REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 321 of 2002

ZIPPORAH MUMBI NGUGI ……..……..……..PLAINTIFF

VERSUS

JOSEPH NJUGUNA NGAE ……...……..1ST DEFENDANT

TIGER FARM LIMITED …….....……..…….2ND DEFENDANT

KIMUNYU COFFEE PLANTATION LIMITED……3RD DEFENDANT

M.A.D. WOOD sued as Executor of the

Will of CECIL GEORGE ALLEN DREW……...…..…4TH DEFENDANT

GOLDEN FLEECE LIMITED…… ……..…..5TH DEFENDANT

JUDGEMENT

In the amended plaint dated 13th March 2002 the plaintiff seeks the following orders: -

(a) A declaration that the 1st Defendant owns 59,993 shares registered in his name in the 1st Defendant upon trust for the Plaintiff.

(b) A permanent injunction to restrain the 1st Defendant from selling transferring or mortgaging to any person the said 59,993 shares.

(c) A permanent injunction to restrain the 5th Defendant from disposing or dealing with land reference 4945/2 Karen.

(d) A permanent injunction to restrain the 5th Defendant from registering any transfer from the 1st Defendant to any person of the 59,993 shares registered in the name of the 1st Defendant in the 5th Defendant.

(e) An order that the 5th Defendant do register the Plaintiff as a shareholder of the 59,993 shares.

(f) Costs of this suit.

After the close of her case the plaintiff applied for leave of this court to amend prayer (a) to read a declaration that the 1st Defendant holds 59,993 shares registered in his name in the 5th Defendant upon trust for the plaintiff. She also requested that an order that the 1st defendant do transfer to the plaintiff forthwith the 59,993 shares registered in his name in the 5th Defendant. It is alleged the purpose of the amendment sought is to facilitate the grant of reliefs on the understanding that the trial has come to an end. And the said amendment does not require any evidence to be adduced by any party.

The starting point for me is whether to allow the said application for amendments so as to determine the real question or controversy between the parties. From what I gather from the submissions made by the plaintiff the purpose of the amendment is to correct the defect or error in the proceedings that are before court. In order to determine the real question in controversy between the parties it is within the powers of this court to allow the application by the plaintiff. In my understanding there is no injustices that would result from the said application being allowed therefore the application to incorporate the reliefs sought by the plaintiff into the plaint is hereby allowed.

The plaintiff's claim is that sometimes in January and July 1997 she gave a total of Kshs.34,513,716/= to the 2nd and 3rd defendants. The alleged money was effected through bank transfers carried out between the Plaintiff and the 1st defendant. It is alleged that the money was given to the two defendants pursuant to a request by the 1st defendant. The 1st defendant was to hold the money in trust for the plaintiff to be returned to her at a future date when the need arises. It is the contention of the plaintiff that the 1st defendant allegedly using the said money proceeded to purchase 59,993 shares in the 5th defendant. It is contended by the plaintiff that the 59,993 shares registered in the name of the 1st defendant in the 5th defendant company are hers because;

(1) They were purchased with the plaintiff's Kshs.30 million which was part of the purchase price of her property LR NO.214/107 Muthaiga which she sold for Kshs.33 million in 1995 therefore the 1st defendant holds the said shares upon a resulting trust which arises by operation of the law.

(2) Through the doctrines of following a trust asset and tracing the same the plaintiff follows the proceeds of her Muthaiga house to the shares registered in the name of the 1st defendant in the 5th defendant.

(3) The background to the registration of the 1st defendant as holder of 59,993 shares in the 5th defendant started with the 1st defendant meeting the plaintiff in 1995 when she was selling her Muthaiga house to start a new life after her marriage with **Michael John Tomkinson** broke up. Upon the house being advertised for sale the 1st defendant went to the plaintiff as an interested purchaser. After meeting the plaintiff for the purchase of the said house, the 1st defendant adopted a close relationship with the plaintiff. He became the lover of the plaintiff instead of becoming a buyer of the property. It is contended by the plaintiff that the 1st defendant became her lover and adviser on how to invest the net proceeds of the sale which she had deposited on a fixed account with **ABN Amro Bank**.

(4) On advice of the 1st defendant the plaintiff opened with **Prudential Bank Limited** and **Daima Bank Limited** two deposit accounts of Kshs.10 million each on 4th July 1996 with an interest of 25% interest per annum. At the time the 1st defendant's two companies namely 2nd and 3rd defendant and another one known as **Mbuzi Farm Limited** had accounts with the two banks. It is the case of the plaintiff that a **Mr. Kahumbura** and **Sam Mumbi** were the directors of the two companies which was controlled totally by the 1st defendant.

(5) On 4th October 1996 the plaintiff removed a sum of Kshs.9,366,361/= from **ABN Amro Bank** and invested the said sum with the same banks as directed by the 1st defendant with an interest rate of 25% per annum. A sum of Kshs.5,366,361/= was deposited in a fix deposit account with **Prudential Bank Limited** while the balance of Kshs.4 million was deposited with **Daima Bank Limited**.

(6) In late 1996 and early 1997 after the plaintiff had transferred to **Prudential Bank Limited** and **Daima Bank Limited** a sum of Kshs.29,366,361/= from her **ABN Amro Bank** three important events happened;

(a) She accepted the 1st defendant's proposal to marry her which came together with request that the two begin a family immediately. As a result of that mutual agreement the plaintiff conceived a child belonging to the 1st defendant.

(b) The plaintiff who was getting threats to her life from her former husband developed a need for somebody to hold her money and the natural person to do so was the 1st defendant who offered to assist since they were close friends. The former husband was bitter about the loss of his interest in his Muthaiga house and on an application made before the English High Court the plaintiff paid a sum of Kshs.10 million for their son's education in England.

(c) It was under the aforesaid circumstances that the plaintiff at the request of the 1st defendant transferred to him through the 2nd and 3rd defendant a sum of Kshs.15,237,494/= on 9th January 1997 and Kshs.5,061,799/= on 6th January 1997. At the time of the said transfers the plaintiff did not deal at all with the 2nd or 3rd defendant. And that the 1st plaintiff told her he would hold the money until she needed it. The plaintiff alleges that at the time of the transfers the 1st defendant was the signatory of the bank's accounts of the 2nd and 3rd defendants with **Prudential Bank Limited** and **Daima Bank Limited** and controlled the operations of the two companies.

In her case before this court, the 1st to 3rd defendants are the ones who handled her monies before it was invested in the purchase of shares in the 5th defendant. And her cause of action is based on equitable doctrines of trust and equitable remedy of tracing trust properties. In essence the property owned by the 5th defendant in which the 5th defendant is the registered legal owner of 59,993 shares in LR NO.4945/2 Karen is where her money was used in the transaction carried out by the 1st defendant in the purchase of the said shares. The plaintiff's case is that the 1st defendant holds the shares in the 5th defendant upon a resulting trust because she is the one who contributed the purchase price taking the form of monies that she transferred to the 1st defendant through the 2nd and the 3rd defendants on 6th and 9th January 1997. In her evidence before court she contended that when transferring her monies to the 2nd and 3rd defendant's accounts in January 1997 she did not deal with the said companies at all but she only dealt with the 1st defendant.

PW2 told the court that the shareholders in the 3rd defendant in 1997 were the 1st defendant and **Mbuzi Farm Limited** while the 2nd defendant had the 1st defendant and his brother **Michael Muhia** as the shareholders.

The 1st defendant on his part relies on his defence dated 26th March 2002 and prays that this suit be dismissed. He stated that there is a similar suit HCCC No.170 of 2001 and which has not been determined and which largely covers the issues that are before this court. The 1st defendant states that this suit on its face is an abuse of the court's process and discloses no reasonable cause of action against him. He has averred that the plaintiff has not proved the averments and the allegations set out in the amended-amended plaint. It is the case of the 1st defendant that the plaintiff has not proved that she transferred any of the sums alleged directly to him and that any monies were also transferred to him by the 2nd and 3rd defendants. In his view no trust document was produced to show any fiduciary relationship between the plaintiff and the 2nd and the 3rd defendants. And since the 2nd and 3rd defendants are distinct entities from himself, then he cannot be liable for the acts and omissions of the said companies. It is the contention of the 1st defendant that he purchased the shares in the 5th defendant in his own name using funds from his own person sources and not from 2nd or 3rd defendants. And in that context he relied on the following documents;

(a) The agreement of sale dated 30th November 1999.

(b) The letter dated 31st July 1997 in his bundle.

(c) The cheque dated 19th December 1997 for Kshs.10 million payable to **K. H. Osman** marked No.31 in his bundle.

(d) The cheque dated 19th August 1999 payable to **Jockey Club** for Kshs.3,000,000/= marked No.52 in the bundle.

(e) The cheque dated 14th September 1999 for Kshs.7,000,000/= payable to Lake Nakuru marked No.53 in the bundle.

(f) The handwritten request by the **Late George Drew** marked No.51 in the bundle.

(g) Cheque dated 27th October 1999 for Kshs.1.5 million paid to the late George Drew which is document marked No.54 in the bundle.

(h) Cheque dated 12th November 1999 for Kshs.1 million payable to **George Drew** which is document marked No.55.

(i) Cheque dated 22nd November 1999 issued by the 1st defendant to **George Drew** for Kshs.500,000/=, which is document marked No.56.

(j) Letter dated 1st December 1999 marked No.57 from the Advocate for the 5th Defendant **Mr. K. Osmond,** acknowledging the receipt of Kshs.10 million from the Plaintiff.

The 1st defendant also produced documents showing the source of funds for the purchase of shares in the 5th defendant;

(a) Sale of land reference No.3734589 for USD 510,000. The cheque showing the sums he received is dated 5th November 1999 and has been produced before this court.

(b) The 1st defendant also relies on documents marked 28, 29 and 30 in his bundle showing that he charged his property land reference No.4393/7/6 to receive a sum of Kshs.9369250/= from **Housing Finance Company of Kenya**. The cheque is dated 25th November 1997.

(c) The 1st defendant also produced a letter dated 14th April 1998 showing that he invested in a treasury bill with a face value of Kshs. 10 million. He also produced a letter which was marked No.42 and which is dated 6th July 1998 and which he requests for discounting of the said Treasury bill. Again he produced a letter marked No.43 in his bundle and dated 6th July 1998 showing that he received the discounted Treasury bill in the sum he earlier invested.

(d) The 1st defendant also relies on the agreement for sale marked No.10 in his bundle and dated 1st November 1995 showing that he sold his property in Kajiado for Kshs.4.5 million. The receipt of the money is evidenced through a letter dated 13th November 1996 for Kshs.4083376/=.

(e) The 1st defendant further relied on the letter dated 19th October 1998 marked No.48 in his bundle showing that he sold land reference No.Kajiado/Kaptiei/North/4276 for Kshs.3 million.

In short it is the case of the 1st defendant that he did not receive or use money belonging to the plaintiff or to the 2nd and the 3rd defendant to purchase shares in the 5th defendant. His contention is

that the 59,993 shares he bought in the 5th defendant constitutes his own property and has nothing to do with the funds allegedly transferred to him by the plaintiff through his companies.

The 2nd and the 3rd defendant relied on joint defence dated 26th March 2002 and stated that no prayer is sought against them in this suit and none should not be granted. They stated that they are solvent and that the plaintiff has not given sufficient evidence to enable this court to lift their veil of corporation. In particular the 2nd defendant has denied having received Kshs.15,237,174/= from the 1st defendant. And it contended that since the plaintiff did not produce any evidence, the alleged deposit slip dated 9th January 1997, the alleged transfer has not been proved. On the other hand the 3rd defendant denies having received Kshs.5,061,799/= from the plaintiff and contends that the plaintiff has failed to prove transfer of the said sums into its account. It was contended by the 2nd and the 3rd defendants that the plaintiff has not proved her claim against the said two companies, therefore this court cannot lift the veil of corporation in respect of its directors or shareholders. Further it is the case of the 2nd and 3rd defendants that no connection has been made between them and the 1st defendant other than that the 1st defendant is a director and shareholder of both companies. And that alone cannot form the basis of an alleged trust or for lifting the veil of corporation. They also state that that they are not shareholders in the 5th defendant and none of their assets was used in purchase of shares in the 5th defendant by the 1st defendant. It is the contention of the 2nd and the 3rd defendants that they were limited liability companies carrying or trading, held their own assets and were not insolvent at the time this suit was instituted or at all. No demands were made by the plaintiff to the 2nd and the 3rd defendant for the alleged payments. It is also contended that the 3rd defendant is a going concern and all assets which were valued at Kshs.65 million and that the plaintiff gave no reason why she has not pursued the assets of this company under trust or contract or a simple claim for money it had received. The 2nd and 3rd defendant further contend that they had been sued in HCCC No.170 of 2001 and that the particulars of trust and particulars of interest of that suit are substantially different from those in the present suit.

The case against the 4th and 5th defendants is merely preferral or procedural since the 4th defendant has been sued as the executor of the will of **Cecil George Allen Drew** who sold his shares in the 5th defendant to the 1st defendant. On the other hand the 1st defendant allegedly used monies from the plaintiff to purchase 59,993 shares in the 5th defendant. In essence the 4th defendant is one of the directors of the 5th defendant and at the same time as an executor of the will of **Mr. Cecil George Allen Drew** who sold some shares to the 1st defendant.

After the close of the respective cases of the parties herein the advocates made extensive and exhaustive written submissions which I have taken into consideration. **Ms Kilonzo** learned counsel for the 1st, 2nd and 3rd defendants submitted that the relationship (fiduciary) has not been established in evidence by the plaintiff. In her submissions she contended that a fiduciary relationship between the plaintiff and the 1st defendant was an essential ingredient in the success of the plaintiff's case. The shares of a company are distinct from the company and that the shareholder has no special rights on the shares which only entitles him the right to vote. **Ms Kilonzo** advocate submitted that the 1st defendant is a minority shareholder in the 5th defendant therefore this court should not place a fetter on the assets of the 5th defendant. By doing so it would take 25% rights of other shareholders to determine the management of the company. The shares in a company constitute of a property and this is recognized under Cap 486 Laws of Kenya. Further **Ms Kilonzo** submitted that if this court should find that in deed the shares of the 1st defendant in the 5th defendant were purchased using monies belonging to the plaintiff, then her claim should stop at those shares and should not be extended to the property of the company namely LR NO.4945/2 in Karen.

It was the submission of **Ms Kilonzo** that under section 119 of Cap 486, no trust can be registered against the shares of a company and since no prayer for ratification has bee made, then the case of the plaintiff must fail. She also contended that the plaintiff has not proved the transfer of money to the 2nd and 3rd defendants as she did not produce exhibits i.e. instruments or documents showing payment or

transfer made or effected into the accounts of the two companies. Therefore, it was her submission that there is no proper claim against the 1st, 2nd and 3rd defendants.

On his part **Mr. Nyaencha** learned counsel for the 4th and 5th defendants submitted as follows: That there is absolutely no claim and no prayer against the 4th and 5th defendants. And in that regard no cause of action has been established against them. As against the 5th defendant, for the prayers to succeed the remedy of following and tracing must be in the first instance be established against the 2nd and 3rd defendant. He stated that following is about how the money moved from the accounts of the plaintiff into the 2nd and 3rd defendants. In deed the plaintiff would have looked into the accounts of 2nd and 3rd defendants that the money had arrived and it was subsequently transferred into the accounts of the 5th defendant. The plaintiff should have also proved that the money was used to purchase shares in the 5th defendant. And since there is no evidence to show that the money disappeared to the party it is traced from or that it was lost through the acts and designs of the 2nd and 3rd defendants, then the claim against the 5th defendant cannot succeed. **Mr. Nyaencha** submitted that tracing is a process of identifying property/money from the old to the new. For that reason there has to be systematic evidence of tracing money into the accounts of the 2nd and 3rd defendants and how it left the custody of those two defendants into the purchase of shares in the 5th defendant.

On behalf of the plaintiff **Dr. Kuria** submitted that the concept of fiduciary is broad and wide. And that the 1st defendant was in fiduciary relationship which he breached. He stated that the plaintiff's case is that her money was transferred from her accounts to the accounts of the 2nd and 3rd defendants under instructions from the 1st defendant. The said money was later mixed up with the assets of the defendants. Under such circumstances it is the duty of the fiduciary to demonstrate when he took out money from a mixture, he only took out his money and not that of the plaintiff. He stated that what the 2nd and 3rd defendants should have done was to bring statements of accounts to show that the monies deposited in those accounts first did not belong to the plaintiff and secondly if it did it was not used in the purchase of shares in the 5th defendant. Therefore, he asserted that the 1st defendant cannot be allowed to say that he bought shares in the 5th defendant with his own money while he spent the plaintiff's money. In short it was the submission of **Dr. Kuria** that there is no distinction between shares and other properties as contended by the defendant's advocates hence he urged me to allow the plaintiff's case with costs and interest.

I have considered the evidence as tendered by the five plaintiff's witnesses and the documentary evidence in support of the plaintiff's case. I have also taken into consideration the evidence given by the 1st defendant and that given by DW1 **Kenneth Mwangi** on behalf of the 2nd and 3rd defendants. The 4th defendant and the 5th defendant did not call any witnesses since their case was limited to matters of procedure. It is important to note that after the plaintiff completed its case and after hearing the evidence of DW1, **Ms Kilonzo** learned counsel for the 1st, 2nd and 3rd defendants made an application to withdraw the counterclaim of the 1st defendant dated 26th March 2002. The basis of that application was that the 1st defendant has another or similar counterclaim in HCCC No.170 of 2001 between the plaintiff and the first to the 3rd defendants. And since there was no objection to the application to withdraw the counterclaim, the 1st defendant's application was allowed with no orders as to costs.

The pertinent issues in this case is whether the 1st defendant received monies from the plaintiff through the 2nd and 3rd defendants and which was subsequently used in the purchase of shares in the 5th defendant. The 1st defendant in his evidence before court has denied having received any money from the plaintiff and has demonstrated or shown to court an alleged independence source of cash for the purchase of shares in the 5th defendant. The 1st defendant also asserted that no link has been established by the plaintiff by way of documentary proof to connect the 2nd and 3rd defendants with the 5th defendant. It is important to establish that money jumped hands and landed with the grasp of the 1st defendant who then used the same or part of it to purchase shares in the 5th defendant. To establish the existence of a trust it

is essential to show that money was given to the 1st defendant by the plaintiff and that he had used or applied the said monies in purchasing shares in the 5th defendant. For the plaintiff to trace or succeed in her pursuit, it is required for her to show;

(1) The money is being given in trust.

(2) To establish to whom it was given.

(3) To establish its movement or substituted items purchased by the said money.

In my understanding a resulting trust arises where a person purchases property using monies provided by another. The advance of the purchase price by the donor need not appear on the face of the deed. In such circumstances where no deed exists the person intending to benefit from a resulting trust is required to prove the existence of the same by way of oral evidence. In short where a property is purchased in the name or placed in a position of a person without any intimation that he is to hold in trust, the law presumes that the parties had intended to create a resulting trust and the same is held to be equitable. In this case the evidence of the plaintiff is that while in vulnerable position the 1st defendant duped her to transfer her monies from fixed accounts which were earning substantial interest into his companies. Having been involved in a failed marriage and having entered into an intimate and cordial relationship with the 1st defendant the plaintiff alleges that she transferred her monies to the 1st defendant, without differentiating between him and his companies. The evidence of DW1 in the course of cross examination proved that indeed that the 1st defendant controlled the 2nd and 3rd defendants. PW2 testified on the history of the incorporation of the 2nd defendant in 1989 and thereafter when the sole shareholders and directors were the 1st defendant and his brother **Michael Muhia**. The 1st defendant also confirmed to court that indeed he was the one who controls the 2nd defendant's bank account held at **Prudential Bank Limited**. The plaintiff told court when transferring her monies to the 2nd and 3rd defendant's accounts in January 1997 she did not deal with the 2nd and 3rd defendants at all. She stated that she only dealt with the 1st defendant. Again PW2 told court that the shareholders in the 3rd defendant in 1997 were 1st defendant and **Mbuzi Farm Limited**. It was contended on behalf of the plaintiff that the 1st defendant control of these companies was such that even their company secretary DW1 did not know that they had accounts at **Prudential Bank Limited** and **Daima Bank Limited**.

There is ample evidence which was not properly contested by the defendants that sometimes in January 1997 sums of monies Kshs.15237494/= and Kshs.5061799.85 had been transferred into accounts of the 2nd and 3rd defendants. This evidence was confirmed by PW3 and PW5. Again as clearly stated by the 1st defendant and his witness DW2 **Kenneth Muira Mwangi**, the 1st and 2nd defendants had no business relationship with the plaintiff. They even claim that the plaintiff's monies were not received by 2nd and 3rd defendants. However, the 1st defendant admitted that the 2nd and 3rd defendants had bank accounts with **Prudential** and **Daima Bank Limited** and the 1st defendant was the sole signatory to those accounts.

PW3 **Stephen Nderitu Ndungu** produced documents to show a sum of Kshs.15,237494/= was transferred to the 2nd defendant's account at the same bank.

PW5 **Hannington Tabu** produced documents to show that indeed the plaintiff's Kshs.5,061,799.85 was transferred to the 3rd defendant's account with **Prudential Bank limited**. The evidence of the 1st defendant was that he was the sole signatory to the said account.

I am therefore satisfied that since no dealings was undertaken between the plaintiff and the 2nd and 3rd defendants, the real recipient of the money was the 1st defendant. The 1st defendant therefore, cannot shield himself from his obligation to account and return monies entrusted to him by the plaintiff. By asserting the veil of incorporation to refuse to explain what happened to the plaintiff's money after it was deposited into accounts held by the 1st defendant's companies at **Prudential** and **Daima** Banks, the 1st

defendant is founding his claim for failure to explain on deceit and deception. The law is very clear that no person shall be allowed to take advantage of his own wrong. And that a reasonable judicial officer directing his mind the facts before would rule that the 1st defendant had received monies from the plaintiff which money is liable to return. Having made a decision that the money belonging to the plaintiff was transferred to companies directly under the control and management of the 1st defendant, then the 1st defendant has an obligation to offer a reasonable explanation as to where the money went. The point I am making is that the 1st defendant is using the intricacies of Cap 486 to take advantage of his own wrong, however, a man cannot be allowed to use a Statute as an instrument of fraud. In my understanding of the 1st defendant's case is that although he is the sole signatory to the accounts where the money of the plaintiff ended up, he has nothing to do with where the money went and that he cannot offer a legitimate explanation to the plaintiff.

In the case of **Hallet's Real Estate (1879-80)13, Equity, 696 Jessel M. R.** held;

"**The guiding principle is that a trustee [like the 1st to 3rd defendants herein] cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains the subject to the trust. A second principle is that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own", that is, the trust property comes first. … Then he says, "If a man has 1,000 pounds of his own in a box on one side and 1,000 pounds of trust property in the same box on the other side, and then takes out 500 pounds and applies it to his own purposes, the court will not allow him to say that that money was taken from the trust fund. The trust must have its own 1,000 pounds so long as a sufficient sum remains in the box. So here, Edwards could not be allowed to say that the Two Hundred and Eighty Four pounds deposited in the Bank of England was his own, and that the trust portion of the fund was that which he took abroad with him and from which he drew as he required for his own purposes. There is, therefore, no difficulty in treating that sum at the bank as belonging to the trust together with what remains of the sum which he took abroad. …Now, first upon principle, nothing can be better settled either in our own law or, is suppose, the law of all civilized countries than this that where a man does an act which may be rightly performed he cannot say that that act was done intentionally and in fact, done wrongly. A man who has a right to entry cannot say he committed a trespass in entering. … when one comes to apply that principle, the case of a trustee who has blended his trust monies with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust money with a bag of money of trustees own. Suppose he has a 100 sovereign in a bag, and he asked them another 100 sovereigns of his own so that they are co-mingled in such a way that they cannot be distinguished and the next day he draws out for his own purposes 100 pounds, is it tolerable for anybody to alee that what he drew out was the first 100 pounds, the trust money, and that he misappropriated its own 100 pounds in the bag. It is obvious he must have taken away that which he had a right to take away, his own 100 pounds. ….I will first of all take his position when the purchase is clearly with what will call, for shortness trust property, although it is not confined as I will show presently to express trusts. In that case according to well established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased or to hold it as security for the trust money laid out in the purchase; or as we generally express it, he is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money."**

In this case the plaintiff contends her money was used by the 1st defendant to purchase 59,993 shares in the 5th defendant. She has therefore elected to take the property rights or interest that belongs to the 1st defendant in the 5th defendant. On the other hand the 1st defendant stated in his evidence that he used his own monies to acquire shares in the 5th defendant. He has brought before court documentary evidence to show that he sold his properties and other interests in order to acquire shares in the 5th defendant. In such circumstances it is incumbent upon the plaintiff to show that the money paid to the 2nd

and 3rd defendants was used in the purchase of shares in the 5th defendant. The plaintiff's case is that the 1st to 3rd defendants mixed up her monies with their monies and they are under equitable duty to separate their monies from her own and if they fail to do so the assets purchased with her monies belongs to her. It is contended that the 1st defendant is the human agent of the 2nd and 3rd defendants and it is through him that the two can account for the monies transferred to him. If the monies are not in those accounts he is the one who withdrew it. The question is whether such a proposition is tenable in law. First of all there is no evidence to show that monies deposited by the plaintiff into the accounts of 2nd and 3rd defendants was withdrawn by the 1st defendant and which he used in acquiring shares in the 5th defendant. In the absence of documentary evidence to show that the 1st defendant used his human position to withdraw monies from the accounts of the 2nd and 3rd defendants and which he subsequently used in the purchase of shares in the 5th defendant, then the proposition by the plaintiff remains speculative and presumptuous.

In my understanding the beneficiary of a trust is entitled to continuing beneficial interest so long as he can show that his money has been used in the purchase of the trust property or that his monies had been mixed fraudulently by the person who received his money and who eventually used that money in acquiring a property or an interest. It was the responsibility of the plaintiff who is claiming the shares in the 5th defendant to show that the 1st defendant used her money in acquiring a whole or in part of the said shares. What is to be traced is not the physical asset itself but the value inherent in it, therefore a claimant must demonstrate what happened to his property, identify its proceeds and the persons who have handled or received them and justify his claim that the proceeds can only be regarded as representing his property. It is therefore my position that there is no evidence to show that the 1st defendant used monies given to him by the plaintiff in the purchase of shares in 5th defendant.

In conclusion it is my determination that the 1st defendant through the 2nd and 3rd defendant received a sum of Kshs.15,237,474/= and Kshs.5,061,799/= from the plaintiff. It is clear there was also another sum of Kshs.10 million which remained at **Daima Bank Limited** until 30th June 1997. The plaintiff then gave instructions to the bank for the money to be transferred to **Mbuzi Farm** Limited a company related and/or connected to the 1st defendant. A few months later the plaintiff needed some money to be paid for her son's school fees in England. The 1st defendant then remitted a sum of sterling pounds 100,000/= equivalent to Kshs.10 million to the plaintiff's solicitors in England. It is clear the source of money was not from the 1st defendant but money entrusted to him by the plaintiff. The source of the monies that was given to the 1st defendant is from the sale of the plaintiff's Muthaiga property for Kshs.33 million sometimes in 1996. It is also clear that the relationship between the plaintiff and the 1st defendant started as a result of that sale. It is therefore my decision that the 1st defendant through the 2nd and 3rd defendants received a sum of Kshs.20299273.85 from the plaintiff. When the monies were transferred to the 1st defendant and his companies in January 1997 the plaintiff was earning an interest on the principal in excess of Kshs.500,000/=.

The question therefore, is the amount of money which should be refunded by the 1st defendant and his companies. There is evidence to show that the 1st defendant paid a sum in excess of Kshs.150,000/= monthly allegedly for maintenance. There is also evidence that between 1997 and 1999 the 1st defendant made payments in excess of Kshs.200,000/= to the plaintiff. There are two payments of Sterling pounds 6,100 made by the 1st defendant to the plaintiff's solicitors. It is not true that the 1st defendant was making all these huge payments as an expression of his love towards the plaintiff. The point that comes out from the evidence that was tendered before me is that the plaintiff entrusted the 1st defendant with the proceeds from the sale of her Muthaiga residence because their relationship was that of husband and wife as alleged. Now the relationship has turned sour, it is the duty of the person entrusted with the monies to faithfully return the same to his erstwhile friend or lover.

Having taken into consideration all factors in this case and without underestimating the nature of the claim that is before me, I make the following determinations:

(1) There is ample and uncontroverted evidence to show that the plaintiff transferred the sum of Kshs.20,299,273.85 to the accounts of the 2nd and 3rd defendants. The transfer of the said monies was effected or done under the control or direction of the 1st defendant. The 1st defendant used his relationship with the plaintiff and her vulnerability to solicit the said funds from her. The said money was meant to attract interest at the same time it was kept in safe custody by the plaintiff. The 1st defendant breached the trust by refusing to repay back the money. I am therefore satisfied that the claim of the plaintiff is in respect of refund of her money paid to the 1st defendant and his companies.

(2) There is no direct evidence that the 1st defendant used the monies of the plaintiff in the purchase of shares in the 5th defendant and in the absence of the cogent and reliable evidence to link the plaintiff's monies in the purchase of shares in the 5th defendant, then the claim against the 5th defendant cannot succeed.

(3) The issue of interest as claimed by the plaintiff is untenable since there is no documentary proof or evidence that the 1st defendant and his companies were to invest the said monies in an interest bearing account. In any case there is no evidence to show that the rate of interest claimed by the plaintiff was applicable. I reckon that the periods of interest are different and the sum claimed being different, the alleged payment concerning interest in this case would in my view be speculative. In the circumstances of this I rule the applicable rate of interest is that of court rate to be effective from the date of judgement.

In the premises and in view of my determination I make the following orders:

(1) That there shall be judgement for the plaintiff against the 1st, 2nd and 3rd defendants in the sum of Kshs. 20,299,273.85 plus interest at court rate.

(2) Permanent injunction to restrain the 1st defendant from selling, transferring, mortgaging to any person his shares in the 5th defendant until the judgement is satisfied or overturned.

(3) The 5th defendant is entitled to deal in its property in so far as the shares of the other shareholders is concerned but without prejudicing the rights and interests of the plaintiff. It means the injunction that was earlier granted shall remain in so far as and as it concerns the shares of the 1st defendant and the 5th defendant.

(4) Upon satisfaction of this judgement HCCC No.170 of 2001 shall remain settled with no orders as to costs.

(5) Due to the nature of this dispute which concerns an estranged relationship, it is not in the interest of the parties herein to seek and get costs, therefore, I order that each party shall bear its own costs.

Dated, signed and delivered at Nairobi this 13th day of May, 2009.

M. WARSAME

JUDGE