



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 197 of 1994

W B..... PLAINTIFF

- Versus -

E W DEFENDANT

JUDGMENT

W B (W) is a male adult of German extraction residing and working for gain in Malindi Kenya. E W W (E) is a Kenyan female adult residing and working for gain in the same Kenyan Coastal town. They both met in January 1987 and a love affair developed between them. It lasted 7 years up to: January 1994, when it irretrievably broke down.

In his plaint filed on 28.3.94, W avers that E by conduct and through oral and written representations to him, her family and to members of the public, showed that she was agreeable to marrying. W and W did genuinely and honestly believe the representations to be true. He acted on them by openly treating E as his wife and when he bought some immovable property in Malindi, 4 plots, he instructed his lawyers to include the name of E as a joint owner. In respect of one of the properties which was bought in W's absence in Germany, E used her own name to register the property. W went ahead and provided money for the development of that property for purposes of running the businesses of an Inn and a Garage, which he successfully did. All this he did between 1987 and 1992. And all this time W believed E would marry him and they would stay for life. But in that year, W discovered that E was having an affair with another man known as Maina. On being asked about it, E confirmed it and said she was going to marry Maina. She went ahead and moved out, of W's house to join Maina in his.

W further avers that E through the use of force and threats locked him out of the business premises and posted security guards there. She also took away motor vehicle Registration No. KAB 251X a Nissan Sunny which belonged to W. He prayed for a declaration that he is the exclusive owner of all the five plots of land together with the developments made and being thereon; the release of the motor vehicle Registration No. KAB 251X and an injunction to restrain E from dealing in any manner with the motor vehicle and all the plots.

It is not clear when E was served with the plaint and summons to enter appearance. Filed with the plaint was also a Chamber Summons seeking a temporary injunction to restrain her from dealing with the properties and interfering with the moveable properties. It is however on record that M/S Khaminwa & Khaminwa Advocates were appointed to act for E and they filed their Notice of appointment on 31.3.94.

It would appear that E, either after being served with the documents filed in this case, or before, came to court and filed her own suit, HCCC 201/94 on 30.3.94. In her plaint she averred that she, and W were "associates" but that the "Association was terminated by mutual agreement". She claimed that the plot

which was registered in her *name* was solely hers as was the business of hotel and restaurant known as "Malindi Inn" operated thereon. She had only permitted W to enter the plot *from* time to time but had recently asked him to keep off the plot and the property. W had refused to do so and had started to carry on extensions to the property and to interfere with the hotel business. She wanted him evicted. As for the other 4 plots registered in joint names, E wanted them sold and the proceeds shared out equally. She averred that there was another chicken business for which she contributed funds to set

up but W refused her access to it. She sought the sale of the chicken house and the chicken business and the sharing out of the proceeds. Finally she referred to various personal items of clothing, shoes and ornaments, cutlery, radio cassette and others which she alleged W had detained and converted to his own use. She sought their release. Together with that plaint she also filed a Chamber Summons for a temporary injunction to restrain W from carrying on construction works and for release of the items.

Both matters were by order of the court consolidated on 31.3.94 and set down for hearing of the interlocutory application together.

In the meantime, E filed her defence to this suit on 18.4.94. She averred that the plaint should be struck off for being against public policy and that it lacked legal basis since W had no legal capacity to marry. She denied having been given any money by W and asserted that the properties bought were purchased with her own money. The garage alleged to have been built by W on the plot registered in her name was a gift by W to her sons. She denied all other averments made in the plaint and averred that W could not carry on any business in Kenya as he had no work permit or licence. As for the motor vehicle, E averred that she bought it from W for valuable consideration and the property in that vehicle has therefore passed to her. She prayed for the dismissal of the suit.

W's Advocates abandoned the prosecution of the interlocutory application in preference for the main hearing of the suit. They also sought and were granted leave to amend the plaint by including the averment that E was holding the plots of land and the motor vehicle in trust for W. In the amended defence filed this trust was denied. Hearing dates were set for the main suit. In the meantime both parties recorded a consent before Wambilyangah J. on 23.11.94 for preservation of the status quo in respect of the moveable immovable property until the determination of the suit. Summons for Directions was dispensed with by consent on 25.1.95 and both parties agreed to file separate issues. As far as I can see only M/S Mouko & Co. for W had filed any issues by the time the suit came up for hearing on 25.1.95 before Wambilyangah J.

The issues posed for determination are these:

1. Is the plaintiff's claim based on matters that are commonly against public policy as alleged in paragraph 2 of the defence?
2. Did the plaintiff and the defendant meet sometimes in 1987 and develop an affair and the defendant represented to the plaintiff that she would marry him as stated in paragraph 3 of the amended plaint. If so can the said matter be found a legal obligation? .
3. At the time of contracting the alleged relationship did the plaintiff have the capacity to marry or did he not as alleged in paragraph 3 of the defence?
4. Was the plaintiff the sole provider of the money of the purchase of plot Numbers 2032, 2033, 2034 and 2035, Malindi as alleged in paragraph 6 of the amended plaint or did the defendant obtain registration as appropriator for valuable consideration as alleged in paragraph 4 of the defence?
5. Did the plaintiff provide the purchase price of plot No. 2613, Malindi in the sum of 60,000/- Duesche Marks or any other sum as alleged in paragraph 5 of the amended plaint with instructions to the defendant to purchase the said plot for him or was the said plot purchased by the defendant with her own money as alleged in paragraph 5 of the defence?

6. Did the plaintiff build a garage on the aforesaid plots alleged in paragraph 6 of the plaint or was the same built for the defendant's sons as alleged in paragraph 6 of the defence?
7. Was the plaintiff the sole financier of the purchase price of the plots Numbers 2032, 2033, 2034, 2035, 2613 the construction and for the purchase of all moveable property as alleged in paragraph 7 of the amended plaint or was he assisted in any way by the defendant?
8. Was there a promise made by the defendant to the plaintiff and if so was it the basis or consideration for the plaintiff to join the defendant as a joint owner of the aforesaid plot Numbers 2032, 2033, 2034 and 2035 as alleged in paragraph 8 of the amended plaint or did the plaintiff lack the capacity to contract a marriage as alleged in paragraph 8 of the defence.
9. Has the defendant locked the plaintiff out of plot No. 2613 as alleged in paragraph 9 of the amended plaint. If so does the plaintiff have a right of entry or not?
10. Are there or are there not grounds for restraining the defendant from dealing with the suit property as alleged in paragraph 10 of the amended plaint.
11. Should the names of the defendant be cancelled from the register as a joint owner of the aforesaid 4 plots and as a sole proprietor of plot No. 2613 as pleaded in paragraph of the Amended plaint or has the plaintiff failed to disclose cause as alleged in paragraph ii of the defence?
12. Was motor vehicle Registration No. KAB 251X given by the plaintiff to the defendant for use as alleged in paragraph of the amended plaint or was it purchased by the defendant from the plaintiff for valuable consideration as alleged in paragraph 12 of the defence.
13. Should an order of injunction issued against the defendant as prayed in paragraph 13 of the plaint or not.
14. Further and in the alternative and without prejudice, to the foregoing issue, does the defendant hold the subject property for and in trust for the plaintiff as alleged in paragraph 12A of the Amended plaint or does a trust arise as alleged between the parties in relation to the subject property in issue?
15. Is the plaintiff entitled to the prayers sought in his prayers in the amended plaint or any other order at all?
16. Costs of and incidental to this suit?

W testified and was cross examined at length on the seven days that he took the witness stand: Viz. 26.1.95, 13.2.95, 14.2.95, 15.2.95, 16.2.95, 9.3.95, and 5.4.95. He called E's mother to testify in his favour too. His last witness was a taxi driver who knew E well for some years.

Only E testified for the defence. She was cross examined at length on the three days she took the witness stand.

All the plaintiff's and defendant's evidence was recorded before Wambilyangah J. before he left the station on transfer. I took over on 27.5.96 and proceeded with the case under Order 17 rule 10 of the Civil Procedure Rules. In the meantime Mr. Mouko appears to have left the Firm of M/S Gikandi and Co. who were on record for W and he filed a notice of Change of Advocates on 24.2.95. E also changed her Advocates from M/S Khaminwa & Khaminwa to Magolo Ochuka & Co. on 7.6.95.

The proceedings had to be typed out and this took some time. Mr. Magolo had also indicated that he would call two other witnesses to testify for E but after several adjournments, no such witnesses were produced. The defence case was closed on 27.5.96. Oral submissions were recorded and the parties were given leave to file authorities in support of the legal points in their submissions.

The plaintiff's counsel filed four Authorities on 17.10.96. I see none on record for the defendant. Certified copies of Titles for Plot No. 2613, 2032, 2033, 2034, 2035, 3050 and 3051 were also agreed between counsel to be produced by consent before judgment. -I did not see any on record before writing this judgment.

Before considering the 16 issues framed above, I have to put away one matter that does not appear in the issues but was raised in the pleadings and evidence thereon was tendered on both sides. This is the matter of ownership of plot Numbers 3050 and 3051 together with the developments made and being thereon.

In her plaint filed in HCCC 201/94, "E averred that:

"__ she contributed to the construction of a residential house on plot Number 3050/Plot No. 365 with a well and plaintiff's chicken banda and all necessary items for running chicken business

She prayed that the house and the two plots (Nos. 3050 and 3051) including the chicken business be sold and the proceeds be divided equally.

But in her evidence in chief which she gave on 17.7.95, she stated:

"When, we came back to Malindi he told me he had found a plot. He took me there. I found it to be in a good site. We bought it. He deposited 3000 DMS and promised to remit the balance through Don Amolo. That is plot No. 3051. It is also 3050. He then asked for my Bank Account. He bought it from Sheikh Salim. The two plots in Tanganya, No. 3050 and 3051 belong to W. I have no claim over them." She confirmed that evidence during cross examination on 27.7.95.

"Two plots were bought for 300 DM (Sic). These 3050 and 3051 I have no claim on these ones."

This evidence would appear to be a complete about-face to the pleadings and the prayer made therein as cited above. The matter of purchase, development and ownership of those two plots is thus a non-issue. They and the developments made and being thereon belong to W. On the evidence he financed the construction through funds channelled through the Bank Account owned and controlled by E.

That does not appear to be the first or only about-face E will make between her pleadings, Affidavits and evidence in open court. I shall now deal with the issues seriatim

The first issue was raised by E in her defence paragraph 2.

It is a statement lacking in particularity that the plaint is based on matters that are commonly against public policy and should be struck off. I find no evidence on record relating to such issue nor any reference to it in submission of counsel and I can only surmise that the averment was thrown in as a red-herring and without good cause. As defined in the "Concise Law Dictionary by Osborn;

"Certain classes of acts are said to be against Public Policy -- when the Law refuses to enforce or recognise them on the ground, that they have a mischievous tendency so as to be injurious to the interests of the State or the Community."

Some examples in that definition are given. Jessel MR is cited in Printing etc Co. -Vs- Sampson (1875) LR 19 Stating:

"However, you are not to extend arbitrarily.;, those rules which say that a given contract is void as being against Public Policy because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have utmost liberty of contracting".

If therefore the matter of Public Policy alluded to is that relating to "Marriage between the parties in this suit, then I find nothing to say that it was against Public Policy. Kenya is not at war with Germany. On the contrary, I take Judicial Notice that the two countries have warm and cordial diplomatic socio-economic

and other relations. I dismiss that issue.

Issues No. 2 and 3 may conveniently be discussed together. They relate to the legal relationship of W and E and the capacity or lack of it, of W to enter into any marriage relationship.

W was 66 years old when he testified in January 1995. He was therefore about 58 years old when he arrived in Kenya in January 1987 as a tourist. He was introduced to E by a German friend at Palm Garden Hotel in Malindi. They fell in love and started sleeping together in the Guest house - African : Sun Club, Malindi where he was booked in. Soon they were touring together all over the country in Kisumu, Kericho, Tsavo East. W was a divorcee since 1969. He produced the Divorce papers issued in Germany. E was a single lady born on 19.5.1950, who had had four children with four different men, including one from "a Mzungu from Europe".

In addition to falling in love with E. W fell in love with the country and decided to settle here. He obtained a Residents Permit. Then he started looking for land to buy. He bought and developed the first two plots - Nos. 3050 and 3051 on Tanganya Road Malindi - which have been discussed above. The details are in exhibits 19 and 20 which are conveyances dated 9.4.1987 and Registered on 29.4.87. He also said he bought other plots as will be discussed presently. As regards this issue I take it from Halter verbatim "When I bought these plots E 'was-my friend for 3 years. I was happy and satisfied with her and I wanted to marry her. She agreed that I would marry her".

E even moved into W's Residential house constructed on Plot No. 3050 and 3051 when it was completed. He produced various letters addressed, to him by E on 25.10.87, 12.11.87 and 25.11.87 (Exh. 9(a) (b) & (c) where amongst other contents he is referred to as "Darling" and "Honey" and all ended with assurances of...unbending love and millions of kisses. By 1990 W had almost apparently worked himself to death as he suffered a heart attack and had to go back to Germany for an operation. E wrote to him there on 10.5.91 (Exh.1), telling him how he was missed and cautioning him:

"Don't work* so much darling even if we need money you can't sacrifice yourself for death for it God know all(sic) relax and give your body some rest as you are told by everybody plus your Doctor.

We still *need* you and if you have a chance to live use it so darling please spare yourself for me thousand kisses I love you".

E in 1988 took W to see her mother at Kitale. It was her mother who was staying with E's children. The mother testified and said E had never introduced the previous men she had children with and so thought E was serious with this Mzungu and would marry him.

So did W, and that is why he made reliance on these expressed emotions from E and on her conduct; to believe that she would marry him and he had no fear in letting her in on his property and commercial dealings. He gave instructions to his Advocate, the late Don Amolo to draw up a General •Power of Attorney on 13.5.1987 and Registered as P/A 5989 on 6.2.89. I will revert to this shortly. W was therefore shocked when he asked E to sign documents he had to signify that they were married but she refused.

On these two combined issues, E took off on a tangent in her pleadings.

She denied any amorous relationship with W as pleaded in this suit. In her own suit, HCCC 201/94, she averred that the two were merely "Associates" and that "the association was terminated by mutual agreement". If that pleading was not clear, it was clarified, in E's Affidavit sworn on the same day the plaint was drawn, that she was a businesswoman in Malindi while W was a foreigner with active business activities in his own country. It is in this capacity that they carried on business dealings for seven years "for mutual benefit and financial gain", but a "business disagreement" arose which made it impossible to carry- on the business association. Simply put, they were business partners and the partnership was dissolved. The amorous relationship and promises made by her to marry W were denied and to put the matter beyond contention it is pleaded in her defence dated 15.4.94 that

"(3) the plaintiff lacks capacity to marry'

"(8) No representations were made to the plaintiff as alleged and further more, the plaintiff was not in a legal position to contract any marriage".

In another Affidavit sworn by E on 18.4.94, she stated:

"2..... although I showed my love to the plaintiff he was not having the capacity to marry me. Me -said there was another lady known as Patricia Angel who has¹ lived with him for 30 years and that they had acquired property and he had made a Will in her favour which would be revoked by any marriage he contracted. Indeed I went to Germany and I met the lady who appeared to be his wife.

"3. At no time was the plaintiff able or willing to enter into a marriage with me *due* to his prior commitments of other women". .

Despite all the above averments and statements on oath E made a general denial of the allegation that she was having an affair with one Maina or that she had made it clear she was going to marry the said Maina.

In an amazing and acrobatic about-face, however, E re-canted the above averments and statements on oath and in her sworn testimony disowned them as creations of her Advocate who drew them up. I will take extracts of her evidence on this aspect verbatim:

"I met him on 11.1.1987 in Beer Garden. He introduced me to his friend. We went to the Beer Garden for a drink. His friend is W B. He became my lover. He was staying in a Hotel I cannot remember its name. I used to sleep with him in the Hotel. He suggested that I accompany him on safari. I said that was alright. We went to Kisumu Kericho, Tsavo East."

Later under cross examination:

"I 'went-with W and stayed with him in Germany. At that time I intended to marry him. We had discussed it. I did not change my mind. I am still interested in marrying. . I knew the German woman who stayed with W. She was 80 years when I went with him to Germany. W is now 63 years of age. W was about 50 or so. W did not say that he was married to her. He said that she had looked after his house then. I know that they were not married. I deny that I said that he was married to her.

I see Para 3-of the defence. It is only the lawyer who drafted the defence that knows what she meant when she said thereon that W had no capacity to marry me."

"I see my Affidavit sworn where I said that the plaintiff had no interest in marrying. Again I say that my Advocate made a mistake in this Affidavit".

It seems to me that E suddenly realised, or was advised, that she stood a better chance of securing some property if she claimed to have lived with W as man and wife than if she claimed he was a business partner. But a party shall not be allowed, to resile from his/her pleadings.

That is trite law Pleadings would Otherwise lose meaning. /They are also one of the best gauges for testing credibility and consistency. I find no evidence that E's first Advocate drafted pleadings contrary to any instructions given to her by E or that the Affidavits which were drawn and sworn by E before a Commissioner for Oaths contained anything other than what E intended to state. I find her credibility on this issue at its lowest ebb. I neither trust nor believe her evidence. On a balance of probability, the two parties met in January 1987 and a love affair developed into a promise to marry made by E. W, at all times material to that relationship had the capacity to marry. I find that it was E who resiled from the promise to marry and caused the irremediable break up which followed prior to the institution of this suit. I further find that heavy reliance was made by W on the relationship and the promise to marry, which affected the dealings with them in other matters the subject matter of the issues which I will now examine.

The first is the matter of purchase of Plots Nos. 2032, 2033, 2034 and 2035, Malindi. These are registered in the joint names of W and E. But W says they are solely his, E's name having appeared purely because W loved her and she had promised to marry him. Since she had decided not to, there was no basis for the name to remain on the Title and should be deleted. E for her part said registration of the plots in her name as a joint owner was : made for valuable consideration "which would be clarified at the hearing of the suit". She wanted them sold and the proceeds shared out.

In support of his contention Walter testified that as he was not continuously in the country and had to go back to his business in Germany periodically, he donated a General Power of Attorney to E on 13.5.1987. Amongst other provisions, E became the true and lawful Attorney and Agent with full powers and authority for me and in my name and for my Account and benefit ...

Also for me and in my name to settle and adjust accounts as she shall think fit and proper" further buy and sell, moveable property or immovable property; to make, sign, give and receive in due and customary form; all acts or deeds or transfers of such moveable or immovable property, also to appear at the office of the collector of transfer dues ... and to borrow or give money on mortgage of immovable property" and "generally for me and in my name to choose Domicilium citandi et executandi, to manage and transact all my affairs in KENYA and execute such deeds or instruments as may be necessary, most to my advantage

There is no evidence of the revocation of that Power of Attorney.

Through this Power of Attorney, W channelled funds through E's Bank Account for execution of various transactions in Kenya. E admitted such channelling. His Lawyer in all these transactions was the late Don Amolo.

Before W returned to Germany he had identified the 4 plots for purchase and he left instructions, with his Advocate and E that the plots be bought. On 10.4.1990, his Advocate wrote to him (Exhibit 5(a) asking him to remit DM 130,000 through another person in Germany. Upon confirmation of such payment, the Advocate promised to collect the Title deeds and Transfer and take them to W in Germany by 1.5.1990. Shs. 1,350,000/= (equivalent DM 100,000) was confirmed as having been remitted (Exh.5(b)). DM 30,000 was paid to Don Amolo, direct. This was the time W had had a heart attack and stayed away for one year after the operation. In short W asserts that he fully financed the purchase of the four plots and that E did not contribute a single cent to such purchase.. , She could not have done so because in his evidence, when they met, E had no business activity. She was staying in one room in a place called Majengo. The single room was 3 x 3 metres. She had a bed, a fan, a cupboard, two small stools and a gas cooker. Her mother P.W.2 confirmed that E was staying in one small rented room, at Malindi before Walter came. She had made a visit there before W came into E's life. The taxi-driver P.W.3, who had known E 3 years before W arrived in the country also confirmed that she was staying in a small room in a Swahili type house. She had no work and E never asked him to take her to any known >business. All he did was take her from the bar to her house regularly as his customer.

To show further that E was not capable of making any financial contribution towards the purchase of the plots W produced E's Savings Accounts books with Barclays Bank of Kenya Limited at Malindi. This was Exh.3(i), (ii), (iii) and (iv) running from 8.7.86 to 2.11.89. It showed an opening balance of Shs. 999.80 on 8.7.86 and Shs. 1001.45 as at January 1987 when E met W. From there there are numerous debits and credits on the period of 3 years. E agreed that she had this Account and that it had a balance of Shs. 999.80. Also that the Account never had more than 2000/= before W came.

But she said this was a Women Co-operative Account and not the only Account that she had. She alluded to two other Accounts - one with Standard Bank where she had a fixed deposit of Kshs. 200,000/= and other with Kenya Commercial Bank. She produced as Exhibit D 14 the Standard Bank Account which ran from 3.9.1992 to 31.12.92 and mainly reflected debit balances. There was no indication that it had any fixed deposit sum of Shs. 200,000 or that it was in existence before 3.9.92. Asked in cross examination to produce any evidence that she ever had such a fixed deposit other than the Current Account, E had nothing to show. She said she did not think it was necessary although she had brought the statements on the

Current Account.

She also produced letter D [Ex.It. 15](#) addressed "To. whom it may concern" by the Manager of Barclays Bank Malindi on 29.4.94 showing that she had borrowed Shs. 15,000 on 3.12.88, Shs. 50,000 on 23.11.90 and Shs. 20,000 on 3.10.1991 from the said Bank. This she referred to as the loan Account with Barclays Bank apart from the Women's Group Savings Account.

On allegations that she had no known source of income and was virtually destitute before she met W, E said she was not staying in one room as alleged but she had two rooms one of which was occupied by her grown up son. She had stayed in Malindi for 14 years before she met W and had worked with Marine Park and Cashew Nuts earning Shs. 1000 per month as a typist. She also started receiving 200 - 300 DMS per month from the "Mzungu man" who was the father of her 4th child. Asked about proof of all this she however had nothing to show for it. She said she was given Shs. 30,000 by the Mzungu to enable her to start a Gem stone business. She made Shs. 100,000 in 1981 but had no proof that she made such money. She then said she was earning Shs. 40,000 per month from the Gem stone business. On investing Shs. 10,000 she could make Shs. 30,000 as profit, a 300% profit. But she left this business which could easily have made her a millionaire. Why, she was asked in cross-examination.

"I used to feed my children. I left it when I met with W. I had children to feed and I had rent to pay. So my earnings could not be said to be a lot."

In examination in chief she had said that the German father of her 3rd child had given her Shs. 30,000 to look after the child. She then went to Voi to look for Gemstones:

"I got a few and sold them. So I started business but *i stopped* going on with gemstones 'because it meant keeping away from the children."

She then said she branched off to buying and selling secondhand clothes, rice, beans, coffee from Taveta. She also started a curio kiosk at the South Coast in 1984 and gave it to her cousin to run. She produced some two documents D Exh.8 and D Exh.9 to show that she had a mining licence and agreement with other miners to market their products. From this she said she was making Shs. 30,000 per month until 1985 when she stopped to concentrate on the kiosk business. The kiosk was demolished in 1986 and she lost money. She went back to the Gemstones business and was also buying and selling clothes. It was towards the *end* of 1986 when she met W's friend who then introduced her to W. She was given Shs. 20,000 by W as compensation for abandoning her business.

E thus painted a picture of a lady who was actively in business and had steady income before she met W. The problem with this picture is that it is only backed up with assertions with nothing to show for the steady income generated by the businesses or what the income accomplished by way of investments before W appeared on the scene.

I accept the evidence on record that she was a woman around Malindi town with no known or legal source of income and was staying in one room in Majengo before she met W. She never even told her mother what she did. for a living although her mother assisted her in looking after the four children.

I find no sufficient or any evidence from E to displace the finding which I now make that W was the sole financier of the purchase of the undeveloped plots Nos. 2032, 2033, 2034 and 2035 in Malindi. She never contributed financially and was not in a position to contribute the money for such purchase. The inclusion of her name in the Title documents was, I find, a benevolent act on W's part based on his expressed belief that E had agreed to enter into a contract of marriage with him. At the time of purchase of these plots E held a Power of Attorney. She remains a trustee until the Power is revoked.

The next issue is the purchase of plot No. 2613 which was later developed into "Malindi Inn" which is run as an hotel business by E. This is issue no 5

It is W's evidence on his pleading that he bought the plot for DM60,000 With specific instructions to E

that the property would be for a commercial venture. This was in 1990 when W had to return to Germany for surgical operation after a heart attack. As in the other transaction Don Amolo, Advocate acted for W in this transaction. The seller is said to have been paid through Don Arnold Advocate. The transfer was made directly to E. W says he did not know about this until he returned to Kenya after his hospitalisation and asked for the transfer documents. E said she had signed on his behalf. He demanded a retransfer and it was agreed that Don Amolo would draw it up for execution. E refused to sign the transfer. W had agreed that on condition that E married him, then she would keep the Malindi Inn, plot without the garage. She still refused such proposal.

That is because she contended that the plot was her own property. This is how she explains the acquisition of the plot.

"In 1990, he wrote me a letter that he did not have money and I should sell the Stanza vehicle. He had bought a Mercedes. I found plots- along the Mombasa/Malindi Road. I took W to see them. He said they were good plots. I told him I had 200,000. He gave me that money. We went to Don Amolo for an agreement to be drawn. This is plot No. 2613. On the next day I paid Don Amolo the money. When I sold the Stanza W had been present. In March 1990, W went back to Germany."

In view of my findings on issue No.4 that there was no evidence of any fixed deposit of Shs. 200,000 or any substantial funds that E could contribute, I do not accept her evidence that she was the sole purchaser of plot No. 2613 either. It is more probable than not that W provided the funds he says he did. Although E testified that W was in Kenya when the plot was purchased in 1990, she also testified that he went back in March 1990 and that he suffered a heart attack in the same year. It is not clear whether the attack came before he went back to Germany or later in that year. But it is W's evidence that the purchase and registration of the Transfer of the plot was done when he was away in Germany for surgical operation. He had identified the plot before he went to Germany and had given out the money for its purchase. That is when E used her own name to have the transfer of the plot in her name. At the time, E was the holder of a valid Power of Attorney. In registering the property in her own name she did not act in the interest of the Donor of that Power of Attorney. In this she was in breach of trust... The plot No. 2613, Malindi is in truth and in my finding, the property of the plaintiff, W.

Issues Number 6 and 7 may; conveniently be discussed together. They relate to the developments made on plot No. 2613 after its purchase, including the moveable. Whether this was done by E as she contends, or by W.

The evidence on development by W is that he spent over 4 million in construction of Malindi Inn. Such money was provided in several ways. Directly to E, through Don Amolo Advocate, through loans which he repaid.

He produced a letter E wrote on 10.5.91 when he was in Germany asking for money for the construction of the roof and explaining what she informed Income Tax people regarding her source of income for constructing the building, that W had borrowed the money from German friends and was repaying them there. Exh.1. W did not have a Bank Account in Kenya. The various monies for construction were channelled through E's Bank Account, some three Mercedes cars were sold to Don Amolo Advocate by W for Shs. 3 million. • The proceeds she said were channelled through E for the construction of Malindi Inn. The Inn was completed in 1992 and he provided further funds for the commencement of the business of restaurant. He produced Exh.17, an agreement between him and a contractor dated 11.5.92 for the "erection and completion of toilet cubicals and garage." This cost Shs. 696,432/=. The toilets were for the main building. He also started the construction of a garage behind the Inn but on the same plot and for this he signed a contract, Exh.2 with a contractor for Shs. 964,480.50. The garage was completed and he equipped it. He denied on cross examination that he was building the garage as a gift to E's children, although he would have donated the garage in his last Will to the sons if E had agreed to marry him. He bought a machine for making stools and chairs for Malindi Inn. All in all he spent DM 150,000 on the construction of the Malindi Inn Building.

In addition to this W testified that he brought into the country six containers of assorted items. Some

contained cars, as in Exh.16 which contained a Nissan Saloon Car. Exh.D6 containing a Tractor, Exh.PS personal effects, Exh.D6 containing various items like concrete mixers, water pump, wheels, electric motors, excavator axles and others. Most of the items in these containers were received and sold by E to construct the Inn Building. Others she sold and never accounted for the proceeds. W alleged that E stole a container of tyres and other goods when he was in Germany despite having given her in excess of Shs. 10 million for her needs. In the end she even took away from their residential house two lorry loads of goods. She used the Power of Attorney to change the ownership of a Pick-up motor vehicle and attempted to do the same with his Mercedes Benz car before she was intercepted by the police at Maina's house and the documents recovered. Finally she borrowed various amounts of money through guarantee, as in Exh.8 Shs. 20,000 on 1.10.91 and Shs. 50,000. Exh.25(a) on 23.11.90 for construction of the Inn building expecting "Overseas funds or business income" to repay the loan. W testified that he was the one who repaid these loans. She finally mortgaged the Title to LR 2613 and gave as collateral Titles to plots 3050 and 3051 using the Power of Attorney but without W's knowledge or consent.

On her part E said the items sent by W in containers were designated for her and there was no reason why she could not use them as she pleased.

She said she informed W that she had the money to develop the plot in 1990 but in 1991 her money had been exhausted. She asked him to assist her with Shs. 100,000 for finishing works when he returned to the country in 1991. She further asked for assistance on the furniture which W agreed to provide using his machine. He made 20 tables, 30 stools, 50 chairs at a price of Shs.95,000 and brought them to the business. Then W brought in the containers for the Mercedes and the tractor in 1992. He also brought 200 tyres and many small items. She sold the tractor and the tyres but the money for the tractor Shs. 300,000 was paid to W to defray the loan he had given to her for Shs.400,000. She said W had promised her the tractor as her own property. She conceded that some three Mercedes cars had been sold to Don Amolo but asserted that the money was not used to construct the Inn Building.

As for the garage constructed on the property she conceded that it was constructed by W but on the understanding that he would use it and after he died the garage would become her children's property.

In cross examination, E said she started constructing the business premises in 1986. She built a temporary structure but could not put-up a permanent one because she had 4 children to feed and did not have enough money to put up the building. She had a financial problem in 1987 but was not stranded. This evidence however flies in the face of her evidence that the plot was acquired in 1990 - Exh.D12. On the loan she took she said:-

"The loans were taken to enable me to do my work and also do work which W had begun. I used also to use money left with me by W to do my own work. The loan of 20,000 shown in Exh.15 was used for paying workers. It is not true that W paid that loan in order to discharge the property. I also took a loan in order to build the 1st and 2nd floor of Malindi Inn buildings. This 1.2 million shillings. I have not yet repaid. I took it in 1993. I was using the building for the business when I took that loan. W was not in the country at that time. I did not have any problem with him then. We disagreed at the end of 1993. I have never informed him that I had taken the loan."

I do not accept that the loan obtained in 1993 was for construction of Malindi, Inn Building. In all probability it was a Bank overdraft for operating capital for the business commenced by E two years earlier. The Mortgage instrument D.Exh.16 imports this inference. I do not find sufficient or any evidence from E that she was the sole financier of the construction of the Malindi Inn Building. The proof on the expenditure incurred on that construction is not forthright and clear on the record, but I accept on the evidence available and on a balance of probabilities that W provided the direct cash required, or cash through sales of items delivered from Germany in containers or through sales of motor vehicles to Don Amolo Advocate. E admitted that some 20 tables, 30 stools and 50 chairs were made and provided by W. I would therefore hold that the building otherwise known as Malindi Inn on plot 2613 lawfully belongs to the plaintiff together with 20 tables, 30 stools and 50 chairs. There is no issue regarding the construction and ownership of the garage. It is W's. I find no evidence that he constructed it as a gift to E's children whether or not W and E were married. There was no marriage or any presumption of one.

There is evidence however that W had no interest in the business conducted in that building. He stated so himself although he claimed to have financed the business itself. He never knew when E obtained the licence to run a Bar & Restaurant from July 1991 and 1992. Exh.D2 and D3. He never knew when E registered the business and renamed the business "Malindi Castle Inn" in January 1993. Exh.D1. He never knew when E obtained a Bank overdraft to run the said business Shs. 1.2 million in January 1993 Exh.D.T2. He did not know when the business Account was opened with Standard Chartered Bank Limited, as exhibited in D.Exh.14 nor was he a signatory to that business account. Indeed he had no permit to run any business in Kenya. In the circumstances I hold that the business of Bar & Restaurant conducted on plot No.2613 Malindi was set up and solely belongs to E, the defendant.

As for issue No.8, in view of my findings on issue No.4, the issue has been dealt with.

Issue No.9 relates to the right of entry into plot No.2613. I have held above that the plot and the developments made thereon lawfully belong to the plaintiff. I have also held that the business of Bar & Restaurant carried out in those premises belongs to the defendant. That position was not so definitive until this judgment was delivered. In that event I do not blame either party for holding steadfastly to the beliefs they had before the dispute was brought to court.

and the "new owner". She did it on 14.2.94. W says this was fraudulent and she had no right, or consent to perpetrate such fraud. He had bought the motor vehicle in Kenya for Shs. 1 million. He was in the country then but E took the documents to Nairobi together with the log book and signed in his place as the owner of the vehicle. -- He only discovered that his log book had disappeared when he sent someone to Nairobi to make a search on the motor vehicle only to confirm the fraudulent transfer. That is how he took possession of the copy of the transfer Exh.10. The same trick was tried on his Mercedes car but Police intercepted the papers before E took off to Nairobi with them. She was doing all this because of their breakup and even went ahead to report to the police that W was in unlawful possession of guns. He was charged in court but was released as there was no evidence to support such charge.

In response to this evidence E admitted, that the car belonged to W but asserted that he, had sold it to her for Shs. 2000/=.' However she had nothing to show by way of an agreement that there was such a sale. She did not deny that the police intercepted papers and log book she held in respect of W's Mercedes Benz except to say that she had not run away. She was found in Maina's house in a bathroom but said the house belonged to the mother of Maina and she only knew Maina, through his mother. That is why she was staying there. She further did not deny setting the police on W on a gun possession charge and insisted that despite his denial he had a gun.

There is enough material to enable me to hold that the transfer of the motor vehicle into E's name was not lawful. She signed the transfer Form without consulting or seeking authority from the lawful owner of the vehicle who was available to sign such transfer if as contended he had sold it to E. It was a further blatant abuse of the Power of Attorney donated to her. The transfer must be declared a nullity and the motor vehicle must revert back to what remains between the parties now is a business relationship. As the lawful owner of the property, W is entitled to receive rental income there from unless he occupies the premises himself. I direct that the premises be assessed for rent by a Government Valuer within one month of this judgment and the rent so determined be paid by E with effect from one month after the delivery of this judgment. The cost of the valuation shall be borne equally by the parties unless in lieu of valuation they agree on the rental payable. E has otherwise acquired the rights of a Tenant in possession and W has no right of interference with the business run therein. Implied terms of tenancy in law shall apply.

For the avoidance of doubt the garage business operated on the same plot is not affected as it is the sole property of W.

In view of what I have stated in issue No.9, issue No.10 is answered.

It also follows from my findings in issues 4 and 5, that the defendant's names should be deleted from the Register as joint or sole proprietor of the plots. Issues No. 11 and 14 may therefore be answered by holding that the defendant holds the said properties in trust for the plaintiff. That trust is now terminated.

The defendant shall discharge any existing encumbrances on the property and transfer her interest? on the property to the plaintiff. The defendant shall in the meantime be restrained by injunction from dealing with the properties in any manner that may be prejudicial to the proprietary interests of the plaintiff. That answers issue 13.

There remains the issue of a motor vehicle Registration No. KAB 251X which W says belongs to him but was unlawfully taken and transferred by E into her name. This is a Nissan Sahara Pickup. The vehicle was in E's possession before their breakup and in February 1994, E used the Power of Attorney donated and still apparently valid, to sign the transfer form as the "old owner" its lawful owner, the plaintiff.

That exhausts the substantive issues submitted to me for determination. There are various other moveable properties alluded to in the pleadings but I did not find any issue framed for determination in respect thereto. Possession of such properties must therefore remain where it lies.

On the whole I find on the evidence that E has behaved in a mercenary manner and abused the generosity endowed on her and her family by W since their fortuitous encounter in 1987. She became so blind and avaricious that she would not listen to her own mother's advice or the entreaties of her own sisters and brothers. The mother testified. Letters written by the mother and the family members are exhibited. Her own evidence was given in disjointed fashion and lacked supportive material. It betrays her intention to becloud issues and in the process hope to reap where she never planted.

I have expressed my views and findings on each of the issues. Judgment shall be entered for the plaintiff and orders shall issue according to my findings on those issues. The plaintiff shall also be entitled to costs. I assess them at 2/3 of the taxed costs since he did not succeed on the issue of the ownership of the business. I would dismiss HCCC No. 201/94 with costs.

Dated at Mombasa this 19th day of February 1997.

P.N WAKI

JUDGE