



**NJB v JMM (Environment & Land Case 24 of 2019)  
[2023] KEELC 17292 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17292 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 24 OF 2019**

**SM KIBUNJA, J  
MAY 10, 2023**

**BETWEEN**

**NJB ..... PLAINTIFF**

**AND**

**JMM ..... DEFENDANT**

**JUDGMENT**

1. NJB , the plaintiff, commenced this suit against JMM , the defendant, through the amended plaint dated 5<sup>th</sup> March 2019 seeking for the following prayers;
  - a. “A permanent injunction restraining the Defendant by himself, servants, agents, representatives, assigns and/or employees from alienating, advertising for sale, selling, leasing, disposing, wasting, damaging, transferring in any way howsoever dealing with or interfering with the Plaintiff’s ownership and possession of Title numbers Kwale/Ukunda/5532 and Kwale/Ukunda/915.
  - b. A declaration that the portion of interests in the subject properties held by the Defendant is held in trust for the Plaintiff and the Plaintiff is the sole bonafide and beneficial owner of the interest held in the subject properties to wit, land known as Title numbers Kwale/Ukunda/5532 and Kwale/Uknda/915.
  - c. A declaration that the Plaintiff is beneficially entitled to the sale proceeds of the sale of motor vehicle registration number KCP 221D.
  - d. A mandatory injunction compelling the Defendant to forthwith and unconditionally deliver up to the Plaintiff the original title deeds of the suit properties Title numbers Kwale/Ukunda/5532 and Kwale/Ukunda/915 issued in the joint names of the Plaintiff and the Defendant together with duly executed transfer instruments and all documents necessary to transfer the suit properties in favor of the Plaintiff.



- e. The sum of KSH 1,700,000 being the sale proceeds of the sale of subject Motor vehicle.
- f. Costs of suit.
- g. Interests on (e) and (f) above Courts rates.
- h. Any other relief this Court deems fit and just to grant.”

The Plaintiff among others averred that in the year 2014, she visited Kenya from the United Kingdom, and met the Defendant, with whom they started a romantic relationship. She then made the decision to settle in Kenya and disposed all her assets in the United Kingdom. She and the Defendant scouted for land where she would build her retirement home and in 2015 and 2017 she acquired land parcels Kwale/Ukunda/5532 and 915, the suit properties, and further financed the purchase of a motor vehicle registration number KCP 221D, Toyota Hilux Pick up, the Motor. That when she asked the defendant to hand over the original title documents for the lands and log book of the vehicle he adamantly refused to hand them over to her. Later, she discovered that the defendant had fraudulently forged her signature and procured registration of the suit properties in their names jointly, and the subject motor vehicle in his sole name. When she confronted the defendant, he lied to her that foreigners were prohibited from owning land in their sole name. The plaintiff then had her building plans for her retirement home drawn and approved and asked the Defendant to supervise the construction works on parcel Kwale/Ukunda/915. That when she later visited the said property she discovered that the defendant had without her consent started constructing rental apartments instead of the retirement home she had directed. That upon completion of the apartments on title number Kwale/Ukunda/915 the Defendant became hostile to her, assaulted her, and she fled to the United Kingdom for safety. The Defendant then advertised the subject properties and motor vehicle for sale on online platform called Bidi Badu solutions and sold the subject motor vehicle for KSH 1,700,000 and failed to remit the proceeds of sale to the Plaintiff. That when she attempted to stop the advertisement and illegal sale, the Defendant threatened to expunge her name from the title documents. Plaintiff averred that Defendant’s actions of registering subject properties in their joint names, subject motor vehicle in his sole name and disposing of it was fraudulent and in breach of trust. The Plaintiff therefore claims special damages of KSH 1,700,000 from sale of subject motor vehicle. The Plaintiff cited fraud on the part of the Defendant for forging the Plaintiff’s signature on the transfer instruments of the suit properties; registering of his name as co-owner on the title documents for the suit properties; forging of Plaintiff’s signature on the transfer of suit properties; procuring registration of his name as the sole owner of the subject motor vehicle contrary to the Plaintiff’s instructions when he had not contributed to its acquisition; advertising the subject properties for sale without the Plaintiff’s knowledge or consent; threatening the Plaintiff with violence in case she visited the subject properties and threatening to expunge Plaintiff’s name from the register of the tittle deeds for subject properties; advertising and letting out apartments on title number Kwale/Ukunda/915 and falling to account for the proceeds from the apartments and advertising the subject motor vehicle for sale and or purporting to sell the subject motor vehicle and failing to account for the proceeds of the sale.

2. The plaintiff’s claim is opposed by the Defendant through the filed amended defence and counterclaim dated 16<sup>th</sup> July 2019, in which he inter alia averred that the claims made by Plaintiff were false to the extent that he did not contribute to purchase of the suit properties. That the Plaintiff’s contribution of Kshs.6,700,000 was not enough for the purchase and development of the suit properties which are worth over Kshs.21,000,000. That he single-handedly used his saving and monies to purchase and develop Plot No KWALE/UKUNDA/915 that is now valued at Kshs.16,000,000, and that the motor vehicle was purchased by the Plaintiff as a gift to him. That the money the plaintiff sent to him was used for charitable events within Ukunda at the express request of the plaintiff. That the plaintiff was also



taking and selling art facts in the United Kingdom on the defendant's behalf, and the proceeds later remitted to him through Western union for general upkeep. He added that he had never advertised for sale of the suit premises, other than for rental purposes during the high season. He added that plans of construction of a retirement home on the suit property were never discussed and could not have been developed on Kwale/Ukunda/915 due to its topography. In the counterclaim, the defendant verred that he developed the suit properties without direct contribution from the Plaintiff. He financed the purchase of the properties and developments thereon from proceeds of sale of curios and other art facts, sale of property and sale of produce from his farm in Meru farm and earned commissions. The Defendant further averred that Plaintiff was deceitful and fraudulent toward him by lying to him that she would divorce her husband in the United Kingdom and marry him when she knew it to be false. The Plaintiff also purported to have financed the purchase of suit properties when she knew she had no interests whatsoever over them. The defendant therefore prays for the plaintiff's suit to be dismissed with costs and judgement be entered against her in the counterclaim as follows;

- a. "A declaration that the portion of interest in the suit properties held by Plaintiff is held in trust for the Defendant and that the Defendant is the sole bona fide and beneficial owner of Kwale/Ukunda/5532 and Kwale/Ukunda/915.
  - b. A mandatory injunction compelling the Plaintiff to execute all necessary transfers to reflect the Defendant as the sole Proprietor of the suit properties herein being Kwale/Ukunda/5532 and Kwale/Ukunda/915.
  - c. Alternatively, to (b) above an order to the Land Registrar Kwale to make all necessary entries in the lands records to reflect the Defendant as the sole proprietor of the suit properties herein being Kwale/Ukunda/5532 and Kwale/Ukunda/915.
  - d. Costs and interest of suit.
  - e. Any other or further relief that this Honorable Court deems and just to grant."
3. In her reply to the defence and defence to the counterclaim dated the 21<sup>st</sup> August 2019, the Plaintiff averred that the Defendant was an unwelcome guest in the suit properties and therefore had no color of right to occupy them. That the counter claim is a diversionary ploy to cloud issues before the Court as the defendant has never had any steady income or meaningful employment apart from remittances from her. That she never gifted the defendant the vehicle as claimed. That she wholly financed the acquisition of the properties and development thereon and the defendant's counterclaim should be dismissed with costs.
  4. During the hearing, the plaintiff, NJB , testified as PW1 on the 20<sup>th</sup> May 2021 before Munyao J. She testified that she had known the defendant from 2014 and the two have been in a romantic relationship with the Defendant from January 2015 to September 2018 when it ended. She bought the first suit parcel Kwale/Ukunda/915 in 2015 through savings, monies from sale of her horse transport lorry, and a mortgage on her farm for 54,650 pounds. She further testified that she never signed any sale agreements for the two plots as she was told by the defendant that all the transactions would be in Swahili. She was told that she did not have a work permit and that was the traditional way of buying lands from the locals. In regards to the purchase of the second property Kwale/Ukunda/5532, she testified that she bought it from a man and his wife, and that she never signed any transfer form. The stated that the signature on the transaction document was not hers. She testified that as can be seen on the approved plans for development of Plot No. 915 at page 192 of her bundle of documents, she had wanted to build a two-bedroom house and two separate one-bedroom accommodation as rentals but what was indeed constructed were four one bedroom apartments that were not what she intended to build. She testified that she and the Defendant had many communications between them



wide text messages, phone calls and emails as seen on page 22 of her bundle of documents. She further testified that she was paying for a VW polo car on hire purchase, and catered for all defendant's basic needs, including to stock for his small shop at the beach. She testified that she was sending money to the defendant through bank transfers and western union as evinced by the documents at pages 6 to 171 of her bundle of documents to buy the properties and development. She further testified that he had bought plot 5532 in 2017 as an investment with the intention to later sell it to facilitate the development on plot 915. The Defendant tried to sell the properties without her consent and she had to put a restriction order. She testified that the subject motor vehicle that she bought for Kshs.2,000,000 from Planet Motors was sold off by the Defendant on promise that he would refund the money but she got nothing back. The Defendant had registered the motor vehicle in his name, and sold it through an advertising agent owned by his friends called Bidi Badu for Kshs.1,700,000. That the Defendant also tried to sell the plot on the same website but she restricted the sale. She testified that on 18<sup>th</sup> February 2018 she flew in from England and the Defendant assaulted her later at night. She adopted the contents of her statements dated 18<sup>th</sup> February 2019, 2<sup>th</sup> April 2019, 6<sup>th</sup> August 2020 and 14<sup>th</sup> November 2019. During cross examination PW1 testified that she was not present when the sale agreements were done. She used about Kshs.28 million in buying and developing the properties. That Plot 915 was bought at Kshs.1,300,000. She testified that she did not have a Kenyan Identification Number (PIN) and she had been told that the purchases were to be done locally and there was no need to involve lawyers. She further testified that she never intended for their romantic relationship to lead to marriage as she was already married and never meant to divorce her husband. In re-examination she said that the Defendant was always broke and he had not shown her any money that he contributed for the project. That she wanted the properties transferred to her name so that she can sell them. That she is not willing to share the properties with the defendant at all.

5. JMM , the defendant, testified as DW1 before Munyao J, on the 13<sup>th</sup> July 202 that in 2014 he met the plaintiff through his friend Cathy and they started a romantic relationship. In April 2015 he negotiated purchase of Plot No Kwale/Ukunda/915 for Kshs. 1,000,000 using his savings, sale of some land in Meru, commissions that he earned selling safari and adventures in Diani and other regions. That he registered it in his name and that of the Plaintiff as they were in love and intended to get married after her divorce was finalized. That Kwale/Ukunda/5532 costed Kshs.5 million, and he paid deposit of Kshs.1.5 million and balance in instalments. The Plaintiff would occasionally send him small amounts for upkeep and charitable purposes. In 2017 the Plaintiff bought him a pick up as a gift of love, which he used in his miraa transport business. That due to the fast ways miraa vehicles are driven, it got involved in numerous accidents and he sold it in September 2018. He denied ever forging the Plaintiff's signature. He used approximately KSH 10,000,000 on the land. On cross examination, he said Plaintiff used to send him money and by calculation she had sent him around Kshs.6.7 Million for his curios, her charity and his use. That parcel 915 was about ¼ of an acre and 5532 was one acre. That the money to buy the vehicle was sent to him by plaintiff as a gift. That he sold his Meru land for Kshs.3.5 million and used a total of Kshs.10 million to develop plot 915. That he now resides in the said development and charge guests who visit a fee. That the plaintiff's name should be removed from the title to the properties. Agnes Kitundu, a valuer, testified before this court on the 5<sup>th</sup> December 2022 as DW2, that she had carried out a valuation on land references Kwale/Ukunda/915 and 5532. That she concluded parcel 915 was valued at Kshs.14,750,000 and parcel 5532 Kshs.6,300,00. DW2 produced her report dated 27<sup>th</sup> March 2019 as exhibit. During cross examination, DW2 confirmed that the valuation report was paid for by the counsel to the defendant who were the instructing client. That the titles had restrictions filed by the plaintiff. In re-examination, DW2 stated that the values of the properties would not have changed had the instructions come from another person. That the restrictions did not have an effect on the valuation.



6. Ms. Onyango & Ameyo Advocates for the plaintiff filed their submissions dated the 3<sup>rd</sup> February 2023, while Ms. Nyandwat Odundo & Company Advocates for the defendant filed theirs dated the 3<sup>rd</sup> March 2023 which the court has considered.
7. Counsel for the Plaintiff submitted inter alia that there existed an implied trust between the Plaintiff and Defendant which grew from the romantic relationship between them that started in 2014. That DW1 had acknowledged that he received funds from the Plaintiff. That supporting evidence of remittance towards purchase of the suit properties and subject motor vehicle in form of bank transfers, documents demonstrating repayment of mortgage of E 54,650 /- and cash withdrawal statements and email exchange between the parties were produced in the plaintiff's bundle of documents dated 23<sup>rd</sup> April 2016. That the Defendant had also admitted in his amended defence that he received monies to the tune of Kshs.6,700,000 from the Defendant. That though the Defendant had claimed to have raised the funds for the purchase of suit properties through his curio shop and sale of a land parcel in Meru, he had failed to produce any cogent evidence to prove this. Counsel cited Section 2 of the [Trustee Act](#) Cap 167 Laws of Kenya, Section 3 of the [Law of Contract Act](#) Cap 23 Laws of Kenya. And the decision in the cases of Charles K Kandie VS Mary Kimoi Sang [2007] eKLR, Hamm Helmut VS Farida Riziki [2011] eKLR, Twalib Hayatan & Another versus Said Sagggar Ahmed Al-heidy & Others [2015] eKLR. The counsel submitted that the Plaintiff would not have gone to great lengths to mortgage her property in the United Kingdom only to use the funds to gift the Defendant a motor vehicle. That in their email communication it was evident that the intention of buying the motor vehicle was to run her business when she eventually moved to Kenya. On whether the defendant had established a beneficial interest in the ownership of the suit property in the counterclaim, counsel submitted that his evidence fell short of the required standard to prove ownership of the suit properties and the motor vehicle. The Defendant never produced a title deed or search for the property he alleged to have sold in Meru, that the petty cash receipts were full of inconsistencies and he failed to provide bank statements that were indicative of the cash flow he alleged to have had. Moreover, DW2 testified that once the property was developed it had capital gains and its value increased to KSH 21,000,000 but when it was initially bought it was not that price. That on the allegations of fraud by the Defendant against the Plaintiff were never proved as the Defendant never adduced any evidence demonstrating that Plaintiff had promised to marry him, and that she had been lying about her marital status. The counsel cited the decision in the cases of BBAM V MB [2019] eKLR, ELC Case Number 1302 of 2016, ELC NO. 1302 of 2016, Milimani. On the issue whether PW1 was entitled to the remedies sought under the plaint, counsel submitted that the Plaintiff had provided evidence to prove that she had advanced all monies to purchase the suit properties and subject motor vehicle. Counsel relied in the decision in the case of Juletabi African Adventure Limited & Anor VS Christopher Michael Lockley Civil Appeal No. 75 of 2016. The Counsel also submitted that as the Plaintiff had proved her case to the required standard, she is entitled to costs of the suit. The counsel relied on section 27 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
8. On whether the Defendant's portion of interest in the suit properties is held in trust for the Plaintiff or if the converse is applicable, the counsel for the defendant submitted that the Plaintiff did not meet the requirements of a constructive trust as documents produced, that is receipts from western union and sale of properties from the United Kingdom had numerous duplications; the remittances from Halifax did not bear dates and ought to be expunged and the supplementary list documents were illegible and they ought not be admitted. The Plaintiff also failed to prove that the ATM withdrawals were used for the development of the construction works. The copy of the letter from Lewis Lewis & Company Limited was not notarized or authenticated in any way that shows the Plaintiff was to receive GB 150,761.95/- for the sale of the Deans land property and the letter was authorized 4 years after the transaction was completed. It was further submitted that the remittances filed in 2016 could



not have been sufficient to cover the purchase price of Kshs.5million for the 2<sup>nd</sup> parcel of the suit property. It was submitted that money sent to the Defendant amounted to Kshs.6.7 million which was for artefacts that the Plaintiff went back with to the United Kingdom and charitable courses that the Plaintiff was involved in. It was submitted that the Defendant produced a sale agreement of Kshs.3,360,000 /- and further produced vouchers that showed that he was earning commission for selling curio's. Counsel argued that just because the Defendant did not produce ETR receipts and vouchers bearing the company logos does not mean that he was not carrying out business. It was submitted that the Defendant had registered the suit parcel in their joint names as he had believed that the Plaintiff had intention of divorcing her husband and becoming a resident of Diani. In any case the suit parcels were registered in April 2015 and December 2017 and the Plaintiff never complained but only filed the case once the love had turned sour. It was submitted that the Plaintiff's alleged plans of construction were never submitted to relevant authorities and if anything the Plaintiff visited regularly and was aware of developments made by the Defendant. It was submitted that the Plaintiff had failed to discharge the burden of proof as provided under *Evidence Act* sections 107 to 109 in regards to proving that a constructive trust existed. Funds sent to the Defendant were never for a specific purpose and amounts sent were far and apart and intention of the parties was clearly not determined, as required by law. Reliance was placed on the decision in the case of Charles K Kandie VS Mary Kimoi Sang (2017) eKLR, Gichuki VS Gichuki (182) KLR 285 and in Mbotu & 8 others VS Waitimu & 11 other (1986) KLR 171. It was submitted that emails produced in support of the supplementary documents dated 14<sup>th</sup> November 2020 and 6<sup>th</sup> August 2020 should be rejected as evidence as the Plaintiff admitted that the Plaintiff husband sometimes used the same email and sent emails to the Defendant as well. It was submitted that the valuation of property was never disputed. The property value was Kshs.21,000,000 and the Plaintiff only submitted an amount of Kshs.6,700,000. It was further submitted that the suit parcels were held in free hold title and as per Article 65 a foreigner could only hold land on the basis of leasehold tenure only. The Plaintiff never produced a KRA PIN and this only proved that the Defendant went out of his way to ensure the Plaintiff name was included in the title documents despite inadequacy of the Plaintiff's document and status to own free hold property. On the issue whether the motor vehicle KCP 221D was a gift to the Defendant or not, counsel submitted that as per evidence provided, the motor vehicle was purchased vide a pro-forma invoice dated 23<sup>rd</sup> December 2017 made in favor of the Plaintiff and a receipt of a deposit of Kshs.70,000. The Plaintiff however transferred the rest of the balance of Kshs.1,930,000/- to the Defendant. The subject motor vehicle was purchased in 2017 and the Plaintiff only raised issues about its sale after the love soured. It is submitted that the Plaintiff had not proved allegations of fraud, deceit, misrepresentation and illegality and breach of trust to the extent required in Erick Juma & 2 others V Fredrick Gacheru & Another [2016] eKLR, Rosemary Wanjiku Murithi V George Maina Ndinwa NYR Civil Appeal No 2014 [2014] eKLR, and Central Bank Kenya LTD V Trust Bank Ltd & 4 others NAI Civil Appeal No. 215 of 1996 (UR). Counsel submitted that only gift given on condition to marry are recoverable and that was not the case in this scenario as the Plaintiff categorically said that she had never made the promise to marry the Defendant. Reliance was placed on Piccininni VS Hajaus 180 Conm 369 [1989] cited with approval in Captain Ingo Bernd Rauer VS Teresia Murugi & Another [2019] Eklr. On what remedies would be available to the parties in the circumstance the counsel submitted that that the costs be awarded to the Defendant as Plaintiff had failed to prove his case and Defendant had proved his counter claim.

9. The following are the issues for the determinations by the court;
  - a. Whether the court has jurisdiction over all issues raised in the suit and counterclaim.
  - b. Who between the plaintiff and defendant is entitled to ownership of the motor vehicle, Kwale/Ukunda/5532 and Kwale/Ukunda/915; or



- c. Whether any of the parties has established the existence of a trust over the suit properties against the other party.
  - d. Who bears cost of suit and counterclaim.
10. The court has carefully considered the parties' pleadings, oral and documentary evidence presented, submissions by both learned counsel, superior courts decisions cited thereon, and come to the following determinations;
- a. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of [the Constitution](#) which establishes the three tiers of Kenya's Superior Courts. It provides thus:

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
  - a) employment and labour relations; and
  - b) The environment and the use and occupation of, and title to, land.
- 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
- 4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

In the discharge of the mandatory obligation placed on it by [the Constitution](#), Parliament enacted the [Environment and Land Court Act](#) No. 19 of 2011 and set out in details the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

“ 13. Jurisdiction of the Court

- 1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes-
  - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.



- b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
  - e. any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of *the Constitution*.
- 4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- 5) Deleted by Act No. 12 of 2012
- 6) Deleted by Act No. 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
- a) interim or permanent preservation orders including injunctions;
  - b) prerogative orders;
  - c) award of damages;
  - d) compensation;
  - e) specific performance;
  - f) restitution;
  - g) declaration; or
  - h) costs.”

The issues raised herein are two-fold, ownership and interests held in suit properties Kwale/Ukunda/5532 and Kwale/Ukunda/915 and entitlement of sale proceeds of subject motor vehicle registration number KCP 221D. From the provisions of *the Constitution* and *Environment and Land Court Act* set out above, ownership and interests in the two suit properties fall under the ambit of this Court as they are land matters. That though the issue



relating to the acquisition of the vehicle, its ownership, sale and entitlement to the proceeds thereof, do not fall within the land and or environment category, and would otherwise have been outside the jurisdiction of this court, the issue is connected and intertwined with the predominant questions relating to the two suit properties. Going by their financial value, the contestation over the suit land is the predominant matter, while that over the motor vehicle is secondary. If the court was to leave the question over the vehicle without a determination merely because it is not a land or environment issue, the parties will mostly likely move to another court to litigate over it all over again, thereby incurring additional expenses both to the court and parties. The court will therefore deal with all issues raised in both claims.

- b. Both the Plaintiff and Defendant make the case that they are the sole bona fide owner of the suit parcels and the motor vehicle. That the inclusion of the other's name in the title documents was according to the plaintiff through fraud and without her consent, and for the defendant it was out of love and considerations of a future together. Both parties accuse each other of fraud, deceit, misrepresentation, illegality and breach of trust. Section 26 of the [Land Registration Act](#) No. 3 of 2012 provides the following in regards to proprietorship of land;

“ 26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Plaintiff produced copies of the freehold titles of the two suit properties that are in both the names of the Plaintiff and Defendant. Article 65 of [the Constitution](#) of Kenya provides that;

“ 65.

- (1) A person who is not a citizen may hold land on the basis of lease hold tenure only and such lease however, however granted, shall not exceed ninety- nine years.
- (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.
- (3) For purposes of this Article-



- (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and
- (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.”

If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine-year leasehold interest, and no more. As the plaintiff was not admittedly a citizen of Kenya at all material times, then it follows the interests she acquired by virtue of registration as co-owner of the suit properties if any, was a ninety-nine leasehold, and not freehold interest.

- c. It was the Plaintiff’s case that the Defendant’s name was entered on the suit property titles and motor vehicle for the purpose of creating a trust relationship in her favour, as she could not be the sole registered owner, especially for the lands. That the Defendant had misrepresented to her the nature of purchasing land in the country and had made her believe that she was not in a position to purchase the suit parcels independently as she was a tourist and lacked a work permit. The Plaintiff produced 120 western union money transfers to the Defendant between the dates of 19<sup>th</sup> January 2015 and 7<sup>th</sup> June 2018 that she said were for the purpose of developing the property and catering to his accommodation as captured in the email dated 1<sup>st</sup> June 2017. The Plaintiff further provided a copy of contract for sale of her farm Deanlands, Blaenwaun Whitland dated 4<sup>th</sup> December 2015 among others to show her sources of the funds employed in the acquisition of the properties in dispute. She testified that the proceeds from the sales were used to finance the development of the property. She availed the various bank withdrawals made on various dates at Ukunda and Halifax bank statements, and testified that the said monies were handed over to the defendant.
- d. The Defendant on the other hand tendered in proof of ownership of the suit parcels vide sale agreements of both suit parcels and petty cash vouchers from his work at Nuru Tours and travel accumulating to Kshs.957,000, covering the period 2012 to 2018. He also produced bank statements from DTB (Diamond Trust Bank) from 3<sup>rd</sup> May 2017 to 27<sup>th</sup> December 2017. The Defendant also produced a reference letter from his employer adding that he had been working at Nuru tourism agency where he was paid on Kshs.6000 commission per tourist brought, and a cumulative Kshs.31,680 earned over 11 years. He also provided bank statement from DTB Bank with the highest amount recorded being Kshs.520,789 on 27<sup>th</sup> December 2017 and mpesa statement. He also produced a sale agreement of his and in Maua worth Kshs.3,300,000.
- e. From the relevant financial documents availed by both parties in their efforts to show that they indeed had the resources to buy the two properties and fund the developments thereon, the court finds it is abundantly clear the Plaintiff had a steadier cash flow than the Defendant for the period in question, that is 2014 to 2018. It has not been disputed that the rent money for the Defendant’s accommodation was being provided by the Plaintiff, which then leave one wondering whether the Defendant was really earning Kshs.31,680 from his work as a tourist guide as alleged. The petty cash invoices relied upon by the defendant lacked letter heads and were too far apart. He also failed to produce a copy of title of the land he allegedly sold at in Maua, and evidence of receipt of the purchase price.



- f. A perusal of email exchanges between the Plaintiff and Defendant leaves no doubt that the conversation was dominated by the Defendant asking the Plaintiff for monies to develop the property and living costs, though the western union transfers documents produced were not indicative of the specific purpose for the monies sent. From evidence provided it is clear that the Plaintiff was the financier of the purchase and development of suit properties contrary to the defendant's claim. It must have been on that basis that the defendant ensured the plaintiff's name was in the title documents during the registration of the transfers, even though she was away. It follows therefore that the defendant's claim in the counterclaim was merely an afterthought, to hit at the plaintiff when she took steps to claim the properties as exclusively hers.
- g. The question that the Court must then ask itself is whether there was fraud on the part of the Defendant in having his name registered on the title deeds to the suit properties and logbook. and whether there was resulting trust in respect of the suit properties for the benefit of the Plaintiff. In the case of *Githinga Kibutha vs Caroline Nduku ELCA No 16 of 2007* the court stated thus:

“The *Land Registration Act* does not define fraud. Recourse must therefore be had to other sources of law. The Black's Law Dictionary defines fraud thus: “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’. Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

Similarly, in the case of *Denis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR*, the court stated that:

“As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel vs Lalji Makanji (Supra)*, the former Court of Appeal for Eastern Africa stated thus: “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The provision of Article 65 of *the Constitution* is clear, that a non-citizen cannot own freehold land in Kenya. The plaintiff was aware about that fact as in her testimony, she conceded that the defendant had told her it would not have been possible for her to purchase land as a foreigner, as land was being purchase locally. The plaintiff still went ahead with the transactions and to send money to the defendant to acquire and develop the properties. The plaintiff has therefore failed to prove the particulars or allegations of fraud raised in her pleadings on part of the



Defendant, as what the defendant had told her was not a lie or misrepresentation of the fact, but the position of the law in view of Article 65 of *the Constitution*.

- h. On whether there was a resulting trust created for the benefit of the Plaintiff, the decision in the case of *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & Others* (2015) eKLR, comes in handy and is relevant. The court in that case expounded on the law on trusts as follows:

“According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as “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).” 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...” 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. ... 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. ... 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 ... 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).”

It was the Plaintiff’s case that the suit properties were held in trust by the Defendant on her behalf. However, the Plaintiff produced no document showing that there was intention to create a trust between the parties or that the Defendant was to hold the property in trust for her.

- i. The email exchanges were indicative of a romantic relationship between the two and that the Plaintiff hoped to retire in Kenya and live with the Defendant in the house they were constructing. Evidently, the defendant was not just a worker or employee of the plaintiff. There is no evidence tendered by the plaintiff that she paid the Defendant for his services of scouting for the properties to purchase, transactions leading to registration of title, procuring building materials, and supervising the construction of the apartments on Kwale/



Ukunda/915. Though it may not be possible to ascertain the level of the financial and other contributions each of the parties in this suit made towards the acquisition of the two suit properties and developments thereon, the defendant's contribution cannot be said to have been nil.

- j. In any case, in law it was impossible for free hold titled land to be owned in trust for non-Kenyan Citizen, in view of Article 65(3) of *the Constitution* which provides;

“(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.”

The court sympathizes deeply with the Plaintiff but the law is just but not fair. The evidence before the court leads to only one determination, that the suit properties are co-owned by both the Plaintiff and Defendant as the title documents indicates. That in terms of section 91(2) of the *Land Registration Act* No. 3 of 2012, as the title documents do not indicate the shares of each proprietor, they are presumed to hold the interests over the two parcels of land “as tenants in common in equal shares.”

- j. Having come to the finding that the plaintiff has failed to establish fraud and the existence of a trust in her favour in this suit, then it follows that her claim over the motor vehicle must fail as there is no documentary evidence to even suggest that she owned it. That accordingly, the court finds the plaintiff has no basis to claim any entitlement to the proceeds from the sale of the vehicle. The foregoing shows that neither party has succeeded against the other in the main suit and counterclaim and both claims are definitely for dismissal.
- k. From the evidence tendered by both the plaintiff and defendant, their relationship is no longer rosy. The plaintiff's suit and defendant's counterclaim is a loud manifestation that each want the other out, not just from the suit properties title documents, but also from their lives. That may not be realized so long as they hold the titles documents to the two parcels in their joint names. Though not specifically prayed for by any of the parties, the court is of the view that under “any other relief” in the amended plaint and counterclaim, it would be fair and just for the court to consider issuing an order that will help the parties terminate the property relationship and liquidate their jointly owned properties and each get her/his share thereof. That way, the parties will be free to part from each other peacefully and without the need to file fresh litigation over the same matter, that would lead to more costs and delay in determination of the dispute. An order to sell the two properties and share the proceeds equally commends itself to the court.
- l. It is trite that costs largely follow the event, unless where for good cause the court directs differently as can be seen from the provisions of section 27(1) of the *Civil Procedure Act* chapter 21 of Laws of Kenya. As none of the party has succeeded in their case against the other, each will bear their own costs in both the main suit and counterclaim.

11. Though both parties have failed to establish their claim against the other to the standard required of balance of probabilities, the court orders as follows;
- a. That both the plaintiff's suit and defendant's counterclaim are hereby dismissed.
- b. Each party to bear her/his own costs in both the main suit and counterclaim.



- c. That having restated that the two suit properties are co-owned by the plaintiff and the defendant, and being cognizant of the parties unrealized desire to terminate that ownership arrangement through this suit, and so as to avoid multiplicity of litigation and costs, the court directs as follows;
- i. That the parties to, either directly and or through their counsel, have the two properties valued through a licensed relevant practitioner to establish their current market price within the next thirty (30) days, and the parties to share the valuation exercise fees equally. Thereafter, any party be at liberty to buy the other's half [50%] share of the suit properties in thirty (30) days.
  - ii. In case there is no party buying the other's half share as contemplated above, the parties be free to engage a real estate agent to sell the suit properties and the proceeds thereof be shared equally between the plaintiff and defendant. The fees payable to the real estate agent to be shared between the plaintiff and defendant equally.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 10<sup>th</sup> DAY OF MAY 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : Absent

Defendant : Absent

Counsel : Mr. Odhiambo for the Plaintiff and Mr Odundo for the Defendant.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

