



**Behal (Suing as the administrator to the Estate of the Late Vijay Behal) v Behal & another  
(Both sued as administrators to the Estate of the Late Pradeep Behal) (Environment  
& Land Case E414 of 2022) [2024] KEELC 4021 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4021 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E414 OF 2022**

**JA MOGENI, J**

**MAY 6, 2024**

**BETWEEN**

**RAJNI BEHAL (SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE  
LATE VIJAY BEHAL) ..... PLAINTIFF**

**AND**

**RANJANA BEHAL ..... 1<sup>ST</sup> DEFENDANT**

**ALOK BEHAL ..... 2<sup>ND</sup> DEFENDANT**

**BOTH SUED AS ADMINISTRATORS TO THE ESTATE OF THE LATE  
PRADEEP BEHAL**

**JUDGMENT**

1. The Plaintiff commenced this suit through a Complaint dated 6/12/2022 seeking for Judgment against the Defendants for the following orders:
  - a. A declaration that the residential property known as L.R No. 2/314 (L.R No. 2/55/1) registered in the name of the Late Vijay Behal and Pradeep Behal as joint tenants is held by the Defendants on trust for the Plaintiff.
  - b. An order that the Defendant do execute and deliver to the Plaintiff a conveyance of the property known as L.R No. 2/314 (L.R No. 2/55/1).
  - c. An order that the Court in HCFP & A No. 465 of 2013 do confirm the Letters of Administration in favour of the Plaintiffs.
  - d. Costs of this suit.
  - e. Any other and further relief this Court may deem just to grant.



2. The suit is opposed. The Defendants entered appearance on 27/01/2023 and filed a statement of defence dated 30/06/2023.
3. Upon pleadings thereby being closed, the suit proceeded by way of viva voce evidence. The Plaintiff called four (4) witnesses and the Defendants called two (2) witnesses. The witnesses all testified on 26/02/2024.

### **Plaintiff's case**

4. The Plaintiff asserts that she was and still is the Administrator to the Estate of the Late Vijay Behal, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were Co-administrators to the Estate of the Late Pradeep Behal. The Late Vijay Behal purchased a residential property in Kilimani in 1972, known as L.R No.2/314 (L.R No. 2/55/1), with financial assistance from Housing Finance Corporation of Kenya (HFCK). The Late Pradeep Behal assisted by allowing his name to be included in the loan application. It was agreed that the Late Vijay Behal would make all financial contributions and carry out all expenses related to the property. A loan was granted, and the property was conveyed to both parties as joint tenants through a conveyance dated 22/05/1972. The Late Vijay Behal made all payments towards the loan, including interest and capital.
5. Repayment of the loan continued until 1995, with Late Vijay Behal exclusively occupying and maintaining the property. Standard Chartered Bank took over the loan in the year 1995. In 2000, he obtained a further loan from Fidelity Commercial Bank for business purposes and likewise repaid the interest and capital. The Late Pradeep Behal made no financial or other contributions to the property. The intention was always to transfer his share in the property to the Late Vijay Behal and this was openly known to all members of the family including the Defendants. The Plaintiff has always known the property as her matrimonial home. The Late Pradeep Behal and his family including the 1st and 2nd Defendants lived in their own accommodation.
6. Upon their deaths, the Plaintiff and the Defendants were appointed Co-administrators of their respective estates. The Plaintiff seeks a declaration that the Defendants hold the property in trust for them, asserting that the Late Pradeep Behal held a half share of the property in trust for the Late Vijay Behal.

### **Plaintiff's Evidence**

7. PW1 – Rajni Behal confirmed that she is the Plaintiff and she filed a Plaint dated 6/12/2022. She adopted her witness statement dated 29/11/2022, as her evidence before the court together with a list of documents dated 6/12/2022. The documents are at page 1 to 303.
8. In cross-examination, PW1 revealed that she got married in 1972 and had three children. Before and after her marriage, she resided with her parents and later with her husband in Kilimani, alongside her sister-in-law Ravi Kent and brother-in-law Pradeep, who was unmarried. She clarified that Vijay purchased the property alone but added Pradeep's name to the mortgage application to secure the loan, although she lacked documentary evidence from HFCK to confirm this. Despite both being registered owners, Pradeep made no financial contributions to the property, as evidenced by ownership documents and payment records. Pradeep's family voluntarily vacated the house between 1981-1982, coinciding with renovations, but the witness couldn't confirm the timing.
9. In re-examination, she emphasized that all mortgage payments and bills were solely covered by Vijay, while Pradeep benefited without contributing financially. Discussions about transferring Pradeep's tenancy share were initiated by him, and Vijay even financed Pradeep's medical treatment. Except for



- Pradeep, none of Vijay's siblings lived in the house, and Pradeep only stayed temporarily after returning from India.
10. PW2- Ravi Prabha Satish Kent Behal testified that he filed an affidavit dated 4/12/2015 which adopted as his evidence. He informed the court that Rajni Behal is his late brother's wife. The 1<sup>st</sup> Defendant is his younger brother's wife. His younger brother had a kidney transplant and he is the one who donated the kidney.
  11. In cross-examination, PW2, a resident of the UK since 1985, clarified that he didn't own a house in Nairobi. He described Pradeep's employment status as irregular and intermittent, noting his stint at Fuji Kenya after the house purchase. PW2 confirmed his residence in the Kilimani house from 1972, married in 1973, and highlighted the plaintiff's employment history, indicating she wasn't Vijay's partner when he bought the house. He testified that Pradeep expressed a desire to relinquish his share before a transplant, but his passing prevented this. Although Pradeep mentioned his intention verbally, there's no written documentation.
  12. In re-examination, PW2 reaffirmed Pradeep's intention, communicated during the kidney transplant procedure, concluding that the house rightfully belonged to Vijay.
  13. PW3- Amish Pradeep Kumar Patel testified that he is 43 years old. He adopted his witness statement dated 18/11/2022 as his evidence. He testified that the 1<sup>st</sup> Defendant is his mother and the 2<sup>nd</sup> Defendant is his elder brother. The plaintiff is his dad's elder brother's brother.
  14. In cross-examination, PW3 emphasized his commitment to truth, detailing his upbringing and familial relationships. He recounted his education, employment history, and his father's health challenges, including kidney transplants. He recalled his father's verbal intentions to transfer his share of the property to his brother, stressing the absence of written documentation. Despite their close relationship, his father never initiated formal discussions or sought clerical intervention regarding the property transfer.
  15. In re-examination, PW3 reiterated his father's acknowledgment of his brother's ownership of the house, despite their family's hardships and inability to move into the property.
  16. PW4- Aman Behal testified that he is aware of the matter in court. He adopted his witness statement dated 30/11/2022 as his evidence in this court.
  17. In cross-examination, PW4, born in the property in 1974, detailed his education, funded by his father, and his work history with his father's company. He asserted that his father solely funded the purchase, maintenance, and loan repayment of the property, with verbal mentions of transferring his share to his brother, though lacking documentary evidence. These discussions occurred within the family circle over many years, without external disclosure. He acknowledged Pradeep's health challenges and the family's close relationship.
  18. In re-examination, he noted Pradeep's departure from the property in 1981, his illness in the 90s prompting discussions on property transfer, and his lack of claim to the property share until his health declined. Despite financial struggles, Pradeep never contested Vijay's ownership, and the witness emphasized their family's unity and support during Pradeep's illness.
  19. With that evidence, the Plaintiff closed her case.

### **Defendants' case**

20. The Defendants dispute the Plaintiff's claims regarding the ownership and financial arrangements concerning the property known as L.R. No: 2/314 (L.R. No: 2/55/1). They deny that the late Vijay



Behal exclusively purchased the property and assert that both Vijay Behal and the late Pradeep Behal contributed to its acquisition. The Defendants argue that Pradeep Behal not only allowed his name to be included in the loan application but also took on joint household financial responsibilities, resulting in both brothers being registered as equally liable for the loan. They reject the existence of any oral agreement whereby Pradeep Behal was merely providing nominal support, emphasizing that both brothers financially contributed to the property.

21. Additionally, the Defendants contest assertions regarding Vijay Behal's exclusive residence on the property and the alleged takeover of the loan portfolio by Standard Chartered Bank. They deny that Pradeep Behal made no monetary contributions and assert that he intended to transfer his share of the property only if adequately compensated. The Defendants also dispute the characterization of the property as solely belonging to Vijay Behal, asserting that it was jointly occupied by both families from 1972 when it was purchased until 1982 when health concerns led them to vacate. They challenge the plaintiff's claim that the Grant of Probate indicated sole ownership of the property by the Estate of Vijay Behal and argue that the issue of ownership should be determined by the court.
22. In conclusion, the Defendants pray for the dismissal of the suit with costs awarded to them, contending that the Plaintiff has not provided sufficient evidence to support their claims.

### **Reply to statement of defence**

23. The Plaintiff rebuts the Defendants' defense, asserting her legal standing as the appointed Administrator of Vijay Behal's Estate. She challenges the Defendants' claims regarding Pradeep Behal's involvement in the mortgage, arguing his contribution was merely nominal, supported by an oral agreement with Vijay Behal.
24. The Plaintiff contends that all mortgage payments were made solely by Vijay Behal, refuting Pradeep's ownership claim. Moreover, she highlights Pradeep's lack of contestation of the property's ownership during his lifetime. The Plaintiff emphasizes the mortgage agreement designating Vijay and Pradeep as joint tenants, and with Pradeep's demise preceding Vijay's, the property passed solely to Vijay. Ultimately, she seeks the dismissal of the Defendant's defense with costs, affirming the prayers stated in her earlier submission.

### **Defendants' Evidence**

25. DW1 – Ranjana Behal testified that she is familiar with the suit before the court. She adopted the statement of defence dated 30/06/2023 and her witness statement (undated) as her evidence in chief. She produced a list of documents at page 14-20 dated 7/07/2023 as her exhibits.
26. During cross-examination, DW1, Pradeep's wife, stated that she met him in 1977, after the property was purchased, and wasn't aware of his financial contributions towards it. She mentioned his employment in 1979 but couldn't recall his salary. She claimed Pradeep gave her money for household expenses, but she didn't know the amounts. She acknowledged their move out of the property in 1982 for renovations but didn't provide evidence of her alleged asthma. She admitted ignorance about Pradeep's financial transactions and mortgage repayments. Despite his health issues, Pradeep never indicated a desire to sell his share or move back to the property.
27. During re-examination, she clarified their financial struggles when her son couldn't complete his studies due to lack of funds. She affirmed Pradeep's contributions to household expenses but couldn't confirm his payments towards the loan. She explained their move out of the property due to health reasons, not disinterest in Pradeep's share.



28. DW2- Alok Pradeep Behal adopted his witness statement at page 10 of the Defendant's bundle as his evidence before this court. He also adopted the exhibits at page 14-20. He added that he would rely on the defence statements.
29. During cross-examination, DW2, identified Amit as his younger brother and disputed claims of their father being a gambler or alcoholic, stating he had a steady job. He couldn't specify his father's employment before 1983 but knew he worked at Vanguard for about 21 years. His father allegedly mentioned making payments towards the property's purchase, but DW2 lacked evidence. Payments for utilities and groceries were reportedly made in cash, with no documentation provided. The witness acknowledged family contributions towards his father's kidney transplant.
30. In re-examination, it was his testimony that the extracts at page 121 of the Plaintiff's bundle do not carry any endorsement of the payments nor who made the payments. He had no evidence of the payments his father said he made. DW2 expressed skepticism about his aunt's claim regarding property ownership. He reiterated his father's positive character traits.
31. With that evidence, the Defendants closed their case.

### **Written Submissions**

32. The Court gave directions on filing of written submissions on 26/02/2024 which they did and I have considered them. The Plaintiff filed her submissions dated 26/03/2024 and the Defendants filed their submissions dated 26/04/2024.

### **Issues for determination**

33. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the plaintiffs and the authorities cited. The issue for determination is: -
  - a. Whether there was an intention to create a tenancy in common.
  - b. Whether the suit property known as L.R No. 2/314 (L.R No. 2/55/1) registered in the name of the Late Vijay Behal and Pradeep Behal as joint tenants is held by the Defendants on trust for the Plaintiff.
  - c. Whether the Plaintiff is entitled to the reliefs sought.

### **Analysis and determination**

#### **Whether there was an intention to create a tenancy in common**

34. The suit property was registered under the Government Lands Act (now repealed). It was registered in the names of both Vijay Behal and Pradeep Behal as tenants in common in equal shares. The import of the proprietorship between the Vijay Behal and Pradeep Behal in the suit property is governed under Section 103 of the Registered *Land Act* (now Repealed) which is equivalent to Section 91(8) of the current *Land Registration Act* No. 3 of 2012. Section 103 of the repealed Registered *Land Act* provides as follows:

“ 103 (1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate.



(2) No proprietor in common, shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietor of the land, but such consent shall not be unreasonably withheld”.

35. The [Land Registration Act](#) (No. 3 of 2012) which replaced the repealed Act does not approve joint proprietorship. It effectively bans them unless the proprietors are spouses or by an order of Court. The operative Section is 91 (8) which provides thus:

“91 (8) On and after the effective date, except with leave of Court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a Court shall take effect as a tenancy in common”.

36. The evidence before this Court indicates that though the parties herein are close relatives, they are not able to resolve this matter amicably. It is evident from the title to the suit property produced herein that the late Vijay Behal and the late Pradeep Behal were tenants in common. The Certificate of Postal Search for LR No. 2/55/17 (Original No. 2/55/17) produced in Court by the Defendants also indicates that the suit property was registered in the names of Vijay Behal and Pradeep Behal as tenants in common. However, it is the Plaintiff’s contention that the late Pradeep Behal only donated his name and that his share was held in trust for the late Vijay Behal. It is trite law that he who asserts must prove. This adage was enunciated in the Court of Appeal decision of Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR.

37. What was the intention of the late Vijay and the late Pradeep when they executed the mortgage with HFCK? Did they intend to create a tenancy in common of the suit property or was their intention to have the late Vijay exclusively acquire the title for the suit property? Section 91 of [Land Registration Act](#), 2012 provides for meaning and incidents of co-tenancies. Section 91 (1) provides that:

“in this act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.”

38. Section 91 (2) states:

“Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.”

39. Section 91 (5) states that:

“If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.”

40. In this case, there is no dispute that the brothers (now deceased) executed a mortgage with HFCK for the purchase of the suit property. The narrative before this Court is that the late Vijay Behal’s salary was not sufficient to meet the HFCK qualification requirement for a loan and so in order to meet the said loan requirement, the late Pradeep Behal offered to assist the late Vijay Behal by offering to include his name on the application for the loan. PW1 testified that HFCK felt that the late Vijay could not



pay for the mortgage alone so his brother chose to include his name to enable his loan application to go through. That this is the reason why Pradeep's name had to be included pursuant to an oral agreement.

41. It is contended that the late Vijay made all financial contribution towards the purchase price of the property as well as carry out all improvements, renovations, payments of taxes, insurance and running expenses and that the late Pradeep did not make any contribution towards the same. The loan was granted by a conveyance dated 22/05/1972 and a title was issued in the names of the late Vijay Behal and Pradeep Behal as tenants in common. The same is disputed by the Plaintiff, who contends that the late Vijay Behal had no intention of being registered as tenants in common.
42. The suit property was registered in the names of Vijay Behal (deceased) and Pradeep Behal (deceased). This is not disputed. Evidence before me demonstrates that the late Vijay Behal solely made all financial contribution towards the purchase price of the property as well as carried out all improvements, renovations, payments of taxes, insurance and running expenses and that the late Pradeep did not make any contribution towards the loan advanced by HFCK for the purchase of the suit property. This evidence has not been successfully controverted. Evidence has been adduced to demonstrate that the late Pradeep Behal was employed during this period however, no evidence has been proffered to show that he made any payments towards the purchase of the suit property or even contribute to any other expenses regarding the suit property.
43. PW1 testified that Pradeep never paid bills nor made any contributions towards the running of the household. The clear indication of the tenancy in common in this matter demonstrates that the type of proprietorship in the register relating to land registered in the names of the two brothers, the presumption is that the ownership of the suit property is in equal shares as co-proprietors. To my mind, ownership of land would involve but limited to payment of the purchase price. Seeing that there is no evidence of any financial contribution on the part of the late Pradeep Behal, I am inclined to hold that there was no intention for the registration of the brothers as tenants in common in the first place.
44. It is my considered view that the true intention of the brothers (now deceased) was for the late Vijay Behal to purchase and hold the title to the suit property exclusively and not to create a tenancy in common.

**Whether the suit property known as L.R No. 2/314 (L.R No. 2/55/1) registered in the name of the Late Vijay Behal and Pradeep Behal as joint tenants is held by the Defendants in trust for the Plaintiff**

45. The Plaintiff's argument is that in 1972, the late Vijay Behal purchased a residential property in Kilimani with financial aid from HFCK, and his brother, the Late Pradeep Behal, assisted by allowing his name on the loan application. It was agreed that Vijay (deceased) would handle all financial responsibilities related to the property. A loan was granted, and both brothers were named joint tenants. The late Vijay made all payments towards the loan until 1995, and he exclusively occupied and maintained the property. The late Pradeep made no financial or other contributions to the property, and it was always understood that his share would be transferred to Vijay (deceased). This understanding was known to all family members, including the defendants.
46. The Plaintiff presented several pieces of evidence to support their case: Documents including a re-conveyance of Plot No. LR 2/314, mortgages, and letters demonstrating employment of Vijay Behal and Pradeep Behal, an unsigned memo from Vijay Behal authorizing deductions from his salary for mortgage payments, supported by a ledger showing payments made to HFCK between 1976 and 1992, letters from Kenya Publicity Services Limited forwarding payments for Vijay Behal's mortgage to HFCK, paying-in slips, statements of accounts, and a receipt from HFCK issued to



Vijay Behal, a letter from Vanguard Studio confirming Pradeep Behal's employment since July 1979 and indicating authorization for salary deductions for mortgage payments. These pieces of evidence collectively demonstrate the financial contributions and mortgage payments made by Vijay Behal, as well as Pradeep Behal's employment and potential authorization for salary deductions, supporting the Plaintiff's case regarding ownership and financial responsibilities of the suit property.

47. On their part, the Defendants dispute the Plaintiff's claims regarding the property L.R. No: 2/314 (L.R. No: 2/55/1), denying that Vijay Behal exclusively purchased it and asserting that both Vijay Behal and Pradeep Behal contributed financially to its acquisition. They argue that Pradeep Behal shared joint household financial responsibilities, making both brothers equally liable for the loan, and reject the existence of any oral agreement suggesting nominal support from Pradeep Behal. Additionally, they contest assertions regarding Vijay Behal's exclusive residence on the property and Standard Chartered Bank's alleged takeover of the loan portfolio, stating that Pradeep Behal intended to transfer his share only if compensated adequately. The Defendants dispute the characterization of the property as solely belonging to Vijay Behal, stating it was jointly occupied until 1982. They challenge the Plaintiff's claim regarding the Grant of Probate, arguing that the issue of ownership should be determined by the court.
48. The Defendants adduced into evidence a copy of the title for LR No. 2/55/17 dated 22/05/1972 at page 16, transfer instrument dated 23/05/1972 at page 19 and certificate of postal search for LR No. 2/55/17 (Original No. 2/55/17) at page 20.
49. Section 24 of the [Land Registration Act](#) 2012 provides as follows;
  - “Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
50. Section 25 of the [Land Registration Act](#) recognizes overriding interests in registered land including trusts. It provides;
  1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
    - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
    - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
  2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
51. Whereas Section 28 of the same Act provides;
  - “28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
    - (a) deleted by Act No. 28 of 2016, s. 11(a);
    - (b) trusts including customary trusts;



- (c) .....
- (d) ....
- (e) .....
- (f) .....
- (g) .....
- (h) ...
- (i) ..... and
- (j) any other rights provided under any written law.”

52. The Plaintiff herein pleads the existence of a resulting trust. According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as:

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

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

54. It is common ground that the late Vijay Behal and the late Pradeep Behal are brothers. It is also common ground that the family of the deceased brothers used to live in the suit property at one point in time until the family of the late Pradeep Behal had to move out in 1981/1983 due to health issues (asthma) when the property was undergoing renovations. It has also been contended that the late Vijay paid for maintenance and utility bills for the property. Volumes of evidence was produced in support of this. The 1<sup>st</sup> Defendant asserted that the late Pradeep would give her Kshs. 1000 in cash for house expenses but this was not supported by any evidence. No evidence has been adduced by the Defendants to demonstrate that both Vijay and Pradeep contributed financially to the acquisition of the suit property. They also failed to prove that Pradeep Behal shared joint household financial responsibilities, making both brothers equally liable for the loan. The Plaintiff produced evidence to the effect that the late Pradeep indeed had a job by the time the mortgage was issued in their favor. In fact, evidence before me demonstrates that the late Pradeep had two jobs. There is a letter dated 24/04/1981, showing that Pradeep Behal had been employed by Vanguard Studio since July 1979 on permanent basis while earning a salary of 8000/- per month. The letter is addressed to HFCK and the Director indicated that the money installments can be deducted directly from Pradeep’s salary if the need arises. No further evidence has been produced demonstrating that Pradeep authorized deductions from his salary.

55. The doctrine of trust, though not a new concept, cannot be imposed on parties. However, a party has to produce sufficient evidence to enable the Court imply a trust. This was expressed by the Court of Appeal in the case of Kazungu Fondo Shutu & Another vs Japhet Noti Charo & Another [2021] eKLR which relied on its earlier decision of Juletabi African Adventure Limited & Another vs Christopher Michael Lockley [2017] eKLR wherein it held;

“The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”



56. Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiaries. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust. 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.
57. 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 para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises was registered in the names of Vijay Behal and Pradeep Behal as tenants in common in equal share. Evidence before the Court shows how the brother came to be registered as owners of the suit property. Therefore, it cannot be said that one of the brothers acquired property by wrong doing. Furthermore, there is also no unjust enrichment to be forestalled.
58. This leaves us with resulting trusts. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29<sup>th</sup> Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).
59. As earlier stated, it is not in doubt that Vijay Behal (deceased) and Pradeep Behal (deceased) are the registered owners of the suit property. There was no evidence of their intention. By applying the definition of trust earlier stated, it is the late Vijay Behal who became the settlor and the family of the late Pradeep the beneficiaries. As established, the Defendants together with the rest of the late Pradeep Behal's family and the family of the late Vijay Behal including the Plaintiff all lived on the suit property together at one point. By the time the late Pradeep Behal had passed on in 2002, his family had moved out of the suit property. It has been alleged that the late Pradeep contributed to the utilities expenses but the same has not been substantiated. The evidence before this Court is that it is only the late Vijay Behal who made payments towards payment of the mortgage with HFCK and that he paid for utilities and maintenance of the suit property. That the mortgage repayments were advanced by the late Vijay Behan alone.
60. The Court has looked at the circumstances of this present case and the circumstances in this case suggest that the late Vijay Behal did not intend to confer a beneficial interest upon the late Pradeep Behal. There is an unexpressed but presumed intention of the late Vijay Behal that he did not intend to confer a beneficial interest upon the late Pradeep Behal as he solely made all the financial contributions towards the purchase and maintenance of the suit property. It was contended that the late Vijay Behal



paid the deposit for the purchase of the suit property and then HFCK financed the balance. The general rule is that a resulting trust will automatically arise in favour of the person who advances the purchase money.

61. Lastly, it has been severally asserted in evidence that Pradeep Behal was going through financial difficulties. PW3 testified that his father, the late Pradeep had a heart attack and then he got diabetes and chronic illness. PW3 testified that his father went through a lot of difficulties but he could not cash out his half share since it was not his. PW4 testified that the late Pradeep moved out of the suit premises in 1981. That in 1981-2002 he struggled but never ever asked for his half share nor lay claim to his half share nor seek to come back to the suit property. DW1 led evidence that her eldest son did not complete college in South Africa due to lack of funds. It is evident that despite Pradeep Behal's (deceased) financial situation, he did not sell his share of the suit property. In the case of Isabel Chelangat v Samuel Tiro Rotich & 5 others (2012) eKLR the Court held that:

“In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. ....The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner.”

62. I note that a tenant in common is free to dispose of his or her share without the restrictive conditions placed on a joint tenancy. In a tenancy in common, no other tenant in common is entitled to receive a share of the property upon a tenant in common's death; instead, the property goes to the deceased's heirs. It is not disputed that the late Pradeep went through financial difficulties prior to and during his health issues. The fact that the late Pradeep Behal was undergoing financial difficulties and he did not sell his share of the suit property demonstrates that he did not believe that he had beneficial interest in the suit property.
63. Considering the entirety of the circumstances herein as laid out in the foregoing analysis, the Court finds that the suit property was not a tenancy in common but was held in trust for the deceased Vijay Behal and the Plaintiff as the administrator of his Estate.
64. Ultimately, the Court finds that the Plaintiff has proved her case on a balance of probabilities.
65. Having found that the estate of Vijay Behal (deceased) is the rightful owner of the suit property, it follows that the Plaintiff is entitled to all the rights appertaining to the ownership thereof save for prayer (c). This Court does not have the jurisdiction to determine prayer (c). Consequently, the Plaintiff's suit is allowed as follows:
- i. It is hereby declared that the residential property known as L.R No. 2/314 (L.R No. 2/55/1) registered in the joint names of the Late Vijay Behal (deceased) and Pradeep Behal (deceased) as tenants in common is held by the Defendants in trust for the Plaintiff.
  - ii. The Defendants are hereby ordered to execute and deliver to the Plaintiff a conveyance of the property known as L.R No. 2/314 (L.R No. 2/55/1).
  - iii. In view of the close family ties between the two families, I order each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY MAY 2024.**



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**MOGENI J**

**JUDGE**

**In the virtual presence of: -**

**Mr. Ng'ang'a for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Ms Nabwire holding brief for Mr. Khan for the Plaintiff**

**Ms. Caroline Sagina: Court Assistant**

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**MOGENI J**

**JUDGE**

