



REPUBLIC OF KENYA



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**Kent v Kanyua & 3 others (Environment & Land Case 1567 of 2016)
[2023] KEELC 21372 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1567 OF 2016**

JA MOGENI, J

NOVEMBER 2, 2023

BETWEEN

TREVOR KENT PLAINTIFF

AND

CHARITY NJERI KANYUA 1ST DEFENDANT

IVY WANJIRU 2ND DEFENDANT

JEFF GITONGA 3RD DEFENDANT

THE COUNTY REGISTRAR OF LANDS 4TH DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 14/12/2016, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. The title deed number Dagoretti/Kinoo/2800 issued on 22/02/2011 in the names of Charity Njeri Kanyua, Ivy Wanjiru and Jeff Gitonga, the 1st, 2nd and 3rd Defendants herein be revoked.
 - b. The 4th Defendant be ordered to rectify the register in respect of the suit property Dagoretti/Kinoo/2800 to read Charity Njeri Kanyua as the sole proprietor.
 - c. The court be pleased to find that Charity Njeri Kanyua holds the suit property Dagoretti/Kinoo/2800 in trust for Trevor Kent, the Plaintiff herein.
 - d. The court does order that the Defendants, either acting individually or jointly be barred from any dealings in respect to the suit property Dagoretti/Kinoo/2800 without involving the Plaintiff.



- e. Costs of this suit and interest thereon be awarded to the Plaintiff.
 - f. Any other order the court may deem just and fit to award.
2. The 1st, 2nd and 3rd Defendants filed a Defence and Counterclaim dated 16/11/2017 and filed on 30/01/2018 wherein they sought for judgment against the Defendant to the Counterclaim for;
- a. A finding that the Defendant is in possession of the Title to the suit Property illegally.
 - b. An Order directing Trevor Kent to deliver the Title to the suit Property herein to the 1st Defendant, in the alternative, surrender of the Title Deed for the Suit Property issued on the 25/01/2000 to the Land Registrar Kiambu.
 - c. Damages and costs of the suit with interest.
 - d. The Plaint be dismissed with costs and the Counterclaim be allowed as prayed.

Plaintiff's Case

3. It was the Plaintiff's contention that in the month of October 1999, the Plaintiff and the 1st Defendant entered into an agreement as joint purchasers to purchase the property known as Dagoretti/Kinoo/2800 formerly known as plot 106 from one David Ndungu Kariuki at an agreed price of Kshs. 1,260,000/= only. The Plaintiff was later informed that being a British national, he could not hold a freehold title and so the parties agreed that the title would be processed in the name of the 1st Defendant who would hold it in trust for the Plaintiff.
4. The Plaintiff singlehandedly financed the purchase of the property from the proceeds of winding up Arch Aviation (U.K) Ltd which paid him £52,695 as salary and a further £100,000 being payment of loans.
5. The 1st Defendant was paid £12,532 as salaries by the same Company where she was working as an air hostess part of which she used to purchase some furniture for the hotel that was put up on the suit property. The parties agreed that since the Plaintiff had fully financed the purchase of the property, he would have custody of the title deed.
6. On 17/05/2016, the 1st Defendant filed Nairobi High court civil suit number 184 of 2016 seeking orders inter alia barring the plaintiff from operating the accounts of the business. Upon perusing the pleadings and more so the responses, it become evident that the 1st Defendant had fraudulently changed the title deed from her name and added those of her daughter Ivy Wanjiru, the 2nd Defendant herein and nephew Jeff Gitonga, the 3rd Defendant herein as joint owners.
7. The Plaintiff listed the particulars of fraud as follows: Lodging a fraudulent report that the original title deed had been misplaced/lost or stolen in order to obtain a Police abstract form to process a duplicate title, adding the names of the 2nd and 3rd defendants without consulting the Plaintiff who is a major stakeholder in the suit property and failing to disclose to the Police and the 4th Defendant that the original title was in the safe custody of the Plaintiff.
8. The plaintiff avers that the above was meant to defraud him of his interest in the property which was purchased wholly using his funds. The 1st Defendant has maintained in subsequent court papers that the property belongs to her solely which is not correct.



Evidence By The Plaintiff

9. PW1 – Trevor Kent adopted his witness statement dated 14/12/2016 and produced his bundle of documents dated 31/05/2022 which he relied on them as his evidence, marked as PW1-EX1-27.
10. On cross examination, he mentioned that he and the 1st defendant had jointly agreed to purchase and develop a site, but he was a shareholder and director of Arch Aviation, while the 1st defendant was an employee, not a shareholder or director. A further witness statement from 28/10/2022 indicated that the Land Board agreed to transfer the property into their joint names. He clarified that Ace Aviation SARL, registered in Rwanda, was established due to a contract with Air Rwanda, but the aircraft was owned by Ace Aviation. He also discussed Kikuyu Lodge and Kent Water, companies registered in 2005 and 2007, with transactions appearing in joint names due to a personal relationship. The land purchase was in the 1st defendant's name.
11. He stated that Ace Aviation was liquidated in 1998, and he was in possession of the title as of January 2000. The 1st defendant gave him the title, but she later couldn't find it when she returned from the US in 2010. A dispute arose, and he produced a letter addressed to the 1st defendant about UK bank accounts, emphasizing that he wasn't a party to those accounts.
12. PW1 claimed to have produced audited accounts for Ace Aviation, clarifying that Arch Aviation is the UK company and Ace Aviation SARL is Rwandan. He provided details about claims and debts related to Ace Aviation SARL, highlighting the 1st defendant's role and debt evidence presented in documents 2D and 3B.
13. On re-examination, he affirmed that the 1st defendant was an employee, not a director of Arch Aviation. Ace Aviation was registered to enable them to operate aircraft, but it had no assets. He confirmed that the 1st defendant was paid as indicated in document 3B. Regarding the title deed, he maintained that he still had it along with receipts from the advocate. He mentioned that a letter to the 1st defendant, though not addressed to him, was significant because it related to the 1st defendant's sole signatory bank account and her claim about money transfer by Janet Kent.
14. PW2- Hannah Wanjiku Maina; The witness, who is employed by the Plaintiff, confirmed her association with the Plaintiff and that she was testifying on his behalf. She adopted her witness statement from 14/12/2016 as her evidence.
15. On cross-examination, she mentioned knowing the 1st defendant since 21/04/1999 when she was employed. She recalled an incident when the Plaintiff and the 1st defendant were arguing loudly about the land certificate, specifically regarding the suit title.
16. PW3 – Samuel Kinundu Ngugi testified that he knows the plaintiff as he employed him to construct the house and that he was before the court to testify on behalf of the plaintiff. He adopted his affidavit sworn on 25/10/2016 as his evidence.
17. On cross-examination, he testified that he knows the 1st defendant as she used to visit the construction site in Rungiri. She used to visit the construction site as the Plaintiff's wife. He has never dealt with her. She would not visit the site as often.
18. PW4- Janet Susan Kent identified herself as a retired office administrator with experience in clerical work. She acknowledged her familiarity with the Plaintiff, who is her ex-husband. She adopted her witness statement from 9/12/2016 as her court evidence, verifying her signature.



19. On cross-examination, she mentioned being informed that the land purchase was meant to be in the joint names of the Plaintiff and the 1st defendant as a joint venture. The 1st defendant was described as an air hostess working with the Plaintiff. Paragraph 6 of her statement referred to the registration of a company, and she clarified that it was the Plaintiff who informed her that the title would be held by him, not the 1st defendant.
20. On re-examination, she explained that the reason the Plaintiff and the 1st defendant jointly held the land title was that the Plaintiff, being a British citizen, couldn't own land due to his non-national status. Therefore, they decided to have the 1st defendant hold the land title since she was a friend of the family. The funds for purchasing the property came from her, and they discussed this arrangement as a joint venture between the Plaintiff, herself, and the 1st defendant.
21. With that evidence, the Plaintiff closed his case.

Defendants' Case

22. The 1st, 2nd and 3rd Defendants entered appearance on 12/05/2017 and filed a defence and counterclaim dated 16/11/2017 on 30/01/2018. The 4th Defendant did not enter appearance or file a defence.

1st, 2nd and 3rd Defendants

23. The 1st, 2nd and 3rd Defendants aver that the Property was purchased by the 1st Defendant between the years of 1999 and 2000. It was not a joint purchase between the 1st Defendant and the Plaintiff. The 1st Defendant did not at any time hold in trust the Property for the Plaintiff. The rights to the Property were acquired by the 1st Defendant absolutely.
24. They aver that the 1st Defendant was at all material times financially capable of acquisition of the Property. The 1st Defendant states that such possession of the Title to suit Property is without Consent of the 1st Defendant who is the registered owner of the Property.
25. The 1st, 2nd and 3rd defendants aver that land reference number LR No. 7785/288 (I.R 52118) was registered in the names of Edward Kamau Wairi and Annie Wangechi Wairi as joint owners on 27/02/1991 and a title issued to that effect.
26. The 1st, 2nd and 3rd defendants contend that it is true that the 1st Defendant filed Nairobi High Court Civil Suit Number 184 of 2016, Charity Njeri Kanyua vs Trevor Kent. The suit Property however, is not subject of those proceedings.
27. The 1st Defendant denies the allegations of fraud as particularized in paragraph 12(i) to (iii) of the Plaint and further states, that:
 - a. It came to 1st Defendant's notice in the year 2010 that the Original Title to the Suit Property was missing from her custody.
 - b. That she reported the said loss to the Police and obtained a police Abstract upon which she applied to the office of the 4th Defendant for replacement of the Title which was later issued by the Lands Office, after following due process.
 - c. That the 1st Defendant's decision to transfer the Property and jointly own with the 2nd and 3rd Defendants was not fraudulent.
 - d. That the 1st Defendant did not authorize the Plaintiff to hold the title and such custody is illegal and unlawful.



28. The 1st, 2nd and 3rd Defendants pray that the suit herein be dismissed with costs.

Counterclaim

29. The 1st, 2nd and 3rd Defendants depone that pursuant to an agreement for sale with one David Ndungu Kariuki, the 1st Plaintiff in the Counter Claim, (hereinafter referred to as Charity), purchased all that property known as Dagoretti/Kinoo/2800, comprising by measurement nought decimal two nought two (0.202) hectares. (Hereinafter referred to as the Suit Property).
30. The Suit Property was registered in Charity's name as absolute proprietor and a Title Deed issued in her favour on the 25/01/2000. Charity ordinarily resides out of the country, in the United States of America, and when she came home sometime in the year 2010, it came to her notice that the Original Title Deed in respect of the Suit Property was not amongst the documents in her custody.
31. They aver that following that discovery, Charity, embarked on the process of obtaining the replacement of the Original Title Deed from the Land Registrar. Charity avers that all legal processes were followed and having satisfied the Land Registrar, Kiambu that the Title Deed was missing, she was issued with a Title Deed in the Joint names of herself, the 2nd and 3rd Defendants who are her daughter and nephew respectively.
32. Charity avers that it was not until she instituted legal proceedings against the Defendant in Nairobi High Court Case Number 184 of 2016, Charity Njeri Kanyua vs Trevor Kent that the Defendant herein made a deposition to having in his possession the original title issued to Charity on 25/01/2000, in respect of the suit property.
33. Charity avers that the custody of the Original Title of the Suit Property by the Defendant was not with her knowledge and /or consent, and is accordingly illegal.
34. Charity avers that having secured another Title Deed to the property, she is legally bound upon finding of the lost title Deed to surrender it to the land Registrar.

Plaintiff's Reply to the 1st, 2nd and 3rd Defendant's Defence and Defense to Counterclaim

35. The Plaintiff did not file a reply to the 1st, 2nd and 3rd Defendants' defence and defence to counterclaim dated 16/11/2017.

Evidence By The Defendants

1st, 2nd and 3rd Defendants

36. DW1 – Charity Njeri Kanyua testified in court on behalf of the 2nd and 3rd defendants. She adopted two statements as her evidence, one from 3/07/2018 and another from 12/07/2022. She stated that she was a director of the SARL Company, a service company based in Rwanda, along with the plaintiff, each holding 50% of the company. The company managed the affairs of Ace Aviation. There was also Ace Aviation Jersey, a trading company in which she held 50% of the shares. She wanted to transfer land to Ace Aviation but didn't due to unpaid compensation. She wasn't aware of any loan from the plaintiff to Ace Aviation, and the transfer agreement was not in writing. She claimed not to have received her share of money paid to Ace Aviation by Arch Aviation.
37. On cross-examination, she mentioned wanting to buy land initially, but the plaintiff expressed interest in a joint venture. She stated that Ace Aviation was a paper company with no assets, created to obtain an Air Operating Certificate in Rwanda.



38. She testified that she didn't own shares in Arch Aviation, received a salary upon its liquidation, and contributed £4,000 to Ace Aviation. She also mentioned Janet's £10,000 transfer and believed the money came from Ace Aviation.
39. She claimed the plaintiff stole her title deed and reported it lost but never canceled the report. She stated Ace Aviation owed her £55,000 (50% of her share). The suit property was purchased in 1999, while the money paid to Ace Aviation dated back to 6/03/2009 as seen on the statement at page 89 of the defendant's bundle.
40. On re-examination, she mentioned signing a draft statement to be reviewed by the plaintiff. She clarified the timeline of liquidation and the completion of the hotel. She also emphasized on her 50% ownership in Ace Aviation and therefore being entitled to 50% shares.
41. With that evidence, the 1st, 2nd and 3rd Defendants closed their case.

Written Submissions

42. After viva voce evidence on 03/07/2023, all parties were given the opportunity to file their written submission. Both parties duly submitted and I have considered them. The Plaintiff filed his submissions dated 18/09/2023 on the even date and the 1st, 2nd & 3rd Defendants filed their submissions dated 18/10/2023 and filed on the even date.

Issues for Determination

43. Having considered all the pleadings filed in this matter, the following arise as the issues for determination before this court.
 - a. Was the suit property held in trust by the 1st Defendant in favour of the Plaintiff?
 - b. Did the 1st Defendant fraudulently register the title issued on 22/02/2011 in the names of the 1st, 2nd and 3rd Defendants?
 - c. Whether the Plaintiff is entitled to prayers sought in the Plaint.
 - d. Whether the 1st, 2nd and 3rd Defendants are entitled to the orders sought in the counterclaim.
 - e. Who shall bear the costs of the suit and the counterclaim?

Analysis and Determination

Was the suit property held in trust by the 1st Defendant in favour of the Plaintiff?

44. In the present case, the Plaintiff contends that he and the 1st Defendant entered into an agreement dated 23/11/1999 to jointly purchase a property known as Dagoretti/Kinoo/2800 (formerly plot 106) from David Ndungu Kariuki for Kshs. 1,260,000. Due to the Plaintiff being a British national, they agreed that the title would be processed in the 1st Defendant's name, who would hold it in trust for the Plaintiff.
45. The Plaintiff deponed that he financed the property purchase singlehandedly using funds from the winding up of Arch Aviation (U.K) Ltd, receiving £52,695 as salary and an additional £100,000 as loan repayment. The 1st Defendant, an air hostess, received £12,532 in salary and used part of it to buy furniture for the hotel on the property. The agreement was that the Plaintiff would have custody of the title deed since he fully financed the purchase.



46. Conversely, the 1st, 2nd, and 3rd Defendants assert that the property was purchased solely by the 1st Defendant between 1999 and 2000, and it was not a joint purchase with the Plaintiff. The 1st Defendant did not hold the property in trust for the Plaintiff, and she acquired the rights to the property in her name.
47. They argue that the 1st Defendant had the financial capability to buy the property. The possession of the title to the property was without the consent of the 1st Defendant, who is the registered owner.
48. The 1st, 2nd, and 3rd Defendants state that the land was originally registered in the names of Edward Kamau Wairi and Annie Wangechi Wairi as joint owners in 1991, with a title issued to that effect. However, this evidence was not adduced before this court.
49. They acknowledge that the 1st Defendant filed a separate court case (Nairobi High Court Civil Suit Number 184 of 2016) but clarify that it doesn't involve the suit property.
50. Finally, the 1st, 2nd, and 3rd Defendants request the court to dismiss this suit with costs.
51. In their counterclaim, the 1st, 2nd and 3rd Defendants argue that Charity (the 1st Plaintiff in the Counter Claim) purchased a property known as Dagoretti/Kinoo/2800, through an agreement with David Ndungu Kariuki. This property was registered in Charity's name, and a Title Deed was issued to her on 25/01/2000. That she later discovered in 2010 that the original title deed was missing from her documents. The 1st defendant asserts that it wasn't until she initiated legal proceedings against the Defendant in Nairobi High Court Case Number 184 of 2016 that the Defendant claimed to have the original Title Deed issued to Charity on 25/01/2000 regarding the suit property.
52. To begin with, a person who is not a Kenyan citizen may only hold land on the basis of leasehold tenure whose term should not exceed 99 years under Article 65 (1) of *the Constitution*.
53. The proviso to that Article states that property held in trust shall be regarded as being held by a citizen if all of the beneficial interest of the trust is held by persons who are citizens.
54. The Court has looked at the title deeds in respect of the suit property. Charity Njeri Kanyua was registered as the absolute proprietor of Title Number Dagoretti/Kinoo/2800 on 25/01/2000. The second title deed was registered in favour of Charity Njeri Kanyua, Ivy Wanjiru and Jeff Gitonga on 22/02/2011. The 1st Defendant has denied that she held the suit property in trust for the plaintiff. The plaintiff on the other hand insists that the 1st defendant holds the property in trust in his favor because he is a British citizen and he could not hold a freehold title. He averred that the parties agreed that the title would be processed in the name of the 1st Defendant who would hold it in trust for him.
55. The suit property was registered under the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed). The title did not overtly indicate that the suit property was trust land. The registration of the 1st defendant as the proprietor of the suit property conferred upon the 1st defendant absolute ownership of the suit property together with all the rights and privileges associated with such ownership and that such rights were not liable to be defeated save as was provided in the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed).
56. In *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, this Court examined and stated the law on trusts as follows:

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds



legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

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 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).”

Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, 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. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also *Charles K. Kandie vs. Mary Kimoi Sang* [2017] eKLR.”

57. Further Halsbury’s Laws of England, 4th Edition Vol. 48 at paragraph 597 defines a resulting trust as:

“A resulting trust is a trust arising by operation of law:

- i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
- ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or



- iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”

58. While discussing the burden of proving trust, the Court of Appeal in the case of *Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Center* [2018] eKLR stated that:

“Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* – Civil Appeal No. 75 of 2016 (unreported). I therefore hold the view that it is upon the plaintiff to establish that it was the intention of the plaintiff and the 1st defendant that they would purchase and the 1st defendant would hold the suit parcel in trust for the plaintiff”.

59. Section 107 of the *Evidence Act* Cap 80 of the laws of Kenya provides that: -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

60. I have carefully perused the sale agreement dated 23/11/1999. It identifies Charity Njeri Kanyua and Trevor Kenya as “joint purchasers of other part”. There is no indication in the Agreement, or in any other writing or communication between the parties, to suggest that Trevor Kent's name was to feature in the Agreement on any condition or subject to any trust or other understanding. No reading of the document suggests such trust or condition. However, subsequent actions of the parties after the purchase do evince the intention on the part of Charity that Trevor's inclusion in the purchase was done on trust for him.

61. It is for Trevor to prove the existence of a trust. A mere allegation of its existence cannot create one. It is trite law that a trust, by definition, arises when a donor or grantor reposes a confidence in a person, who is termed a trustee, for the benefit of another who is called a cestui que trust, respecting property which is held by the trustee for the benefit of the cestui que trust. The essential elements of trust are, according to Black's Law Dictionary, as shown in the description of trust:

“A trust, when not qualified by the word “charitable” “resulting” or “constructive”, is a fiduciary relationship with respect to property subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of manifestation of an intention to create it.”

62. At trial, PW1 testified that he and the 1st Defendant jointly agreed to purchase and develop a site. PW1 testified that he singlehandedly paid for the purchase of the suit property. So did the 1st Defendant. She deponed that she was financially capable of acquisition of the suit property. The Plaintiff adduced evidence of the payment of Kshs. 1,260,000 vide two banker's cheques; Cheques numbers 751720 and 751715 both for Kshs. 630,000.00 each. The sale agreement dated 23/11/1999 provided the terms of payment. The payment was made to David Ndungu Kariuki, the vendor as per the sale agreement. PW4 testified that she transferred £10,000.00 in November 1999 towards the purchase of the suit property to be paid to Muguku Poultry Farms Ngong. Although DW1 doubted that the monies remitted by PW4 came from Arch Aviation account as she did not have any paper trail, she never adduced evidence to prove PW1's testimony as false. She only testified that she believed the money



- came from Ace Aviation account. She also did not adduce sufficient evidence demonstrating payment to David Ndungu Kariuki or to Muguku Poultry Farms Ngong. I believe she only claims ownership of the suit property by virtue of her allegations that she is owed money from her 50% shareholding from Ace Aviation.
63. In my view, the purchase transaction established above manifests the intention on the part of the plaintiff that the 1st Defendant should hold a share of the property for him. The purchase is indicated to have been made jointly and it has been established that the purchase price was paid by the plaintiff.
64. This court is bound, in circumstances where it is sought to imply a trust, to follow the case of *Mbothi and 8 Others vs Waitimu and 11 Others* [1986] KLR 171, where the Court of Appeal held:
- “The courts will not imply a trust save in order to give effect to the intentions of the parties and such intention must be clearly determined beforehand.” See *Cork vs Fountain* (1676) 36 ER 984, 987; *Marie Ayoub and Others vs Standard Bank of South Africa Limited and Another* [1963] EA 619, 622; *Joseph Kamau Kamani vs Ndungu Kiiru C.A EA Civil Appeal 43 of 1976*.
65. In *Marie Ayoub vs Standard Bank of South Africa and Another* [1963] EA 619 the Privy Council affirmed the statement of the law to be as follows as stated in *Cook vs Fountain* (1) (36 ER at Page 987):
- “... so the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the court never presumes a trust, but in the case of absolute necessity.”
66. PW1 pointed out that Kikuyu Lodge and Kent Water operate from the suit property and the partners are the 1st defendant and himself but they were registered in 2005 and 2007. He added that the transactions appear to be in their joint names i.e. land control board, kikuyu lodge and Kent waters because they had a personal relationship but there was an agreement date 1/07/2000. The agreement stated that they will issue shares in proportion to the monetary investment. The land was bought in the names of the 1st defendant. This agreement of 1/07/2000 was not adduced before the court.
67. The 1st Defendant testified that there was a plan to transfer the suit property from herself to the company known as Air Aid Company. The shareholding was 50% between herself and the plaintiff. It has been established that the plaintiff and the 1st defendant have various companies with equal shares of 50% shareholding each. It is not disputed that the only company where the 1st Defendant is not a director or a shareholder is Arch Aviation.
68. DW1 further testified that Ace Aviation was paid money by Arch Aviation but she never got her share which was 50% of the money paid, so that was the reason she did not transfer the land. The agreement for transfer of the money was not in writing. She also alleged that Ace Aviation owed her £55,000 which was 50% of her share. She relies on this debt to justify that the suit property is hers. However, there is no agreement before this Court to support this.
69. PW1 admitted that monies to Ace were paid but not distributed to the 1st defendant. The liquidation to himself was paid. The monies to the 1st defendant from the liquidator was paid.
70. DW1 also admitted that her contribution was not sufficient to purchase the suit property as the same was being sold for Kshs. 1.2 million.



71. Evidence before me suggests a predisposition of a trust that necessitates a presumption of one. A perusal of the Court record demonstrates that the Plaintiff and the 1st Defendant were partners in business. They both entered into a sale agreement as joint purchasers of the suit property. By virtue of Article 65 (3) (b) of *the Constitution*, it is evidently clear why the title deed could not be registered in the joint name of the 1st Defendant and the Plaintiff. Evidence before me, invoices and contracts point to transactions made by the 1st Defendant and the plaintiff as partners in business. The drilling contract at page 142 & 143 of the 1st to 3rd defendants' bundle, even though it is only executed by the contractor, indicates that the contractor was entering into an agreement with the 1st Defendant and the plaintiff was to witness the same. The hotel on the suit property and the water business have also been registered in the names of both the 1st Defendant and the Plaintiff as seen on page 144 of the defendant's bundle. Both parties acknowledge each other as partners in the two businesses. PW4 did mention being informed that the land purchase was meant to be in the joint names of the Plaintiff and the 1st defendant as a joint venture.
72. In *Mwangi Mbothu & 9 others v Gachira Waitimu & 9 Others* (1986) eKLR, the court stated that:
- “The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”
73. All in all, it is my considered view that proof of payment of purchase of the suit property has not been established by the 1st Defendant as far as I am concerned. Therefore, I am convinced that the Plaintiff funded the purchase of the suit property vide direct payment made to David Ndungu Kariuki vide the two banker's cheques for Kshs. 630,000/- each.
74. Applying the emphasized principles to the case of *Twalib Hatayan Twalib Hatayan* (supra), all indications are that a resulting trust arose as between the 1st Defendant and the plaintiff. As stated in the said authority somewhere hereinabove, 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.
75. The person in whose names the suit property is registered is presumed to hold the plots on trust in favour of the person who provided the purchase monies. The burden of rebutting this presumption lay on the 1st to 3rd Defendants who failed to discharge that burden.
76. Consequently, I am satisfied that from the dealings between the plaintiff and the 1st defendant that a resulting trust was created in favor of the plaintiff in relation to the suit property. The suit property as at 25/01/2000 was held by the 1st Defendant on a resulting trust for the Plaintiff for the benefit of the businesses in which both the plaintiff and 1st defendants are partners of equal shares. The Court is satisfied that the funds used to purchase the suit property were raised and paid by the Plaintiff.

Did the 1st Defendant fraudulently register the title issued on 22/02/2011 in the names of the 1st, 2nd and 3rd Defendants?

77. This Court already found that the Plaintiff has proved on a balance of probability the existence of a resulting trust over the suit property. The Plaintiff seeks for the cancellation by court of the names of the 1st, 2nd and 3rd Defendants from the title deed of the suit property. The 1st Defendant admitted that the decision to add the names of the 2nd and 3rd Defendants to the title issued on 22/02/2011 was her own and she claims that the same is not fraudulent.



78. It is the plaintiff's contention that, sometime in 2016, the 1st Defendant filed a civil suit (number 184 of 2016) in the Nairobi High Court, seeking orders to prevent the Plaintiff from accessing business accounts. It was revealed that the 1st Defendant had fraudulently altered the title deed by adding the names of her daughter (2nd Defendant) and her nephew (3rd Defendant) as joint owners without consulting the Plaintiff. The Plaintiff claimed that the fraud included falsely reporting the original title as lost to obtain a duplicate, adding names without the Plaintiff's consent, and not disclosing the safekeeping of the original title by the Plaintiff. The Plaintiff asserts that this fraud was an attempt to deprive him of his interest in the property, which was entirely financed by him. The 1st Defendant has maintained in subsequent court documents that the property belongs solely to her, contrary to the Plaintiff's claims.
79. On the other hand, the 1st Defendant denies the fraud allegations mentioned in paragraph 12(i) to (iii) of the Plaint. She claims that she reported the loss of the original title to the police in 2010, obtained a police abstract, and applied for a replacement title through due process. She argues that her decision to transfer the property and jointly own it with the 2nd and 3rd Defendants was not fraudulent, and she did not authorize the Plaintiff to hold the title, considering it illegal and unlawful.
80. In their counterclaim, they reiterated that the 1st Defendant, who usually resides in the United States of America, discovered in 2010 that the original Title Deed for the property was missing from her documents. In response to this discovery, she initiated the process of obtaining a replacement Title Deed from the Land Registrar. According to her, all legal procedures were correctly followed, and upon satisfying the Land Registrar in Kiambu that the original Title Deed was indeed missing, a new Title Deed was issued in the joint names of Charity, the 2nd Defendant (her daughter), and the 3rd Defendant (her nephew).
81. The 1st defendant asserts that it wasn't until she initiated legal proceedings against the Defendant in Nairobi High Court Case Number 184 of 2016 that the Defendant claimed to have the original Title Deed issued to Charity on 25/01/2000 regarding the suit property. She maintains that she neither had knowledge of nor consented to the Defendant having custody of the original Title Deed, deeming it an illegal action. Now, having obtained a new Title Deed for the property, she is legally obligated to surrender it to the Land Registrar if the lost Title Deed is found.
82. According to the Plaintiff, the particulars of fraud include; lodging a fraudulent report that the original title deed had been misplaced/lost or stolen in order to obtain a Police abstract form to process a duplicate title, adding the names of the 2nd and 3rd defendants without consulting the Plaintiff who is a major stakeholder in the suit property and failing to disclose to the Police and the 4th Defendant that the original title was in the safe custody of the Plaintiff.
83. To succeed in claiming fraud, the Plaintiff not only needs to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others –vs- Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these



acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

84. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of Kinyanjui Kamau – vs George Kamau [2015] eKLR expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

85. The plaintiff is challenging the title to the suit property on account of fraud. He contended that he found out that the 1st Defendant had fraudulently altered the title deed by adding the names of her daughter (2nd Defendant) and her nephew (3rd Defendant) as joint owners without consulting him. The Plaintiff claimed that the fraud included falsely reporting the original title as lost to obtain a duplicate, adding names without the Plaintiff's consent, and not disclosing the safekeeping of the original title by the Plaintiff. The 1st Defendant deponed that once she could not find the original title, she reported the loss to the police in 2010, obtained a police abstract, and applied for a replacement title through due process. She argues that her decision to transfer the property and jointly own it with the 2nd and 3rd Defendants was not fraudulent,
86. The main evidence relied on to prove fraud tendered by the Plaintiff are the two title deeds for the suit property; the new title deed issued in favor of the 1st to 3rd Defendants on 22/02/2011 and the initial title deed that was issued in favor of the 1st Defendant alone in 25/01/2000. It has been admitted that the 1st Defendant found out that the original title deed was not lost when she filed a case in Nairobi High Court Civil Suit Number 184 of 2016. I note that she did not notify the police that the original title is in the custody of the Plaintiff.
87. The 1st Defendant has also been accused of adding the names of the 2nd and 3rd defendants on the title. From the record, evidence has been tendered to demonstrate that the 1st Defendant followed due procedure in order to replace a “lost” title. A copy of the gazette notice no. 13588 dated 12/11/2010 was adduced in support of her claim. The gazette notice only included her name as it appeared in the original title deed that had been reported as “lost”. The only red flag with this alleged due procedure is that the 1st Defendant contended that she made a decision to include the names of the 2nd and 3rd Defendants to the new title deed. I am not sure whether there is a law that allows the transfer of interest in land based on only a decision by an absolute proprietor. That the absolute proprietor can tell the land registrar to add names on a title that were not previously on the original title and it is done. As simple as that. The 1st Defendant severally reiterates that it was her decision to transfer the property and jointly own it with the 2nd and 3rd Defendants and that the same is not fraudulent. She also adds that a new Title Deed was subsequently issued in the joint names of the 1st defendant, the 2nd Defendant (her daughter), and the 3rd Defendant (her nephew). It is my considered view that the registration is more irregular/unprocedural than fraudulent or even a misrepresentation.



88. A title once replaced should reflect the original title which in this case, only had the 1st Defendant's name. Purporting to add the 2nd and 3rd defendants is equal to transferring the property without following due procedure. The 1st defendant was skipping steps in the process of land ownership.
89. With the definition of fraud in mind and bearing in mind *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR as well as Section 80(1) of the [Land Registration Act](#), the authenticity of the title to the suit property held by the 1st, 2nd and 3rd defendants is in doubt,
90. In view of the foregoing, the Court finds that the registration of the title deed of the suit property in the names of the 1st defendant, 2nd defendant and 3rd defendant was done irregularly, unprocedurally and/or illegally. The same is a candidate of cancellation.
91. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the [Land Registration Act](#) gives the registered proprietor absolute rights over land, Section 26 gives sanctity to title and makes provisions when such title can be cancelled or revoked. Cancellation may be by a Court Order as provided under Section 80 of the [Land Registration Act](#) or by an order of Land Registrar as provided by Section 79 of the same Act. The said Section 80, provides; -
- “ (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
92. Rectification by Court concerns one that goes to the cancellation or amendments of title, circumstances of which are provided above. This Court agrees with the sentiments of the Court in *Kisumu Misc No. 80 of 2008 Republic v Kisumu District Lands Officer & another* [2010] eKLR where the Court held;
- “It is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.
93. Similarly, the Court of Appeal in *Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR agreed with the trial Court that “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.
94. It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. But since irregularity has been established it follows therefore that cancellation will issue. The upshot of the above is that this Court finds and holds that the 1st 2nd and 3rd Defendants' title having been tainted with irregularity is ripe for cancellation and proceeds to cancel the same.



Whether the Plaintiff is entitled to prayers sought in the Plaintiff

95. Having found that there was a resulting trust in the suit property in favor of the Plaintiff and that the registration of the title held by the 1st, 2nd and 3rd Defendants is irregular and thus canceled, I shall now focus on the prayers sought in the plaintiff.
96. Regarding prayer for revocation of title, I have already dealt with the same hereinabove and effectively granted prayer (a). I see no reason to return to it.
97. Prayer (b) is seeking an order for rectification of the register in respect of the suit property. The Court has already held that the registration in favour of the 1st, 2nd and 3rd Defendants was procured irregularly and then canceled the same. It is only fair that the register be rectified to cure the fraud or misrepresentation perpetrated by the 1st to 3rd Defendants and return the suit property to its original owner. Prayer (b) is therefore granted.
98. I have already dealt with prayer (c) wherein the Court found that a resulting trust was created in favor of the plaintiff in relation to the suit property. This effectively granted prayer (c). I see no reason to return to it.
99. Regarding prayer (d), from the Court's analysis somewhere hereinabove, once again, since the Court has held that there was a resulting trust in the suit property in favor of the Plaintiff, I find that this prayer is meritorious and therefore, I will grant the same.
100. In the end, I am satisfied that the Plaintiff has proved his claim against the Defendants therefore are entitled to the orders sought.

Whether the 1st, 2nd and 3rd Defendants are entitled to the orders sought in the counterclaim.

101. Having found that there was a resulting trust in the suit property in favor of the Plaintiff and that the registration of the title held by the 1st, 2nd and 3rd Defendants is irregular and thus canceled, it is my considered view that the 1st, 2nd and 3rd Defendants' counterclaim dated 16/11/2017 fails.
102. In light of the foregoing, the Court finds that the 1st to 3rd Defendants have failed to prove their case on a balance of probabilities. The Counterclaim dated 16/11/2017 is hereby dismissed with costs.

Who shall bear the costs of the suit and the counterclaim?

103. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the Plaintiff is the successful party and are therefore entitled to the costs of the suit and the counterclaim.

Disposal Orders

104. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that the Plaintiff's case succeeds, and I make the following orders: -
 - a. The Counterclaim dated 16/11/2017 is hereby dismissed with costs.
 - b. A revocation of the title deed number Dagoretti/Kinoo/2800 issued on 22/02/2011 in the names of Charity Njeri Kanyua, Ivy Wanjiru and Jeff Gitonga, the 1st, 2nd and 3rd defendants herein is hereby issued.



- c. The 4th Defendant is hereby ordered to rectify the register in respect of the suit property Dagoretti/Kinoo/2800 to read Charity Njeri Kanyua as the sole proprietor.
- d. The Court finds that Charity Njeri Kanyua holds the suit property, Dagoretti/Kinoo/2800 in trust for Trevor Kent, the plaintiff herein.
- e. The Court directs that the defendants, either acting individually or jointly are barred from any dealings in respect to the suit property Dagoretti/Kinoo/2800 without involving the Plaintiff.
- f. The 1st 2nd and 3rd Defendants to bear the costs of this suit and counterclaim jointly and severally together with interest thereon at Court rate from the date of this Judgment until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2023.

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MOGENI J.

JUDGE

In the virtual presence of:-

Mr. Osiemo for the Plaintiff

Mr. Ithondeka for the Defendants

