interpretation and General Provisions Act (Cap 2), immovable property includes land, whether covered by water or not, any estate, right, interest or easement in or over any land and things attached to the earth, and includes a debt secured by mortgage or charge on immovable property. He also referred to the Land Conservation Act (Cap 283), which defined land to include land covered with water any estate or interest in land other than a charge, all things growing thereon and buildings and other things permanently affixed thereto. – The same definition is given under the Registration of Documents Act (Cap 285) and the Land Titles Act (Cap 282). All these statutes are called to demonstrate that this court has no jurisdiction to order that the buildings on the suit property do not form part of the land or decree or that it is only the Plaintiff who can enjoy the income out of the suit premises or use the buildings or other developments in the suit premises. This is because **MR MUHURI** has dwelt extensively on the financial input that Plaintiff has made towards construction in property which stands on the land, and which she has undertaken on her own without the Defendant's participation. I do not think Defendant is making any claim about contributing towards the improvements on the property in fact her portion is that the improvements were made without her consent. **MR MUHURI** urges this court to take into account the evidence of **DAVID MUIRIRURI** regarding his participation in the construction of the buildings which stands on the suit land. He further draws this court's attention to the valuation report by Basemark Consultants dated 2nd October 2002 which he submits has not been challenged and which indicates that the property was in a dilapidated state, so there could not have been a mere understanding between the parties for simple maintenance work and/or renovation involving only applying a fresh coat of paint.

MR MUHURI questions the credibility of Defendant saying that she initially had maintained that she purchased the suit premises on their own from one **RENATO MARINI** and denied the fact of joint registration, and in her counter claim she went ahead to plead that the developments and improvements stand on land purchased by herself. Then on her testimony, she agreed that she entered into an agreement with the Plaintiff that the property was to be jointly owned by each party at 50% and that she invited the Plaintiff to be jointly registered with her on agreement that Plaintiff would undertake the renovation.

He also questions the credibility of the defence witness **RENATO MARINI** when he says is not consistent in his testimony regarding transfer of the property, saying transfer was effected on 30/09/02,

yet in his earlier evidence he claimed to have received the entire purchase price by 1994 and that the property was wholly owned by Defendant. **MR KINYUA**'S submissions is that the Plaintiff has no evidence of payment of a single cent towards acquisition of the property or even registration of the transfer and that, it is the Plaintiff who paid 250,000,000 Italian Lira to **RENATO MARINI** in 1992 and transfer was duly effected in 1994. **MR KINYUA** further submits that Defendant had possession of the suit premises for 1993 when she completed payment up to 2005 when an interlocutory injunction was issued against her. During this time, she was paying for maintenance of the house and she had a tenant in the house – which is why the water and electricity bills for that period are in the names of the Defendant.

Of course if the property was purchased by Defendant alone – as suggested by **MR MARURI**, then how does she explain her evidence regarding joint ownership with the Plaintiff at 50%:50%. I also note that **RENATO MARINI** refers to difficult plot numbers – then to my mind is not an attempt by **MR MUHURI** to mislead the court – this was **RENATO MARINI**'s own testimony where reference to difficult plot numbers – then to my mind is not an attempt by **MR MUHUNI** to mislead the court – this was **RENATO MARINI**'s over testimony where refer to LR No.5881/8, then in cross-examination he referred to plot No.5181/4 although he says that was a mistake and although he says that was a mistake and that if the number is 5624 in the transfer signed in 1994, then he has no explanation. **MR KINYUA** had an opportunity to re-examine this witness on these differing numbers, but he did not address the same, instead he only referred to the differing numbers shown in the Deed Plans and the witness instance that the physical building/plot which he sold is the one and he same one for which Defendant paid.

I think we need to belabor the issue, from the Plaintiff's evidence, and from the Defendants own evidence, they are joint owners of the suit property which they had purchased at 50:50 share – that is shown in the transfer document under Transfer of Titles Act that is shown in the transfer document under Transfer of Titles Act. At the time of purchase, there was a structure on the property, which the Plaintiff has now improved on by way of further construction so as to change the character of the original structure which stood on the premises. If no other improvements had been carried out on the property, the parties would (upon disagreement) split the share at 50:50 by the value of the property. Of course it is myopic to act as though prices of property in Kenya, let alone the Coastal region, have been stagnant for the last almost 10 years – to that extent to even deny to think that this dispute can easily be resolved by simply ordering the Plaintiff to pay the Defendant Kshs.1 million, which is touted as the sum she paid for purchase of the is arguable. Land prices have skyrocketed to almost 5 or 6 times what they were eight years ago – that is a fact which I take Judicial notice of.

The other undeniable fact is an ably presented by **MR KINYUA**, that refer to land includes the attachments rooted thereto – so that there is no way a decision can just be made that one party takes the land value and the other party takes the land and house – that land happens to be the umbilical cord for the house. Furthermore, over the prosecution witnesses(including the gardener **ERIC**) confirm that there was an old worn structure standing thereon – I deliberately use the term “**old worn out**” – because if that were not the case, then Defendant would have no basis for saying that what she agreed upon with Plaintiff was to do some renovation work and general maintenance. I doubt that the entire structure was knocked down or demolished – otherwise Plaintiff would have adduced evidence of such demolition, and it is significant that both Plaintiff and her counsel refer to “**improvements**” – this of course involved construction work, as even Defendant confirms that the premises now boasts of a resort – even Plaintiff confirmed that she operated the place as a forest house/hotel and received monies from paying guests. There is no denying that the parties cannot both occupy or continue with the joint ownership of the property. The solution lies in getting the value of the property as at the date of purchase – with each side giving a different version as to costs, payments, value, then I am inclined to apply the balance of probability – **RENATO** who purportedly first sold the property to Defendant gives a value of 250,000/- Italian Lira which he stated was equivalent to Kshs.2.5m then. The Plaintiff says it was worth Kshs.2 million – almost ten years later – that is probable – it had duplicated because the state of the structure erected thereon had de.....- that was it probable that in 2002 its value was Kshs.2 million who paid for the purchase price? The Plaintiff does not have a single document to support her claims of payment of Kshs.1 million.

Defendant on the other hand says she paid to **RENATO MARINI** 250,000,000 Lira which would have

been 150,000Euros in the nineties. This money was paid to **RENATO** who issued a receipt produced as evidence – to acknowledge receipt of the money. Apart from that, there are a list of documents, all showing payment to **RENATO MARINI**. It has been submitted by **MR MUHURI** that what Defendant paid for related to a different property whose member is given as 5630. **RENATO MARINI** testified and explained that even if the numbers differ, the only property he sold to **ALCAMO VINCENZA** was the same suit property, and that the money he received from her was 250,000,000 Italian Lira. There is no evidence to suggest that he refunded that money to her then entered into a fresh sale agreement. What is presented even by Plaintiff is that he subsequently transferred the same portion to the Plaintiff and Defendant. These were not two different numbers. I say this because in a document produced by none other than Plaintiff herself – a document prepared by her regular valuer Basemark, and which was detailed to the last unit indicated as follow(that is the report and valuation of Residential Property(Kenyan House) upon plot 5630 Malindi dated 15th September 2009 has annexed to it the Certificate of Postal Search carried out as at 16th September 2009 and signed by the Registrar of Titles showing Plot No.5630(original NO.5181/8) Malindi. Under the encumbrances, it is clearly indicated that the plot was subdivided into various sub-plots and portion No.5630(Original No.5181/81) issued to **SILVANA DOMENICA BAROLI** and **VINCENZA ALCAMO**. However it does not explain what **RENATO** attempted to convey to this court, about No.5881/8 which is the number that features in respect of all the payments made by **VINCENZA** could then have been a mistake. **RENATO**(who it seem suffers severe back injury) gave his evidence while lying down, he appeared to be in a lot of pain and felt bothered by the inquiries regarding something which he no longer had an interest in, having disposed of it. Could it be that he subdivided the plot 5630 into many plots and 5881/4 was a separate one from 5181/1 which was eventually transferred to the parties here. What about his insistence that he only sold to Defendant one house and that the same property transfer signed in 1994, the original number is given as 5624? **RENATO** was not able to fully expenses this on cross-examination saying;-

“I cannot remember, it’s a long time ago. I may have forgotten. I have no idea why the 2002 has a different number – how can I remember such minute details – I never noticed those variances in number. What I was paid for is that house – whatever the plot number.....”

It is curious that despite all the claims about payment of the Kshs.1 million (which was a lot of money in 2002, Plaintiff does not have evidence of payment, not a cheque, money transfer, withdrawal of such amount from the bank, and the person who she claims to have made payment to denies receiving money for such purchase – did he end up selling the same property twice to Defendant? But then again it is not settled whether it was the same property and evidence by either side does not assist the court much. How does evidence tilt the balance of probabilities in any great direction towards one party. There is probably that **RENATO** sold the same property to **VINCENZI** and **CEASAR** effected transfer, **CESARO** pulled out and **SAROLI** came in and he then effected the subsequent transfer in 2002 – which would mean that the monies allegedly paid by **SAROLI** was for processing transfer. But there is also the probability that the property he transferred to the Plaintiff and Defendant was a different one, as it bears a difficult number – the only thing then is that in this second scenario, it lacks a “history” a background to support the payments made by **SAROLI** for purchase and she just seems to have happed onto the scene and fitted in any at the transfer stage. She also appears to be a stickler for records on detail, keeping receipts for even petty purchases such as cigarettes, beer and chocolates, yet she did not find it necessary to keep one document to confirm that she parted with Kshs.1 million – at least even if **RENATO** did not give her a document acknowledging receipt she surely must have some document relating to the source of money such as bank withdrawal slip, money transfer, cheque – she has nothing.

If there was an error in the plot numbers recorded by **RENATO**(who is now ailing and very grumpy), then this has also not been satisfactory explained. The upshot is that neither the Plaintiff nor Defendant has proved what they paid for purchase of plot 5181/8 and I will not award either of them the sum sought for initial purchase. What the evidence proves is that the property was eventually transferred into the names of the Plaintiff and Defendant and they now own it as 50:50%.

When valuation was carried out in September 2005, the same valuer assessed its worth at Kshs.24,

500,000/- it is noted that construction works had been completed, - naturally the value would appreciate markedly. In September 2009, the same valuer prepared another valuation reporting assessing the value of the property at Kshs.60,620,000/-. **MR KINYUA** maintains that this was despite the fact that no further works or extensions were done on the property since 2005. Out of that sum, the value of the land is given as Kshs.16,900,000/-.

(b) There is the fact that a structure had been on the premises, at the time of purchase it was not operating as a resort. The valuer's report of 2002 confirmed there was a residential house, a garage, a swimming pool, wall, fence, gate and garden. The house is described as a single storey building house which has a foundation (which was reinforced mass concrete foundation, the floor was cemented sand screed finish, but cracked and in poor condition. The walls were made of brick but not plastered or painted internally or externally with visible cracks. The roof (unlike what is touted by witnesses) had not collapsed but was made of makuti with timber trusses – the roof was in very poor condition and had no ceiling. The doors were made of alternate softwood panel and T and G timber but rather old and cracking. The windows had timber shutters, old and falling off. The structure had a lounge cum dining room, 4 bedrooms, 1 kitchen room which was incomplete, one toilet whose construction was incomplete and an incomplete shower room. The garage was also incomplete and in poor condition, it was made of makuti roof built upon timber trusses and brick walling materials. The floor was earth or loose and it had no doors or windows. The swimming pool was of standard size but had been abandoned and was in poor condition. There was a perimeter wall built using bricks, enclosing the entire compound. It was in a rather poor condition with the brickwall exhibiting circles and the wall generally falling and in need of major reconstruction and repair. The gate was a double opening steel metal one in good condition. The value of the property was then given at 1,300,000/- with the following breakdown.

Land	- 590,000/-
Main House	-300,000/-
Garage	- 30,000/-
Swimming Pool	-300,000/-
Fence/Perimetre water	- 60,000/-
Gate	- 20,000/-

This valuation report was relied on by Plaintiff and it then suggest that the parties were overcharged almost double when they made the joint payment. The second valuation report made in 2005 – does not suggest a fresh construction but an improvement on the double storey dwelling house as follows;-

-The foundation had the reinforced main concrete.

The floor had alternate terrazzo and floor tiles.

The walls were made of bunch which were well plastered and painted both internally and externally. There were beautiful flower decorations in all rooms of great aesthetic value and visual appearance. The roof had Canadian tegola roofing material upon hardwood T & G design timber trusses with ceilings made of reinforced concrete for the ground floor and open Canadian tegola and T & G hardwood trusses and Casuarina poles on the upper floor. The doors were now made of hardwood Lamu antic door with burglar proofing steel metal. The windows were made of Lamu antics similar to the door. There appeared to be further improvement on the ground floor which had a large, television room, dining room, an enclosed verandah cum restaurant, 4 bedrooms each ensuite with toilet, shower and an conditional a large kitchen room complete with and was plastered and decorated. There were three steel metal gates, two big double opening ones for vehicle usage and one single gate for pedestrian use, all in good condition. The garden was beautiful and well tended with flowers and King Palm trees. There was a single concrete paved driveway leading to the compound from the eastern approach. The entire piece was described as aesthetically appealing and attractive – adding enough there was no separate valuation for the land and one for the houses. I wonder why this distinction was not found necessary in this report, yet by 2005 the parties had already fallen out with Defendant indicating her unwillingness to make any financial contribution. My own perception is that Basemark deliberately undervalued the property in the initial assessment report, by tailoring it to suit the Plaintiff's interest

because her belief was that the Defendant would only be entitled to a refund of the value of the property as at 2002 and nothing more. By 15th September 2009 another valuation done by the same valuer attached photographs showing layout of the property and it gave the open market value as Kshs..... cupboards, concrete worktops, shelve, taps and a separate shore. There was a laundry room with a washing machine and one guest toilet cum bathroom with an overhead shower. On the upper floor was a lounge, enclosed balcony cum restaurant, a Television room, 3 bedrooms each ensuite with toilet and shower – air conditioned. There was a bungalow (that is a single storey residential buildings structure covering a total area of 749.23 square feet. It had a lounge, two bedrooms each ensuite with bathroom, toilet and dressing room. There were staff quarters which confirmed a single storey residential building structure covering a total of 378 square feet – basically it was a bed sitter with a single room, small kitchen and toilet with an overhead shower. The garage was now a modern building constructed using building materials similar to the ones used to construct the main house. The garage had a large double opening wooden door of Lamu antic but no windows. The swimming pool now was in good condition and functional with a machine room. The perimeter wall had the bricks.

60,620,000/- forced sale value(which would be the reserve price for mortgage)

Purposes Kshs.45,500,000/- and insurance value @ Kshs.42,400,000

A breakdown of the open market value comprised the following

Land - Kshs.16,900,000/-

Main House Kshs.30,300,000/-

Guest House – Kshs.2650,000/-

Staff Quarter-Kshs.860,000/-

Engine Room-Kshs.610,000/-

Swimming Pool-Kshs.2,800,000/-

Fence wallings and Gates – 4,500,000/-

Landscaping, Trees and Grass come Kshs.2,000,000/-

Going by the definition of what constitutes land, and because it is abundantly clear that the joint ownership cannot continue, and the property cannot be split into equal portion, especially because there are buildings standing thereto, then the only realistic approach is to first consider the improvements Plaintiff has made – this can easily be deceived form the reception she produced to determine the costs of materials and labour, - that would certainly be Plaintiff`s exclusive entitlement. Receipts relating to items such as leisure snacks, groceries and foods, on my view have not been sufficiently demonstrated as having been purchased for the use of person working at the site. Those receipts total a sum of Kshs.4,037,570/-. Secondly the Guest House, staff quarters and Engine room are new address which did not exist at the time the property was purchased. I have no doubt that they were erected solely by the Plaintiff the value is Kshs.2650000+860,000+610,000/- for these new extensions to give a total of 4,120,000.

That is the Plaintiff`s entitlement and which Defendant cannot reap form as it would result in unjust enrichment. This means that even if Plaintiff opted to keep the premises, then its value would be less the value attached to these structures. If the Defendants elects to keep the property then she would have to compensate the Plaintiff for the value of these structures. This then now leaves the bounce as the current value of the land(being Kshs.16,900,000), the main house valued @30,300,000/-, the swimming pool Kshs.2800,000/-, fence, walls and gate Kshs.4,500,000/- landscaping trees and grass Kshs.2000,000 as a balance of what constitutes land and this total value must then be shared equally between Plaintiff and

Defendant – the total being Kshs.56,500,000 on the assessed current market value in 2011. This means that the party wishing to retain the entire property would have to pay the one opting out half that assessed market value.

As for the counterclaim, really do not know how the figure proposed by **MR KINYUA** is arrived at that is 42,646,084 – there was no evidence even on cross-examination as to how the Defendant contributed towards selling up of the hotel business, no evidence that she injected any capital or participated in running the business and I think that is a rather ambitious and far fetched pursuant by Defendant. She is not entitled to that nor is there any reason why she should claim exemplary or aggravated damages. The counter claim is not proved and is dismissed. For purposes of clarity these are my findings;-

1. Both Plaintiff and Defendant own the property jointly and are entitled to its value at 50:50. There is no reason whatsoever to decline one party as the sole owner of that property.
2. The Plaintiff made improvements and renovations which from the receipts(I have excluded receipts for furniture, food and snacks) for building materials and labour charges total 4037, 470. Plaintiff is entitled to that sum which means that if they disagree on who should retain and who should compensate, then the building would be sold at its assessed value at time of sale and proceeds split into half less Kshs.4,037,470 being the cost of building materials and which would be the Plaintiff's entitlement so she would be entitled to half value of property plus 4120,000 (Guest House, Noand Staff Quarter) – so Plaintiff is entitled to Kshs.8,157,470/-.
3. The Defendant claims to have put furniture in the house but the valuation report shows the house did not have furniture. I need not assess the value of the furnishings and ornaments placed to add aesthetic value to the property – clearly those belong to Plaintiff.
4. The counter claim is dismissed.
5. Each party shall bear its own costs.

Delivered and dated this 23rd day of June 2011 at Malindi

H A OMONDI

JUDGE

MR MUHURI for Plaintiff

MR KINYUA for Defendant

20/7/2011

Coram

Before Hon Lady Justice H A Omondi

Douglas Randu-c/c

Mr Muhuni for the Plaintiff

Mr Kinyua for the Defendant

Court;-In the calculations some receipts were erroneously included in working out what was due to the Plaintiff – i.e receipts for 7 doors reading Kshs.32,100/- and which was admitted on cross-examination have been altered and ought to have read Kshs.300/- per door, so the total ought to read as 2100. The amount is reduced by Kshs.30,000/-.

(2) Receipt for order of windows was Kshs.8000/- altered to read 38,000/- it should be reduced by Kshs.30,000/-

(3) Receipt for Kshs.800/- being fax charges, is removed completely.

The total amount awarded to the Plaintiff should be less 60,800/- on item No.2 in last part of judgement. This is done under section 99 CPA.

H A OMONDI
JUDGE
20/07/11