



Oyolla v Awange & 2 others (Environment & Land Miscellaneous Case E035 of 2022) [2024] KEELC 4015 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E035 OF 2022**

JO MBOYA, J

MAY 6, 2024

BETWEEN

JOHN KENNETH AJIMA OYOLLA PLAINTIFF

AND

PERES ANYANGO AWANGE 1ST DEFENDANT

RED ROSE REALTORS LIMITED 2ND DEFENDANT

GOLD GREEN LIGHT RESIDENCE LIMITED 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. Though the title of the instant suit shows and/or bears the abbreviation of a Miscellaneous suit [Application]; same is however a misnomer. For coherence, the subject matter was indeed commenced by way of a Plaint dated the 3rd March 2022.
2. Owing to the foregoing, the error in the title [which creates the impression that the suit is a miscellaneous application], was occasioned by the Judicial staff sitting at the Registry; and same ought to have been remedied.
3. Be that as it may, it suffices to point out that what is beforehand, is a substantive suit which was filed/ commenced vide Plaint dated the 3rd March 2022, but which was subsequently amended on the 8th April 2024.
4. Instructively, the amended Plaint has impleaded the following reliefs, [verbatim]
 - i. A permanent injunction restraining the Defendants either by themselves or through their agents, servants, employees, proxies or any one on their behalf from transferring, disposing, selling, charging, constructing on or in other way interfering with the status and conditions



of all that property known as L.R No 209/14990/16, registered as I.R No. 90324, without consent, approval, permission and involvement of the Plaintiff.

- ii. A declaration that the 1st, 2nd and 3rd Defendants or either of them hold certificate of title for land known as L.R No. 209/14990/16 registered as I.R No. 90324, in trust of the Plaintiff and that the Plaintiff holds shares and has interests in the property proportionate to 72.78%.
 - iii. An order directing the Chief Land Registrar to cancel all previous entries to the title for land known as L.R No. 209/14990/16 registered as I.R No. 90324 and register the Plaintiff as a joint owner of the said property to a proportion of 72.78% and issue certificate of lease to that effect.
 - iv. In the alternative, Judgment be entered for the Plaintiff against the Defendants jointly and/or severally for the sum equivalent to 72.78% of the current value of the property known as L.R No. 209/14990/16 registered as I.R No. 90324.
 - v. Interest o [iv] above at court rates from the date of filing of this suit until payment in full.
 - vi. Costs of the suit.
5. Upon being served with the original Plaint, the 1st and 2nd Defendants duly entered appearance and filed a statement of defense dated the 17th March 2022; and in respect of which same [1st Defendant] denied the claims by and on behalf of the Plaintiff herein. Furthermore, the 1st and 2nd Defendants contended that the suit property was offered to and in favor of the 1st Defendant by M/s Teleposta Pension Scheme, arising from the fact that same [1st Defendant] had been an employee of Telkom Kenya Ltd for over 32 years.
6. On the other hand, the 3rd Defendant entered appearance and filed a statement of defense dated the 21st February 2023; and in respect of which same [3rd Defendant] also disputed the Plaintiff's claim.
7. Notably, when the Plaintiff filed the amended Plaint dated the 8th April 2024, none of the Defendants sought to file and/or file any amended statement of defense. In any event, the amended Plaint only introduced one [1] prayer/ relief, at the foot of the previous Plaint.
8. Suffice it to point out that the Defendants chose to adopt and rely on the statements of defense, which had hitherto been filed. Consequently and in this regard, the pleadings stood closed.
9. On the other hand, it is imperative to underscore that the subject matter came up for pretrial directions on the 8th November 2022 whereupon the parties confirmed having filed and exchanged the relevant documents, inter-alia the List and bundle of documents and the witness statements. Consequently, the court proceeded to and confirmed the matter as being ready for hearing.

Evidence by the parties:

a. Plaintiff's Case:

10. The Plaintiff's case is premised and anchored on the evidence of two [2] witnesses, namely, John Keneth Ajima Ojola and Peter Rotich, who testified as PW1 and PW2, respectively.
11. It was the testimony of the witness [PW1] that same is the Plaintiff in respect of the matter. Furthermore, the witness averred that by virtue of being the Plaintiff, same is conversant[familiar] with the facts of the matter.



12. On the other hand, the witness averred that same [Witness], has since recorded a witness statement pertaining to the instant matter. In this respect, the witness adverted to the witness statement dated the 3rd March 2022 and thereafter sought to adopt and rely on same.
13. Suffice it to point out that the witness statement dated the 3rd March 2022; by the Witness, was thereafter adopted and constituted as the evidence in chief of the witness.
14. Other than the foregoing, the witness also alluded to a List and bundle of documents dated the 3rd March 2022; and which witness statement the witness sought to produce before the court as exhibits. Instructively, the documents at the foot of the List dated the 3rd March 2022 were thereafter adopted and constituted as Plaintiff's Exhibits P1 to P19, respectively.
15. Additionally, the witness adverted to the Plaint dated the 3rd March 2022 and sought to adopt the contents thereof. For coherence, the witness implored the Honourable court to grant the relief[s] alluded to thereunder;
16. On cross examination, by learned counsel for the 1st and 2nd Defendants, the witness averred that same [PW1] is conversant with the 1st Defendant herein. In any event, the witness added that the 1st Defendant was his [witness] mother in law.
17. It was the further testimony of the witness that same [witness] was married to the 1st Defendant's daughter, namely, Lucy Awange. Besides, the witness added that same [PW1] begot children with the 1st Defendant's daughter.
18. Whilst under further cross examination, the witness averred that the 1st Defendant's daughter, namely, Lucy Awange was and is still working with Central Bank of Kenya. In addition, the witness averred that the said Lucy Awange was/is earning salary.
19. On further cross examination, the witness averred that Lucy Awange [who is his erstwhile wife]; took a loan and same was using her salary to service the loan facility.
20. Nevertheless, it was the testimony of the witness that it was him [Witness] who was paying for the various domestic activities, whilst Lucy was servicing the loan.
21. Furthermore, the witness averred that same made contribution[s] towards the purchase and acquisition of the suit property. In this regard, the witness averred that his [witness] contribution constitutes/represent Seventy Two percent [72.%] shares in the suit property.
22. It was the further testimony of the witness that the 1st Defendant's shares are also dependent on the contributions that were made by the 1st Defendant. In particular, the witness added that the shares for each and every contributing party was agreed to be calculated on the basis of the contribution.
23. Furthermore, it was the testimony of the witness [PW1] that the 1st Defendant herein was hitherto working with Kenya Post and Telecommunications. However, the witness stated that same [witness] did not agree with the suggestion that the suit property was allocated to the 1st Defendant on the basis of her [1st Defendant's] employment.
24. On further cross examination, the witness averred that the letter of offer as pertains to the suit property was issued to and addressed in favor of the 1st Defendant. For good measure, the witness confirmed that the letter of Offer was in respect of the suit property.



25. Whilst under further cross examination, the witness averred that the suit property was indicated to have been offered to the 1st Defendant at the purchase price of Kes.4, 340, 000/= only. In any event, the witness added that the said figure [Kes.4, 340, 000/= only] was the value of the suit property.
26. Other than the foregoing, the witness was referred to a letter from M/s Kale, Maina and Bundotich Advocates and upon examining the letter in question, the witness averred that the value indicated at the foot of the said letter reflects Kes.26, 000, 000/= only.
27. On the other hand, it was the testimony of the witness that same [witness] occupied the suit premises together with his wife [Lucy Awange] for a period/duration of 10 years. In any event, the witness averred that during the period of occupation of the suit premises, same [witness] paid rents to the 1st Defendant.
28. Nevertheless, it was the testimony of the witness that same is not before the court with a view to claiming the rents which were paid to the 1st Defendant.
29. Other than the foregoing testimony, the witness averred that the suit property was transferred to and in favor of the 2nd Defendant in the year 2016. However, the witness added that the transfer of the suit property in favor of the 2nd Defendant was not only fraudulent, but also amounted to breach of trust.
30. Whilst under further cross examination, the witness averred that the transfer in question was also undertaken in breach of lawful court orders. Nevertheless, when pressed further, the witness acknowledged that the transfer was effected in the year 2016 yet the court order was only issued on the 23rd November 2021.
31. It was the further testimony of the witness [PW1] that the 1st Defendant herein was entitled to pension. However, the witness added that the witness was not aware of the amount payable to the 1st Defendant on account of Pension.
32. Whilst under further cross examination, the witness averred that same made payments amounting to Kes.2, 159, 000/= only directly to Teleposta Pension Fund. For good measure, the witness averred that the payment in question was rendered vide cheque number 10206 which was drawn in favor of Teleposta Pension Scheme.
33. On the other hand, it was the further testimony of the witness that other than the said cheque which emanated from Maisha Corporative Society Limited, same also paid other monies towards the purchase/acquisition of the suit property. In short, the witness averred that his [witness] total contribution, contributes [72%] of contribution in respect of the suit property.
34. On cross examination by learned counsel for the 3rd Defendant, the witness herein confirmed that same is not conversant with what constitutes with a joint venture. Nevertheless, the witness averred that same has a claim as against the 3rd Defendant herein.
35. It was the further testimony of the witness that same went to the suit property in the year 2021 and discovered that there was a project that was being undertaken on the suit property. Furthermore, the witness averred that the project in question was being undertaken on the suit property by the 3rd Defendant herein.
36. It was the further evidence of the witness that when same undertook a search in respect of the suit property, same [witness] established that the suit property was registered in the name of the 2nd Defendant.



37. Whilst under further cross examination, the witness averred that the transfer in respect of the suit property to and in favor of the 2nd Defendant was undertaken in December 2020.
38. On the other hand and upon being shown the documents at page 68 of the 2nd Defendant's bundle of documents, the witness averred that the property is currently registered in the name of the 3rd Defendant. Nevertheless, the witness averred that the transfer to and in favor of the 3rd Defendant was undertaken long before the order of the court.
39. Whilst under further cross examination, the witness averred that the 3rd Defendant herein was no a party to the suit at the point in time when the court order was issued. Be that as it may, it was the testimony of the witness that by the time the instant suit was filed, the 3rd Defendant was already registered as the owner of the suit property.
40. Nevertheless, the witness averred that upon discovering that the suit property has been transferred to and in favor of the 3rd Defendant, same [witness] proceeded to and registered a caveat against the title of the suit property.
41. On re-examination, the witness averred that in terms of the Certificate of Official search which has been availed to the court, the suit property is indicated to have been registered in the name of the 2nd Defendant.
42. In any event, the witness added that the Certificate of Official search in question was procured/ obtained in January 2022. On further re-examination, the witness averred that the payments which same [witness] made on account of purchase of the suit property were made directly to the vendor.
43. Other than the foregoing, the witness averred that the payments were being made towards the purchase of the suit property, which had been offered to the 1st Defendant.
44. The second [2ND] witness who testified on behalf of the Plaintiff was Peter Rotich. Same testified as PW2.
45. It was the testimony of PW2, that same is currently the administrator and the trust secretary of Teleposta Pension Scheme. In this respect, the witness averred that by virtue of being the Administrator and Secretary thereof same [witness] is therefore conversant with the facts of this matter.
46. Furthermore, the witness averred that same has since sworn an affidavit and wherein same [witness] has articulated the facts pertaining to the issue beforehand. In this respect, the witness alluded to the affidavit sworn on the 17th March 2023 and thereafter sought to adopt and rely on same.
47. Suffice it to point out that the affidavit under reference and which was sworn on the 17th March 2023, was thereafter adopted and constituted as the Evidence in chief of the witness.
48. On the other hand, the witness also alluded to various [assorted] documents which were annexed to the affidavit and which documents the witness sought to tender and produce before the court as exhibits.
49. There being no objection to the production of the various [assorted] documents, same were duly tendered and produced before the court as exhibits P20 to P24, respectively.
50. On cross examination by learned for the 1st and 2nd Defendants, the witness [PW2] herein averred that by virtue of being the administrator and secretary of Teleposta Pension Scheme same [Witness] is therefore conversant with the facts pertaining to the sale of the suit property.
51. In any event, the witness averred that the suit property was sold to the 1st Defendant in the year 2003.



52. It was the further testimony of the witness that as the administrator of Teleposta Pension Scheme same [witness] is in charge of various records pertaining to the pension contributors, which included the records in respect of the 1st Defendant herein.
53. Whilst under further cross examination, the witness averred that in the year 2003 same [witness] was an assistant administrator and in any even same [witness] did not deal with the suit property.
54. Furthermore, the witness averred that same was not aware of the circumstances under which the suit property was sold to the 1st Defendant.
55. On further cross examination, the witness stated that the suit property was sold to the 1st Defendant for the sum of Kes.4, 340, 000/= only. However, the witness added that all the properties of the pension scheme, including the suit property, were sold at the market price.
56. Additionally, the witness averred that even though the suit property was sold at market price, same [witness] did not produce before the court a copy of the valuation report, as pertains to the suit Property.
57. Upon being shown a letter from M/s Kale, Maina and Bundotich Advocates, the witness herein averred that the letter was issued in respect of the suit property. In any event, it was the testimony of the witness that the said advocates were the advocates for Teleposta Pension Scheme.
58. On further cross examination, the witness averred that according to the letter under reference, the value alluded to showed that the suit property was valued at Kes.26, 000, 000/= only.
59. Other than the foregoing, it was the testimony of the witness [PW2] that the Pension Scheme received various bankers cheque towards and on account of the sale of the suit property. Nevertheless, the witness added that the cheques alluded to were brought to the Scheme [Teleposta Scheme] by the advocates for the Scheme.
60. On cross examination by learned counsel for the 3rd Defendant, the witness [PW2] averred that the suit property was sold to the 1st Defendant. Furthermore, the witness added that thereafter Teleposta Pension Scheme processed and issued the Certificate of title to and in favor of 1st Defendant.
61. With the foregoing testimony, the Plaintiff's case was duly closed.

b. 1ST AND 2ND DEFENDANTS' CASE:

62. The 1st and 2nd Defendants' case revolves around the testimony of one [1] witness, namely, Peris Anyango Awange. Same testified as DW1.
63. It was the testimony of the witness, that same [witness] is the 1st Defendant herein. Furthermore, the witness averred that same is also a Director of the Second Defendant and therefore same [DW1] is conversant with the facts of the instant matter.
64. On the other hand the witness [DW1] adverted to the witness statement dated the 15th July 2022 and which witness statement the witness sought to adopt and rely on as her evidence in chief.
65. Suffice it to point out that the witness statement dated the 15th July 2022 was thereafter adopted and constituted as the evidence in chief of the witness.
66. Additionally, the witness adverted to a List and bundle of documents dated the 15th July 2022; and which the witness sought to produce before the court as E[xhibits D1 to D8, respectively.



67. For coherence, the documents under reference were thereafter produced and admitted in the manner proposed by Dw1.
68. Other than the foregoing, the witness adverted to a statement of defense dated the 15th July 2022 and implored the court to adopt and utilize same. In any event, the witness invited the court to find and hold that the Plaintiff's suit was devoid of merits.
69. On cross examination by learned counsel for the Plaintiff, the witness [DW1] averred that the suit property was offered unto her by Teleposta Pension Scheme. In any event, the witness averred that the sale of the suit property was completed in the year 2004.
70. Whilst under further cross examination, the witness averred that the last payments towards and on account of the purchase of the suit property was made on the 25th August 2004 vide cheque number 3599125210.
71. On the other hand, the witness averred that the cheque under reference, which same identify as Exhibit P23, was given unto her [witness] by her daughter, namely, Lucy Oyola Awange.
72. Additionally, the witness averred that the said Lucy Oyola Awange was hitherto married to the Plaintiff herein. Nevertheless, the witness averred that same [witness] did not ascertain the source of the cheque from her daughter.
73. On further cross examination, the witness also identified another cheque dated the 30th August 2004; for the sum of Kes.700, 000/= only and which cheque the witness stated was similarly brought to her by her daughter. For good measure, the witness confirmed that the said cheque bore cheque number 010206.
74. Whilst under further cross examination, the witness also alluded to another cheque dated the 22nd April 2024 and which cheque bore cheque number 00182 for the sum of Kes.500, 000/= only.
75. It was the further testimony of the witness that the cheques under reference went towards the purchase of the suit property. In any event, the witness clarified that the cheque for Kes.500, 000/= only related to the first instalments which was paid in respect of the suit property.
76. On the other hand, it was the testimony of the witness [DW1] that the payment at the foot of the cheque number 00182 and in the sum of Kes.500, 000/- only was the only payment that was made by her [witness] towards the acquisition of the suit property.
77. On further cross examination, the witness averred that same did not know whether her daughter was a member of Maisha Bora Sacco Ltd.
78. It was the further testimony of the witness that the purchase price in respect of the suit property had already been fully paid by the time same [witness] sold her suit property at Tena Estate within the City of Nairobi. In any event, the witness added that the proceeds of the house at Tena Estate was utilized towards payments of legal fees and stamp duty.
79. On cross examination, by learned counsel for the 3rd Defendant, the witness averred that the suit property was transferred and registered in her name. For good measure, the witness added that same [witness] was the sole proprietor of the suit property.
80. Whilst under further cross examination, the witness averred that thereafter same transferred the suit property to the 2nd Defendant.



81. Other than the foregoing, it was also the testimony of the witness that subsequently, same [witness] entered into a joint venture with the 3rd Defendant over and in respect of the suit property. Be that as it may, the witness clarified that by the time same entered into the joint venture with the 3rd Defendant, there was no encumbrance over and in respect of the suit property.
82. On further cross examination, the witness averred that same [witness] holds 20% share in the joint venture.
83. Besides, the witness added that if there is any claim by the Plaintiff, such a claim can only be laid against her [witness] and the 2nd Defendant. According to the witness, the Plaintiff herein does not have any claim as against the 3rd Defendant.
84. Furthermore, the witness averred that if the Plaintiff has a claim, such a claim can be compensated in monetary terms.
85. With the foregoing testimony, the 1st and 2nd Defendants' case was duly closed.

c. 3RD DEFENDANT'S CASE:

86. The 3rd Defendant's case is similarly premised on the evidence of one witness, namely, Shaban Yilmatzurk, who testified as DW2.
87. It was the testimony of the witness that same [witness] is a director of the 3rd Defendant company. Furthermore, the witness averred that by virtue of being a director of the 3rd Defendant company, same [witness] is thus knowledgeable of the facts of the instant matter.
88. Additionally, the witness averred that same has since recorded a witness statement dated the 20th March 2023 and which witness statement same [DW2] sought to adopt as his evidence in chief.
89. Instructively, the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
90. On the other hand, the witness adverted to a List and bundle of documents dated the 20th March 2023; and which documents the witness sought to tender and produce before the court as Exhibit[s].
91. Suffice it to point out that there being no objection to the production of the said documents, same [documents] were duly admitted and marked as defense exhibits D1 to D13 on behalf of the 3rd Defendant's.
92. Other than the foregoing, the witness alluded to a statement of defense dated the 21st February 2023 and thereafter sought to adopt and rely on same. Besides, the witness has invited the court to find and hold that the Plaintiff's case was devoid of merits.
93. On cross examination by learned counsel for the Plaintiff, the witness pointed out that the 3rd Defendant paid consideration towards the acquisition of the suit property. Nevertheless, when pressed further, the witness stated that same [DW2] has explained the manner in which the 3rd Defendant paid the consideration in his witness statement.
94. Nevertheless and whilst under further cross examination, the witness averred that no monies were paid towards the purchase of the suit property.
95. On the other hand, the witness thereafter made an about turn [turn-around] and stated that the 3rd Defendant paid to and in favor of the 2nd Defendant Kes.11, 000, 000/= only.



96. On further cross examination, it was the testimony of the witness that by virtue of the joint venture, it was agreed that the 3rd Defendant would own 80% of the shares in respect of the suit property whereas the 1st and 2nd Defendants would be entitled to 20% shares.
97. Additionally, it was the testimony of the witness that same [DW2] has since established that there is a claim on behalf of a third party. Nevertheless, the witness averred that the third-party namely, the Plaintiff herein has no stakes and/or interest in the said suit property.
98. Furthermore, it was the testimony of the witness that the 3rd Defendant herein paid stamp duty of kes.3, 000, 000/= on account of transfer of the suit property, which amounts far exceeds [sic] the monies that the Plaintiff claims to have paid towards the purchase of the suit property.
99. On cross examination by learned counsel for the 1st and 2nd Defendants, the witness averred that the 3rd Defendant entered into and executed an agreement with the 2nd Defendant. Furthermore, the witness added that the agreement in question was in respect of the suit property.
100. Other than the foregoing, it was the testimony of the witness that the 2nd and 3rd Defendants also agreed to form a management company, wherein both 1st and 2nd Defendants on one hand and the 3rd Defendant on the other hand were to hold shares.
101. On re-examination by learned counsel for the 3rd Defendant, the witness averred that the 3rd Defendant paid the purchase price to and in favor of the 2nd Defendant. In any event, the witness added that the payment in question was via bank transfer.
102. On further re-examination, the witness averred that it was also agreed that the 2nd Defendant herein would be entitled to 9 units/apartments, besides the cash payments.
103. On the other hand, it was the further testimony of the witness that the 1st and 2nd Defendants are entitled to 20% shares. In any event, the witness added that it is the 20% shares [alluded to] which comprises of Kes.11, 000, 000/= only and 9 apartments.
104. Additionally, the witness averred that the 3rd Defendant duly paid the stamp duty in the sum of Kes.3, 000, 000/= only. Besides, it was the testimony of the witness that the payment of the stamp duty was duly receipted and evidence of same has been placed before the court in terms of the documents at the page 30 of the 3rd Defendant's bundle of documents.
105. Finally, the witness averred that even though same has not undertaken a valuation over and in respect of the suit property, however, the value thereof is in the region of USD 4 Million only.
106. With the foregoing testimony, the 3rd Defendant's case was duly closed.

Parties' Submissions:

a. Plaintiff's Submissions:

107. The Plaintiff filed written submissions dated the 2nd February 2024; and in respect of which same has highlighted and amplified three [3] issues for determination by the court.
108. Firstly, learned counsel for the Plaintiff has submitted that though the suit property was offered to the 1st Defendant by Teleposta Pension Scheme, the 1st Defendant herein approached the Plaintiff and his [Plaintiff's wife], namely, Lucy Awange, the latter who happens to be the 1st Defendant's daughter, to contribute towards the purchase of the suit property.



109. Additionally, learned counsel has submitted that on the basis of the parole agreement and or mutual understanding, the Plaintiff herein proceeded to and made various payments towards and on account of the purchase price. For coherence, learned counsel for the Plaintiff submitted that the Plaintiff made payments amounting to Kes.3, 159, 000/= only, which represent/constitute 72% of the ownership of the suit property.
110. It was the further submissions of learned counsel for the Plaintiff that the payments by and on behalf of the Plaintiff were remitted vide cheques directly to the vendor, namely, Teleposta Pension Scheme. In any event, Learned counsel contended that the payments made by the Plaintiff were duly confirmed by PW2.
111. Other than the foregoing, it was the submissions by learned counsel for the Plaintiff that the 1st Defendant herein only paid the sum of Kes.500, 000/= only towards the purchase of the suit property.
112. Based on the foregoing, learned counsel for the Plaintiff has submitted that the Plaintiff herein paid and/or contributed a substantial chunk of money towards and in respect of the acquisition of the suit property. In this regard, counsel added that the payment of a substantial portion of the purchase price establishes a basis for the existence and/or inference of a constructive trust in favor of the Plaintiff.
113. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on inter-alia the holding in the case of Juletabi African Adventure Ltd & Another vs Christopher Michael Lokli [2017]eKLR and Twalib Hatayan & Another vs Saaid Sagar Hammed Al-Heidy & Others [2015]eKLR, respectively.
114. Secondly, learned counsel for the Plaintiff has submitted that the Doctrine of bona fide purchaser for value does not avail to and in favor of the 3rd Defendant, either as contended or at all.
115. Furthermore, learned counsel for the Plaintiff has submitted that the 3rd Defendant herein did not tender and/or produce any scintilla of evidence to demonstrate that same paid any purchase price [consideration] towards and in respect of the suit property.
116. Other than the foregoing, it was the submissions by learned counsel for the Plaintiff that the 3rd Defendant has neither established nor demonstrated the requisite ingredients that underpin [anchor] the claim for bona fide purchase for value or at all.
117. Finally, learned counsel for the Plaintiff has also submitted that the 1st Defendant herein was privy to and knowledgeable of the extent of contribution made by the Plaintiff towards the acquisition of the suit property, but nevertheless, same [1st Defendant] chose to deal with the suit property, albeit without regard to the interest to the Plaintiff.
118. Owing to the foregoing, learned counsel for the Plaintiff has therefore invited the court to find and hold that the transfer of the suit property by the 1st Defendant to the 2nd Defendant and thereafter by the 2nd Defendant to the 3rd Defendant, was fraudulent and constituted a deliberate attempt to defeat the Plaintiff's interests thereto.
119. Nevertheless, learned counsel added that despite the actions and/or omissions by the 1st Defendant, the Plaintiff's entitlement to a portion of the suit property vide trust remains in situ on account of the contributions towards the purchase price.
120. Furthermore, learned counsel for the Plaintiff has cited and relied on the decision of the Court of Appeal in the case of Githengi vs Mwaura [2022] KECA [KLR], where the court of appeal underscored the ingredients that underpins a claim for trust.



121. In a nutshell, learned counsel for the Plaintiff has invited the court to find and hold that the Plaintiff has duly established and proved his claim on account of trust and thus the suit beforehand ought to be granted.

b. 1st and 2nd Defendants' Submissions:

122. The 1st and 2nd Defendants herein filed written submissions dated the 7th February 2024 and in respect of which same [1st and 2nd Defendants] has raised, highlighted and canvassed three [3] issues for determination by the court.

123. First and foremost, learned counsel for the 1st and 2nd Defendants has submitted that the suit property was actually offered for sale to and in favor of the 1st Defendant, albeit on a discounted price by virtue of the fact that the 1st Defendant was an employee of Telkom Kenya Ltd. Instructively, learned counsel for the 1st and 2nd Defendants has invited the court to take cognizance of paragraph 7 of the Plaintiff [amended plaint].

124. On the other hand, learned counsel for the 1st and 2nd Defendants has submitted that save for the discounted price, evidence abound that the suit property was actually valued at Kes.26, 000, 000/= only.

125. Be that as it may, learned counsel for the 1st and 2nd Defendants has submitted that even assuming that the Plaintiff had made payments towards and on account of the purchase of the suit property [which is disputed], the payments made by the Plaintiff cannot entitle same to [sic] 72.78% stake in the ownership of the suit property.

126. Furthermore, learned counsel for the 1st and 2nd Defendants has submitted that despite of the contention by the Plaintiff that same procured and paid various monies towards the purchase of the suit property, the Plaintiff has however failed to tender and produce before the court credible evidence to establish his contention or at all.

127. In particular, learned counsel for the 1st and 2nd Defendant submitted that even though the Plaintiff contended that same sourced the sum of Kes.2, 159, 000/= only from Maisha Bora Sacco Society Ltd, no credible evidence was tendered to demonstrate the said allegations.

128. Moreover, learned counsel for the 1st and 2nd Defendants submitted that it was incumbent upon the Plaintiff to tender and produce before the court cogent and plausible evidence to demonstrate the payments which same alludes to. However, learned counsel contended that the Plaintiff has failed to discharge the burden of proof in accordance with the provisions of Section 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.

129. Furthermore, learned counsel for the 1st and 2nd Defendants has also submitted that the Plaintiff's claim to be entitled to a portion of the suit property on account of trust was being mounted with some degree of unreasonable and inordinate delay. In this respect, learned counsel contended that the Plaintiff's claim is therefore an afterthought.

130. Additionally, learned counsel for the 1st and 2nd Defendants has also submitted that the totality of the evidence that was tendered by and on behalf of the Plaintiff does not establish and/or prove the requisite ingredient[s] that underpin a claim for either resulting trust or constructive trust or at all.

131. At any rate, learned counsel has invited the court to take cognizance of the holding in the case of Archer & Another vs Archer & 2 Others [2023] KECA 298 [KLR], Twalib Hatayan & Another vs Saaid Sagar Hammed Al-heidy & Others [2015]eKLR and Ben Duke Omwenga vs Abigael Bonareri



- Omenga & Another [2021]eKLR, respectively, which decisions espouse the ingredients necessary towards proving/demonstration of the existence of resulting and constructive trust.
132. In a nutshell, learned counsel for the 1st and 2nd Defendants has submitted that the Plaintiff has not proved his case as pertains to trust over and in respect of the suit property.
 133. Secondly, learned counsel for the 1st and 2nd Defendants has submitted that even if the Plaintiff had paid the monies alluded to by the Plaintiff, it is imperative to recall that the Plaintiff was married to the 1st Defendant daughter and hence the payments alluded to by the Plaintiff constitute matrimonial property [between the Plaintiff and the First Defendant's Daughter].
 134. Furthermore, learned counsel for the 1st and 2nd Defendants added that insofar as no evidence was tendered to show that the Plaintiff and the 1st Defendant's daughter were divorced, it is apparent that the said marriage is still subsisting and the monies alluded to thus constitute matrimonial property.
 135. In any event, learned counsel added that insofar as there has been no determination by a court of competent jurisdiction as pertains to the degree of contribution between the Plaintiff and [sic] his former wife, the Plaintiff herein cannot be heard to lay a claim to the funds which were contributed towards the purchase of the suit property.
 136. In support of the foregoing submissions, learned counsel for the 1st and 2nd Defendants has invited the court to take cognizance of the decisions in the case of JOO vs MBO; Federation of Women Lawyers [Fida Kenya & Another; Amicus Curie] [2023]KESC 4 [KLR], where the Supreme Court [the Apex Court] considered the import and tenor of Article 45[3] of [the Constitution](#) 2010.
 137. Premised on the fact that the contributions [funds] which have been alluded to by the Plaintiff were allegedly made during the subsistence of the marriage with the 1st Defendant's daughter, learned counsel for the 1st and 2nd Defendant has thus contended that the Plaintiff herein cannot leverage on the said monies to stake a claim to ownership of the suit property.
 138. Thirdly, learned counsel for the 1st and 2nd Defendants has submitted that the suit property was lawfully transferred and registered in the name of the 3rd Defendant. In this respect, learned counsel has contended that there was no fraud or at all, in the manner in which the suit property was transferred to and in favor of the 3rd Defendant.
 139. At any rate, learned counsel has submitted that at the time when the suit property was transferred to and in favor of the 3rd Defendant, there was no encumbrance that was shown [registered] on the register of the suit property.
 140. Other than the foregoing, learned counsel for the 3rd Defendant also submitted that the orders of injunction which were procured and obtained by the Plaintiff vide Milimani CMELC No. E456 of 2021, were obtained/issued on the 23rd November 2021, whereas the transfer complained of in favor of the 3rd Defendant was undertaken on the 16th December 2020.
 141. In view of the foregoing, learned counsel for the 1st and 2nd Defendants has submitted that the Plaintiff has neither tendered nor produced before the court any evidence to demonstrate fraud, either as alleged or at all.
 142. Finally, learned counsel for the 1st and 2nd Defendant cited and relied on inter-alia, the holding in the case of Ardhi Highway Developers Ltd vs Westend Butchery Ltd & Others [2015]eKLR, Dr. Joseph Arap Ngok vs Justice Moiyo Olekuwa [1997]eKLR and Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015]eKLR, respectively, to propagate the position that before a title can be vitiated



on the basis of fraud, it must be shown that the party charged or chargeable with such allegation, was privy and/or party to the fraud.

143. Premised on the foregoing, learned counsel for the 1st and 2nd Defendants has submitted that the Plaintiff herein has neither established his claim based on trust nor demonstrated that the transfer of the suit property in favor of the 3rd Defendant was fraudulent.
144. Consequently and in view of the foregoing, learned counsel for the 1st and 2nd Defendants has implored the Honourable court to find and hold that the Plaintiff's suit is devoid of merits and thus ought to be dismissed with costs.

3rd Defendant's Submissions:

145. The 3rd Defendant filed written submissions dated the 19th February 2024; and in respect of which same has highlighted and amplified three [3] salient issues for consideration by the Honourable court.
146. Firstly, learned counsel for the 3rd Defendant has submitted that the 3rd Defendant herein entered into and executed a joint venture agreement with the 2nd Defendant pertaining to and concerning the suit property.
147. Furthermore, learned counsel for the 3rd Defendant has contended that prior to and before entering into the joint venture, the 3rd Defendant paid valuable consideration and thus the 3rd Defendant is a bona fide purchaser for value without notice.
148. In support of the contention that the 3rd Defendant is a bona fide purchaser for value without notice, learned counsel for the 3rd Defendant has cited and relied on the case of Lawrence P Mukiri vs Attorney General & 4 Others [2013]eKLR.
149. Secondly, learned counsel for the 3rd Defendant has submitted that the 3rd Defendant did not engage in any fraudulent actions and/or activity in the process towards the acquisition of the suit property.
150. At any rate, learned counsel for the 3rd Defendant has submitted that no evidence was tendered to demonstrate that the 3rd Defendant was knowledgeable of and/or privy to any fraud affecting the acquisition and transfer of the suit property.
151. Based on the foregoing, learned counsel for the 3rd Defendant has therefore submitted that the acquisition, transfer and registration of the suit property in favor of the 3rd Defendant was lawful and hence the 3rd Defendant acquired a clear title to the suit property.
152. Thirdly, learned counsel for the 3rd Defendant has submitted that the Plaintiff's case has captured and pleaded at the foot of the Plaint does not make any allegations as against the 3rd Defendant or at all.
153. Furthermore, learned counsel for the 3rd Defendant has submitted that when the Plaintiff realized that same [Plaintiff] had not alluded to any claim against the 3rd Defendant, same [Plaintiff] resorted to an unorthodox procedure of seeking to sneak in a prayer against the 3rd Defendant albeit through the submissions.
154. Be that as it may, Learned counsel for the 3rd Defendant has invited the court to find and hold that the Plaintiff herein has neither demonstrated and/or proved any wrong doing by and on behalf of the third-party at all. In this respect, learned counsel for the 3rd Defendant has implored the court to find and hold that the Plaintiff's case is devoid of merits.



Issue for Determination:

155. Having appraised the pleadings filed by the Parties; the evidence [oral and documentary] tendered before the court and upon consideration of the written submissions filed on behalf of the parties, the following issues do emerge [crystallize] and are thus worthy of determination;
- i. Whether the Plaintiff herein has tendered and placed before the court sufficient evidence to demonstrate the existence of trust [resulting or constructive trust].
 - ii. Whether the 3rd Defendant was indeed a Bona fide purchaser for value or better still, whether the 3rd Defendant has placed before the court sufficient evidence to warrant such a declaration/finding.
 - iii. What reliefs, if any, ought to be granted.

Analysis and Determination:

Issue Number 1 Whether the Plaintiff herein has tendered and placed before the court sufficient evidence to demonstrate the existence of trust [resulting or constructive trust].

156. The gravamen/crux of the Plaintiff's claim before the court touches on and concerns the contention that same acquired and/or accrued equitable rights to and in respect of the suit property on the basis of trust. Furthermore, it is the Plaintiff's case that the trust alluded to is anchored on and/or informed by the quantum of the payments [contributions] that was made by same [Plaintiff] towards purchase of the suit property.
157. It was the Plaintiff's evidence that the suit property was offered to and in favor of the 1st Defendant, who had hitherto been an employee of Telkom Kenya Ltd, but was retiring.
158. Be that as it may, the Plaintiff contended that the 1st Defendant engaged with him [Plaintiff], taking into account that the Plaintiff was at the material point in time married to the 1st Defendant's daughter, namely, Lucy Awange.
159. Additionally, it was the Plaintiff's position that arising from the approach and the mutual understanding [read agreement] same [Plaintiff] made various contribution to and in respect of the acquisition of the suit property amounting to Kes.3, 159, 000/= only.
160. On the other hand, it was the Plaintiff's submissions that the 1st Defendant herein however contributed and paid the sum of Kes.500, 000/= only whilst the 1st Defendant's daughter chipped in the outstanding balance. In any event, it was the Plaintiff's evidence that the purchase price in respect of the suit property was Kes.4, 340, 000/= only.
161. Arising from the foregoing, it was the Plaintiff's position that the amounts of monies which were contributed and/or paid out by him [Plaintiff] constituted/reflected 72% share of the property.
162. For ease of reference, it is imperative to reproduce the salient aspects of the Plaintiff evidence under cross examination by learned counsel for the 1st Defendant.
163. Same stated as hereunder;

“The arrangements was not reduced into writing or at all. However, we agreed that the sharing ratio would be equivalent to the contribution. My share arrangement was/is 72%. The percentage of shares was agreed at 72%. The 1st Defendant's shares are dependent on



the basis of her shares contributions. The shares for each and every party was agreed on and the same were to be calculated on the basis of the contributions”.

164. From the Plaintiff’s testimony [details in terms of the preceding paragraph], it is evident that the Plaintiff was laying a basis underpinning the various contributions that were made by the parties and [sic] the mutual understanding that was arrived at by the parties.
165. On her part, the 1st Defendant testified as DW1 and other than acknowledging that the suit property was offered unto her as a former employee of Telkom Kenya Ltd, same went ahead and pointed out that the suit property was offered unto her [First Defendant] at the rate of Kes.4, 340, 000/= only.
166. On the other hand, DW1 ventured forward and provided a scheme concerning the manner in which the purchase price was paid. Notably, DW1 acknowledged and admitted that same DW1 only paid the sum of Kes.500, 000/= only towards the purchase/acquisition of the suit property.
167. To be able to appreciate the crux of DW1’s evidence, it is imperative to reproduce a portion of her evidence whilst under cross examination by learned counsel for the Plaintiff.
168. Same [DW1] stated as hereunder;
- “The sale of the property was completed in the year 2004. The last payment was made on the 25th August 2004. The payment was made vide cheque. The cheque was number 3599125210. The cheque herein is exhibit P23. There was another cheque dated the 23rd August 2004. The cheque was given to me by my daughter. My daughter is known as Lucy Oyola Awange. I do confirm that Lucy Oyola Awange was the wife of the Plaintiff. She did not inform on how she got the money”.
169. Whilst under further cross examination, by learned counsel for the Plaintiff, the witness proceeded and stated as hereunder;
- “I am also aware of another cheque for kes.700, 000/= only. The cheque is dated the 30th August 2004. The cheque was also brought to me by my daughter. There is also another cheque dated the 22nd April 2004. The cheque also came from my daughter. The money herein went towards the purchase price of the suit property”.
170. Furthermore, whilst still under further cross examination, DW1 stated as hereunder;
- “Referred to cheque number 00182 and the witness avers that the cheque is for Kes.500, 000/= only. The cheque also went towards the purchase price of the suit property. the cheque herein was the first instalment. It went towards the purchase of the suit property. The payment herein was the only payment from me”.
171. Notably, the first Defendant, in whose favor the property was offered is confirming that out of the agreed purchase price which was Kes.4, 340, 000/= only, same only paid Kes.500, 000/= only.
172. On the other hand, it is also apparent from the testimony of DW1 that the rest of the cheques, were brought to her by her daughter, namely, Lucy Awange, who was at the material point in time married to the plaintiff.
173. At any rate, DW1 confirms that even though the cheques, [whose details have been highlighted in the excerpts herein before], were brought to her by her daughter, same [DW1], did not authenticate and/or enquire from her daughter the sources of the cheque in question.



174. Moreover, the Plaintiff herein tendered evidence and produced documents to show that same procured the payment of Kes.2, 159, 000/= only from his [Plaintiff's Maisha Bora Sacco Account] and the said money was paid directly unto the vendor of the property, namely, Teleposta Pension Scheme.
175. Similarly, the Plaintiff also tendered evidence and produced yet another cheque, namely cheque number 793664 for the sum of Kes.900, 000/= only which money was also pad directly to the vendor.
176. Suffice it to point out that the testimony [evidence] by the Plaintiff and in particular the payments that were remitted to the vendor on account of purchase price, were duly confirmed by PW2.
177. On the other hand, it is not lost on this court that DW1 did not contest the payments of the other monies that completed that balance of the purchase price, other than the sum of Kes.500, 000/= only which same [DW1 paid].
178. Notwithstanding the foregoing, it is imperative to recall and reiterate that even though DW1 stated that the cheques that were brought to her and which were utilized towards paying the balance of the purchase price, were brought to her [DW1], by one , Lucy Awange, the said DW1 did not find it appropriate to summon and or bring forth the said Lucy Oyola Awange, as a witness.
179. Instructively, the said Lucy Oyola Awange, who is the daughter of DW1 and an estranged wife of the Plaintiff, would have shed light as pertains the source[s] of the cheques which same handed over to DW1.
180. However, to the extent that the said Lucy Oyola Awange [daughter of DW1] was not called to testify and to shed light on the sources of the cheques which same handed to DW1, it is evident that the evidence of the Plaintiff remains uncontroverted and thus believable.
181. Other than the foregoing, learned counsel for the 1st and 2nd Defendant has contended that the first Defendant also sold her property which was situate in Tena Estate within the City of Nairobi and that the proceeds of the said sale were utilized and/or deployed towards the payment of the purchase price.
182. Nevertheless, I beg to point out that the submissions by and on behalf of learned counsel for the 1st Defendant, is not anchored on any evidence or at all. Instructively, no amount of submission[s] can take the place of Evidence. [See the Holding in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi[2014] eklr; and Douglas Odhiambo Apel versus Telkom Kenya Limited [2014] eklr].
183. To the contrary, the correct position as pertains to the sale of the 1st Defendant's property at Tena Estate obtains in the evidence of DW1; where same acknowledged that the property at Tena Estate was sold after the suit property was fully paid for.
184. To this end, it suffices to reproduce certain salient aspects of the evidence of DW1 whilst under cross examination.
185. Same testified as hereunder;

“ The sale agreement shows the purchase price of the property. referred to paragraph 7 of the witness statement and the witness [DW1] states that the purchase price had already been paid by the time same sold her property at Tena. However, I wish to state that the legal fees and stamp duty have not been paid. The sale of the property was towards payments of stamp duty and legal fees”.



186. From the foregoing testimony, there is no gainsaying that the proceeds of the sale of the 1st Defendant's property at Tena Estate, within the City of Nairobi, was never utilized over the purchase of the suit property.
187. Other than the foregoing, learned counsel for the 1st and 2nd Defendants has also brought forth another issue and wherein same contends that the monies [funds], which the Plaintiff is alluding to were paid during the subsistence of the marriage between the Plaintiff and the 1st Defendant's daughter, who was the Plaintiff estranged wife.
188. Premised on the foregoing, learned counsel for the 2nd Defendant has therefore contended that the said monies/funds thus constitutes matrimonial property and in the absence of a court order to determine contribution by the Plaintiff and his estranged wife, the Plaintiff herein cannot stake a claim to the entirety to the said contribution[s].
189. My answer to the said submissions by and on behalf of learned counsel for the 1st and 2nd Defendant is threefold. Firstly, a claim founded on matrimonial property can only be ventilated and/or canvassed by either of the spouses and not otherwise.
190. In this respect, one Lucy Oyola Awange [the estrange wife of the Plaintiff] has not canvassed a claim that the contribution[s] beforehand constituted matrimonial property.
191. Secondly, no evidence was ever tendered or at all to anchor the proposition that the said monies which were contributed by the Plaintiff constitutes matrimonial property. Consequently, the submissions by learned counsel for the 1st and 2nd Defendants have been mounted in vacuum.
192. Suffice it to point out that submissions cannot take the place of evidence and where submissions are tendered in the absence of supporting evidence, such submissions are in vein. See Daniel Torotich Arap Moi vs Mwangi Stephen Mureiithi [2014]eKLR.
193. Thirdly, the submissions touching on whether or not the contribution paid by the Plaintiff constituted matrimonial property [which can not exclusively be claim by the Plaintiff] is also out of order. For coherence, a dispute if at all touching on matrimonial property [if any], can only be handled by the High Court and not otherwise. [See Section 6 and 7 of the *Matrimonial Property Act*, 2013].
194. Arising from the foregoing analysis, it is evident and apparent that the Plaintiff herein has indeed placed before the court plausible and credible evidence to demonstrate that same [Plaintiff] made substantial contribution [advancement] towards the purchase of the suit property.
195. Additionally, the fact that the contribution [advancement] by the Plaintiff was made towards the purchase of the suit property has not been controverted. For good measure, DW1 did not testify as to any other purpose for which the said monies were actually paid to and in favor of the vendor [Teleposta Pension Scheme].
196. Simply put, the Plaintiff herein has espoused and demonstrated the requisite ingredient[s] underpinning a claim for both resulting and constructing trust.
197. To buttress the foregoing position, it suffices to take cognizance of the holding by the court of appeal Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others [2015] eKLR, where the court stated and observed as hereunder;

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 beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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.

198. Similarly, the ingredients that give rise to a finding on trust were also discussed by the court of appeal in the case of *Archer & another vs. Archer & 2 others (Civil Appeal 39 of 2020)* [2023] KECA 298 (KLR), where the court stated and held thus;

35. A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in *Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others (supra)* as follows:

“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.”

199. Additionally, the court went further and stated and held as hereunder;

36. Therefore, while the resulting trust focuses on monetary contribution towards purchase of a property, a constructive trust is concerned with the bargain or common intention of the parties relating to ownership of the subject property. It is also notable that the focus in resulting trusts is on the unilateral intention of the provider of the purchase money, while constructive trusts are rooted on the bilateral intentions of the relevant actors. The House of Lords in *Stack vs Dowden (supra)* held that a common intention is recognised as relevant, only if one party alters



his or her position in detrimental reliance upon some form of bargain that would confer upon them a sufficiently defined beneficial interest in the subject property, and an unconscionable denial of rights would result if the legal estate owner tries to evade the bargain. As regards the timing of the bargain, this can precede, be contemporaneous with, or occur after the acquisition of title.

200. Other than the foregoing, the Supreme court of Kenya [the apex court] has also had occasion to discuss the ingredients that bely a finding on trust. For coherence, the Supreme Court highlighted the salient ingredients in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), where the court and held thus;
72. As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.
73. From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.
201. Arising from the foregoing and having taken into consideration the various perspective emanating from the evidence on record, my answer to issue number 1 is twofold. Firstly, the Plaintiff herein has tendered before the court clear and uncontroverted evidence to demonstrate that same made contribution [advancement] towards the acquisition of the suit property.
202. Secondly, that the contribution [advancement under reference] was induced by the 1st Defendant based on the existence of a relationship between the Plaintiff and the 1st Defendant, arising from the marriage of the 1st Defendant's daughter [Lucy Awange] to the Plaintiff.

Issue Number 2

Whether the 3rd Defendant was indeed a Bona fide purchaser for value or better still, whether the 3rd Defendant has placed before the court sufficient evidence to warrant such a declaration/finding.

203. As pertains to the issue herein it is important to recall the submissions by and on behalf of the 3rd Defendant, who contended that that the 3rd Defendant is a bona fide purchaser for value without notice of any defect in the 2nd Defendant's title to and in respect of the Suit Property.
204. To the extent that the 3rd Defendant was contended to a bona fide purchaser for value, learned counsel for the 3rd Defendant thus implored the court to find and hold that the 3rd Defendant acquired a clean, clear and lawful title to the suit property.
205. Be that as it may, even though learned counsel has contended that the 3rd Defendant was/is a bona fide purchaser for value in respect of the suit property, it is important to point out that before one can attract a proclamation of being a bona fide purchaser for value, same [Claimant], must demonstrate and satisfy certain known and established ingredients.



206. Without belaboring the point, the ingredients that must be satisfied by a Claimant, before a pronouncement of being a bona fide purchaser for value can be made [rendered] were highlighted by the Court of Appeal in the case of *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* [2021] eKLR, where the court stated and observed as hereunder;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

207. Furthermore, the Supreme Court of Kenya [the apex court] has also had an occasion to analyze and consider the salient ingredients underpinning a claim founded on the doctrine of bona fide purchase for value.

208. In the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), the supreme court stated and held as hereunder;



91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1. he holds a certificate of title; 2. he purchased the property in good faith; 3. he had no knowledge of the fraud; 4. he purchased for valuable consideration; 5. the vendors had apparent valid title; 6. he purchased without notice of any fraud; and 7. he was not party to the fraud.”
92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”
209. Having considered and taken into account the requisite ingredients that underpins the concept [doctrine of bona fide purchase for value], it is now appropriate to revert to the evidence that was tendered by DW2 and to discern whether same [evidence] captures the requisite ingredients.
210. Suffice it to point out that when DW2 was subjected to cross examination by learned counsel for the Plaintiff, same [DW2] was evasive and kept shifting ground from one point to the other. At one point, same [DW2] stated that the 3rd Defendant paid a consideration for the suit property, whereas on the other hand, same makes an about-turn [turn-around] and states that no monies were paid towards the purchase of the suit property.
211. In this respect, it is imperative to reproduce the salient aspects the evidence of DW2 whilst cross examination by learned counsel for the Plaintiff.
212. Same [DW2] stated as hereunder;
- “I paid consideration for the suit property. I have stated what I did in the witness statement before the court. I wish to state that the witness statement is comprehensive and states what the parties agreed upon. I do confirm that no monies were paid towards the purchase of the suit property”.
213. Whilst under further cross examination, by learned counsel for the Plaintiff, DW2 went further and stated as hereunder;
- “I now wish to state that I paid the vendor [Red rose] the sum of Kes.11, 000, 000/= only”.
214. Whilst under re-examination by learned counsel, DW2 stated as hereunder;
- “I paid cash money to the 2nd Defendant. The money in question was paid vide bank transfer. On the other hand, the 2nd Defendant was also entitled 9 apartments apart from the cash payment”.



215. Other than the foregoing averments, DW2 when further whilst under re-examination and stated as hereunder;

“The 1st Defendant herein owns 20% of the shares. The 20% is what comprises of Kes.11, 000, 000/= only and 9 apartments”.

216. In my humble view, the evidence which was tendered by DW2 on behalf of the 3rd Defendant is wrought with and replete of contradiction[s] as to whether there was any valuable consideration paid to and at the foot of the purchase of the suit property.

217. Secondly, even though DW2 had also spoken about having entered into an agreement, it is worth recalling that other than the joint venture agreement, there was no sale agreement between the 2nd Defendant and the 3rd Defendant or at all.

218. Even assuming that there was a valid sale agreement between the 2nd Defendant and the 3rd Defendant [which is not the case], leading to the transfer of the suit property to and in favor of the 3rd Defendant, there is no gainsaying that such a transfer would not extinguish trust which is an overriding interests on the title.

219. In this respect, it suffices to highlight and reiterate the provisions of Section 25 of the [Land Registration Act](#), which provides as hereunder;

25. Rights of a proprietor

(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.

220. At any rate, it is also worth noting that the supreme court of Kenya [the apex court] has also underscored that trust [whether resulting or constructive trust] overrides the rights of a registered proprietor. [See *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)].

221. In view of the foregoing, my answer to issue number two is twofold. Firstly, the 3rd Defendant herein has neither tendered nor placed before the court any credible evidence to demonstrate that same paid valuable consideration towards the purchase and/or acquisition of the suit property, which is a precondition to staking a claim on the basis of bona fide purchase for value.

222. Secondly, even if the 3rd Defendant had placed such evidence [which is not the case], it suffices to point out that the sale and/or transfer of a property that is subject to trust [like the one beforehand] does not defeat, supersede and/or extinguish the trust or at all.



Issue Number 3

What reliefs if any, ought to be granted.

223. From the foregoing discourse, it must have become apparent and evident that the Plaintiff beforehand has indeed established and demonstrated that same made substantial contribution[s] towards the acquisition and purchase of the suit property.
224. At any rate, there is no gainsaying that the contribution by and on behalf of the Plaintiff comprising of Kes.2, 159, 000/= and Kes.940, 000/=, constitute a substantial chunk of the purchase price. In this respect, the Plaintiff's contribution [arising out mathematical calculations] constitutes 71.4%.
225. Be that as it may, I beg to proceed and round up the Plaintiff's contribution to 70% of the total purchase price. Consequently, the portion of the purchase price that was contributed by the 1st Defendant and her daughter [Lucy Oyola Awange] constitute 30%.
226. In a nutshell, I am prepared to and do hereby decree that the Plaintiff is indeed entitled to 70% share in the ownership of the suit property and hence the 1st Defendant duly held the suit property on trust for herself [1st Defendant] and well as for the Plaintiff herein.
227. Furthermore, to the extent that the suit property was held on trust, in the manner adverted to in the preceding paragraph[s], it suffices to point out that the 1st Defendant could not purport to deal with the suit property, either by transferring same to the 2nd Defendant and thereafter to the 3rd Defendant or at all. [See Section 25[2] of the [Land Registration Act](#)].
228. Consequently and in view of the foregoing, there is no gainsaying that the various transactions that impacted upon the suit property, albeit without due regard to the Plaintiff's rights and interests thereto as the beneficiary of 70% thereof were therefore illegal and unlawful.
229. In a nutshell, and taking into account the import and tenor of the provisions of Section 25[2] and 28 of the [Land Registration Act](#), 2012, it is my finding and holding that all the transaction that were undertaken over and in respect of the suit property and all the entries made thereunder [which divested the 1st Defendant of registration] are all invalid.

Final Disposition

230. Having analyzed and evaluated the various perspective[s] arising from and attendant to the dispute beforehand and having taken into account relevant decision, inter-alia decisions from the Supreme court of Kenya [the apex court], I come to the conclusion that the Plaintiff has indeed proved his case to the requisite standards.
231. Consequently and in view of the foregoing, I proceed to and do hereby enter Judgment in favor of the Plaintiff in the following terms;
- i. A declaration be and is hereby made that the 1st Defendant held the suit property namely L.R No 209/14990/16, registered as I.R No. 90324 on trust for herself [1st Defendant], Lucy Oyola Awange and the Plaintiff herein, respectively.
 - ii. A declaration be and is hereby made that the Plaintiff's share in respect of the suit property known as L.R No 209/14990/16, registered as I.R No. 90324 is 70% thereof.
 - iii. A declaration be and is hereby made that all the transaction that were undertaken by and on behalf of the 1st Defendant, inter-alia the transfer of the suit property to the 2nd Defendant and



the subsequent transfer of the suit property to the 3rd Defendant, were illegal, unlawful and invalid.

- iv. Consequently, the entries affecting and impacting upon the suit property and in particular the entries relating to the transfer of the suit property in favor of the 2nd Defendant and thereafter in favor of the 3rd Defendant, be and are hereby revoked, canceled and nullified.
 - v. The 3rd Defendant be and is hereby ordered and directed to surrender the C[ertificate of title [lease] to the Chief Land Registrar for cancellation within 60 days from the date hereof.
 - vi. The transfer and registration of the suit property in favor of the 1st Defendant is similarly revoked and in lieu thereof a certificate of title [lease] shall issue reflecting that the suit property is owned by the 1st Defendant, Lucy Awange and the Plaintiff herein in the ratio of 30% to 70%, respectively.
 - vii. For the avoidance of doubt, the 1st Defendant and Lucy Awange shall be entitled to 30% whereas the Plaintiff [John Kenneth Ajima Oyola] shall be entitled to 70%.
 - viii. There be and is hereby issued an order of permanent injunction to restrain the Defendants either by themselves, agents, servants and/or employees from dealing with and/or interfering with the Plaintiff's 70% share/stake in the suit property, in any manner whatsoever.
 - ix. For the avoidance of doubt, the Plaintiff's share and/or stake in the suit property relates to the suit property in its current status, taking into account the meaning and tenor of what constitute land. [See Article 260 of *the Constitution*, 2010].
232. Even though the Plaintiff and the 1st Defendant had a relationship [son in law and mother in law] the circumstances under which the impugned transactions were undertaken constituted a grave breach of fiduciary obligations.
233. Consequently and in view of the foregoing, I am minded to award and do hereby proceed to award costs to the Plaintiff as against the Defendant jointly and/or severally. For good measure, the Court has duly considered and taken into account the Principle[s] highlighted by the Supreme Court in the case of Jasbir Singh Rai and 3 Others versus Tarlochan Singh Rai and 4 others [2014] eKLR.]
234. Finally, I beg to state that it would have been apposite for the Court to address and consider the question of indemnity in favour of the Third Defendant, taking into account the volume [quantum] of money spent on the project. However, in the absence of a Notice of Indemnity by and on behalf of the 3RD Defendant, such a course is prohibited by Law.[See the provisions of Order 2 Rule of the Civil Procedure Rules, 2010, which underpin the Doctrine of Departure].
235. Consequently and in the premises, the Orders of the Court are as postulated [posited] in paragraph 233 hereof.
236. It is so ordered.

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

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. B M Mosyoki for the Plaintiff



Mr. Erick K Mutua SC for the 1st and 2nd Defendants

Mr. Andere for the 3rd Defendant

