



**Storelli v Mbindyo & another (Environment & Land Case  
125 of 2021) [2023] KEELC 17968 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17968 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 125 OF 2021**

**AE DENA, J**

**JUNE 5, 2023**

**BETWEEN**

**ANIELLO STORELLI ..... PLAINTIFF**

**AND**

**DAMARIS MWONGELI MBINDYO ..... 1<sup>ST</sup> DEFENDANT**

**STOW CITY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Plaintiff's Case and Evidence**

1. Aniello Storelli the Plaintiff a citizen of Italy visited Kenya (Diani) in 1999 as tourist when he was approaching retirement age. He fell in love with the country as well as with one Damaris Mwangeli Mbindyo the 1<sup>st</sup> Defendant. Aniello decided to make Diani his retirement home thereafter allegedly cohabited with Damaris as husband and wife. That he subsequently bought several parcels of land some were registered in the names of Damaris and others in name of the 2<sup>nd</sup> defendant company which the Plaintiff purchased but was controlled by the 1<sup>st</sup> Defendant. According to Aniello the properties were to be held in trust and he did this to secure his interest as a foreigner who was told he could not own land. He also considered Damaris as wife and long-term partner whom he trusted.
2. The Plaintiff avers he built residential houses and commercial buildings in some of the properties where together with Damaris they collected rent for their family upkeep. Later Damaris directed tenants to deposit rent into her personal account since she was the registered absolute owner. To Aniello, at all material times the 1<sup>st</sup> and 2<sup>nd</sup> defendant did not have financial capacity to make such investments and their actions amounted to breach of trust meant for unjust enrichment. The Plaintiff pleaded a number of particulars of breach of trust.



3. Vide the plaint amended on 15/05/2017 with leave of the court, the Plaintiff stated that he was entitled to the suit properties having solely financed their purchase, cost of construction and craved the following reliefs;
- a. A declaration the Plaintiff solely is entitled to ownership and possession of the following properties: -
    - i. Kwale/Waa/932
    - ii. Kwale/Waa/1206
    - iii. Kwale/Galukinondo/1103
    - iv. Kwale/Galukinondo/1105
    - v. Kwale/Galukinondo/1106
    - vi. Kwale/Galukinondo/1107
    - vii. Kwale/Galukinondo/1111
    - viii. Kwale/Galukinondo/1112
    - ix. Kwale/Galukinondo/1113
    - x. Kwale/Galukinondo/1114
    - xi. Kwale/Galukinondo/1119
    - xii. Kwale/Galukinondo/1120
    - xiii. Kwale/Galukinondo/1121
    - xiv. Kwale/Galukinondo/1122
  - b. A declaration that there exists a resulting trust between the Plaintiff and the 2nd Defendant and that the Defendant is holding the suit properties mentioned in (a) above in sole trust for the Plaintiff.
  - c. A mandatory order directing the 1st and 2nd Defendants to transfer the suit properties to the Plaintiff failure of which the Deputy Registrar of the High Court do sign the transfer forms in favor of the Plaintiff.
  - d. A permanent injunction to restrain the Defendants whether by themselves, and their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever be restrained from interfering with the Plaintiff's quiet enjoyment, possession and occupation of the suit properties as well as restrained from selling, disposing of, charging, subleasing, processing sub titles or leases, dealing, interfering with and/or intermeddling in any manner whatsoever with the suit properties enumerated in (a) above.
  - e. Costs of and incidental to this suit.
  - f. Any other relief or remedy that this court may deem just to grant.

### **Plaintiffs Evidence**

4. The Plaintiff testified on his behalf as PW1 and called one additional witness P.W.2. PW1 adopted his witness statement dated 19/2/2015 as his evidence in chief. He testified that he had purchased the



fourteen (14) suit properties situate in Diani and Matuga on diverse dates from Giovanni and Peter Kibe respectively. That at the time of the hearing he had known Damaris for about 15 years but had been separated for the last 5 years.

5. He stated in cross examination that he had a wife and children who lived in Italy. That he had two businesses in Diani, 'Pizzeria Restaurant Aniello' which he opened around the time she met Damaris and 'Why Not Snack Bar' which was now closed. He clarified in re-examination that he financed the companies with money from Italy. He admitted he was not a party in the sale agreement between Stow City Limited and Damaris as he was told he was foreigner. He stated that he had paid Giovanni about Kshs 5 million in instalments in full but he had no documentary proof.
6. It is noteworthy that the Plaintiff did not produce the 9 documents as listed in the Plaintiff List of Documents dated 19/02/15. Ms. Otunga for the Plaintiff confirmed the position but had no objection to their reference during cross examination.
7. PW2 was Peter Ndungu Kibe. It was his testimony while adopting his witness statement dated 19/2/2015 that he had known the Plaintiff for a long time. That he PW2 sold plots Kwale/Waa 1206 and 932 to the Plaintiff. He stated that the Plaintiff paid him the full purchase price of Kshs. 1.6 million by several cheques as shown the said agreement. He produced the sale agreement dated 6/6/2009 as PEX 1.
8. PW2 in cross examination confirmed he signed the agreement between him and the 1<sup>st</sup> defendant. That he was paid the full purchase price in cheques by the Plaintiff. He told the court he was privy as the vendor that the properties were in the 1<sup>st</sup> Defendants name because the Plaintiff is a foreigner and the agreement was a per, Aniello's instructions.
9. With the above the Plaintiff closed his case.

### **Defence Case and Evidence**

10. In her defence amended on 27/6/17 the 1<sup>st</sup> Defendant admitted to the existence of a relationship with Aniello which never materialized to a marriage. She avrered that Aniello made some joint investments in Kenya with her but had no role or interests in the establishment, management and/or assets of Stow City Limited, the 2nd Defendant. The 1<sup>st</sup> defendant denied the suit proeprties belonged the Plaintiff and equally denied there was an implied trust or any trust. It was urged that the suit be dismissed with costs.
11. The 1<sup>st</sup> Defendant admitted they had joint investments with the Plaintiff namely, Pizzeria Restaurante da Aniellos Limited wherein Aniello held 90% and Why Not Snack Bar Limited where the shareholding was on 50% basis each. That Aniello kept all the books of accounts. It is stated that there was no demonstration of existence of any other joint investment and that from the income generated from these two companies Aniello kept his share while Damaris used her share to initiate her own investments. (see para 6- 7 of ammended defence).
12. DW1 testified on her behalf and while adopting her witness statement dated 24/01/2022 testified that she met Aniello in the year 2002 while working at Diani Reef Hotel as cashier for 5 years. That Aniello was a tourist and supported himself through pension. That together they opened Pizzeria and Why Not Snack Bar which she was managing as Aniello did not speak in English. That while she received a salary she also received her share of the profit from Aniello which later built up to arrears of Kshs. 5 million which was then resolved in winding up Cause 12 of 2004 and paid by postdated cheques. The postdated cheques were to be paid from the Pizeria business account of which she was signatory directly to the vendor (PW2) forKwale/Waa 932 & 1206 which were to be acquired in her name.



She testified that she signed the agreement, for the purchase price of Ksh 1.6 M. Aniello issued the postdated cheques from Barclays Bank Pizzeria Restaurant Account. That she paid stamp duty.

13. It was DW1 further testimony that she did not form Stow City but found about it through a friend when she was looking for land to buy. She purchased 12 undeveloped plots at Kshs. 3.5 Million from Stow city in vacant possession. Subsequently around the year 2006/2007 the company was transferred to her and currently she was director together with her son and brother. That she raised the purchase price from her salary and income from her small business. Kshs.1.6 was paid in cash. That she then developed cottages on plots 111,1114,1112,1113 and 1119. through a loan from Imperial Bank which she secured by a charge against plot 1223. That the rest of the plots remained vacant. She added that she serviced the loan through rental income from the developments and not through Aniello and denied existence of any agreement with the Plaintiff to share the rental income as the Plaintiff was not a director neither was he a shareholder.
14. It was DW1 further testimony that the rental income was being deposited in an account belonging to Stow City. That Aniello trespassed in plots 1206 & 932 during the pendency of the present proceedings and harvested Casurine trees and sold the animals for which she has never been compensated. That she never received the full purchase price of Kshs.8.5 for plot 1119. That the Plaintiffs cousin sent Ksh 2.8M to Aniello which she never received neither had Stow City authorized Aniello to keep the money.
15. DW1 reiterated he couldn't marry Aniello as he had a family in Italy. That she cannot transfer the property to the 1<sup>st</sup> Defendant since it belonged to the Company. That she owed nothing to the Plaintiff and instead it was Aniello who held her money.
16. In support of her case the 1<sup>st</sup> Defendant produced as exhibits
  - D Copy of Memorandum and Articles of Association of Pizzria Restaurante Da Anielos Limited
  - Exhibit 1- D Copy of Memorandum and Articles of Association of Why Not Snack Bar
  - exhibit 2- D Copy of the Petition Winding Up Cause No. 12 of 2004
  - exhibit 3- D Copies of Title Deeds for Plot No's Kwale/Waa /932 and Kwale/Waa /1206
  - Exhibit 4- D Copies of Kwale/Waa/932, Kwale/Waa /1206, Kwale/Galukinondo/1103, Exhibit Kwale/Galukinondo /1105, Kwale/Galukinondo/1106, Kwale/Galukinondo/1107, 5- Kwale/Galukinondo/1111, Kwale/Galukinondo/1112 Kwale/Galukinondo/1113 Kwale/Galukinondo/1114, Kwale/Galukinondo/1119, Kwale/Galukinondo/1120, Kwale/Galukinondo/1121, Kwale/Galukinondo/1122
  - D Copy of the Agreement of Sale dated 4<sup>th</sup> April 2013
  - Exhibit 6- D A copy of a letter by the firm of J.Thongori & Co. Advocates dated 4<sup>th</sup> February 2014
  - Exhibit 6- D A copy of a letter from M/s Aminga & Co. Advocates dated 7<sup>th</sup> February 2014
  - Exhibit 7- D A copy of a letter from M/s Aminga & Co. Advocates dated 13<sup>th</sup> March 2014
  - Exhibit 8- D A copy of a letter by the firm of J. Thongori & Co. Advocates dated 4<sup>th</sup> April 2014
  - Exhibit 9- D A copy of a letter dated 15<sup>th</sup> January 2014 by the Plaintiff acknowledging receipt of Kshs. Exhibit 2,800,000/=
  - 10 -
17. Upon cross examination DW1 admitted she had no proof of her employment at Diani Reef and no proof of her businesses. She confirmed she had no documents to show she contributed to the company. That though she was entitled to Ksh.5m which was agreed upon after consultations she had



not presented documents to show the profits of the company and the settlement agreement thereof. On being shown the sale agreement for 6/6/2009 she confirmed upon deduction of Kshs. 1.6 million the balance would be Ksh3.4 but had no proof she paid it. That she bought the land with trees in it which Aniello cut valued at Kshs 3.5 m.

18. DW1 confirmed on cross examination the agreement did not refer to any development, that she did not present in court a company resolution by Stow City to sell the land to her, stamp duty receipt, agreement for Stow City properties and the balance payment for the purchase of Stow City which she stated she paid in cash through the lawyer. She further confirmed she had no evidence from the said lawyer acknowledging this balance. She stated Aniello adopted her son and she DW1 were in relationship with Aniello for 13 years.
19. With the above the Defendant closed her case.

### **Submissions**

20. The Plaintiff through the firm of S.M. Otunga Advocates filed his submissions on 28/02/23. Counsel identified 3 key issues for determination namely, Whether the Plaintiff is the legitimate owner of the suit properties; Whether the Plaintiff is entitled to be registered as the owner of the suit properties and Whether the Plaintiff is entitled to injunctive orders against the defendants preventing them from dealing with the suit property in any manner detrimental to the Plaintiffs claim.
21. It was submitted the plaintiff bought the suit properties from Giovanni Dal Din then a Director at Stow City Company Ltd at an agreed price of Kshs. 5 million. A deposit acknowledgement of receipt of Kshs.1.3 Million was filed in court as part of the purchase price. The balance was paid in instalments. That the vendor confirmed the sale to the plaintiff vide an affidavit filed in court. It was submitted further that the defendant claimed ownership of Kwale Waa/932 and 1206 yet the same were purchased by the Plaintiff from PW2 the previous owner and who confirmed to court that he indeed received payment for the properties. The Plaintiff relied on 1)The receipt and acknowledgement of receipt 2) Affidavit by Giovanni Dal Din and 3) Witness statement of Peter Kibe.
22. It was submitted that the Plaintiff cohabited with the defendant for more than 12 years and was misled into believing that he could not as a foreigner have any property registered in his name. That he opted to register them in the 1<sup>st</sup> and 2<sup>nd</sup> defendants in trust but not as the legal and beneficial owners.
23. It was submitted there was no proof of payment of the purchase price by the 1<sup>st</sup> defendant neither was any witness called to confirm the 1<sup>st</sup> defendants paid the same.
24. This court in view of the above was urged on behalf of the Plaintiff to invoke the the provisions of the *Civil Procedure Act* and the inherent powers of the court to order compensation to the Plaintiff for the disposed properties which was undertaken in contempt of the court orders of 12/6/2015. That since the purchases of the disposed properties were innocent purchasers for value without notice they should not be punished instead liquidated damages should be awarded the Plaintiff.
25. It was urged that after amendment of the Plaint the 2<sup>nd</sup> defendant did not enter appearance. The court was urged to grant the orders as prayed by invoking order 10 rule 9 of the *Civil Procedure Rules*.

### **Defendants Submissions**

26. The Defendants submission were filed on 12/5/23. I must explain this delay. When this court retired to prepare the judgement I observed that the Defendants submissions were not on record. I instructed the court assistant to inquire whether the same had been filed. Mr. Mkomba confirmed they had not



and at the same time filed the same. I instructed that that the same be brought to the attention of Ms. Otunga for any objection to their admission but with a deadline. No objection was received.

27. Citing various authorities, it was submitted that the 1<sup>st</sup> defendant had failed to prove a resulting trust in regard to the suit properties and was undeserving of the orders sought. There was no proof by the plaintiff of intention to create a trust between him and the defendant. There was no proof by the Plaintiff that he contributed to the purchase of the 2<sup>nd</sup> defendant as a company as well as the developments. That the plaintiff being bound by his pleadings the prayer (b) which touched on the issue of a resulting trust was only attributed to the 2<sup>nd</sup> defendant. That the documents in the plaintiffs list of documents filed on 19/2/15 were never produced consequently they were not of any probative value.
28. It was further submitted that those who come to equity must come with clean hands which the Plaintiff had not. That PW1 had with impunity trespassed, destroyed and converted property belonging to the 1<sup>st</sup> defendant and withheld funds from the sale of plot 1119 belonging to the 2<sup>nd</sup> defendant which he admitted during cross examination, registering cautions on suit properties sold to 3<sup>rd</sup> parties on the basis of spousal interest which the Plaintiff admitted he was not a spouse. This court was invited to consider the evidence as well as the Deputy registrars report on site visit.
29. Citing the provisions of section 25(1) of the Land Registration Act it was submitted that DW1 produced all her titles and gave cogent evidence of how she acquired the same and there being no challenge on the basis of fraud, the titles were indefeasible and there was no basis for a constructive trust.

### **Discussions And Determination**

30. Upon considering the pleadings, the evidence presented and led by the parties and the written submissions the following issues commend for determination.
  1. whether a trust could be presumed to have been created in the circumstances of this case.
  2. Whether the Plaintiff is entitled to the prayers sought.
  3. Who should bear the costs of this suit.
31. I found it necessary to look into the legal definition of a trust and the various types of trusts that attach to land. The Court of Appeal in James Archer & Ano v Inger Christine Archer & 2 Others (2023) KECA 298 (KLR) stated as follows in respect to the definition of trust and the types thereof; -

*Black's Law Dictionary*, 9<sup>th</sup> Edition; defines a trust 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).

32. The court (*supra*) went on to state that; -

"There are three types of trusts that can arise with respect to land, as explained in *Elements of Land Law*, 5<sup>th</sup> Edition by Kevin Gray and Susan Francis Gray at page 824 paragraph 7.1.11:

Trusts relating to land can be classified as either express trusts or implied trusts, the latter category subdividing into further categories of resulting and constructive trusts ... Consistently with the characteristic preoccupation of equity, the primacy of intention is exemplified in each of these three cases of trust.



The trust is the express very embodiment of an intention explicitly formulated by a legal owner regarding the beneficial ownership of his land. Implied trusts arise by operation of law, but do so against a background of actual or presumed beneficial intentions as to beneficial title. Yet, although premised alike upon intended beneficial ownership, the resulting trust and the constructive trust have traditionally enjoyed distinct spheres of operation.”

This position was confirmed by this Court (Makhandia, Ouko & M’noti, JJA.) in *Twalib Hatayan & Another v Said Saggat Ahmed Al-Heidy & 5 Others* [2015] eKLR as follows:

“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...”

33. Applying the above principles to the present case the 1<sup>st</sup> and 2<sup>nd</sup> defendants appear separately as registered proprietors but not as trustees. The Plaintiff is not endorsed in any of the titles presented as DW1 exhibits. This therefore negates an express trust. In any event there was no evidence presented to this court that there was an express trust and neither was it in dispute that there was no express trust.
34. The Plaintiff at paragraph 16(b) of the Amended plaint craved for a declaration that there existed a resulting trust. In the case of *Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge* (2017) eKLR & *Mbothu & 8 Others v Waitimu & 11 Others* (1986) KLR 171 it was stated that the courts will only imply a trust in order to give effect to the intentions of the parties which must be clearly determined. In the case of *James Archer & Ano v Inger Christine Archer & 2 Others* (*supra*) the court stated thus;-
  26. The two main requirements for a resulting trust to arise are firstly, the intention and contribution to the purchase of the property must be contemporaneous with the taking of legal title, as was held in *Pettit v Pettit* (1970) AC 777 and in *Gissing v Gissing* (1971) AC 886. The relevant time frame for the existence of the required intention and contribution is therefore at the point of purchase of the land, which is the time the beneficial entitlement crystallizes, and resulting trusts cannot in principle be founded on intentions, events or circumstances which arise after the date of purchase. Secondly, the clearest instances of resulting trust emerge from direct cash or other forms of financial contributions to the purchase of property at the point of purchase.’
35. Based on the above authorities the burden of proof lay upon the Plaintiff to prove the intention of the parties to create a trust as well as his financial contribution to the purchase of the property at the point of purchase. PW1 evidence was that he financed the purchase of the properties but allowed their registration in the 1<sup>st</sup> and 2<sup>nd</sup> defendants name since he was informed he could not own land in his name as foreigner and also trusted that the 1<sup>st</sup> defendant was his long-life partner. The suit properties were in two main categories those in Waa and those in Diani the former registered in the name of the 1<sup>st</sup> Defendant and the later in the 2<sup>nd</sup> Defendants name.
36. PW1 told the court that he bought Plots Kwale/Waa/932 and Kwale/Waa/1206 from PW2 one Peter Kibe. The consideration of Kshs. 1.6 m was not in dispute except for who paid it and which was critical to a finding for a resulting trust. Through PW2 was produced a sale agreement dated 6/6/2009 (PEX1) which shows the agreed purchase price as Kshs. 1.600,000/-. My reading of the agreement affirmed it



was entered into on 6/9/2009 between PW2 and the 1<sup>st</sup> Defendant and the purchase price was to be paid by way of six (6) cheques whose cheque numbers were stated therein and spanning the period 6/6/09- 01/12/09. The first cheque for Kshs. 100,000, on the date of the agreement and the rest in instalments of Kshs. 300,000/= until payment in full. No documentary proof of the transmission of this money to the vendor by the Plaintiff was presented.

37. However, on cross examination PW2 acknowledged that he received the full purchase price from the Plaintiff through 6 cheques. DW1 in her evidence in chief confirms that indeed the purchase price for Kwale/Waa 932 & 1206 was paid by the Plaintiff when she stated that the Plaintiff paid postdated cheques from the Pizzeria Account to PW2 the vendor since Aniello did not have cash and the land was to be bought in her name. This therefore confirmed and was an admission by the 1<sup>st</sup> defendant that the Plaintiff paid for Kwale/Waa/932 & 1206.
38. Additionally, PW1 reiterated in cross examination that he is the one who negotiated the deal and PW2 confirmed in cross examination that he sold the land to the Plaintiff and the agreement was prepared in tandem with Aniello's instructions and he was privy as the vendor to the narrative about the Plaintiff being unable to own land as a foreigner. PW1 was very consistent with the position that he was told he could not own land as a foreigner and he believed it. He acted on this information to his detriment. The Defendant's contention that the Plaintiff had a lawyer in this transaction cannot stand because my perusal of the agreement for Kwale/Waa/932 & 1206 shows that the same was not drafted by a firm of advocates but what I would say to be homegrown.
39. There were also contradictions in DW1 witness statement and her viva voce evidence as well as the amended statement of defence. While DW1 testified she received a salary and her share of the profit from Aniello (which later built up to arrears) forming part of the payments made by the Plaintiff above which settlement agreement she did not produce. In paragraph 7 of her witness statement the 1<sup>st</sup> Defendant avers she had for the last 7 years earned nothing from the Pizzeria and Why Not Snack Bar. At para 12 of her witness statement she states that out of the operations of the two companies she was able to acquire the Kwale/Waa/932 & 1206. DW1 could also not produce any documentation for Lions Bar which she indicated she operated at Shimba Hills as well as Hide Out Bar which she stated she operated in Ukunda Corner ya Police before she met the Plaintiff. There is so much that did not add up with DW1 evidence amidst the lack of documentation and the contradictions earlier cited. I found it difficult to believe the 1<sup>st</sup> defendants' narrative and in any event the 1<sup>st</sup> defendants' evidence was not corroborated by any witness in regard to these two properties.
40. I'm further emboldened by Justice Anne Omollo's conclusion in the ruling delivered on 12/6/2015 being part of the court record in this suit, in respect of the Plaintiff's application dated 19/2/2015 where the court stated as follows at paragraph 11; -

'In conclusion the respondent has admitted two properties in her name to wit Kwale/Waa/1206 and Kwale/Waa/932 belong to the applicant.....'

A notice of appeal was lodged on behalf of the Defendant against the ruling but no evidence was placed before court on its outcome.

41. The Plaintiff was also in possession of the two properties and this also supported the Plaintiff's case that he had an interest in the property and it was not intended to confer absolute legal title to the 1<sup>st</sup> Defendant. Additionally, a site visit was conducted on 20/7/2018 by the Deputy Registrar pursuant to the orders of the court and which Counsel for the Defendant invited this court to consider. It revealed that it was apparent the Plaintiff was in charge of the farm and the activities therein.



42. The court was further guided by the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR the court observed as follows; -

‘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 29th 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).’ Emphasis added 28.

43. Based on the foregoing and the discussions it was this court’s finding that on a balance of probability the Plaintiff proved that he financed the purchase price for Kwale/Waa 932 & 1206 the same having been corroborated by the vendor PW2 and admitted by the 1<sup>st</sup> defendant in her evidence in chief and affidavit as stated by Justice Omollo above. It is also my finding that the Plaintiff has to the required standard demonstrated the intention that the said properties were to be held in trust for him. I make a finding that there was a resulting trust.
44. The issue of marriage featured prominently in the pleadings as well as the hearing of the case and could not be wished away. During cross examination the 1<sup>st</sup> Defendant vehemently denied there was a marriage and for obvious reasons. However, in the letter dated 9/4/14 produced by Caroline Njogu Advocate on behalf of the 1<sup>st</sup> Defendant refers to ‘a matrimonial bedroom’. On cross examination PW1 was referred to cautions he had lodged and which this court observed on the titles for plots No.1103,1120,1119,1107 and 1106 claiming spousal interest which he later in cross examination denied he was a spouse.
45. Both parties conceded that they cohabited resulting into one issue and the adoption of Damaris biological son by the 1<sup>st</sup> Defendant. DW1 Stated in cross examination they cohabited for about 13 years. I preferred to steer away from the issue of marriage because for the purpose of this case the issue of cohabitation was more pronounced.
46. This court first set out the legal position of cohabitees and their rights in Kenya and other jurisdictions. I was guided by the recent judgement of the Supreme Court of Kenya delivered in January 2023 in the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) Neutral citation: [2023] KESC 2 (KLR) which though was on the presumption of marriage several principles were also laid out with regard to cohabitees which I found applicable to the present case. While the court found that a presumption of marriage did not exist in considering the reliefs available pointed that it was crucial to make a finding on proprietary rights of the parties, whatever the nature of the relationship. I found the following insights useful to this discourse;

“In England, courts have long recognized that common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which can be inferred from conduct other than making financial contributions to cohabitees. In defining constructive trusts, the



Court of Appeal in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR the court held that;

‘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 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. ... [emphasis added].

We however note that even though constructive trust is premised on section 38 of the *Land Act*, 2012 the same has not been applied in solving disputes relating to cohabittees.

In the case of *Elayne Marian Teresa Oxley v Allan George Hiscock* [2004] EWCA 546 the Court of Appeal of England and Wales quoted with approval Lord Diplock in *Gissing v Gissing* [1971] AC 886 where the guidelines to consider when interrogating constructive trust were laid down as follows:

“ . . . the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.

1. The nature of the substantive right

If the legal estate in the joint home is vested in only one of the parties (‘the legal owner’) the other party (‘the claimant’), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention.

2. The proof of the common intention.

a. Direct evidence, it is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other



possible forms of direct evidence of such intention.

- b. Inferred common intention, Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention, viz contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. The quantification of the right.

Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important." [emphasis added].

47. The court further observed as follows:

"I have referred, in the immediately preceding paragraphs, to "cases of this nature". By that, I mean cases in which the common features are:

- (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife;
- (ii) each of them makes some financial contribution to the purchase;
- (iii) the property is purchased in the sole name of one of them; and
- (iv) there is no express declaration of trust." [emphasis added].

48. The court in the case of *Gideon Mwangi Chege v Joseph Gachanja Gitutho* (2015) eKLR supported the position that where there was no evidence to support a finding of an agreement or arrangement



to share the court will rely on the conduct of the parties as the basis from which to infer a common intention to share the property beneficially and direct contributions by the partner who is not the legal owner to justify the inference necessary to the creation of a constructive trust.

49. PW1 stated in cross examination that the agreement with Giovanni was Kshs. 1.3 Million though he had paid Giovanni about Kshs 5 million in instalments in full but could not produce documentary proof since he paid him as a friend. An agreement for sale dated 15/11/2006 together with a supplemental agreement dated 19/01/2007 was listed as part of the Plaintiffs list of documents which were not produced. This agreement was between Stow City Limited and Damaris Mwangeli Mbindyo for the sale of the 12 plots. The purchase price was stated as Kshs. 1.3 million which vide a supplemental agreement was amended to Kshs. 3.5M. PW1 maintained in cross examination that he bought Store City and left it to Damaris control because he was a foreigner. In the submissions filed on behalf of the Plaintiff it was submitted that the Plaintiff filed a deposit acknowledgement of receipt of Kshs.1.3 Million as part of the purchase price and that the balance was paid in instalments.
50. The above acknowledgement is dated 15/10/2014 and refers to the agreement herein dated 19/01/2007 between Stow City & Damaris and stated that Giovanni Dal Din & Robert Dal Din received the said Kshs. 1.3 from Mr. Aniello being an advance towards the total agreed sum and that so far no further amount had been received from Damaris. I noted Counsel for the defendant's submission that as long as this document was not produced it had no evidentiary value. It is however noteworthy that PW1 explained during cross examination that Giovanni had passed away about one and half years before the date of the hearing of this matter which was not controverted by the 1<sup>st</sup> Defendant. The affidavit of Mr. Tonello sworn on 7<sup>th</sup> January 2015 was also annexed as an exhibit in the supporting affidavit of the Plaintiff sworn on 19/2/15 corroborated the payment of the Kshs. 1.3 million by the Plaintiff. On a balance of probabilities, I had no reason to believe that the Plaintiff did not pay this money. I further say so because a look at the Petition filed by Damaris dated 29/7/2004 revealed that the Plaintiff received some proceeds from the sale of Da Aniello Colliers Center, then it was not plausible to state that the Plaintiff could not finance these purchases because he relied on pension which was hardly Kshs. 100,000 after splitting with his wife in Italy. At the same time the La Pizzeria was still operational and at no point did Damaris show it was struggling.
51. Damaris herself had no proof to show her monetary contribution at the point of purchase of the Stow City. If the same was paid by Aniello rightly so for the reasons stated earlier that she could not produce evidence of the other businesses she ran. and if Stow City had nothing to do with the Plaintiff why would Damaris also want the proceeds from Da Aniello Colliers Center.
52. However, I noted some contributions that were attributable to Damaris which I could not ignore and specifically to the development of the suit properties in Diani. DW1 stated before court that she subdivided the plots, charged plot 1112 to Imperial Bank for Kshs 2M and built cottages on plots 1111, 1112, 1113, 1114, 1119. My perusal of the title documents confirms the existence of the alleged encumbrance/Charge to imperial bank in 2010 for Kshs. 3.4 m against Kwale/Galu Kinondo No 1122.
53. DW1 told the court that the money was not enough and she sold 1112,1113,1119 and 1114 to get capital. Based on my finding that there was a constructive trust disposing without involving the Plaintiff was to me unconscionable. DW1 told the court that she serviced the loan from the rental income which was being deposited into Stow City's Account. The fact that rental income was being collected by Damaris was not in dispute. By a letter dated 15<sup>th</sup> January 2014 (DEX 11) the Plaintiff admitted owing DW1 Kshs. 2.8 Million paid to him for the sale of plot 1119 to the Plaintiffs cousins which he did not remit to Damaris.



54. Assuming I'm wrong on the above, the conduct of the Plaintiff and the 1<sup>st</sup> defendant spoke a lot for example the sale of the plot 1119. PW1 confirmed during cross examination that the purchaser in the sale agreement dated 4/4/2013 (DEX 6) was his cousin. The question that arose in mind was why Aniello's cousins when Damaris could have easily sold to another buyer and without involving the Plaintiff. On one hand the 1<sup>st</sup> defendant wants to treat the Plaintiff as not being a shareholder and the other hand involves him to the extent where the Plaintiff even gets the 1<sup>st</sup> defendant a buyer. This means there were blessings of both the Plaintiff and the 1<sup>st</sup> defendant. Additionally, why would the balance of Kshs. 2,800,000 be remitted through the Plaintiff and which amount he acknowledges via the letter dated 15<sup>th</sup> January 2014 (DEX 11). The Court of appeal in *Stephen Mkare Mulewa v Linda Newman* (2015) eKLR and the case of *Gideon Mwangi Chege v Joseph Gachanja Gitutho* (2015) eKLR supported the position that where there is no evidence to support a finding of an agreement or arrangement to share the court will rely on the conduct of the parties as the basis from which to infer a common intention to share the property beneficially.
55. Moreover in *Stephen Mkare Mulewa v Linda Newman* (*supra*) highlighted this quote in the holding in *Gissing v Gissing* (1970) 2 ALL ER 780 while establishing a donor's intention;
- “Where a beneficial interest in land is claimed by a person, whether spouse or stranger in whom the land is not vested, a common intention has to be inferred from the parties conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable man would draw from the parties conduct or words. The Court must determine what inferences can reasonably be drawn in each case.”
56. From the circumstances of this case, the conduct and behavior of the parties, I would not hesitate to infer a constructive trust. The Plaintiff cohabited with the defendant for more than 10 years and was misled into believing that he could not as a foreigner have any property registered in his name. He proceeded to act on this to his detriment. For me based on the circumstances of this case I saw DW1 taking advantage of an Italian, who trusted her, cohabited with her, adopted her child and also benefitted by dint of this association from other Italians. The 1<sup>st</sup> Defendant being in a position of trust used the same to gain advantage over the Plaintiff by advising the Plaintiff that he could not own property under his name. Let me add that I saw a very bitter man in PW1 during the trial proceedings whose trust had been completely broken and wounded. Some cases just cry out for justice and I think this is one of such based on its own facts and merits. This is a Court of justice and equity, which is expressly mandated under Article 159(2) of the *Constitution* of Kenya 2010.
57. It would be inequitable to allow the 1<sup>st</sup> defendant to assert full beneficial ownership of the properties including the Kwale/Waa 932 & 1206. This is the import of Lord Denning's statement as referred in the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR thus:-
- Lord Denning in *Hussey v Palmer* (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”.
58. In view of the foregoing discussions the next question was to consider the reliefs available to the parties. This was the quantification of the right as espoused in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA)* *supra*.
59. Pursuant to the site visit report dated 23/07/2018 following the orders of Justice Yano of 28/05/2018 the Plaintiff was stated to have been in full control and undertaking some commercial operations in Plot No's Kwale/Waa /932 and Kwale/Waa /1206. Upon inquiry by this court during his evidence



the Plaintiff appeared to still have access thereto. I'm inclined not to disturb that status quo let him continue with this undertaking. It had been urged by Counsel for the Defendant that this was a first registration which was indefeasible except on grounds of fraud and which was not the claim in the present suit. But what about overriding interests which need not be noted in the register? Further section 13(7) of the *Environment and Land Court Act* 2011 provides that 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; (g) restitution; (h) declaration; or (i) cost.

60. Based on the above the relief of restitution should be available to the Plaintiff.
61. With regards to the Kwale/Diani plots it is imperative to interrogate the status of the suit properties registered in the name of the 2<sup>nd</sup> defendant. Upon inquiry by this court PW1 could not confirm what was sold and what has not been sold because everything was being done by Damaris. PW1 could only vouch for Plots No's Kwale/Waa /932 and Kwale/Waa /1206 and 1119 sold to the cousin. DW1 and who was said to be in control testified that she sold plots 1112, 1113, 1119 and 1114. Both counsels agreed in their submissions that properties were purchased by third parties. But for me did this did not mean that the Plaintiff would be without remedy.
62. The site visit report described the Diani properties as gated community with some developed and others partly developed or undeveloped. The 1st Defendant was the one pointing out which properties had been sold or not sold and the Plaintiff seemed not to know which property had already been sold if at all. The undeveloped plots were Kwale/Galu Kinondo 1103, 1105 & 1120. The partly developed were 1106 & 1107 the former with unused swimming pool and the later had unused resting area at the pool side. The developed plot and sold were, 1112, 1113 and 1119. Plot 1121 was noted as developed housing tenants.
63. Plot no. 1122 according to the site visit report was developed with a house was indicated as where the 1st Defendant resided and this was the plot from my observation that was charged. It would be safer in my view not to disturb this status quo. I did consider that the Defendant testified in court she still lived with both the children. I would also be inclined to let the Defendant retain the rental properties 1121 for the same reason.
64. The following orders shall therefore issue to dispose of this suit; -
  - i. A declaration shall issue that the properties known as Plots No's Kwale/Waa /932 and Kwale/Waa /1206 were held in trust by the 1<sup>st</sup> defendant Damaris Mwangeli Mbindyo as trustee for the Plaintiff Aniello Storelli.
  - ii. An order shall and hereby issue directing the 1st Defendant to transfer Plots No's Kwale/Waa /932 and Kwale/Waa /1206 to the Plaintiff Aniello Storelli within 90 days of the date of this judgement.
  - iii. That failure to II above the Deputy Registrar of the Environment and Land Court Kwale do sign the transfer forms in favor of the Plaintiff.
  - iv. A declaration shall and hereby issue that the properties known as Kwale/Diani 1103, 1105, 1106, 1107 and 1120 were held in trust by Stow City Limited, the 2nd Defendant herein as constructive trustee for the Plaintiff Aniello Storelli.



- v. An order shall and hereby issues directing the 2nd Defendant to transfer Plots No's Kwale/ Diani 1103, 1105, 1106 ,1107 and 1120 to the Plaintiff Aniello Storelli within 90 days of the date of this judgement.
- vi. That failure to V above the Deputy Registrar Environment and Land Court Kwale do sign the transfer forms in favor of the Plaintiff.
- vii. That property Kwale/Diani 1111 shall be held in trust for the two children Storelli Nicola Antonio & Storelli Nicholas Kamau and rent therefrom shall be deposited in a fixed deposit account in the joint names of the Plaintiff and the 1<sup>st</sup> Defendant in trust until they become of majority age.
- viii. Due to the nature of the dispute there shall be no orders as to costs.

**DELIVERED AND DATED AT KWALE THIS 5<sup>TH</sup> DAY OF JUNE, 2023**

**A.E. DENA**

**JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Plaintiff

Mr. Mkomba for the Defendants.

