



**Patani v Patani (Environment & Land Case 135 of 2018 & Civil Suit 661 of 2009  
(Consolidated)) [2022] KEELC 14680 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14680 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 135 OF 2018  
& CIVIL SUIT 661 OF 2009 (CONSOLIDATED)**

**JO MBOYA, J  
OCTOBER 31, 2022**

**BETWEEN**

**SHOBHNABEN PANKAJ KUMAR PATANI ..... PLAINTIFF**

**AND**

**PRADEEP HARAKCHAND PATANI ..... DEFENDANT**

**JUDGMENT**

**Background and Introduction**

1. The matter herein, on the face of it relates to three suits, whose details are captured and reflected in the title herein before shown. However, it appears that the operative number, namely, ELC 135 of 2018 was the new number that was assigned by the Environment and Land Court, upon receipt of the two suits that were transferred from the High Court.
2. Nevertheless and arising from the foregoing, it appears that there are only two cases, namely, HCC No 661 of 2009 and HCC No 262 of 2009, respectively, which were however consolidated by the High Court, prior to the transfer of the consolidated suit to the Environment and Land Court for hearing and determination.
3. Be that as it may and having made the foregoing clarifications, it is now appropriate to return to the reliefs that were sought at the foot of the various suits, details which have been disclosed and referred to in the preceding paragraphs.
4. In respect of the original HCC No 661 of 2009, the Plaintiff herein sought for the following Reliefs;
  - i. An Account for the last 3 years from the August 9, 2006 to date in respect of Rental Income, Deposits, Goodwill and any such monies received by the Defendant from LR Number 209/4394, Biashara Street, Nairobi, Kenya.



- ii. Special damages to be particularized after Discoveries and/or Forensic report.
  - iii. Further or other Relief including all further necessary or appropriate Accounts, Inquiries, Directions and/or Forensic Audit.
  - iv. An Order granting the Plaintiff's Agent M/S Swaly & Company, Certified Public Accountants of PO Box Number 42313-00100, Nairobi, in the Republic of Kenya, to administer, manage and collect rental income on behalf of the Plaintiff, the Defendant and Sobhagchand Pemchand Shah from LR Number 209/4394 and preserve the same until finalization of this suit.
  - v. An Order that after the Forensic audit; for a 1/3 Profit for the Goodwill, Deposits and rental income from LR Number 209/4394 to be paid to the Plaintiff.
  - vi. Costs of this suit and interest in (b) and (c) herein above.
5. Upon being served with the Plaintiff in respect of HCC 661 of 2009, the Defendant duly entered appearance and thereafter filed a Statement of Defense and counterclaim. For clarity, the counterclaim sought for the following reliefs;
- a. Accounts.
  - b. A Declaration that the Plaintiff holds the 1/4 share in LR No 1870/III/558 in Trust for the Defendant.
  - c. General and Exemplary Damages for libel aforesaid.
  - d. General and Exemplary Damages for the Malicious Report aforesaid
  - e. Cost of the counterclaim
6. Other than the original HCC No, 661 of 2009, the Plaintiff also filed HCC 662 of 2009 wherein same sought for the following reliefs;
- i. An Account for the last 3 years from 2006 to date of all the Rental income, Deposits, Goodwill and any such monies received by the Defendant from the property LR Number 1870/111/558.
  - ii. Special Damages to be particularized after discoveries and/or forensic report.
  - iii. Further or other Relief including all further necessary or appropriate accounts, inquiries, directions and/or forensic audit.
  - iv. An Order of Permanent Injunction against the Defendant from collecting and/or receiving rental income and/or in any other way dealing with the property namely; LR Number 1870/111/858 until the finalization of the suit.
  - v. An Order granting the Plaintiff's Agent M/S Swaly & Company, Certified Public Accountants of PO Box Number 42313, Nairobi in the Republic of Kenya, to administer, manage and collect rental income on behalf of the Plaintiff and the Defendant from LR Number 1870/111/558.
  - vi. An Order that after the forensic audit; for the profit of the rental income from LR Number 1870/111/558 to be divided to the Plaintiff in 50% shares.
  - vii. Costs of this suit and interest in b and f herein above.



7. On the other hand, the Defendant responded to the said Plaintiff's statement of defense dated the October 28, 2009, whereby the Defendant denied the claims alluded to and contained at the foot of the said Plaintiff.
8. Suffice it to point out that the subject matter was thereafter confirmed ready for hearing and same ultimately proceeded before the High Court Judge on the November 10, 2016. For clarity, the Plaintiff's evidence was wholly taken before the High Court before the suit was thereafter transferred to the Environment and Land Court for further hearing and eventual disposal.

### **Evidence by the Parties:**

#### **a. Plaintiff's Case:**

9. The Plaintiff's case revolves around the evidence of the Plaintiff herein who testified as PW1.
10. It was the evidence of the Plaintiff that same currently resides and lives in London within the United Kingdom.
11. On the other hand, the witness further stated that same was married to one Pankaj Harakchand Patani, now deceased, who died on the 29<sup>th</sup> March 1995. For clarity, the witness added that upon the death of the said deceased same filed succession proceedings, culminating into the issuance of Grant of Letters of Administration in her favor.
12. Further, the witness added that the Grant of Letters of Administration which was issued in her favor, was later confirmed and a Certificate of Confirmation of Grant was issued unto her, on the 26<sup>th</sup> April 1996.
13. Other than the foregoing, the witness testified that prior to his death, one Pankaj Patani, who was her husband, owned and was entitled to 25% share in LR No 1870/III/558, School Lane, Westlands within the City of Nairobi.
14. Besides, the witness added that upon the death of her deceased husband, the 25% share which hitherto belonged to her late husband was transferred to and registered in her name. In this regard, the witness added that same effectively became the registered owner of 25% share in the suit property.
15. On the other hand, the witness also testified that same is also the sole beneficiary of the Estate of one Vanitaben Harakchand Patani, similarly now deceased, who was the Mother-in-law of the witness.
16. In this respect, the witness testified that prior to the death of her mother in law, same generated and executed her last will, whilst residing with her, (Witness), and that vide the said will, her mother in law, namely, Vanitaben Harakchand Patani, gifted/willed her 25% share in the suit property unto her.
17. Consequently, the witness testified that by dint of being the heir of her Mother in law, same is therefore entitled to a total of 50% share over and in respect of the suit property, comprising of her Late Husband's 25% and that of her Mother-in-Law.
18. Nevertheless, the witness testified that despite being the lawful and rightful heir of her mother in law, the Defendant herein proceeded to and obtained Grant of probate over and in respect of the Estate of the said Vanitaben Harakchand Patani, deceased and has since proceeded to appropriate the 25% share of the said Vanitaben Harakchand Patani, in his favor, albeit without due regard to her interests and entitlement.



19. Be that as it may, the witness has added that even though same is entitled to 50% share in the suit property, the Defendant herein has gone ahead and dealt with the suit property as if same wholly belong to him and to the detriment of the witness.
20. In particular, the witness testified that the Defendant herein proceeded to and unilaterally leased the suit Property to a Company known as M/s Citram Properties Ltd, without notice to and involvement of the witness.
21. Further, the witness added that after the initial lease in favor of M/s Citram Properties Ltd terminated, the Defendant proceeded to and leased out the suit property to yet another Company, namely, M/s Mimosa Design Ltd.
22. The witness further added that even the arrangements between the Defendant and M/s Mimosa Designs Ltd, was similarly entered into and executed without her involvement, participation and blessings.
23. Other than the foregoing, the witness also stated that the Defendant proceeded to and appropriated the entire rental income from the suit property, without sharing same with the witness, even though the witness herein owned and was entitled to 50% of the rental income emanating and arising from the suit property.
24. Notwithstanding the foregoing, the witness added that the Defendant herein also failed to disclose the total monies or income that have been received or collected from the suit property. In this regard, the witness added that same was therefore constrained to file and mount the subject suit.
25. Other than the foregoing, the witness also pointed out that at no point in time did same agree to give up or forego her interest in respect of the suit property, either in the manner contended or at all.
26. Contrarily, the witness also testified that the property known as LR No 1870/III/250, situate on Brookside Close, Westlands within the City of Nairobi was bought, purchased and acquired by her own husband and same was duly registered in her Husband's name.
27. In the premises, the witness contended that the Brookside Close Property, was never family property but same exclusively belonged to her late husband, whose estate was transferred to and registered in her name upon the issuance of the Grant of letters of administration and the consequential Certificate of Confirmation of Grant.
28. Other than the foregoing, the witness referred to the written statement dated the June 12, 2014 and thereafter sought to adopt the witness statement. In this regard, the witness statement was duly admitted and constituted as further Evidence- in -chief of the witness.
29. Besides, the witness also referred to the List and Bundle of Documents dated the 17<sup>th</sup> of June 2014 and same sought to adopt and rely on the said documents. For clarity, the said documents were duly admitted and adopted as Plaintiff's Exhibits.
30. On cross examination, the witness stated that same owns 2 Quarters shares in the Property. Besides, the witness added that the 1<sup>st</sup> Quarter share, relates to the one which was/ is registered in the name of her mother in law, who passed away in the year 2009.
31. On the other hand, the witness stated that the other Quarter Share, relates to her late husband's share, which was effectively transferred to and registered in her name.
32. As concerns the Quarter share registered in the name of her Mother- in- law, the witness contended that she is entitled to same on the basis of the Last will left by the Deceased Mother in law.



33. Whilst under further Cross Examination, the witness added that even though she is the beneficiary of her Mother -in -law's will, she has not sought to prove the will in the United Kingdom, either as required or at all.
34. At any rate, the witness added that she has not proven the will but she will do so at her pleasure. However, the witness denied that her failure to prove the will is informed by the fear that upon attempting to prove the will, same will be investigated by the Scotland Yard.
35. Other than the foregoing, the witness also testified that she is aware that the Defendant herein has since moved to the High Court and obtained Grant of Letters of administration over and in respect of the Estate of Vanitabe Harakchand Patani and thereafter proceeded to appropriate the shares of the said deceased.
36. Nevertheless, the Witness further stated that even though the Defendant has since obtained Grant of Letters of Administration over and in respect of the Estate of her Mother -in law, the witness has neither challenged nor sought to impeach the said Grant of Letters of administration.
37. Besides, the witness stated that the Brookside Lane Property, was bought and purchased by her late Husband and same was not a Family Property. In any event, the Witness added that the Brookside Lane Property, has since been sold to a Third Party, who is not a Party to the instant Proceedings.
38. As concerns the suit property, the witness stated the same was registered in the names of Four family members, each owning a Quarters share.
39. In respect the company known as Drop-inn- Limited, the witness stated that same was a family business involving the Three Brothers, including her late Husband, namely, Pankanj Patani, Deceased.
40. Be that as it may, the witness further added that the dealings between the 3 brothers went on well, but everything went wrong after the death of her husband.
41. Notwithstanding the foregoing, the witness stated that ever since the death of her husband and despite being made a Director in the said Company, same has neither received nor been paid her due share from the proceeds of the Company.
42. Other than the foregoing, the witness pointed out that same would be amenable and acceptable to honoring family arrangements. Thereafter, the witness was shown a copy of an agreement made on the August 11, 1997, relating to the minutes of the Family/Partners in respect of the Property described as School Lane Plot Number 1870/III/43.
43. Upon being shown the said minutes, the witness herein stated that same was seeing the said minutes for the first time. At any rate, the witness added that same had not seen the Original of the said minutes.
44. In respect of the signature that was affixed against her name, the witness indicated that same was, 'sort of hers'.
45. While under further cross examination, the witness contended that same could not recall the meeting held on the August 11, 1997.
46. Be that as it may, the witness further stated that same was not aware whether the signature affixed on the said minutes, which she acknowledged to be sort of hers, has been subjected to document examination or whether a document examiner had rendered an opinion in respect of the said signature.
47. Other than the foregoing, the witness also denied having attended another Family meeting held on the February 10, 1999, relating to the distribution of the shares/rights over the suit Property.



48. In any event, the witness also denied having called any witness to attend the said family meeting held on the February 10, 1999.
49. Other than the foregoing, the witness denied having called one Piyus Shah to attend the family meeting held on the February 10, 1999.
50. Finally, the witness stated that same left for England in the year 1996. On re-examination, the witness herein stated that same could not remember whether she was present in the meeting held on the August 11, 1997.
51. In any event, the witness added that same was in England, whereas the meeting is indicated to have been held in Kenya.
52. Further, the witness also stated that she could see her name contained and reflected in the minutes, but added that her name was canceled and the cancellation was not countersigned.
53. In respect of the Brookside Close Property, the witness reiterated that same was purchased and acquired by her own husband, now deceased. Consequently, the witness added that the Brookside Close Property was never family Property and neither was same held on Trust for the Defendant and the rest of the Family Members.
54. In respect of the suit property, the witness reiterated that same owns/holds 2 quarters shares, equivalent to 50% of the suit property.
55. In respect of the will, the witness stated that the will was not a forgery. In fact, the witness added that same will soon present the will for verification in the United Kingdom.
56. On the other hand, the witness pointed out that though same inherited her late Husband's share in the suit Property, same is yet to be paid even a single cent in respect thereof.
57. Finally, the witness denied having transferred her shares in respect of the suit property to the Defendant and DW3, either as indicated vide the impugned minutes or at all.
58. With the foregoing testimony, the Plaintiff's case was closed.

**a. Defendant's Case:**

59. The Defendant's case is premised on the Evidence of 4 witnesses, inclusive of the Defendant, who testified as DW1.
60. According to the witness, same knows the Plaintiff herein, whom the witness clarified is her Sister-in-law by virtue of having been married to one Pankaj Kumar Patani, now Deceased.
61. Further, the witness pointed out that the suit property was purchased and acquired by the family and that thereafter same was registered in the names of 4 members of the family as Tenants in Common, each holding One (1) Quarter share in the Property.
62. Other than the foregoing, the witness also added that the Plaintiff's Late Husband, namely, Pankaj Patani, now Deceased, also held a Quarter share in the Property and that upon the death of the said Deceased, the Quarter share was transferred to and registered in the name of the Plaintiff.
63. Other than the foregoing, the witness also testified that the Family also bought and acquired another Property, namely, LR No 1870/III/250, located on Brookside Lane. However, the witness added that the said property was registered in the names of the Plaintiff's Husband alone.



64. Be that as it may, the witness added that despite the registration of the Brookside Lane Property in the name of the Plaintiff's Husband, now Deceased, the said Property was Family Property.
65. Other than the foregoing, the witness referred to the affidavit dated the October 28, 2009 and same sought to adopt the contents of the said affidavit. For completeness, the affidavit sworn on the October 28, 2009 was duly adopted and admitted as the witness's Evidence- in- chief.
66. On the other hand, the witness referred to the List and Bundle of Documents filed on the January 28, 2022 and same were produced as Defendants exhibits in the matter. However, it is appropriate to clarify that the List and Bundle of documents was dated the January 27, 2020.
67. On cross examination, the witness stated that Drop-in -Ltd was a Family Business/Company, which was being operated by Three Brothers.
68. Further, the witness added that the 3 brothers included Mr. Pankaj Patani, now deceased who was the husband of the Plaintiff, the Witness himself and one, MohinderKumar Pattani, DW4.
69. On the other hand, the witness also stated that the family bought and acquired a property known as LR No 1870/III/558, situate on School Lane and that the property was registered in the name of 4 family members as tenants in common.
70. At any rate, the witness added that his late brother Pankaj Patani, who was the Plaintiff's husband, owned 25% share in respect of the said Property.
71. Similarly, the witness also stated that in 1987 the family company, namely, Drop-inn Ltd purchased and acquired another property situated on Brookside Close and that the property was transferred to and registered in the name of Pankaj Patani, now Deceased.
72. Be that as it may, the Witness contended that even though the Brookside land property was registered in the name of Pankaj Patani, now deceased, same was acquired using Family resources.
73. Whilst under further cross examination, the witness further stated that even though the Brookside Close property was acquired by the family, the sale agreement shows that the Purchaser was Pankaj Patani.
74. Other than the foregoing, the witness pointed out that Pankaj patani, now deceased and the Plaintiff were the ones who were living/ residing in the Brookside Lane Property.
75. Besides, the witness admitted that after the death of Pankaj Patani, the Deceased, the Plaintiff herein proceeded to and took out succession proceedings over the Estate of Pankaj Patani, wherein same was thereafter constituted and appointed as the Legal Administratratix of the said Estate.
76. Nevertheless, the witness further conceded that despite the Plaintiff taking out the Grant of Letters of Administration over and in respect of the Estate of Pankaj Patani, Deceased, the witness herein has neither challenged nor impugned the Grant of letters of administration issued to the Plaintiff.
77. Other than the foregoing, the witness also pointed out that the family held a meeting on the August 11, 1997 wherein the Plaintiff agreed to cede her interests and claims in respect of the suit Property to the Defendant and his other Brother, namely, Mahendra Kumar Patani.
78. Further, the Witness added that the terms and resolutions of the family meeting which was held on the August 11, 1997 were further confirmed on the February 10, 1999.
79. Notwithstanding the foregoing, the witness further stated that though the Plaintiff is registered as holding one Quarter share in the suit Property, the said Quarter share is however held in Trust for the



- witness and his brother Mahendra Kumar Patani, by dint of the Family Minutes held on the August 11, 1997.
80. On re-examination, the witness stated that the Plaintiff agreed to and indeed surrendered her Quarter share in the suit property in exchange of the Plaintiff getting the whole of the Brookside Lane Property.
  81. Further, the witness added that the Brookside Lane Property was bought and acquired using the proceeds and monies that came from the Family Company. In this regard, the witness amplified that the Brookside Lane Property was therefore held on trust by the Plaintiff's late husband.
  82. As concerns the family minutes, arising from the meeting held on the August 11, 1997, the witness stated that the minutes were written by his brother, namely, Mr. Mahendra Kumar in the presence of the named Parties.
  83. Other than the foregoing, the Witness clarified that there was an Error in the minutes and that the error was corrected by Mr. Mahendra Kumar Pattani, who was the author of the minutes. In any event, the witness added that the error was corrected in the presence of the Parties who were present and after the correction of the error, the Parties present duly signed the minutes.
  84. It was the further testimony of the witness that later on, the Plaintiff called for and convened another meeting on the February 10, 1999 and that during the said meeting, the Plaintiff called a witness, namely, Piyus Patani, who was present and confirmed the terms of the agreement that the Parties had entered into and as captured in terms of the minutes taken on the August 11, 1997.
  85. The second witness was one Hezron Wabomba Wamalwa. For clarity, the witness herein testified as DW2.
  86. On the other hand, the witness pointed out that same is a Document Examiner and that by virtue of his Profession, same was approached and instructed by counsel Mr. Rebello to examine some signatures.
  87. Other than the foregoing, the witness further testified that having been instructed by the said Mr. Rebello Advocate, same proceeded to and undertook the exercise relating to the examination of the impugned signatures.
  88. Further, the witness added that same examined the impugned/questioned signatures and thereafter prepared a Report, which was contained at pages 18 to 20 of the Defendant's Bundle of Documents.
  89. Essentially, the witness stated that his examination of the questioned signature showed that same belonged to the Plaintiff.
  90. Additionally, the Witness added that same arrived at the said conclusion after looking at the various samples which were delivered unto him.
  91. On cross examination, the witness stated that same conducted and carried out the impugned comparison of the signatures on the November 29, 2010, when same received the documents.
  92. On the other hand, the witness clarified that the documents which were availed and submitted to him and which same sampled were photocopies.
  93. Nevertheless, the witness admitted that Photocopies of Documents can create a distorted copy that is difficult to use in the process of comparison.
  94. Be that as it may, the witness admitted that the report which same prepared and which has been produced does not contain any annexures, including (sic) the Documents which were submitted to him for comparison.



95. On re-examination, the witness admitted that same was given copies/samples containing the signatures, which same compared, prior to and before reaching his conclusion.
96. Besides, the witness pointed out that the Photocopies which were given to him were clear photocopies and that same duly assisted him in the execution of his work/mandate.
97. The Next witness who testified was one Piyus Patani. For clarity, same testified as DW3.
98. According to the witness, same is conversant with both the Plaintiff and the Defendant herein by virtue of the Plaintiff being a wife of his late cousin, whereas the Defendant is his cousin.
99. On the other hand, the witness stated that same was aware of and privy to a meeting that was held on the 11<sup>th</sup> August 1997, which was attended by inter-alia, the Plaintiff and the Defendant herein.
100. Further, the witness testified that pursuant to the meeting held on the August 11, 1997, the Plaintiff and the Defendant herein together with the rest of the Parties who were in attendance in the said meeting agreed on a Scheme of sharing/distributing the rights over the suit property.
101. At any rate, the witness further testified that the minutes relating to the said meeting were recorded and reduced into writing and that same were similarly signed by all the Parties who were present in that meeting.
102. Other than the foregoing, the witness added that there was yet another meeting, which was held on the February 10, 1999 and that the said meeting was attended by the same Parties who had attended the previous meeting.
103. However, the witness added that other than the Parties who had attended the previous meeting, same was also in attendance.
104. It was the further testimony of the witness that during the meeting held on the February 10, 1999, the Plaintiff herein confirmed to have attended and participated in the initial meeting held on the August 11, 1997 and that the contents of the said meetings were correct and true.
105. At any rate, the witness added that after confirmation of the truth and veracity of the minutes relating to the meeting held on the August 11, 1997, same proceeded to and signed at the foot of the minutes to confirm that same reflected the true position concerning the sharing/distribution concerning the suit Property.
106. Additionally, the witness added that same was called to the meeting and participated therein as a witness of the Plaintiff.
107. Other than the foregoing, the witness further added that during the meeting held on the February 10, 1999, the Plaintiff was present and participated in the said meeting.
108. Besides, the witness further added that during the meeting held on the February 10, 1999, same was shown the original copy of the Minutes and that the Plaintiff herein also confirmed being aware of the terms that were hitherto agreed upon.
109. In the premises, the witness stated that having been satisfied about the terms of the minutes dated the August 11, 1997, same made an endorsement at the foot of the agreement, relating to the veracity of the contents thereof.
110. Other than the foregoing, the witness alluded to and referred to his affidavit sworn on the October 28, 2009. In this regard, the witness sought to rely on the contents of the said affidavit. For coherence, the terms of the affidavit were adopted as the further evidence in chief of the witness.



111. On cross examination, the witness reiterated that same attended the meeting held on the February 10, 1999 at the invitation and instance of the Plaintiff.
112. Besides, the witness also added that the Plaintiff herself was present in respect of the meeting held on the February 10, 1999 and that same confirmed having participated in the previous meeting held on the August 11, 1997.
113. Further, the witness also added that after the Plaintiff had confirmed knowledge of the minutes, same proceeded to and made an endorsement at the foot of the minutes, whereby he confirmed that the Plaintiff was aware of and knowledgeable of the terms of the previous meetings.
114. In any event, the witness confirmed that the Plaintiff was present in Kenya and indeed attended the Meeting of February 10, 1999.
115. Other than the foregoing, the witness testified that same is familiar and conversant with the details of Properties owned by his cousins. In this regard, the witness pointed out/ identified the School Lane Property and the Brookside Close Property.
116. Nevertheless, the witness stated that same had not seen the certificate of title in respect of the Brookside Close Property or at all.
117. Other than the foregoing, the witness also added that he was not present during the meeting of 11<sup>th</sup> August 1997, but the issues which were discussed during the said meeting were deliberated and discussed again on the 10<sup>th</sup> February 1999, albeit in his presence.
118. As to why he attended the said meeting, the witness pointed out that same was called as a witness by the Plaintiff and that the Plaintiff confirmed relinquishing her claim or shares to the suit property.
119. On re-examination, the witness pointed out that the Plaintiff herein left Kenya around the year 1996. Nevertheless, the witness added that on the February 10, 1999, the Plaintiff was present in Kenya and indeed attended the impugned meeting.
120. Finally, the witness testified that after the conclusion of the meeting held on the February 10, 2009, the Plaintiff herein proceeded to and went to his ( Witness), home.
121. The fourth witness was Mahendra Kumar H Patani. Same testified as DW4. The witness herein stated and testified that same is a brother of the Defendant and a brother in law to the Plaintiff. For clarity, the witness testified that the Plaintiff is the wife of his Brother Pankaj Patani, now deceased.
122. Further, the witness testified that he was the eldest of the three brothers. At any rate, the witness added that the family used to operate a Family business vide a company known as Drop-inn-Ltd, wherein the three brothers had shares.
123. Be that as it may, the witness added that the family bought and purchased a property situated along School Lane, Westlands within the City of Nairobi, wherein the family lived together.
124. Nevertheless, the witness added that thereafter the family arranged and purchased another Property situate or located along Brookside Close, Westlands within the City of Nairobi.
125. Further, the witness stated that the Property situate alongside Brookside Close, was bought and or purchased using family resource. However, the witness added that though bought using family resources, the suit property was transferred and registered in the name of Pankaj Patani, now deceased.
126. Besides, the witness testified that it was Pankaj Patani and his family, inclusive of his wife, who stayed and resided in the Brookside Close Property.



127. Other than the foregoing, the witness testified that later on the August 11, 1997, the Family Members entered into an arrangement/agreement wherein the Parties agreed on the distribution/sharing of the Property located on School Lane. For coherence, the witness added that the minutes of the meeting were recorded by himself and thereafter the Parties who were present duly executed and signed the agreement.
128. Be that as it may, the witness referred to his affidavit dated the October 28, 2009 and sought to adopt and rely on the same.
129. Suffice it to point out that the contents of the said affidavit sworn on the October 28, 2009 were thereafter adopted and constituted as the Further evidence in chief of the Witness.
130. Besides, the witness also pointed out that the affidavit in question also contained various annextures/ documents attached thereto. Consequently, the witness sought to rely on the said documents.
131. Essentially, the documents attached to the affidavit sworn on the October 28, 2009 were produced and admitted in evidence as exhibits D2 to D9, respectively.
132. At any rate, the witness also stated that the meeting that was called and held on the August 11, 1997 was called and summoned by his mother, now deceased.
133. On cross examination, the witness reiterated that the minutes of the meeting held on the August 11, 1997, were taken and made by himself in the presence of those Parties who were present. In this regard, the witness indeed produced the original copy of the minutes of the meeting held on the August 11, 1997.
134. Besides, the witness also pointed out that during the said meeting, the Plaintiff was present and participated in the deliberations and thereafter signed the minutes, confirming her acceptance of the terms that were contained therein.
135. At any rate, the witness added that in the course of making the minutes, same committed an Error, which was thereafter noted and corrected.
136. Other than the foregoing, the witness added that the correction of the error was done in the presence of all the Parties and hence same are aware of what was agreed upon.
137. On the other hand, the witness also pointed out that the two Properties, namely, the School Lane Property and the Brookside Close Property, were both bought and acquired using Family resources. Consequently, the witness pointed out that the two properties were therefore Family Properties.
138. In any event, the witness stated that other than the meeting held on the 11<sup>th</sup> August 1997, there was another meeting that was convened and held on the February 10, 1999.
139. In this regard, the witness added that during the latter meeting held on the February 10, 1999, the Plaintiff invited one Piyus Patani who was also present and that after the terms of the agreement entered on the August 11, 1997 were reviewed, the said witness made an endorsement to confirm the terms of the agreement.
140. Besides, the witness also pointed out that same is aware that his late mother left a will and that after the death of his Mother, the Defendant and himself took out Grant of Letters of Administration over the Estate of their Deceased Mother.
141. Effectively, the witness stated that the Estate of their Deceased mother has since been succeeded.



142. As concerns the Brookside Close Property, the witness maintained that same was Family Property even though the property was registered in the name of Pankaj Patani, now deceased.
143. Other than the foregoing, the witness confirmed that the Plaintiff's husband was a Shareholder in the Company known as Drop-in-Ltd and hence the Plaintiff would be entitled to Dividends arising therefrom.
144. In respect of the School Lane Property, the witness admitted that same is currently leased out to a Tenant paying Monthly Rents of about Kshs 300, 000/= only.
145. On the other hand, the witness herein further stated that arising from the minutes of the meeting held on the August 11, 1997, the Plaintiff herein holds 25% share on the suit property on behalf of the Defendant and himself.
146. In answer to a question whether the Plaintiff was in Kenya on the August 11, 1997, when the meeting was convened and held, the witness stated that same did not have any documents to confirm that the Plaintiff was present in Kenya.
147. On re-examination, the witness reiterated that the agreement and the terms contained at the foot of the minutes dated the August 11, 1997, are correct and in any event, same confirm that the Plaintiff was in Kenya.
148. Finally, the witness also added that if there was a dispute as to whether the Plaintiff was in Kenya or otherwise, it behooved the Plaintiff to adduce a copy of her Passport, which same failed to adduce before the Honourable court.
149. With the foregoing, testimony, the Defendant's case was closed.

### **Submissions by the Parties:**

#### **a. Plaintiff's Submissions:**

150. The Plaintiff filed written submissions dated the June 16, 2022 and same has isolated, highlighted and amplified two issues for determination.
151. First and foremost, counsel for the Plaintiff has submitted that there was no effective transfer of the Rights of the Plaintiff in respect of the suit property, namely LR No 1870/III/558, whatsoever to the Defendant and his brother.
152. Counsel for the Plaintiff further added that if the Plaintiff had intended to transfer her shares over and in respect of the suit property to and in favor of the Defendant and DW4, then the Plaintiff would have executed all the requisite documents to effect the transfer of such shares.
153. At any rate, counsel further added that the minutes dated the August 11, 1997, would not be capable of effecting the transfer of the Plaintiff's share over and in respect of the suit property, either in the manner contended or at all.
154. Further, counsel for the Plaintiff added that any transfer of shares over and in respect of an Immovable property can only accrue upon the execution of the relevant transfer instrument and the ultimate registration thereof at the relevant land registry.
155. In support of the foregoing submissions, counsel for the Plaintiff has relied on the decision in the case of *Hiram irungu Maingi v John irungu Japhat & another* [2019] eKLR and *Mwai Kibaki & another v Mathingira Wholesalers Company Ltd & 6 others* (2018) eKLR.



156. On the other hand, counsel for the Plaintiff has further submitted that the minutes at the foot of the document dated the August 11, 1997, are erroneous and misleading. In this regard, counsel for the Plaintiff has contended that at the point in time when the said meeting is purported to have been held, the Plaintiff was in London and hence could not logically have been both in London and in Kenya, at the same time.
157. Secondly, counsel for the Plaintiff has submitted that the Document Examiner's Report which was produced in evidence and marked as exhibit D1, was devoid of credibility and Probative value.
158. Premised on the foregoing, counsel for the Plaintiff has invited the Honourable court to take cognizance of the provisions of Section 50(2) of the Evidence Act, Cap 80 Laws of Kenya.
159. Similarly, counsel for the Plaintiff has also invited the Honourable court to take cognizance of the holding in the case of *Samson Teller Akute v Republic* (2002) eKLR, *Hassan Salum v Republic* (1964) EA 126 and *Republic v Padmore* (1930) 46 TLR 365.

**b. Defendant's Submissions:**

160. The Defendant herein filed written submissions dated the August 22, 2022 and similarly same has highlighted and canvassed two pertinent issues for consideration.
161. The first issue ventilated and canvassed by counsel for the Defendant relates to the Plaintiff's credibility. In this regard, counsel for the Defendant submitted that the Plaintiff herein is not credible to the extent that same chose to deny having attended the family meeting held on the August 11, 1997, even though same executed and signed the resultant minutes.
162. Further, counsel for the Defendant added that after voluntarily signing and executing the said minutes, the said Plaintiff invited a witness to the meeting held on the February 10, 1999, wherein the terms of the previous meeting were reviewed and reiterated.
163. Nevertheless, counsel for the Defendant also submitted that during the cross examination of the Plaintiff, same was evasive and non-committal on issues pertaining to her presence during the meeting held on the August 11, 1997, as well as her signature.
164. Premised on the foregoing, counsel for the Defendant invited the Honourable court to find and hold that the Plaintiff herein is not a credible and believable witness.
165. Secondly, counsel for the Defendant further submitted that by dint of the contents of the minutes of the Family meetings recorded on the August 11, 1997, the Plaintiff herein clearly agreed and conceded to forgo/surrender her Interest in respect of the suit property to and in favor of the Defendant and DW4.
166. Consequently, counsel for the Defendant submitted that having agreed to surrender and forgo her interests in respect of the suit property, the Plaintiff cannot now turn back and deny the clear terms of the mutual arrangements which were entered into and duly executed by all the Parties who were present.
167. Premised on the foregoing, counsel for the Defendant has invited the court to find and hold that the circumstances Obtaining at the time of the meeting captured vide the minutes made on the August 11, 1997, show that the Parties were desirous to be bound by the said minutes.
168. Further, counsel for the Defendant has invited the court to find and hold that even though the Plaintiff is still registered as the owner of a Quarter share over and in respect of the suit property, the said registration is held albeit on Trust for the Defendant and DW4, respectively.



169. To vindicate the foregoing submissions, counsel for the Defendant has invited the Honourable court to be guided by the cases in *Ralph Kiviti v Jessie Nyaga Karuagi* (2017) eKLR, *Jenifer Kasimiyu Green v Esther Mukoya Wekesa* (2017) eKLR and *John Gitiba Boruna & Another v Jackson Rioba Boruna* (2003) eKLR.
170. Premised on the foregoing submissions, counsel for the Defendant has invited the court to find and hold that the Plaintiff has not suitably or adequately proved her case in respect of the suit property.
171. Contrarily, counsel for the Defendant has invited the Honourable court to find and hold that the Defendant has indeed proved the counterclaim; and essentially that the Quarter share of the property registered in the name of the Plaintiff, is indeed held on trust for the Defendant and his brother, namely, Mohendra Kumar H Patani.

### **Issues for Determination:**

172. Having reviewed the Plaintiff's Complaint dated the September 4, 2009, in respect of the original HCC No 661 of 2009 and the Plaintiff's Complaint dated September 4, 2009 in respect of the original HCC No 662 of 2009; and having similarly reviewed the Statement of Defense and Counterclaim filed by the Defendant, together with the various affidavits thereto and having reviewed the oral testimonies tendered by the Parties and witnesses; and finally having evaluated the written submissions filed, the following issues do arise and are thus germane for determination;
- i. Whether Property known as LR No 1870/III/250, (otherwise known as Brookside Close), was held by Pankaj Patani, now deceased on Trust for the Defendant and the Family members.
  - ii. Whether the Plaintiff is entitled to the Quarter share in respect of LR No 1870/III/558, hitherto belonging to Vanitaben Harkchand Patani, now Deceased.
  - iii. Whether the Plaintiff herein holds Quarter share in LR No 1870/III/558, on Trust for the Defendant and one Mahendra Kumar H Patani.
  - iv. Whether the Plaintiff is entitled to Dividends and Income arising from the Operations/affairs of Drop-in Company Ltd

### **Analysis and Determination**

#### **Issue Number 1 Whether Property known as LR No 1870/III/250, (otherwise known as Brookside Close), was held by Pankaj Patani, now deceased on Trust for the Defendant and the Family Members.**

173. It is common ground that the family comprising of Pankaj Patani, now deceased, Vaniben Harkchand Patani, now deceased, Mahindakumar H Patani and the Defendant herein, were duly registered as tenants in common over and in respect of the property known as LR No 187/III/558.
174. In any event, there is no dispute that the named Parties, details in terms of the preceding paragraphs, were duly registered as owning a Quarter share in the suit Property.
175. However, there is yet another property, namely LR No 1870/III/250, which was registered in the name of Pankaj Patani, now deceased.
176. Whereas the Plaintiff contends that the said property, namely, LR No 1870/III/250, was bought, purchased and acquired by Pankaj Patani, now deceased, out of own income, the Defendant herein is of the contrary position.



177. For coherence, the Defendant herein, together with DW4 testified and contended that LR No 1870/III/250, popularly referred to as Brookside Land Property, was acquired through family resources and hence same was family property.
178. In the premises, the Defendant has contended that even though the said property was registered in the name of Pankaj Patani, Deceased, same however held the property on trust for the family.
179. Nevertheless, despite the contention by the Defendant, what is evident and apparent is that by the time LR No 1870/III/250 was being bought, purchased and acquired, all the family members, including the Defendant and DW4, were adults of sound mind and disposition.
180. Consequently, both the Defendant and DW4, who are now contending that the said property, was registered in the name of Pankaj Patani, now deceased, to hold on trust for the family, were not suffering from any incapacitation or limitation, that could have barred them from being registered as Co/ Joint owners.
181. At any rate, I must point out that the Defendant herein has not pleaded any Particulars to show that LR No 1870/III/250 was being held on Trust.
182. Suffice it to point out that if the Defendant and DW4 were keen to agitate a claim based on Trust, which obviously would be an Implied or Resulting trust, then same were statutorily enjoined to plead the Trust and thereafter particularize the circumstances leading to such Trust.
183. To this end, it is imperative to take cognizance of the provisions Order 2 Rule 10 of the [Civil Procedure Rules, 2010](#) which articulates and underpins the manner for pleading a claim premised on Trust.
184. For convenience, the provisions of Order 2 Rule 10 are reproduced as hereunder;
10. Particulars of pleading [Order 2, rule 10.]
- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) Particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
- (b) where a Party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
185. Other than the foregoing provisions, it is also instructive to take note of the holding in the case of [Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd](#) [2004] eKLR, where the Court Of Appeal observed as hereunder;
- “Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:
- “Every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –
- (a) particulars of a ny .....fraud ..... on which the party relies.
- (b) Where a party pleading alleges .....fraudulent intention.....particulars of the facts on which the party relies.”



In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention.

186. Even though the Court of Appeal in respect of the decision cited in the preceding paragraph, was dealing with and addressing the manner of pleading of Fraud, it is imperative to note that the stringent statutory requirements for pleading and particularizing fraud applies, mutatis mutandis to a claim based on the implied and resultant trust, including breach of trust.
187. Consequently, where a claimant is keen to implead and thereafter ventilate a Cause of action touching on implied and resultant trust, it behooves such a claimant to strictly comply with and adhere to the prescriptions of the law.
188. Additionally, the manner of pleading and ventilating a Cause of action founded on Implied and Resultant trust was also articulated vide the decision in the case of *John Gitiba Buruna & Another v Jackson Rioba Buruna* (2007)eKLR, where the Court of Appeal stated as hereunder;

“ Mr. Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the respondent. Under Rule 8 (1) (a) of Order VI Civil Procedure Rules, a plaint should contain the specified particulars including particulars of trust on which a party relies. The respondent did not however, rely on a breach of a trust. The finding that there was a resulting trust was merely an inference arising from the facts as accepted by the learned Judge. The learned Judge however, with respect, erroneously categorized the trust arising from the circumstances of the case as a resulting trust rather than a constructive trust which arises by operation of law. Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.’
189. As pertains to the subject matter, there is no gainsaying that the Defendant has neither particularly pleaded nor particularized the claim based on Trust as pertains to LR No 1870/III/250, either in accordance with the law or at all.
190. Having not particularly pleaded and particularized the claim based on implied and resulting Trust, as pertains to LR No 1870/III/250, the Defendant herein cannot purport to achieve or accrue a favorable order in this regard through the backdoor.
191. On the other hand, even assuming that the Defendant had complied with the strict requirements of the law relating to pleading a cause of action of trust in respect of LR No 1870/III/250, it is common ground that neither the Defendant nor DW4, commenced any suit during the life time of Pankaj Patani, to lay a claim over and in respect of the said property.
192. Why didn't the Defendant and DW4 lay a claim to the said property, during the life time of Pankaj Patani? To my mind, the answer to the Question herein, is obvious.
193. Simply put, no such claim was generated or laid during the lifetime of Pankaj Patani, now deceased, because the Defendant and DW4, respectively knew that LR No 1870/III/250, exclusively belonged to Pankaj Patani, now deceased and not otherwise.
194. Additionally, it is imperative to recall that upon the death of Pankaj Patani, the Plaintiff herein took out Succession proceedings over and in respect of the Estate of Pankaj Patani, Deceased and thereafter same was issued with Grant of Letters of administration.



195. Subsequently, the Grant of Letters of Administration which were issued to and in favor of the Plaintiff, were thereafter confirmed and a certificate of confirmation of Grant duly issued to the Plaintiff on the April 26, 1996.
196. Vide the certificate of confirmation of grant, which was issued on the April 26, 1996, the Honourable court vested the entire LR No 1870/III/250 to and in favor of the Plaintiff, in absolute.
197. For coherence, no objection appears to have been taken by both the Defendant and DW4 to the said succession proceedings.
198. In any event, no evidence was led by the Defendant and his witnesses that same have since challenged the Grant of letters of administration and the certificate of confirmation of grant, which was issued in favor of the Plaintiff.
199. The bottom line is that to the extent that LR No 1870/III/250, was duly vested in the Plaintiff as the legal administratrix of the estate of Pankaj Patani, in absolute, then this court cannot seek to review the decision of a Court of concurrent Jurisdiction and now purport to decree the existence of trust over and in respect of the said property.
200. To my mind, to invite this Honourable court to now come and find that LR No 1870/III/250, was/is being held by the Plaintiff on trust for the Defendant and DW4, would be tantamount to entertaining an appeal against the decision of the High Court ( Certificate of Confirmation of Grant), by sidewind.
201. Simply put, the High court having found and held that LR No 1870/III/250 vested in the Plaintiff wholly and in absolute, such a decision can only be challenged vide Summons for Revocation of grant in line with Section 76 of the *Law of Succession Act*, cap 160 Laws of Kenya or by way of an appeal to the Honourable Court of Appeal.
202. To buttress the foregoing observation, I beg to adopt, reiterate and endorse the holding of the Court in the case of *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR, where the Honourable Court of Appeal observed as hereunder;

“I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng’ang’a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No 203 of 2006 and Ventaglio International SA and Anor v. The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the *Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter.

The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 others*, Nairobi HC Petition No 125 of 2010 (per Majanja, J)”

203. At any rate, there is also evidence that LR No 1870/III/250, was sold and disposed of by the Plaintiff. Consequently, same is currently registered in the name of a third party who has not been impleaded.



204. In the circumstances, can this Honourable court proceed and decree that the said property, which has since been sold and currently vests in a third party, is held by the Plaintiff on trust.
205. In my considered view, the evidence that was tendered by the Defendant and his witnesses, seeking to prove that LR No 1870/III/250, is held on trust, are misconceived, legally untenable and invalid, for all intents and purposes.
206. Put differently, the issues as to whether LR No 1870/III/250 is held by the Plaintiff on trust for the Defendant and (sic) DW4, is not only, pre-mature, but similarly, moot and academic.

**Issue Number 2: Whether the Plaintiff is entitled to the quarter share in respect of LR No 1870/III/558, hitherto belonging to Vanitaben Harkchand Patani, now deceased.**

207. The Plaintiff herein contended and adduced evidence to the effect that Vanitaben Harakchand Patani, now deceased, fled Kenya and went to reside with her (Plaintiff) in England, as a result of emotional and physical abuse meted against her by the Defendant herein.
208. On the other hand, the Plaintiff also tendered evidence that during the time when the deceased resided and stayed with her, the deceased authored her last will, wherein the deceased gifted to and in favor of the Plaintiff the deceased's share in respect of the suit property.
209. Even though the Plaintiff tendered evidence that the last will of the named deceased, has not been proved in England, same contended that she is the lawful and rightful heir of the Quarter share belonging to the said deceased.
210. Premised on the foregoing, the Plaintiff has now claimed that same is entitled to the Quarter share that lawfully belongs to and was registered in the name of Vanitaben Harakchand Patani, now deceased.
211. Notwithstanding the foregoing, it is common ground that the Plaintiff conceded that the Defendant and DW4 filed and or commenced succession proceedings in the High Court of Kenya over and in respect of the Estate of Vanitaben Harakchand Patani, now Deceased, and that thereafter same were issued with the requisite grant of letters of administration and subsequently a Certificate of Confirmation of Grant.
212. For the avoidance of doubt, the certificate of Confirmation of Grant was issued vide Nairobi HCC Succession Cause 544 of 2009 and wherein the shares of the named deceased were vested in favor of the Defendant and Mahendrakumar H Patani, each being entitled to 1/8 share.
213. On the other hand, it is instructive to note that no evidence was led by the Plaintiff to show that the Grant of Letters which was issued in favor of Mahendrakumar Patani and the Defendant herein, as well as the certificate of confirmation of grant, has since been revoked and nullified.
214. In the absence of such evidence, the simple albeit established position of the law is that the shares of Vanitaben Harakchand Patani, over and in respect of the suit property lawfully vested in the named heirs, in terms of the certificate of confirmation of Grant issued on the September 30, 2009.
215. In view of the foregoing observation, I find and hold that the Plaintiff herein is not entitled to the Quarter share of Vanitaben Harakchand Patani, now Deceased, either as claimed or at all.
216. At any rate, I beg to add that the last will of the said Vanitaben Harakchand Patani, now Deceased, which is being held onto by the Plaintiff, pending proving or authentication, is indeed inconsequential, until and unless the Grant of letters of administration and the resultant Certificate of Confirmation of Grant which were issued vide Nairobi HCC Succession 544 of 2009 are revoked or nullified.



**Issue Number 3 Whether the Plaintiff herein holds Quarter share in LR No 1870/III/558, on Trust for the Defendant and one Mahendra Kumar H Patani.**

217. There is no dispute that during the life time of Pankaj Patani, now deceased, same held a quarter share in the suit property in his name.
218. On the other hand, evidence abound that upon the death of Pankaj Patani, who was the husband of the Plaintiff, the quarter share that hitherto belonged to and was registered in the name of the said deceased was transferred to, and registered in the name of the Plaintiff.
219. Essentially, the Plaintiff herein therefore became the lawful and registered proprietor/owner of the quarter share in respect of the suit property, namely, LR No 18870/III/558.
220. However, it was stated that vide a family meeting held on the 11<sup>th</sup> August 1997, the Plaintiff herein conceded and surrendered her quarter share in the suit property to and in favor of the Defendant and DW4.
221. Indeed, the minutes relating to the said meeting were reduced into writing by DW4 and thereafter all the Parties who were present signed and executed the minutes, obviously signaling their desire to be bound..
222. Other than the foregoing, evidence was also tendered that on the February 10, 1999, another meeting was summoned albeit at the instance of the Plaintiff herein, whereupon the terms of the agreement minuted on the August 11, 1997, were reviewed and confirmed.
223. Nevertheless, it was further stated that during the re-convened meeting held on the February 10, 1999, the Plaintiff invited a witness who was well known to the Parties. For clarity, the witness herein was Piyus Patani, who testified as DW3.
224. According to DW3, the Plaintiff confirmed the terms of the minutes dated the August 11, 1997 and upon such confirmation, the witness made an endorsement at the foot of the minutes which were hitherto made on the August 11, 1997.
225. Be that as it may, when the issue of the minutes which were made on the 11<sup>th</sup> August 1997, were raised with the Plaintiff, the Plaintiff became evasive, non-committal and same was not forthright.
226. Perhaps, at this juncture is appropriate to reproduce the response by the Plaintiff during cross examination pertaining to whether same was aware of the meeting held on the August 11, 1997 and whether same signed the said minutes.
227. For completeness of record, the response of the Plaintiff were as hereunder;

“I can see the copy of the agreement on page 86 .I am seeing it for the first time now. I don't know about the original, this one I cannot recall the signature therein.

The agreement shows I was present. I cannot recall being present. I can see my name as No 3 and No 4, my mother in law. I cannot recall that I was in the meeting. I can see Mahendra Patani, my brother in law. He is here (points at a gentleman in court). I can see the percentage of property distribution, of Brookside. I cannot recall the meeting. I can see the signature against my name. It is sort of mine. I don't know if I made the signature. I am not aware the document examiner has expressed the opinion. I made the signature. I am not aware the report is in the bundle. Maybe I don't know. I don't remember this meeting. I have first sworn in court. It might have happened.



I did not call for another family meeting and brought another man called Pius Shah and the meeting discussed again on 10/2/1999. I don't remember. I am not aware the meeting was at Drop in Ltd on Biashara Street. I left for England in 1996. I am not aware that I have no interest in the Brookside Property No, whether Shah or Patani they are the same thing.

228. From the response that was tendered by the Plaintiff herein during the cross examination, one thing is obvious clear. For clarity, the Plaintiff concede that the signature affixed to the said minutes is sort of hers.
229. To my mind, it is either that the Plaintiff indeed was present during the impugned meeting and indeed signed or otherwise.
230. Sadly, the Plaintiff chose to be evasive and noncommittal. Nevertheless, the Plaintiff herein has never lodged or mounted any Criminal complaint that her signature was forged or at all.
231. Similarly, the Plaintiff who has been aware of the impugned document ever since 2009, at the very latest, has never mounted a criminal complaint that the entire document, if at all, fraudulent.
232. Why hasn't the Plaintiff found it appropriate to challenge the validity or authenticity of the said document, if indeed same did not execute/sign the document?
233. In my considered view, the Plaintiff herein voluntarily signed and executed the minutes relating to the distribution of the shares in respect to LR No 1870/III/43 (which admittedly is the suit property), after the re-assignment of the registration number.
234. Notwithstanding the foregoing, the Plaintiff had also raised the issue that same was out of the country and indeed in England, during the time when the impugned meeting was held.
235. However, despite contending that same was outside the country and in England, both on the August 11, 1997 and on the February 10, 1999, the Plaintiff curiously failed to tender in evidence a copy of her passport.
236. Suffice it to point out that a copy of the Plaintiff's passport containing the relevant Immigration stamp, would have put up the issue to rest. Yet again, the Plaintiff has withheld very critical and essential information that would have enabled the Honourable court to arrive at a just conclusion.
237. Premised on the foregoing, I come to the conclusion that vide the minutes taken on the August 11, 1997, the Plaintiff conceded to and indeed surrender her quarter share and/ or I nterests in the suit property to and in favor of the Defendant and DW4, respectively.
238. Even though no transfer instrument was duly executed to effectuate the conveyance of the quarter share/ interests to and in favor of the Defendant and DW4, the intention to surrender the quarter share was final and irreversible.
239. Consequently, I come to the conclusion that even though the Plaintiff continues to be registered as the holder of the one Quarter share in the suit property, same is albeit held on trust for the Defendant and DW4, respectively.
240. To this end, I can do no better than to adopt, reiterate and reproduce the dictum in the case of *Mwangi Macharia & 87 others v Davidson Mwangi Kagiri* (2016) eKLR, where the Court of Appeal stated and held as hereunder;
  25. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of



Madan, JA (as he then was) in Chase International Investment Corporation and another v Laxman Keshra and others, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

26. Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice.
241. The contents of the minutes dated the August 11, 1997 raise a prima facie foundation for the invocation and reliance on the Doctrine of Constructive Trust, which unlike implied and resulting Trust does not require to be particularly, pleaded and the requisite Particulars thereof to be availed.
242. Additionally, it is sufficient to take cognizance of the holding of the Court of Appeal in respect of the case of Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR, where the court held as hereunder;

“In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (*supra*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England *supra* at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled’.

243. In a nutshell, I come to the conclusion that the Defendant has placed before the Honourable Court credible material and sufficient cause to underpin the claim of Constructive Trust.

#### **Issue Number 4 Whether the Plaintiff is entitled to Dividends and Income arising from the Operations/Affairs of Drop-in Company Ltd**

244. Other than the claim touching on and concerning the suit property, there was also a claim arising from the Plaintiff’s entitlement to and in respect of the proceeds of Drop-in Company Ltd, which is a limited liability company.



245. As concerns payment of dividends and pro-rata shares from Drop-in Company Ltd, it is imperative to underscore that such a claim would require the involvement and participation of the Company in the suit.
246. However, it is common ground that the Company, out of whose proceeds the dividends and such other consequential payments are to be made, was neither impleaded nor joined in the subject proceedings.
247. Secondly, there is also no gainsaying that if the Plaintiff is indeed a Director/shareholder in Drop-in Company Ltd (which is admitted), then the Plaintiff's rights and grievances, if any, can be suitably addressed and taken care of by dint of the Articles of Association and the Memorandum of Association of the said Company.
248. Thirdly, where a minority shareholder/director is prejudiced or affected by the manner in which the affairs of the Company is being run, then the minority Director is obligated to commence or file a Derivative suit and not otherwise.
249. Either way, the Minor Director/Shareholder, would still be constrained to implead and join the Company as a Defendant in the matter.
250. Finally, it is also imperative to underscore that the claim by the Plaintiff as pertains to dividends and proceeds arising from the operations of the Company, do not essentially fall within the Jurisdiction of the Environment and Land Court, by dint of the Provisions of Article 162(2) (b) of the [Constitution, 2010](#).
251. To this end, it is imperative to refer to the holding of the Court of Appeal in the case of [Cooperative Bank of Kenya Ltd v Patrick Kang'ethe & another](#) [2017] eKLR, where the court stated and held as hereunder;

“ 41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In *Paramount Bank Limited v Vaqvi Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1<sup>st</sup> respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1<sup>st</sup> respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court



could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the *Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the *Constitution* provides inter alia, that;

1. subject to clause (5), the High Court shall have-
  - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed.

252. In a nutshell, the claim that touches on and concerns payment of dividends, Pro-rata entitlement of proceeds from Drop-in Company ltd as well as taking accounts, are issue that certainly falls outside the Jurisdiction of Environment and Land Court.

253. Be that as it may, I beg to point out that there certain are matters where the disputants and legal advisers can very well sort out and address, without recourse to a court of law. For coherence, one such issue would be the payment of dividends and pro-rata income arising from the operations of Drop-in Company Ltd, to the Plaintiff, who is admittedly a Director.

254. Additionally, the issue of sharing of and availing the Audited Accounts of the said Company and related information, is something that ought not to be ventilated before a court of law. In this regard, the Honourable Court implores both counsel to give meaning to the provisions of Article 35 of the *Constitution of Kenya, 2010*.

### **Final Disposition**

255. Having reviewed, analyzed and evaluated the issues that were Isolated, identified and highlighted in the body of the Judgment, it is now appropriate to make the final and dispositive orders.

256. Consequently and in the premises, I now make the following orders;

- i. The Plaintiff’s claims vide the Original Nairobi HCC 661 of 2009 and HCC 662 of 2009, respectively be and are hereby Dismissed.
- ii. The Defendant’s counterclaim vide original Nairobi HCC No 661 of 2009 be and is hereby allowed to the limited extent that the Plaintiff holds Quarter share in LR No 1870/III/558 in Trust for the Defendant and Mohinderkumar H Patani, respectively in Equal share.
- iii. Consequently, the Plaintiff be and in hereby ordered and directed to execute the requisite Transfer Instrument to facilitate the transfer of the Quarter share in LR No 1870/III/558 to



and in favor of the Defendant and Mohinderkumar H Patani within 120 days from the date hereof.

- iv. In default, to comply with clause (iii) hereof, the Deputy Registrar of this Honourable court shall execute the requisite Transfer Instrument on behalf of the Plaintiff.
- v. The rest of the claims at the foot of the Counterclaim dated the October 2, 2009 be and are hereby Dismissed.
- vi. Each Party shall bear own costs of the suit and the Counterclaim.

257. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant.

Mr. Mr. David Oyatta for the Plaintiff.

Ms. Zeiynab Ejaz h/b for Mr Rebello for the Defendant

