IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PLATT, GACHUHI JJA & MASIME Ag JA)

CIVIL APPEALS NOS 109 OF 1986 & 112 OF 1986 (CONSOLIDATED)

BETWEEN

MUTISO..... APPELLANT

AND

MUTISO.....RESPONDENT

(Appeal from a Ruling/Order of the High Court at Nairobi, Shields J and from a Judgment/Decree of the High Court at Nairobi, Shields J)

JUDGMENT

May 12, 1988 **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Judgment.

The two appeals above were heard together, although in the opinion of Mr. Lakha, who appeared for the appellant, if his client succeeded in appeal No 109 of 1986, there would be no need to continue on to appeal No 112 of 1986. That submission involves the consideration that the first mention of these appeals, was preferred against rulings on two preliminary issues, based on the effect of the Limitation of Actions Act (cap 22) on the two alternate causes of action. Hence, if both causes of action were timebarred, then there would be no need to go further. On the other hand, the judgment after the trial dismissed the first cause of action, which had been expressed in several over-lapping forms, but accepted the second which was based on trust. Looking at the situation as a whole, in my opinion the learned judge, was within his rights to allow the trial to go on, by ruling that the issues were not time-barred, and therefore this judgment will deal mainly with the alleged trust, although the issues concerning setting aside the transfer of the land in question, will be described to complete the whole picture.

The appellant was the wife of the respondent. In the course of their marriage, the respondent acquired a farm LR No. 10727 known as Kiringelele farm in 1967. The purchase of the farm was financed by the Standard Bank and the Agricultural Finance Corporation, these two loans being secured by charges on the farm. The respondent had been a Member of Parliament, but in 1971 he was convicted of sedition and imprisoned for a period of 9 1/2 years. He was released at the end of 1980. The appellant continued to look after the family and the respondent's property in his absence. The question arose how the appellant should do so. The bank began to press for the payment of the capital and interest, especially when the payments fell into arrears due to a drought. The respondent made out a power of attorney to his wife, but it still appeared necessary for the farm to be transferred into her name, for the purpose of taking up a further loan from the AFC in order to pay off the Standard Bank. It was thought that in this way the farm could be saved.

The respondent did not wish to transfer the farm to his wife's name. He suggested two alternatives. One was that the farm should be transferred in their joint names; and the second was that the wife should sell off the cattle to pay off the bank. It was found at the trial that neither of these alternatives were practicable. Apparently the organizations concerned did not wish to do business with the respondent's name upon the documents involved. Secondly, it appears that the drought had prevented the sale of the livestock. So the situation was that the appellant asked her husband to transfer the farm into her name alone, and in effect to trust her to look after his affairs in his absence. In 1975 (it seems to be March 26, 1975 the execution seems to have been May 24, 1974 or 1973) the respondent transferred the whole farm to his wife "by way of gift."

It seems that the parties grew apart, and when the respondent was released as he says in October 1980, he and his wife were unable to resume their marriage. Shortly thereafter the wife left and it seems that a good deal of property was taken over by her. But any claims to the moveable property which were in fact included in the plaint, which the respondent brought on March 5, 1985, were ruled by the learned judge as barred by limitation.

There was no appeal and that matter rests there. The appellant however, claimed the farm as her sole property and that the respondent contested.

In his plaint he sought to set aside the deed of gift on grounds of duress, misrepresentation, or undue influence, on the basis of an unconscionable contract; and on the other hand the respondent claims that the appellant held the land on trust for him. He therefore claimed it back.

One of the difficulties which the learned judge faced was that the plaint was not a model of accurate pleading, and indeed a number of important dates were missing. But I think it can be said that the learned judge was within his rights to hold that the trust alleged could only have been broken after the respondent came out of the prison. The reasoning for this conclusion will become clear as the judgment proceeds.

Now Mr. Lakha contends that the learned judge could not come to the conclusion that the appellant held the land on a resulting trust for the respondent. The judge had held that on a consideration of the acts and declarations of the parties, both before and at the time of the execution of the transfer, he was led to the inescapable conclusion that the presumption of advancement was rebutted. Although the respondent's evidence was not very satisfactory and much of it had to be disbelieved, the learned judge was satisfied that the respondent's reason for executing the transfer was to enable a loan to be obtained from the AFC, and thus save the farm from being sold by the Bank.

Before the drought the milk income was able to service the loan, but thereafter other means had to be found. The respondent had suggested a sale of the livestock or transfer to himself and the appellant; but neither of these things obtained approval. The respondent was told that the authorities did not want his name in the deed. The judge did not believe that the transfer had been signed by the respondent, because he had been induced to do so by any improper means, neither duress, misrepresentation, fraud or breach of a fiduciary relationship. Nor did he believe that there had been a prior promise to reconvey the property. He thought that husband and wife had expected that by operation of law there would be implied a resulting trust in favour of the plaintiff. But in order to put things right, if the appellant was bound to reconvey the property to the respondent, the latter could not complain if it were encumbered with the loan that the respondent had made possible. Consequently, the respondent had to indemnify the appellant against any personal covenants, under which she was liable in connection with the loan.

To begin with, Mr. Lakha complained that no resulting trust had been pleaded, or indeed any trust (see paragraph 4 of the defence.) It was an express trust and paragraph 8 of the plaint was not apt for laying the foundation of a claim under a resulting trust. According to Mr. Lakha there should have been averments that there was no intention of advancement or that the advancement was rebutted. There should have been particulars of facts upon which there could be a rebuttal in defence.

This was a matter which he had raised during the proceedings and had taken objection that the claim was based on an express trust and that the plaint had not been amended to make it clear. In fact the transfer

was specific and expressly by way of gift.

On the basis that the wrong claim had been made, Mr. Lakha relied on *Blay v Pollard and Morris* [1930] 1 KB where Scrutton LJ gave it as his opinion that:-

> "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course."

That opinion was accepted by the Court of Appeal for Eastern Africa in *Gandy v Caspair Ltd* (1956) 23 EACA at p 140 where it was also noted that Lord Westbury had given it as his opinion in a Privy Council case, that a case should be found in the pleadings or involved in or consistent with the case thereby made. Consequently Mr. Lakha said that as a resulting trust was not consistent with a gift, there was no warrant for the finding of the learned judge, nor was there any other ground in the plaint which could give rise to that finding.

On the other hand, it was Mr. Khaminwa's point that the paragraphs 4 to 8 of the plaint sufficiently set out a case of trust and complied with Order VI Rule 8 of the Civil Procedure Rules. Moreover, if there were any lack of pleading it was an issue which was canvassed at the trial by being referred to by both counsel, and certainly became an issue permitting the learned judge to make a finding on it. He derived assistance from *Dhanji Ramji v Rambhai & Co* [1970] EA 515 where it was held that although the facts relied upon to make the appellant (in that case) liable as an apparent partner should have been pleaded, nevertheless the appellant had been prepared to meet a case of apparent partnership, as most of the evidence in support of it was illicited by the appellant's cross-examination, and the judge was addressed on it. Moreover there was no prejudice to the appellant as the unpleaded cause of action became an issue in the trial.

In the instant case paragraph 8 was set out as follows:-

> "The plaintiff further and in the alternative states that the said piece of land was transferred to the defendant in trust, for the defendant to hold the same on behalf of the plaintiff and that the plaintiff is now entitled to the legal estate in his property."

Apart from this, there was the rest of the case that the respondent/plaintiff had bought the farm solely by himself, that he had tried to save the land by two schemes which failed, and finally transferred the land to the appellant in order to raise a loan to pay off the bank. On the other hand, it is said that as it was a "gift," the respondent had to add some averment to rebut the advancement.

I suppose that styles of pleading may differ, and that Mr. Lakha has developed a circumspect precedent, which may have seen him through many case of resulting trust. But on referring to *Atkin's Court Forms Second Edition* Vol 41 at precedent 18 there is an "Indorsement on Writ of a claim for declaration of trust: resulting trust." It describes the plaintiff's claim as a trustee of the property asking for a declaration for the property now standing in the name of the defendant and the plaintiff is held on trust for the plaintiff absolutely. Precedent 19 is an endorsement of a claim by beneficiaries. Precedent 22 is an endorsement by a beneficiary to set aside a gift to a trustee on grounds of undue influence. So far it is necessary only to allege the trust exists. Then turning to the precedents of a statement of a claim, in the case, for instance, of a joint purchase, it is suggested that it should be asserted that the shares have belonged beneficially to the plaintiff and that the defendant had refused to transfer the shares into the sole name of the plaintiff. It is when one gets to precedent 38, when it comes to denying a resulting trust, then the defendant raises the presumption of advancement, as for instance by saying the transfer of shares into the joint names of the plaintiff and defendant was a gift to the defendant, and the defendant denies that the shares belong beneficially to the plaintiff alone, but admits that he has refused to transfer to the plaintiff at his request.

While I would agree with Mr. Lakha that the pleading is too short and does not set out certain matters, I

would not agree with him that it was wrong for the plaintiff not to set out the case against the transfer by way of gift straight-away in the plaint. The plaintiff would have been better advised to gather together the facts which he relied on to support his alternate claim. For instance, he could have shortly explained what occurred after he came out of prison, eg that he found that the loan from the AFC had been taken up; presumably it was being serviced; the appellant wife left after a short period and the respondent resumed possession of the farm; that he claimed to be the beneficial owner; and that he had called on the appellant wife to transfer the title back to him. Then it would be up to the defendant to stress that the transfer was by gift and that it was an advancement by denying that the shares belonged beneficially to the plaintiff alone. The appellant could consider whether to deny refusing to transfer the property. Of course if it were a case of there being no refusal but the plaintiff merely wished to wind up the trust and to make provision for the liability of the trustee with the court's blessing, both parties could have had the scheme put before the court for approval.

But though the pleading is short, what, I wonder could it have led to other than a resulting trust? Mr. Lakha complains that an express trust was pleaded, and yet at the same time he also complains that the transfer by way of gift was not accompanied by any collateral agreement in writing or under seal, whereby the appellant undertook to reconvey the property after the respondent emerged from prison. As far as I understand his argument, it was that there was no express trust under which the appellant was to retransfer the property, (although) a promise to this effect was pleaded. What we have is a transfer by a man in prison to his wife for a lawful purpose of raising a loan to pay off the bank and an allegation of trust. The only conclusion that I can come to is, that the plaintiff was putting forward a case that the transfer was not the whole story, but simply a means to an end, and that was, that the appellant wife would be able to conduct the prisoner's affairs for him and preserve the property for him.

The facts became clearer after evidence was called, and after the court had seen the statements made by the parties, and when it came to final submissions it was clear that a resulting trust had been intended. In his opening address Mr. Khaminwa referred to passages in *Halsbury's Laws of England* and *Underhill on Trusts* relating to the resulting trust. A point which must not escape attention is that paragraph 8 is in the alternative.

The plaintiff is trying to say that the facts upon which he transferred the property led either to setting aside the transfer, or to the re-conveyance of the trust property. After the evidence had been called, no attempt was made to show what representations were false. Duress did not lie even on the law. The plaintiff had agreed to transfer the property for obtaining a loan. Setting aside an unconscionable transfer had largely failed. What was left was the trust. It may well be that the setting aside of a registered transfer, could not be accomplished except for fraud, which was not pleaded. But that has nothing to do with accepting the trust and bringing it to an end. In the circumstances, the appellant was not called to give evidence, and it was left to the legal argument that there had been no resulting trust. Reliance was placed on *Tinker v Tinker* [1970] p 136. On the strength of this case it was urged that the plaintiff did not discharge the burden of proof on him, and that it must be presumed that it was a genuine intention to give the farm absolutely to the wife. In *Tinker's* case it was held that there was a genuine gift and no resulting trust arose. It seems to me therefore that this was a case where a claim of a resulting trust was a live issue from beginning to end at the trial, and indeed as in *Dhanji Ramji v Rambhai & Co*, the most important evidence came from the cross-examination of the respondent/plaintiff, Mr. Mulwa's evidence not being questioned. I would hold therefore that the issue of the resulting trust raised in the plaint was not fully set out, but that nevertheless it was a live issue, throughout the trial.

Two further questions remain. First, was the evidence sufficient to support the finding of the learned judge and secondly was the lack of pleading prejudicial to the appellant? I have listed the questions in this order, so as to make sure whether there was prejudice at any stage of the trial.

Mr. Lakha drew attention to what he called inconsistencies between the claims made by the respondent in the plaint and the transfer which was by way of gift. The salient point of the defence seems to have been that a trust could more easily have been implied if the transfer had simply been effected without the statement that it was by way of gift. By stating that it was a gift that was the crucial point for the plaintiff to overcome.

On the question of a gift, there is *Hodgson v Marks* [1971] Ch 892 Mr.s Hodgson who had owned the house in which she lived for sometime, executed a voluntary transfer of her house to a man called Evans who was her lodger. He was registered as a proprietor of the house though it was already agreed that the beneficial interest and ownership was to remain with Mr.s Hodgson. The oral agreement failed because it was not in writing.

Mr. Evans cheated Mr.s Hodgson and sold the property to Marks. The Court of Appeal in England held that the transfer to Mr. Evans was not intended to operate as a gift and although the express trust in favour of the plaintiff was not effective, a resulting trust arose of the beneficial interests to the plaintiff. It was noted by Russell, LJ at p 933 that the form of transfer to Mr. Evans had been with the implication of gift involved in the words "love and affection." So it was a case where it was taken that a gift had been indicated in the transfer. Nevertheless it was held that they both continued to live in the house, except that Mr.s Hodgson had transferred the house to Mr. Evans upon trust for herself, and that Mr. Evans was the registered proprietor, holding as bare trustee of the legal estate for Mr.s Hodgson who was absolutely entitled as beneficial owner.

Mr.s Hodgson therefore had an overriding interest in possession. It seems to me that the above decision is of great guidance in the instant case. Even if a gift is indicated, it may still be that the beneficial ownership is intended to remain in the person making the gift. Secondly, even if the learned judge were right that there was no agreement that the appellant would re-transfer the farm to the respondent when the latter came out of prison and therefore the express trust failed at this stage, nevertheless the resulting trust may still arise.

The problem then is whether there was enough evidence to support the finding that there was a resulting trust. Mr. Lakha relied, as I have said, on *Tinker v Tinker* (above), and asserted that the respondent found himself on the horns of a dilemma. He could not at one and the same time allege that the farm was the property of the wife to his creditors, and then allege that it belonged to him as against the wife. The presumption is that the gift was an advancement to the wife; and it does not rebut that presumption by saying that he only did it to defeat his creditors. It seems, at first sight, an extraordinary decision, having in mind that the wife was present at the meeting, where the solicitor explained the problem to husband and wife, and the wife knew that she was not being given the house at all, but it was for convenience in case the risk of business went against them. A few weeks later the wife left her husband and divorce proceedings ensued.

She received the matrimonial home and the suit premises! At any rate, that case can be distinguished because there was an attempt to defeat creditors. In the present case, it was an arrangement to pay off the creditor bank, and then incur a further loan in the way the AFC found acceptable.

No one was being deprived of a possible right against the property. The Standard Bank was paid off. The AFC still had the security of the farm.

After the respondent had been released from prison there could be no further stigma against him. Indeed, he was very soon to become a Member of Parliamnet again. There is no dilemma in this case, since the respondent had been rehabilitated politically before the suit was brought, so that the AFC's objections had been removed. The AFC must have been glad to have the respondent back in his own name.

It is not surprising to find that in *Haseltine v Haseltine* [1971] WLR 342 and wife transferred two sums to her husband, the first to equalize their property for estate duty purposes and the second to enable him to qualify as an underwriter at Lloyds. She was able to reclaim both sums on the basis of a resulting trust. One would have thought that the wife would have been in a dilemma for tax purposes. In *Hanbury & Maudsley's Modern Equity* 12th Ed at page 248, the opinion is canvassed that equity will refuse its aid to a plaintiff who has to rely on an illegality to support his claim. The same is true of assignments in fraud of creditors, though a plaintiff may in this type of case not be refused equity's aid if the transaction deceived nobody and nothing had been done under it. It would seem that *Tinker v Tinker* is not the last word upon the subject. *Hussey v Palmer* [1972] 1 WLR 1286 represents Lord Denning's view that a constructive trust may be imposed, regardless of established legal rules, in order to reach the result required by equity,

justice and good conscience. Without going that far in this case, no impropriety arose, and there was no impediment to rebutting the presumption.

No doubt the presumption of advancement applies where a husband makes a gift to his wife. But Lord Diplock warned in *Pettit v Pettit* [1970] AC 777 that the strength of the presumption in modern times may be diminished. I would add that the presumptions to be drawn in Kenya, must similarly accord with the social conditions which prevail, so as to conform with the most likely intentions of married spouses here. It seems to me that Mr. and Mr.s Mutiso were dealing with a period during which the husband in prison could not deal with his affairs, but yet would emerge again one day. During this temporary inability the aim would be to keep their property intact, and where there were male heirs to make sure that they were not deprived of their inheritance. It would be in exceptional circumstances that the main asset would be given entirely to the wife. It would be dealt with in trust for the husband until he came back to the family. In my opinion the presumption of advancement in circumstances such as in this case would not be strong at all.

The evidence was dealt with by the learned judge substantially in accordance with the principles set out in *Shephard v Cartwright* [1955] AC 431. In the course of his speech Lord Simonds approved a passage from *Snell's Equity*, 24th Ed p 153 as follows:-

> "The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration … But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour."

In this case there are the interviews in prison in which the appellant asked that the farm be transferred into her name, and the respondent's replies showing that he was unwilling to do so, and his suggestions that the farm should be transferred into his name, or that the cattle should be sold off and the proceeds paid towards the loans. There is the letter of the appellant to the Commissioner of Prisons dated May 8, 1974 to the effect that the respondent should be contacted to have it explained to him that the transfer was to enable the wife to raise a loan from the AFC to pay off the bank.

The respondent knew of the problem as the wife had mentioned it to him on her last visit to him. His suggested solutions had not proved workable. This was important as there was pressure from the Bank and AFC because repayments were not "proper" due to the drought in the last few months.

The respondent replied on May 20, 1974 through the Commissioner, that he was very sad that his proposals had not worked, and that as a result his wife was in a terrible predicament. He would like to give his consent to his wife's proposals. There was also Mr. Jackson Mulwa's evidence to the same effect. The respondent had not at first wished to transfer the farm to his wife, but he had found that necessary to save the farm. The AFC had insisted on this condition and the transfer was merely for the convenience of getting the AFC loan and he was going to be away for so long, that he had decided to sign the transfer.

The learned judge did not take into account any evidence after the transfer. Having considered the evidence afresh in the light of the authorities above, I am satisfied that the learned judge was right to conclude that the transfer was merely for the convenience of raising money through the AFC loan to pay off the mortgage to the Bank.

Is that then sufficient to rebut the presumption of the gift specified in the transfer? The learned judge thought that it was. If there is no impediment of dishonesty, or impropriety in the way of defeating creditors, can convenience suffice? In *Marshall v Crutwell*, (1875) LR 20 Eq 328 Sir George Jessel MR. treated a case of the husband opening a joint account in the names of himself and his wife, when the husband had fallen sick, as being a case of mere convenience. He came to the conclusion that it had not been intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it left the money still his.

The later history of this case is well set out, if I may say so with respect, in *Re Figgis* [1968] 1 All ER at p 1009 et sec. *Marshall's* case has been distinguished according to different circumstances, but it has not been overruled. In my opinion such convenience as Sir George Jessel explained is a relevant factor. It was surely the summary of this case. I think that the learned judge was right to reply upon it.

There is the general consideration that the result reached must be fair. Two factors sometimes arise which may have an indeterminate effect, but which in proper circumstances may be taken into consideration. They are the degree that the donee took part in the negotiations for the transfer, and the effect on other parties. In this case the appellant knew very well that the respondent would only transfer the farm for its management. His attempts to find other solutions, and his final agreement showed the appellant that it was not a settlement on her outright, but to save the farm until the respondent came out of prison. It was a temporary measure.

Secondly, no one was deceived by the arrangement. The wife carried out the arrangement. In all the circumstances it is fair to imply a resulting trust. The only said aspect is that the parties have parted company. But no doubt provision will be made for them in the ensuing proceedings.

In these circumstances, I would agree with the learned judge that there was a resulting trust to be implied in this case. But I have said earlier that I have to observe whether the lack of pleading had a prejudicial effect on the appellant's situation at the trial. There is the aspect that objections were taken. The learned judge might have been more careful in answering the chamber summons asking him to strike out some of the allegations as showing no cause of action. There never was a case of duress as a matter of law. As it turned out no reliance was placed on misrepresentation. Had the contest been narrowed on these grounds as well as limitation, a much clearer picture would have emerged as to the case the respondent was putting before the court. But there was only an appeal on limitation.

Moreover when that ruling was given, and the question of trust was held not to be time-barred, the appellant could very well have sought to clarify the issues by interrogatories before the trial. Of course, the court has the benefit of hindsight, but it seems to me that the matter was not as contradictory nor inconsistent as the appellant's approach would indicate.

In my opinion there was a clear contest as to whether the transfer could be set aside as unconscionable, or the farm returned under a trust. On the whole, as the nature of the transfer for the purposes of management was quite simple, I do not think that there was or could have been any prejudice, even if the appellant did not give any evidence.

In those circumstances I venture to think that the learned judge came to the correct conclusion. There remains the issue as to limitation. On the evidence of the respondent, the appellant did not transfer the farm, when he came out of prison. Supposing that to be October 1980, and that that was the earliest moment that the respondent could have expected the re-transfer on his evidence, then as the plaint was brought on March 5, 1985 it was brought within time, in accordance with section 20(2) of the Limitation of Actions Act. Where the plaint is not entirely clear and it is not certain that the claim is barred, it is better to allow the facts to emerge at the trial.

On the question of costs, first on the application, and secondly on the main case, I agree with Mr. Lakha that the respondent should pay all the costs both here and below, since the respondent was the husband of the appellant, and because his case was indistinctly put forward. Otherwise think that the consequential orders suggested by the judge ought to stand, except that there should be added a right to apply to the Court for directions.

I would therefore dismiss the appeal with the orders suggested above. As Gachuhi JA and Masime Ag JA agree, it is so ordered.

Gachuhi JA. Having read the judgment prepared by Platt JA in draft form, I am entirely in agreement with it. The position of the law as it stands in Kenya today is clearly stated therein.

My emphasis is on the doctrine of advancement or as it is known as gifts. Such advancement should be clear from the time of inception. It must be free from any consideration such as for defeating creditors. But where there is a rebuttal evidence that it was not the intention of the donor to make such a gift any advancement must be held on a resulting trust, the donor retaining the legal ownership and the transferee must retransfer the property to the donor at the donor's request.

In this appeal, the respondent never intended to transfer the land to the appellant absolutely. There is evidence on record that the respondent gave a power of attorney to the appellant to deal with the property for the time he was in prison. The appellant being not satisfied with the powers contained therein wanted the property to be transferred to her entirely.

She visited him in prison and discussed the matter. The idea was not acceptable to the respondent but the respondent had an alternate idea of selling cattle to clear the bank loan or the property be transferred in their joint names.

The appellant was opposed to the respondent's idea and appear to have said that the AFC will not deal with the property when it remained in the name of the respondent as the Government was not going to have it.

Whether that was true or not, it remains that even at that juncture the respondent was opposed to the idea of transferring the land to the appellant.

Further attempt to persuade the respondent to transfer the land was made by Mr. Jackson Mulwa the then advocate for the appellant. In an hour's persuation at Naivasha Prison Mr. Mulwa conveyed a promise of retransferring the land back to the respondent when he completes his term of imprisonment. All the same, the respondent would not accept the persuation and assurance.

Further attempt was made by the appellant in her letter to the Commissioner of Prisons to persuade the respondent to transfer the land to the appellant. This was followed by her several visits in connection with the signing of certain documents.

In this evidence, it does not appear that the respondent was ready and willing on his free will to transfer the land to his wife. He eventually agreed to do so to raise the loan on probably the promise made that the land will be retransferred back to him when he came out of prison.

This, evidence, in my view is capable of rebutting any presumption of advancement to the appellant. The respondent transferred the land to the appellant to be held in trust for him and to enable her to raise money to clear the debts and to properly manage the farm. There was no absolute transfer as a gift to the wife. The words "as a gift" may have been inserted in the transfer only for convenience since there was no other consideration.

A resulting trust was created in the transfer. For a presumption of advancement to be inferred, the intention of the parties must be clear untainted with any irregularities fraud or duress. I too would dismiss this appeal. I accept the proposed orders suggested by Platt JA that this court should make.

Masime Ag JA. The facts of the case from which these appeals arise are clearly set out in the judgments of Platt and Gachuhi JJA which I have had the advantage of reading in draft. The appeals have been consolidated and heard together although the first challenged the ruling of the superior court on the issue of whether or not the causes of action pleaded were time barred and the second attacks the superior court's finding of a resulting trust in favour of the respondent in respect of the suit premises.

Having heard all the submissions in the appeal it is abundantly clear to me that the gift made by the respondent to his wife the appellant was not absolute; it was strictly for the purpose of the management of the respondent's affairs by the appellant during his prolonged absence in prison; and, it was the last desperate alternative to his earlier proposals which had proved unworkable. The appellant's learned counsel seriously attacked the plaint filed herein which I would agree was not a model one and almost

failed to bring out the causes of action but taking account of the entire transaction and its surrounding circumstances I am satisfied that the learned trial judge correctly constructed a resulting trust thereout. The evidence clearly ruled out a presumption of advancement in favour of the appellant wife.

In any case as the respondent had male children who would be potentially entitled to inherit the suit premises it is unthinkable that the presumption of advancement would hold unless very clearly set out in all the circumstances. There was evidence that the purpose of the so called gift was to obtain loans and that loans were indeed obtained by the appellant.

To hold that the court on such facts should not find a trust by operation of the law would be to enable the appellant or spouses in her position to take a fraudulent advantage of the misfortunes of their husbands.

In view of the finding of a resulting trust by the trial court the issue of limitation does not arise as then it follows the action based on trust was filed within time - section 20(2) of the Limitation of Actions Act.

In the result I respectfully agreed with Platt and Gachuhi JJA that both these appeals should be dismissed with costs. I also agree with Platt JA's proposed order on costs in the trial court.

Dated and delivered at Nairobi this12th day of May , 1988

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.RO MASIME

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AG. JUDGE OF APPEAL