



Mahdi v Bamahriz & 2 others; Law Society of Kenya - Mombasa Branch & another (Interested Parties) (Environment and Land Case 380 of 2016) [2025] KEELC 6415 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 380 OF 2016
LL NAIKUNI, J
SEPTEMBER 26, 2025**

BETWEEN

SALEH OMAR BA MAHDI PLAINTIFF

AND

MOHAMMED SALIM BAMAHRIZ 1ST DEFENDANT

REHAB TRADING COMPANY LIMITED 2ND DEFENDANT

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

AND

LAW SOCIETY OF KENYA - MOMBASA BRANCH INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTOR INTERESTED PARTY

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the Civil suit instituted by Saleh Omar Ba Mahdi the Plaintiff herein against Mohamed Salim Bamahriz, Rehad Trading Company Limited and Land Registrar - Mombasa, the Defendants herein. The suit was by way of a Plaint dated 6th December, 2016. The dispute concerns the ownership of and beneficial interest in the property known as Mombasa/Block XVII/1129 (Hereinafter referred to as “the Suit Property) and the subsequent titles created from its sub - division.
2. Upon service of the summons to enter appearance, the 1st and 2nd Defendants entered appearance through a Memorandum of appearance dated 19th December, 2016 and filed their Statement of



Defence on 18th January, 2017. The Plaintiff responded to the statement of Defence on 26th January, 2017.

II. Description of the parties

3. The Plaintiff was described as a businessman in Saudia Arabia, the 1st Defendant was described as a male adult person resident of Mombasa and Yemen, the 2nd Defendant as a limited liability company incorporated in Kenya and the 3rd Defendant as a necessary party in the present proceedings.

III. Court directions before hearing

4. After confirming that the Plaintiffs had complied with the provision of Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 30th April, 2024. The Plaintiff called its witness and closed his case on 3rd October, 2024. However, the Defendants closed their cases on 7th October, 2024 without calling any witnesses.

IV. The Plaintiff's case

5. From the pleadings before court, the facts as per the Plaint were that in the year 1987 while visiting Mombasa, Kenya representations were made to the Plaintiff by the 1st Defendant as to the suitability of investing in flour milling factory under his able management and control in Kenya. The 1st Defendant represented to the Plaintiff that he is a Kenyan citizen with sufficient knowhow of the local business environment possessed with enough contacts to establish/create clientele for the intended flour milling factory's products to be under his management and control.
6. On the strength of the foregoing representations the Plaintiff in February, 1988 agreed to invest through the 1st Defendant by first incorporating the 2nd Defendant as the vehicle to implement his intentions with the contribution of the 1st Defendant being the aforesaid citizenship, business environment knowhow, contacts management and control without any financial contribution. The whole capital contribution to the Company towards investment was provided by the Plaintiff.
7. The Plaintiff was resident of Riyadh, Saudia Arabia and acting on 1st Defendant's foretasted representations executed a Power of Attorney on 29th September, 1987 nominating the 1st Defendant as his attorney/Agent in Kenya. The Plaintiff in further implementation of the intended investment goals availed funds to the 1st Defendant of which finances the 1st Defendant indicated to have purchased various pieces of land being MSA/XVII/1129 within Mombasa Island, Portion No. 2045 (Original 4185/2) Malindi and another at Malindi whose Title/Plot Number has not been disclosed to the Plaintiff. The total amount invested together with others charges and expenses incurred overtime was in the tune of USD 352,332.
8. The Plaintiff at all material times mistakenly believed and misconstrued out of ignorance by virtue of being a foreigner that the Coast region from Kwale, Kilifi and Malindi where the two aforementioned properties were said to have been situated was part of Mombasa. Towards end of March, 2010 while visiting Kenya the Plaintiff demanded to be taken to inspect the two (2) aforementioned Malindi properties but to his surprise the 1st Defendant made a disclosure that he had sold them at a sum of Kenya Shillings One Million (Kshs.1, 000, 000.00/=) each and utilized without accounting for the whole proceeds therefrom for his own benefit notwithstanding that they were supposed to be in the names of the 2nd Defendant in trust for the Plaintiff.
9. The aforementioned disclosure by the 1st Defendant that he had disposed off the two Malindi Plots raised a red flag consequent to which the Plaintiff held meetings with the 1st Defendant in the presence



of Mr. Mohammed Balala Advocate sometime in April, 2010 resulting to the revocation of the Power of Attorney dated 29th September, 1987 that had been donated to the 1st Defendant. In addition to the revocation of the aforementioned Power of Attorney and on the understanding that shareholding and Directorship in 2nd Defendant Company registered as owner of suit land are in the names of 1st Defendant and Plaintiff there was a mutual agreement whereby the 1st Defendant executed a Power of Attorney nominating the Plaintiff as his Attorney specifically in relation to suit property Title Number Mombasa/Block XVII/1129. The Plaintiff further to the foregoing in order to secure his investment in the suit property Title No. Mombasa/Block XVII/1129 requested and obtained a written declaration dated 12th April, 2010 from the 1st Defendant confirming that the entire shareholding in the 2nd Defendant's Company, registered as owner of Plot MSA/BlockXVII/1129 belongs to the Plaintiff. The declaration revoked previous agreement dated 10th April, 2010 which had provided for disposal of suit land and sharing of the proceeds therefrom.

10. On 9th April, 2010 in exercise of due diligence in safeguarding his interest in suit property MSA/BlockXVII/1129 pursuant to the afore - stated disclosure that the two (2) Malindi Plots had been sold and all the proceeds utilized by the 1st Defendant, the Plaintiff caused a restriction to be registered against suit property. Notwithstanding the registration of restriction of 9th April, 2010 against suit property Title Number MSA/BlockXVII/1129 the 1st Defendant falsely and unlawfully declared by way of Affidavit misrepresenting that the original title for the suit land was lost consequent to which he obtained a replacement title for the same. There was no notification or hearing as regards removal or variation of the restriction.
11. In April, 2010 the 1st Defendant handed over to the Plaintiff at Balala & Abed Advocates a copy of transfer and original Title Number Mombasa/Block XVII/1129 acquired in December, 1988 in the name of the 2nd Defendant but which is wrongly indicated as having been issued on 4th January, 1988 instead of 4th January, 1989 as per proper entry made in the proprietorship section. The 1st Defendant has subsequently proceeded to cause subdivision of the suit land into several portions /sub-Plots Nos. 1611 to 1632 and in collusion with the 3rd Defendant registered them while at the same time purporting to close Title Number MSA/Block/VII/1129 with full knowledge on the part of the 1st Defendant that the original title was in the custody of the Plaintiff. The Plaintiff averred that the aforementioned obtaining of new title and subdivision of suit land was unlawful and fraudulent as the original title for Plot MSA/BlockXVII/1129 had always been and continues to be in the custody of the Plaintiff to date with full knowledge of the 1st Defendant. The Plaintiff further averred that the 1st Defendant acted unlawfully and fraudulently in causing the sub-division of the suit land knowingly that the Power of Attorney of 29th September, 1987 donated to him by the Plaintiff had in April, 2010 been revoked.
12. The Defendant vide a copy of letter dated 8th June, 2011 has a reneged from the Declaration of Trust dated 12th April, 2010 by demanding purported entitlement of a sum of over approximately a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/=) on the basis of an agreement dated 10th April, 2010 that was revoked/cancelled. The 1st Defendant had been in occupation and using/ utilizing the suit land for his own benefit by selling water therefrom without accounting to the detriment of the investor/Plaintiff and without reflecting the same in the 2nd Defendant's Books of Accounts, which Books in any event have never been brought to the attention of the Plaintiff. The 1st Defendant had threatened to dispose of the suit properties unless restrained by an order of the Honourable Court.
13. From the foregoing the Plaintiff states that the suit land is registered and being held in the name of the 2nd Defendant in trust for the Plaintiff. To the knowledge of the Plaintiff there was no other suit pending and that there has been no previous proceedings in any Court between the Plaintiff and the Defendant over the same subject matter. The suit prime land was situated within the commercial City



of Mombasa within the jurisdiction of the Honourable Court and the Plaintiff shall suffer irreparably if the same were to be disposed off by the Defendants as it was incapable of replacement with another piece of land.

14. For these reasons, the Plaintiff prayed for Judgment against the 1st, 2nd and 3rd Defendants jointly and severally for: -

- i. An injunction restraining the Defendants or their agents/servants/representatives from in any manner dealing with, Title Numbers MSA/XVII/1611 to 1632; save for their revocation and annulment.
- ii. Revocation/annulment of the sub-division scheme and titles for MSA/XVII/1611 to 1632;
- iii. Reinstatement and reopening of closed Title records /register for title Number MSA/Block XVII/1129 and issue title for the same.
- iv. An order declaring that the property Title Number MSA/Block XVII/1129 is registered and being held by the 2nd Defendant in trust and wholly for the benefit of the Plaintiff.
- v. Alternatively an order declaring the Declaration of Trust dated 12th April, 2010 by the 1st Defendant as valid and the same be enforced as relates to the property Title Number MSA/Block XVII/1129 by causing transfer of the same in favour of the Plaintiff.
- vi. An order that Title Number MSA/Block XVII/1129 be transferred in favour of the Plaintiff within 10 days of decree/order failing which the Deputy Registrar of the Honourable Court do execute a transfer of the same for registration by the 3rd Defendant in favour of the Plaintiff;
- vii. A mandatory injunction restraining the 1st and 3rd Defendants or their agents/servants/representatives from interfering or trespassing onto or dealing with the suit property in any manner save for transferring the same to the Plaintiff and/or as authorized by the Plaintiff,
- viii. An order for accounts by the 1st Defendant of all proceeds from the sale of Portion No.2045[Original 4185/2] Malindi.
- ix. An order directing the 1st Defendant to disclose the title number for the second Malindi Plot and account for the proceeds of its sale.
- x. An order for accounts by the 1st Defendant for the proceeds from the use and sale of water from Plot MSA/Block XVII/1129 which is registered in the name of the 2nd Defendant and held in trust for the Plaintiff.

15. The Plaintiff responded to the Statement of Defence through filing a reply to 1st Defendant's written statement of Defence dated 26th January, 2017 where the Plaintiff averred that: -

- a. The Plaintiff joined issue with 1st Defendants Statement of Defence whenever the same was inconsistent with the averments in the Plaintiff and reiterates the averments in the Plaintiff and all particulars thereof without hesitation and shall at the hearing crave to prove such statements of facts as true.



- b. The Plaintiff reiterated the contents of Paragraph 5 of its Plaintiff and denies the contents of Paragraph 4 of the Statement of Defence in its entirety.
- c. The Plaintiff reiterated the contents of Paragraph 6 of its Plaintiff in response to the contents of Paragraph 5 of the Statement of Defence in its entirety.
- d. The Plaintiff in response to Paragraph 6 of the Statement of Defence reiterated the contents of Paragraph 7 of the Plaintiff and denied that the 1st Defendant had ever made capital contribution to the 2nd Defendant whether financial or in kind.
- e. The Contents of Paragraph 7 were denied in toto.
- f. The Plaintiff in response to the contents of Paragraph 8 of the Statement of Defence reiterated the averments of Paragraph 8 of the Plaintiff.
- g. In response to the averments of Paragraphs 9, 10, 11, 12, 13 the Plaintiff reiterated the averments of Paragraphs 9, 10, 11 and 12 of the Plaintiff and denies that the 1st Defendant contributed any monies to the 2nd Defendant and denies the averments of Paragraph 13 of the Statement of Defence.
- h. The averments of Paragraph 14 were denied in toto and the plaintiff reiterated the averments of Paragraphs 11 and 12 of the Plaintiff.
- i. In response to Paragraph 15 of the Statement of Defence the Plaintiff denied it.
- j. The Plaintiff admitted the averments of Paragraph 16 to the extent that the property is situated at Kikowani area but all the other allegations are denied.
- k. The Plaintiff admitted the contents of Paragraphs 17 and 18 of the Statement of Defence to the extent that he has visited Kenya on several occasions. But denies the other averments of Paragraphs 17 and 18 of the Statement of Defence.
- l. The Plaintiff reiterated the averments of Paragraph 12 of the Plaintiff in response to paragraph 19 of the Statement of Defence but denied all the other allegations in the said paragraph.
- m. In response to Paragraphs 20 and 21 of the Statement of Defence the Plaintiff reiterated the contents of Paragraphs 12 and 13 of the Plaintiff.
- n. The Plaintiff admitted the averments of Paragraph 22 of the Statement of Defence to the extent that the 1st Defendant appended his signature on the Power of Attorney and all other documents on his own free will without any intimidation, deceit or threats hence such allegations are denied in toto.
- o. The contents of Paragraph 23 of the Statement of Defence were denied in any event the Plaintiff denies owing the 1st Defendant any monies.
- p. The contents of Paragraphs 25 and 26 of the Statement of Defence are denied save that the 1st Defendant knew at all times the Plaintiff had the title documents for Mombasa parcel of land in his possession.
- q. The Plaintiff denied the averments of Paragraph 27 of the Statement of Defence.
- r. The contents of paragraphs 28 and 29 of the Statement of Defence were denied.



- s. In response to Paragraph 30 of the Statement of Defence the Plaintiff reiterated the contents of Paragraphs 18 and 19 of the Plaintiff.
 - t. In response to Paragraph 31 of the Statement of Defence the Plaintiff reiterated contents of Paragraph 21 of the Plaintiff.
 - u. The contents of Paragraph 32 were denied in toto.
 - v. The averments of Paragraph 33 were admitted to the extent of residency of the 1st Defendant but the other averments were denied.
 - w. The averments of Paragraphs 34, 35 and 36 were denied.
 - x. The averments of Paragraphs 37, 38 and 39 were denied.
16. The Plaintiff prayed that the Defendants Statement of Defence be struck out and Judgment be entered against the Defendant as prayed for in the Plaintiff.
17. The Plaintiff called his first witness on 30th April, 2024 at 1.00 pm who testified that: -

A. The Court Interpreter

18. Pursuant to the provision of Article 50 (2) (m) of *the Constitution* of Kenya, 2010, the Plaintiff was provided with an interpreter to interpret from the Arabic to English language and back who addressed the Court as follows: -
19. Accordingly, the Interpreter was sworn and in English language. He informed Court that he was called Mshali Khamisi Mshari. He was a business man between Mombasa and Wasini Island. He indicated that he got a call from the court to undertake the interpretation. He had been a Khadhi before and had interpreted in Arabic and English Language for many years. He undertook to interpret what was said and not give his personal opinion. He did not know any of the parties. He only knew the Bamahriz family in general terms him having been a politician.

B. Opening Remarks by Mr. Mokaya Advocate.

20. The Plaintiff's advocate Mr. Mokaya Advocate stated that the gist of the case, the Plaintiff and 1st Defendant was directors of the 2nd Defendant and shareholders. The Plaintiff is a businessman in Saudi Arabia and wanted to invest in Kenya – Floor Mills. He was introduced to the 1st Defendant. He decided to provide the capital to buy the land – there were parcels of land but one was purchased at Malindi. the 1st Defendant sold the Malindi without involving the Plaintiff. There was dishonesty, hence relationship could not continue. The Plaintiff demanded for the property to be transferred to himself, it was agreed the property to be sold and an account was to be settled and the same be released to the Plaintiff. The Defendant claimed costs. But he later admitted the property belonged to the Plaintiff and he signed a Declaration Trust. But after 1 year the 1st Defendant made an about turn and claimed the property was to be sold and shared the profits, he made a conclusion that the original title had been lost. He obtained a provincial title and subdivision it and sold part of it and hence the basis of the case

C. Examination in Chief of PW - 1 by Mr. Mogaka Advocate.

21. PW - 1 testified under oath and in Arabic language. He was called Saleh Omay Ba Mahdi. He was the Plaintiff. The witness told the court that he knew the 1st Defendant. He knew the legal entity known as Rehab Trading Company Ltd. He recalled signing the witness statement dated 6th December, 2016



- which he adopted as his evidence. He was aware of the list of documents dated 6th December, 2016 which he relied on as his evidence. Further to this, he filed 20 documents which were produced as the Plaintiff Exhibit 1 to 20 as his evidence. The witness told the court that he would rely on the court order Winding Up Order issued on 16th June, 2023. In the year 1987 he came to Kenya to visit as a tourist. In the course of the visit, he met Bamahriz 1st Defendant. He had known him earlier at Riyadh Saudi Arabia. He had been introduced to him through his brother Omar. While there, the Defendant made know that there were a lot of business opportunities in Kenya.
22. PW - 1 stated that he stayed in Kenya for 2 months. They went to look for market and business opportunity in the Flour Mills. Hence they agreed to start business on it. They incorporated the 2nd Defendant Company. He gave the Capital. He was advised being a foreigner he could not incorporate a Company alone. In the course of time, he was sold of 50%;50% shares. He objected on the 50:50 but he was told that was the law. They went to the Swiss Bank and eventually bought the land and they were issued with a Certificate of title deed – in the names of Rehab Trading Co. Ltd. on 4th January, 1988 under Registration of Land Act Cap 30. He was showed the original title and it had never been lost. It – measures 0.16HA with reference no. Mombasa/Block XVII/1129.
23. PW - 1 confirmed that he knew a lawyer called B.A. Balala Mohamed Advocate. They went to his office with Mr. Bamahriz. He would remember giving the Advocate the Power of Attorney in the year 1987. He recalled it was revoked. In the year 2010, he was given a Power of Attorney by Mohamed Bamahriz. With reference to page 19(i) he recalled that there was a sale agreement but later on it (10th April, 2010) was cancelled. It was Bamahriz who cancelled it as he did not want to give an account. In its place there was a Declaration Trust on Pages 18 to 19 dated 12th April, 2010. He stated that the Company and Land belonged to him. He was ready to sign the shares to the witness. Mr. Mohamed confirmed that the agreement of 10th April, 2016 was cancelled. Mr. Mohamed signed the Declaration Trust.
24. With reference to the Plaint – this land had already been sub – divided and would like to have all the sub – divided titles to revert back to him i.e. they remained with one. He wanted the title to the suit property to be registered in his name.

D. Cross Examination of PW - 1 by Mr. Mwanzia Advocate.

25. PW - 1 confirmed that the property belonged to REHAB TRADING CO. LTD. He had 50:50 shares, but the Defendant withdrew his shares. The document was there to show that the Company belonged to him alone. He was not aware whether there was a WINDING UP Order for the Company. He was aware he applied for the Winding Up of the Company to be set aside. While this was going on this case was already in ELC. The witness confirmed that there was misunderstanding with Mr. Mohamed Bamahriz. There was no enmity but its about the rights. He was aware that Advocate Paul Wambua was appointed to sale the shares of the company. There were no issues on the shares apart from accounting after the selling them. There was mistrust about the money. When he left Kenya to Saudi Arabia Bamahriz also left to Yemen. There was no one running the Company.
26. PW - 1 stated that he gave US\$353,000/=. He never brought these documents as he knew Mohamed withdrew from it. He did not know the value of the Company neither did he speak English and hence he would not know the meaning of such terms as Resolution by a Company. As far as he was concerned there was no Company called Rehab Trading Company. Mr. Mohamed Bamahriz signed the Declaration Trust.
27. PW - 1 stated that he was present when Mr. Mohamed did that. In effect from the terms of that document he surrendered all his shares of the Company to him. The witness told the court that he was the one who had the company and the title deed to the suit land which they purchased using his



money. He was not aware that Mr. Mohamed Bamahriz caused the land to be sub-divided after he stated that the title deed was lost. The witness urged the Court to have all those sub – divided parcels transferred to him. Hence his purpose of coming to Court was to affirm to these facts and get his right through a Judgment.

E. Re - Examination of PW - 1 by Mr. Mogaka Advocate.

28. PW - 1 reiterated the he recalled that Mr. Bamahriz had indicated that they take time to allow an out of court negotiations. However, despite of this there had been no outcome of the said negotiation. With reference to the Declaration of Trust on page 18 of the Plaintiff dated 12th April, 2010. Now that the negotiations had failed he urged the Court to order for the land to be registered in his name which was what was contained in the Declaration Trust.
29. The Plaintiff closed his case through his advocate Mr. Mokaya Advocate on 3rd October, 2024.

V. The Defendants' case

30. The 1st Defendant filed his Statement of Defence. He averred that the 2nd Defendant was under liquidation by virtue of an Order given on 25th September, 2015 by the High Court in Mombasa in Winding Up Petition No. 3 of 2014. In response to the contents of Paragraph 5 of the Plaint the 1st Defendant averred that it was the Plaintiff's idea to invest in flour milling industry in Kenya and to put the management and control of his investment in the 1st Defendant. The 1st Defendant categorically denied to have made any representations to the Plaintiff.
31. In response to Paragraph 6 of the Plaint, the 1st Defendant averred that it was a fact that he was a Kenya Citizen. He had sufficient knowledge on how the local business environment. He had enough contacts to establish/create clientele in the flour milling factory products and/ or any other legal business. However, the insinuation by the Plaintiff that the 1st Defendant made any representations to the Plaintiff for the purposes of entering into a business relationship with him was denied.
32. Save that the 2nd Defendant was incorporated as the vehicle through which the Plaintiff and the 1st Defendant would do their business, the allegations that the 1st Defendant's contribution was only citizenship, business management knowhow, contacts management and control without any financial contribution is denied. And the 1st Defendant averred that over the years he had contributed a lot more financially and in kind to the investments of the 2nd Defendant than the Plaintiff. Further to the immediately foregoing averments, the 1st Defendant averred that while the Plaintiff has done nothing towards the acquisition and preservation of the 2nd Defendant's assets, the 1st Defendant had made numerous trips since the year 1993 between Kenya and Yemen, between Nairobi and Mombasa, between Mombasa and Malindi and locally in Mombasa to various offices to procure and preserve the assets of the 1st Defendant all at an expense.
33. The 1st Defendant admitted that the Plaintiff was a resident of Riyadh in Saudi Arabia and that the Plaintiff executed a general power of attorney on 29th September, 1987. The 1st Defendant, however denied that the Plaintiff was acting on any representations by the 1st Defendant. The Plaintiff executed the power of attorney as a free agent and being of sound mind for the reason that it was the 1st Defendant who would be running the affairs of the 2nd Defendant in the absence of the Plaintiff and hence there was a need for the 1st Defendant to be seized of the powers to do what the Plaintiff was prevented from doing by reason of his absence.
34. In response to the allegations at Paragraphs 9,10,11 and 12 of the plaint the 1st Defendant averred that both the Plaintiff and the 1st Defendant are equal shareholders in the 2nd Defendant and the



- initial capital of the 2nd Defendant was contributed in equal shares. It was this initial contribution by the Plaintiff and the Defendant that was used to purchase two properties namely Plot No. MSA/XVII/1129 at a purchase price of a sum of Kenya Shillings Three Million Three Hundred Thousand (Kshs. 3,300,000/-) and Portion No. 2045 (Original 4185/2) Malindi at a purchase price of a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-).
35. The 1st Defendant denied that he either for his personal benefit or for the benefit of the 2nd Defendant, purchased any other property in Malindi or elsewhere that the Plaintiff could lay a claim to. Further to the averments of Paragraphs 9 and 10 hereinabove, the 1st Defendant denied that the Plaintiff has invested the sum of USD 352,332 in the affairs of the 2nd Defendant. Further and without prejudice to the immediately foregoing averment the 1st Defendant hastened to add that the Plaintiff has never made any deposit directly to the account of the 2nd Defendant, and it was not all the money that was deposited with the 1st Defendant that was meant for the sole use in the affairs of the 2nd Defendant. The 1st Defendant averred that the properties were occupied by squatters and the 1st Defendant had to follow legal procedures to remove and to compensate them so that they would move out of the properties. In this respect the 1st Defendant had spent a lot of money. Other expenses too were incurred in surveying and transfer processes.
36. Sometimes on or about March, 1989 the Plaintiff visited Kenya and this is when the disagreement between the Plaintiff and the 1st Defendant started after the Plaintiff told the 1st Defendant that his (Plaintiff's) interest was actually not to deal in flour milling but to illegally trade in game trophy (specifically rhino horns), cloves from Zanzibar through the port of Mombasa and export of "ambari" (a fish product) found around Lamu Island. When the 1st Defendant declined to do such business the Plaintiff said that he is no longer interested in doing business with the 1st Defendant. The Plaintiff told the 1st Defendant to dispose of the two properties and pay to the Plaintiff the sum of Kenya Shillings Six Million Fifty Five Thousand One Thirty Two Hundred (Kshs. 6,055,132/-) after the sale of both properties. The Plaintiff alleged that this was his capital contribution.
37. The 2nd Defendant then went ahead and disposed off the Malindi property with the full knowledge and approval of the Plaintiff. The money was spent on affairs of the 2nd Defendant and more particularly in the preservation of Plot No. MSA/XVII/1129. Sometimes in the year 2010 while in the process of procuring a buyer for Plot No. MSA/XVII/1129 the 1st Defendant was approached by members of the Pentecostal Church who showed an interest in the property for their church activities. The Plaintiff learnt of this through one Mr. M. S Bawazir, who had at all material times shown an interest in acquiring the property through unlawful means. The Plaintiff was also advised that the property had appreciated in value as it was now worth in the excess of one hundred and fifty million. The property was situated at Kikowani/Kibokoni area opposite Kikowani Muslim graveyard where properties are predominantly owned by Muslims.
38. The Plaintiff came to Kenya where he was booked in hotels wherein the Plaintiff and the 1st Defendant held meetings on 5th and 6th April, 2010 at Tamarind Hotel and on 7th, 8th and 9th April, 2010 at Nyali Beach Hotel. On 9th April, 2010 the Plaintiff unilaterally did some calculations and concluded that he had spent USD 330,000 in the business project. The Plaintiff wrote down his calculation in Arabic on a piece of paper which he gave to one Mr. Balala of Balala Abeid & Co, Advocates on 10th April, 2010. The 1st Defendant was not even given a copy.
39. In response to the allegations of paragraph 12 of the Plaintiff the 1st Defendant averred that as stated earlier hereinabove there was only one plot purchased in Malindi which was disposed of with the full knowledge, consent and authority of the Plaintiff. The 1st Defendant admits that on 10th April, 2010 the Plaintiff and the Defendant held a meeting in the office of Mr. Mohamed Balala of Balala



Abeid & Co, Advocates. During all the meetings at the hotels and at the advocate's office threats and intimidation as well as deceit were used against the 1st Defendant with a view that he forego and surrenders all his interests in Plot No. MSA/XVII/1129

40. In further reply to the allegations of Paragraph 12 of the Plaintiff the 1st Defendant averred that he was a stranger to the allegations that his Power of Attorney dated 29th September 1987 was revoked at any time prior to, during or after the meeting as no indication was made to the 1st Defendant of the revocation or of an intention to revoke the Power of Attorney. In response to the allegations of paragraphs 13 and 14 of the Plaintiff the 1st Defendant averred at the office of Mr. Mohamed Balala prepared an agreement dated 10th April, 2010 was put down in writing, executed by the Plaintiff, the 1st Defendant and Mr. Balala. It was witnessed by Mr. A. O. Abeid of the said firm. The tenor and intent of the agreement was that the 1st Defendant and the Plaintiff had given Mr. Balala authority to sell the land parcel at a reserve price of a sum of Kenya Shillings One Fifty Five Million (Kshs. 155,000,000/-). The 1st Defendant and the Plaintiff were then to agree on accounts and the proceeds of the intended sale were to be shared equally by both the Plaintiff and the 1st Defendant.
41. In further reply to the allegations of Paragraphs 13 and 14 of the Plaintiff the 1st Defendant averred while still in the office of Mr. Mohamed Balala on 10th April, 2010 and after the 1st Defendant had signed the aforementioned agreement, threats and intimidation as well as deceit were employed by the Plaintiff and Mr. Balala to obtain the 1st Defendant's signature appended onto a power of attorney and purported declaration of trust. There was an intended deceit and fraud, since he never been to Balala Abeid & Co, Advocates after signing of the four documents which included the declaration of trust on the 10th April, 2010. The 1st Defendant repeated he never signed any documents on the 12th April, 2010 or any day after in year, 2010. The nature of threats, intimidation and deceit included but was not limited to:-
- a. Threats that a declaration of "Fatwa" (curse used by Muslims to declare a Muslim to be a non-believer ("kafir")) who deserved death by stoning). This was allegedly because I had shown an intention to sell the property to the members of the Pentecostal Church.
 - b. Deceit that without the 1st Defendant depositing the original title deed of the property and the official seal of the 2nd Defendant with the firm of Advocates. Then the firm of advocates would not be able to sell the property.
 - c. Deceit whereby the Plaintiff, while holding the Holy Quran in his hand swore that in consideration of the 1st Defendant executing a power of attorney as well as a declaration of trust in favor of the Plaintiff, the Plaintiff would pay to the 1st Defendant his equal share of the proceeds of the intended sale based on the contents of the agreement dated 10th April, 2010 out rightly immediately on the Plaintiff's return to Riyadh. The money to be transferred into the 1st Defendant's account in Yemen.
 - d. Deceit to the effect that the Law firm of Mr. Balala was representing both the Plaintiff and the 1st Defendant and that the Advocate would work towards securing the best interests of the Plaintiff, the 1st Defendant and the 2nd Defendant.
 - e. A promise by the Plaintiff to make an advance payment of the sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) to the 1st Defendant on 11th April 2010 to cover the 1st Defendants travel and accommodation expenses.
 - f. Deliberately calculated failure to allow the 1st Defendant to read through and understand the contents of the power of attorney as well as a declaration of trust in favour of the Plaintiff.



42. On 11th April, 2010 the Plaintiff called the 1st Defendant to Nyali Beach Hotel where the Plaintiff delivered the sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in cash to the 1st Defendant and promised to immediately make a further transfer of Kenya Shillings One Million (Kshs. 1,000,000/-) (while the Plaintiff was still here in Kenya) to the 1st Defendant's bank account in Yemen. The Plaintiff in deed transferred the said Kenya Shillings One Million (Kshs. 1,000,000/-) to the 1st Defendant's account in Yemen.
43. The 1st Defendant averred that he then travelled back to Yemen where after a while he called the Plaintiff requesting to be paid as had been agreed on 10th April, 2010. Regrettably, the Plaintiff informed the 1st Defendant on the phone that he did not intend to pay him any money. Subsequently the Plaintiff cut off all communication with the 1st Defendant, completely refused to pick any of the 1st Defendant's telephone calls and/or to talk to any emissaries of the 1st Defendant sent to contact him in Riyadh.
44. In response to the allegations of Paragraphs 15 and 16 of the Plaint, the 1st Defendant averred that when he realized that the Plaintiff was not willing to pay him his share in the properties of the 2nd Defendant as agreed on 10th April, 2010, the 1st Defendant travelled back to Kenya sometime in June 2011. He visited the Law offices of Messrs. Balala Abeid & Company Advocates where he learnt that the property had not been sold. To the 1st Defendant's surprise, however, the firm of advocates denied being in possession of the title deed that the 1st Defendant had deposited with them as explained hereinabove. They also purported that they had no contact with the Plaintiff.
45. It became apparent that the firm of Balala Abeid & Company Advocates and/or the Plaintiff had misplaced and/or lost the original title deed. The 1st Defendant realized that without a title deed the property could not be sold and the 1st Defendant would, therefore, never be able to recover his share in the assets of the 2nd Defendant. The 1st Defendant duly, reasonably and lawfully made a report of the loss/or misplacement of the title deed, then followed the laid down procedure including publication of a gazette notice and since neither the Plaintiff nor any other person objected, the 1st Defendant (on behalf of the 2nd Defendant) was issued with a provisional title deed. The 1st Defendant stated that he executed searches at the lands office and there was no restriction registered in respect of the suit property when the 1st Defendant was issued with a replacement title. The 1st Defendant denied the allegations of paragraphs 15 and 16 of the plaint. Since the incorporation of the 2nd Defendant the Plaintiff had always taken a back seat and when he cut off communication from the 1st Defendant and upon the 1st Defendant confirming that Messrs. Balala Abeid & Company Advocates had no contact with the Plaintiff, as was confirmed by a letter dated 20th June, 2011 to the 1st Defendant's that the 1st Defendant did the lawful thing by applying for a provisional title deed.
46. The 1st Defendant averred that errors in the original title deed, if any which was denied, was not the doing of the 1st Defendant. In response to the allegations of Paragraphs 18 and 19 of the Plaint, the 1st Defendant averred that it was not him who initiated the subdivision process. Indeed after obtaining the Provisional title deed the 1st Defendant duly and diligently petitioned for the dissolution of the 2nd Defendant in Mombasa.
47. In response to the allegations of Paragraphs 18 and 19 of the Plaint, the 1st Defendant averred that it was not him who initiated the sub - division process. Indeed after obtaining the Provisional title deed the 1st Defendant duly and diligently petitioned for the dissolution of the 2nd Defendant in Mombasa High Court Winding Up Petition No. 3 of 2014 and for the disposal of the assets of the 2nd Defendant and a sharing of the proceeds between him and the Plaintiff in equal shares. In the said Petition the 1st Defendant clearly stated that the subdivision process had been completed except for registration. Nothing is further from truth than any allegations by the Plaintiff that the 1st Defendant



had ever acted fraudulently or that it was the 1st Defendant who caused the subdivision of the property. The 1st Defendant admitted that he had demanded his entitlement to a sum in excess of a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/) in the year 2011. And the 1st Defendant averred the current valuation of the property could now be in excess of a sum of Kenya Shillings Three Hundred Million (Kshs. 300, 000, 000.00/=) of which he deserved and was entitled to a half share. The allegations that the 1st Defendant had reneged on declaration of trust dated 12th April, 2010 and/or that the agreement dated 10th April 2010 between the Plaintiff and the Defendant was revoked / cancelled are denied and an explanation of the circumstances in which the declaration of trust was executed is given herein above.

48. In further response to the allegations of paragraph 21 of the Plaintiff the 1st Defendant averred that he had been advised by his advocates on record, which advice he verily believed to be true, that the coming into partnership, incorporating a company and having jointly acquired property in the name of the 2nd Defendant was akin to entering into a contract wherein for either party to acquire the other's interests in the property, there had to be an offer, an acceptance and a consideration. The 1st Defendant averred that he was entitled to a half share of the property in dispute as a consideration for his half share membership of the 2nd Defendant. In response to Paragraph 22 of the Plaintiff, the 1st Defendant averred that as correctly stated in paragraph 2 of the Plaintiff, the 1st Defendant was a resident Yemen. Where his family was and he only visited Kenya for the purposes of managing the affairs of the 2nd Defendant and more particularly and specifically ensuring that the property in dispute was well preserved and squatters were kept off. For the purposes of preserving the property, the 1st Defendant had diligently taken the following actions:-
- a. Caused the property to be wire fenced, which fence was damaged by people intending to squat and/or trespass on the property,
 - b. Allowed small scale traders to do their businesses on the pavement on the fringes of the property without demanding for any rent,
 - c. Paid watchmen and caretakers to keep off unwanted people from the property,
 - d. Allowed persons of meager means from the neighboring to collect water from a well situated within the property. And for this purpose the 1st Defendant had maintained a water pump, connected electricity to the property, pays electricity charges for water pump and for lighting up the property at night and any minimal charges paid for the water by water vendors only goes to the upkeep of the watchmen and caretakers and settlement of the electricity bills. And the 1st Defendant hastened to add that many a time the money was not enough and he was forced to spend his own money for this purpose as it was not easy to maintain the property because of the danger posed by unwanted trespassers.
49. And the 1st Defendant categorically stated that the property in dispute was an open field (undeveloped), which in spite of the 1st Defendant's efforts to keep clear of trespassers and squatters was at most times a no go zone by reason of invasion by criminal elements. For the reasons given in the immediately foregoing paragraph the 1st Defendant averred that his acts of occupation are necessary act and acts that would be expected of any diligent owner of a parcel of land and the 1st Defendant did not utilize the land for a financial benefit to be gained from the water harvested there from.
50. The 1st Defendant averred that as far as the books of accounts of the 2nd Defendant was concerned, the 1st Defendant used to diligently keep and maintain accounts until the Plaintiff demanded for the books and all the important documents pertaining to the company on 9th April, 2010 at one of the meetings



in Nyali Beach Hotel and the Plaintiff subsequently failed to return the books. The 1st Defendant never followed up when an agreement was reached at the Law offices of Messrs. Balala Abeid & Company Advocates that the 1st Defendant would paid his share of the investments of the 2nd Defendant. In any case, save for the initial capital investment into the 2nd Defendant, expenses on the purchase 2nd Defendant's assets and related expenses (i.e. towards surveying, registration of the properties, legal costs on removal of squatters and costs on maintenance of the properties) the 2nd Defendant had never traded or received any money save for the amount received upon the sale of the Malindi property which amount was swallowed up in the expenses of the 2nd Defendant.

51. In reply to the allegations of Paragraphs 23, 24 and 25 of the Plaint, the 1st Defendant admitted his intention to dispose of Plot No. MSA/Block XVII/1129 through lawful means and with the blessings of this Honourable Court through Orders of the Court in Winding Up Petition No. 3 of 2014. The reasons for such disposal are, "inter alia", that:-
- a. The 1st Defendant and the Plaintiff were the only shareholders and directors of the 2nd Defendant.
 - b. The Plaintiff never resided and he had never resided in Kenya where all the interests of the 2nd Defendant were located. Similarly the 1st Defendant relocated from Kenya to Yemen in August, 1993 with his entire family having disposed of all his properties in Kenya and he did not intend to relocate back to Kenya.
 - c. Since the 2nd Defendant was incorporated on 6th October 1987 it had never been involved in any meaningful activity save for the purchase of Plot No. MSA/Block XVII/1129 and the Malindi plot. Indeed the purpose for which the 2nd Defendant was incorporated as per its objectives in its Memorandum of Association had never been achieved.
 - d. Since the 2nd Defendant acquired Plot No. MSA/Block XVII/1129 on 31st December, 1988 the 2nd Defendant had never developed the property. Indeed if it were not for the 1st Defendant's personal input in terms of money and time, the 2nd Defendant would be said to have abandoned the property in favor of squatters and trespassers. In this respect the 1st Defendant had made more than 17 trips from Yemen to Kenya and spent cumulatively more than 5 years away from his family in Yemen just for the purposes of ensuring the preservation of the property.
 - e. The 1st Defendant had invested his time and money towards the acquisition of the property through his shareholding in the 2nd Defendant in a period of about 30 years now and it was time that he enjoyed the fruits of his investment at his advanced aged of 65 years.
 - f. The relationship between the Plaintiff and the 1st Defendant being the only shareholders and directors of the 2nd Defendant has irretrievably broken down and they cannot see eye to eye and or make any meaningful mutually agreed decisions in the interests of the 2nd Defendant for the purposes of safeguarding their respective interests in the 2nd Defendant.
 - g. It was only in the best interests of justice that the property was sold and the proceeds shared between the Plaintiff and the 1st Defendant or that the Plaintiff buys off the half share of the 1st Defendant in the 2nd Defendant which half share was valued at a half of the current valuation of the property.
52. The 1st Defendant averred that the Plaintiff was aware at the time of filing this suit and /or subsequently became aware after filing this suit that there is a pending Winding Up Cause No. 3 of 2014. The Plaintiff's grievances, if any, which is denied, can only be addresses in the pending Winding Up Cause.



And the 1st Defendant averred that being a director and only other shareholder of the 2nd Defendant the Plaintiff lacks capacity to bring this suit as it amounts to his right arm suing his left arm or vice versa. The 1st Defendant shall raise a preliminary point of objection to the dismissal of this suit on this ground.

53. For these reasons, the 1st Defendant prayed that Plaintiff's suit be dismissed with costs.
54. On 7th October, 2024 the 1st Defendant through his counsel, Mr. Mwanzia Advocate marked his case closed.

VI. Submissions

55. On 7th October, 2024 after the Plaintiff and Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that on 31st January, 2025 the Honourable court reserved a date to deliver its Judgement on Notice.

VII. Analysis and Determination

56. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
57. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
 - a. Whether the Declaration of Trust dated 12th April 2010 is valid and binding upon the 1st Defendant.
 - b. Whether the Plaintiff has proven his claim of fraud against the 1st and 3rd Defendants regarding the subdivision of the suit property.
 - c. Whether the Plaintiff is entitled to the remedies sought, specifically a declaration that the 2nd Defendant holds the suit property in trust for him and an order for its transfer.
 - d. Who bears the costs of the suit.

Issue No. a). Whether the Declaration of Trust dated 12th April 2010 is valid and binding upon the 1st Defendant

57. Under this sub title, the Court is called upon to examine the declaration of trust and whether it was binding. But before examining the nature and declaration of the trust, it is important to examine the nature of the Parties' relation and the ownership. The Plaintiff contends this was essentially a principal-agent relationship. He was the sole financier, and the 1st Defendant was to contribute non-financial expertise. The 2nd Defendant Company was merely a legal vehicle chosen because of the Plaintiff's foreign status, and it held the property in trust for him.
58. The Defendant asserts this was a 50/50 joint venture from the outset. Both parties were to contribute, and the initial capital for the two purchased properties came from both of them. The company's share structure reflects this equal partnership. The Plaintiff's claim of being the sole financier is supported by his testimony and the lack of any documented financial contribution from the 1st Defendant. The company's 50/50 shareholding is a strong point for the Defendant, but the court may look beyond the corporate veil to the substance of the agreement, especially given the Plaintiff's claim of a trust.



59. To this end, the Court finds that the Plaintiff provided the entire capital for the purchase of the properties. In my analysis it is clear that the 1st Defendant's contribution was his Kenyan Citizenship, local knowledge and management. However, the initial understanding appears to have been that this entitled him to a 50% share in the venture, as evidenced by the company's structure. The stronger claim may not be a resulting trust for the sole benefit of the Plaintiff, but rather an acknowledgement of the Plaintiff's significantly larger financial contribution when it comes to an accounting.
60. The validity of this document is the cornerstone of this case. The Plaintiff's case hinges on the validity of the Declaration of Trust executed by the 1st Defendant on 12th April, 2010. This document unequivocally states that the entire shareholding of the 2nd Defendant company and the suit property (MSA/Block XVII/1129) belong solely to the Plaintiff. PW - 1 testified that it was signed voluntarily by the 1st Defendant in the presence of an advocate. PW1 produced the original document as an exhibit. His testimony was that this Declaration was signed by the 1st Defendant voluntarily in the presence of Advocate Mohamed Balala, revoking a prior sale agreement (dated 10th April, 2010) and confirming the Plaintiff's sole beneficial ownership.
61. The 1st Defendant, however, alleges this document was procured through coercion, intimidation, and deceit. He claims he was threatened with a "Fatwa" (a religious curse), deceived into depositing the title, and promised immediate payment of his share of the proceeds, which never materialized. Crucially, he denies signing any document on 12th April, 2010, asserting all signatures were appended on 10th April, 2010 under duress.
62. The law on this is clear. He who alleges fraud, duress, or any other vitiating factor must prove it. The provision of Section 107 of the *Evidence Act*, Cap 80, provides that "the burden of proof" lies on the person who asserts the affirmative of an issue. This principle was aptly stated in the case of "Kinyanjui Kamau – Versus - George Kamau [2015] eKLR":
- “Allegations of fraud and illegality are serious and must be specifically pleaded and strictly proved.”
63. The provision of Section 3 (3) of the *Law of Contract Act*, Cap. 23 Laws of Kenya) provides that: -
- “No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (iii) incorporates all the terms which the parties have expressly agreed in one document; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
64. The 1st Defendant pleaded these allegations but led no evidence to prove them. He did not testify, call the advocate who was allegedly present during the coercion, or provide any independent evidence to corroborate his serious claims of threats and deceit. His unsubstantiated allegations, contained only in his pleadings, remain mere assertions. In contrast, the Plaintiff produced the original document, and his testimony on its execution was unchallenged through cross-examination on this specific point.



65. The Declaration of Trust is a contract for the disposition of a beneficial interest in land (the 1st Defendant's share in the company, which owns the land). The document is:
- a. In writing
 - b. Signed by the 1st Defendant (the party to be charged).
 - c. It appears to incorporate the key term: that the 1st Defendant holds his share and the company's asset in trust for the Plaintiff.
 - d. Attested by a witness (Advocate Mohamed Balala).
 - e. Therefore, it prima facie satisfies the formal requirements of Section 3(3) of the [Law of Contract Act](#), making it enforceable
66. The transaction was also provided for under the Registered [Land Act](#) (Repealed) and the [Land Registration Act](#), 2012. While the property was initially registered under the repealed Registered [Land Act](#), Cap. 300 (Now repealed), the current law is the [Land Registration Act](#), No. 3 of 2012. The provision of Section 26 (1) of the [Land Registration Act](#), 2012 provides that a certificate of title shall be held as conclusive evidence of proprietorship, subject to any overriding interests and entries on the register. Further, the provision of Section 28 of the [Land Registration Act](#), 2012 acknowledges that the rights of a person in actual occupation of land constitute an overriding interest, even if not registered. A trust is a classic example of such an unregistered but enforceable interest.
67. It is this Honourable Court's conceded conclusion that the Declaration of Trust creates an equitable interest (a trust) over the property registered under the 2nd Defendant's name. Kenyan courts consistently uphold that the statutory framework for land registration does not abolish trusts. A court can order the rectification of the register to reflect the true beneficial owner once a trust is proven.
68. In the case of "Wanjiku Jane Mwangi – Versus - Peter Mungai Njoroge & another [2020] eKLR", the court affirmed that a declaration of trust must be in writing, signed, and attested to be enforceable under Section 3(3) of the [Law of Contract Act](#). A written and attested document creates a strong, prima facie case of the existence of a trust. In the present case, the Plaintiff's document is written, signed and attested. This places a heavy evidential burden on the 1st Defendant to prove why this apparently valid document should not be enforced.
69. Further in the case of "Cyrus Karanja Mbugua – Versus - Priscilla Nyawira Mbugua [2019] eKLR", the Court of Appeal stated that: -
- “.....for a trust to be implied, the claimant must prove it on a balance of probabilities. However, an express trust, created by a clear written declaration, is the easiest to enforce. The court will give effect to the clear intention of the declarant.”
70. With reference to this instant case, the Plaintiff relied on an express trust, not an implied one. The language of the declaration (“the entire shareholding... belongs to the Plaintiff”) is clear and unambiguous. The court's duty is to enforce this expressed intention.
71. The Defendants further challenged the validity of the Declaration of Trust. The burden of proving the allegations of coercion, intimidation, and deceit rests squarely on the 1st Defendant. His defence appears inconsistent. He admits to receiving a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) from the Plaintiff immediately after the meeting, which contradicts a narrative of pure coercion and suggests a form of consideration or settlement. Furthermore, he failed to adduce any evidence to



substantiate his serious allegations. He did not call any witnesses, including the Advocate who was present, to corroborate his story. In contrast, the Plaintiff produced the original document.

72. The 1st Defendant's defence hinges on vitiating factors. The case law sets a high bar for proving these claims. In the case of "Pankaj Somaia - Versus - Bimal Shah & another [2019] eKLR" the Court held that the burden of proving duress or undue influence lies squarely on the party alleging it. The court defined duress as "pressure of a kind which amounts to a coercion of the will, leaving the party with no reasonable alternative but to submit". The 1st Defendant in this instant case, must provide compelling evidence to support his claim of threats and a Fatwa. His subsequent action of accepting a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) is powerful evidence against his claim. A person acting under true duress would not later accept a benefit from the agreement; this act suggests ratification of the contract.
73. In make reliance further to the case of "Joseph Ochieng & 2 others – Versus - First National Bank of Chicago Civil Appeal No. 147 of 1991", the Court of Appeal held that for a party to succeed in a defence of duress, they must prove that the pressure was illegitimate and was a significant cause of them entering into the contract. In this instant case, the 1st Defendant must not only prove the threats occurred but also that they were the reason he signed, and that he had no other choice (e.g., he could have refused and sought legal protection immediately). His delay in challenging the document until after the relationship broke down completely weakens his claim.
74. Furthermore, the 1st Defendant's conduct after the alleged duress is inconsistent with his claim. He admitted to receiving a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) from the Plaintiff immediately after the meeting. A person who has just been threatened and coerced would not calmly accept a substantial payment without protest or immediate report to authorities.
75. I also take note that in the case of "Nelson Kivuwai & 4 others – Versus - Credit Bank Limited & another [2018] eKLR", the court reiterated that the corporate veil (the principle that a company is a separate legal entity from its shareholders) can be lifted where a company is used as a vehicle for fraud or to hold property in trust for its beneficial owner(s). In this instant case, the 2nd Defendant is a shell company with no business operations, used solely to hold the suit property. The court chooses to look past the company's legal ownership and goes ahead to examine the beneficial ownership based on the contributions and agreements of its shareholders (the Plaintiff and 1st Defendant). The Declaration of Trust is direct evidence of the true beneficial ownership.
76. Based on the statutory provisions, judicial precedence and the my analysis above, it is clear that the Declaration of Trust dated 12th April 2010 meets the formal requirements of Section 3(3) of the [Law of Contract Act](#). It is therefore prima facie enforceable. The 1st Defendant, as the party alleging the duress and deceit, bears the heavy burden of proving these vitiating factors on a balance of probabilities.
77. I further find the evidence by the 1st Defendant of the duress not credible because his actions (accepting a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) are inconsistent with someone who signed under coercion. The 1st Defendant further took no immediate steps to repudiate the agreement or report the alleged criminal duress. I find that his story was an afterthought designed to resile from a bad bargain once his relationship with the Plaintiff became soured.
78. For these reasons, I find that the 1st Defendant has failed utterly to discharge the burden of proving that the Declaration of Trust was procured by fraud, duress, or any other unlawful means. I hold that the Declaration of Trust dated 12th April 2010 is a valid, binding, and conclusive document. It represents a clear and voluntary intention by the 1st Defendant to acknowledge that the Plaintiff is the sole beneficial owner of the 2nd Defendant and the Suit Property.



79. Consequently, it is a valid and enforceable document. The 1st Defendant is legally bound by its terms, which declare that he holds his interest in the 2nd Defendant and the suit property in trust wholly for the benefit of the Plaintiff.

Issue No. b. Whether the Plaintiff has proven his claim of fraud against the 1st and 3rd Defendants regarding the subdivision of the suit property

80. Under this sub - title, the Honourable Court shall examine whether the Plaintiff has proved fraud against the 1st Defendant. The case against the 3rd Defendant – (the Land Registrar) is more nuanced but still arguable. The Plaintiff alleges that the 1st Defendant acted fraudulently by obtaining a replacement title and subdividing the Suit Property into Plots Numbers 1611 to 1632. The elements of fraud require proof of:

- i. a false representation made by the defendant;
- ii. knowledge that the representation was false (or recklessness as to its truth);
- iii. an intention that the Plaintiff should act on it; and
- iv. resulting loss or damage to the plaintiff. See “Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”.

81. The provision of Section 26 (1) of the [Land Registration Act](#), 2012 provides that:

“The certificate of title issued by the Registrar upon registration... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge, except —

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

82. This section establishes the principle of indefeasibility of title, which is a cornerstone of Kenyan land law. However, it explicitly carves out an exception for fraud. A title obtained through fraud is not indefeasible and can be vacated by the court.

83. The provision of Section 80 of the [Land Registration Act](#), 2012 provides that: -

This section gives the court the power to order the rectification of the register by directing the cancellation of a certificate of title that was issued, inter alia, “wrongly, illegally or through a mistake.”

84. The Kenyan Court have consistently defined fraud in the context of land law. It not mere negligence or a simple mistake. The classic definition comes from the case of “Ungaran Ole Kiminta & Another – Versus - Kisumu Hotel Ltd & Others [1966] EA 70”, which has been cited with approval in numerous recent cases: -

“Fraud” means actual fraud or some act of dishonesty. It does not mean equitable or constructive fraud, which may be founded on a want of care or caution. Mere want of care or caution which may amount to negligence is not fraud. A purchaser who has notice that



his vendor is a trustee or fiduciary agent and that the transfer to him is a breach of duty is guilty of fraud.

85. In simpler terms, to prove fraud, the Plaintiff must show that the Defendant acted knowingly, intentionally, and dishonestly. The Kenyan courts have consistently held that allegations of fraud are serious and must be proved to a higher standard than a mere balance of probabilities, though not as high as beyond a reasonable doubt (the criminal standard). In the case of “Vishva Stone Suppliers Company Limited – Versus - RSR Stone (Kenya) Limited & 4 others [2020] eKLR”, the Court of Appeal reiterated that “fraud must be strictly pleaded and strictly proved.” The party alleging fraud must provide concrete evidence and particulars; it is not enough to merely make the allegation. The Plaintiff herein has pleaded specific particulars of fraud in his Pleint (e.g., falsely swearing an affidavit that the title was lost, subdividing while knowing the original was held by the Plaintiff, doing this after the revocation of the Power of Attorney).
86. Further in the case of “Arun C. Sharma – Versus - Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 2 others [2014] eKLR”, the Court defined the ingredients of fraud as: -
- (i) A false representation made by the defendant;
 - (ii) Knowledge that the representation was false (or recklessness as to its truth);
 - (iii) An intention that the plaintiff should act on the representation; and
 - (iv) The plaintiff suffering loss as a result of relying on the representation.
87. I also make reference to the case of “Njeri Wangari & another – Versus - Mary Wanjiru Igamba & 4 others [2019] eKLR”, the court stated that for a title to be impeached for fraud, the registered proprietor must be shown to have been a party to the fraud. Innocent acquisition for value from a fraudulent party is protected, but the initial fraudulent actor is not. From the analysis of this instant case, it is clear that the 1st Defendant is the direct instigator of the fraud, not an innocent purchaser.
88. The Plaintiff’s evidence directly targets these ingredients. On false representation, the 1st Defendant according to the evidence made a false statement on oath by swearing a statutory declaration that the original title for MSA/Block XVII/1129 was lost. This was the foundational act for the fraud. The 1st Defendant knew this representation was false. This is the most crucial piece of evidence. The Plaintiff produced the original title deed in court. This single act devastatingly proves that the 1st Defendant’s oath was knowingly false. His claim that the advocate lost it is negated by the fact that the Plaintiff had it all along, which the 1st Defendant likely knew.
89. It is clear on the intent to deprive that the 1st Defendant intended for the Land Registry to act on this false representation to issue a provisional title, which he then used to subdivide the property and effectively disinherit the Plaintiff. His actions were a deliberate scheme to circumvent the Plaintiff’s ownership rights as declared in the Trust document.
90. The resulting loss was that the Plaintiff suffered the loss of his property was subdivided and titles issued to others (likely the 1st Defendant or his associates), threatening his ownership.
91. PW - 1 testified and produced the original title deed for the Suit Property, proving he had possession of it all along. Despite this, the 1st Defendant swore a statutory declaration stating that the title was lost, leading to the issuance of a replacement. This was a deliberate and knowing falsehood. PW - 1 testified that he has always been in possession of the original title deed, which was never lost. He stated that the 1st Defendant falsely swore an affidavit that it was lost to obtain a provisional title, all while a



- restriction was placed on the property by the Plaintiff. The subdivision was done after the Power of Attorney had been revoked.
92. The 1st Defendant stated that upon returning to Kenya and discovering the Plaintiff's advocates did not have the title and had lost contact with the Plaintiff, he lawfully followed the procedure for a lost title, including a gazette notice. He denies any fraud and states the sub - division was part of the process in the winding - up Petition.
93. Further, this act was done in blatant disregard of the restriction lodged by the Plaintiff on 9th April 2010. The provision of Section 76 (1) of the [Land Registration Act](#), 2012, provides that a restriction prohibits any dealing with the land inconsistent with the restriction. Obtaining a new title and subdividing the land is the quintessential “dealing” a restriction is meant to prevent. The 1st Defendant's actions were not only fraudulent but also in direct contravention of a lawful court process.
94. The Plaintiff's possession of the original title is a compelling fact. For the 1st Defendant to swear an affidavit stating the title was lost, while it was safely held by the Plaintiff, constitutes a deliberate misrepresentation to the Lands Registry. The subsequent actions of obtaining a replacement title and subdividing the property based on this falsehood were therefore unlawful and fraudulent. The 1st Defendant's actions were a clear attempt to circumvent the Plaintiff's known interest and the restriction on the title. The Plaintiff has successfully proven his claim of fraud against the 1st Defendant on a balance of probabilities.
95. The Plaintiff has provided conclusive, undeniable proof of fraud against the 1st Defendant. Producing the original title is a “smoking gun” that meets the strict standard of proof required. I therefore find that the Plaintiff has provided on a balance of probabilities that the 1st Defendant acted fraudulently in obtaining the replacement title and subdividing the suit property.
96. On the fraud against the 3rd Defendant (Land Registrar), proving fraud against the 3rd Defendant is more challenging but this Honourable Court shall analyse the same to determination. The Plaintiff's allegation against the 3rd Defendant is one of collusion and/or negligent procedural failure for allowing the subdivision and issuance of new titles despite the existence of a restriction. The question that arises therefore is whether the Plaintiff has proved fraud or collusion against the 3rd Defendant?
97. The Land Registrar enjoys a presumption of regularity in the performance of official duties. The Land Registrar's office can be liable if it is shown to have been a willing party to the fraud or if it acted so negligently that it facilitated the fraud. The Plaintiff averred that the 1st Defendant acted “in collusion with the 3rd Defendant” and that there was “no notification or hearing as regards removal or variation of the restriction.”
98. The standard for proving fraud against a state officer to prove collusion (active fraud), the Plaintiff would need to show that the Land Registrar knowingly and intentionally participated in the 1st Defendant's scheme. This requires evidence like a bribe or a direct instruction to ignore the law. There is no such evidence presented in the facts. However, the Land Registrar can also be liable if the registration was done “unprocedurally” (Section 26(1)(b) [Land Registration Act](#)), which is a lower threshold than actual fraud. This means failing to follow the mandatory procedures set out in the law.
99. In the case of “Republic – Versus - Director of Survey & another Ex-parte Acres Valley Limited [2019] eKLR”, the Court held that Public officers, including land registrars, have a duty to act fairly, lawfully, and reasonably. While they are entitled to rely on documents presented to them, they must exercise due diligence, especially if there are red flags.



100. On the issue of the restriction. The provision of Section 76 of the *Land Registration Act* makes specific procedures for dealing with restrictions. Generally, a restriction cannot be simply ignored or overridden. The registered proprietor – the 2nd Defendant, represented by the 1st Defendant) must apply to the court to have it removed if they disagree with it. If the Land Registry processed the application for a replacement title and subdivision without notifying the Plaintiff (the person in whose favour the restriction was registered) and without requiring a court order to vacate the restriction, this would be a serious procedural failure.
101. In the case of “Ephantus Mwangi & 68 others – Versus - Salama Beach Hotel Ltd & 7 others [2020] eKLR”, the court emphasized that land officials must exercise utmost care and follow the law strictly. Failure to do so can lead to transactions being deemed unprocedural and thus nullified.
102. The Plaintiff had placed a restriction on the title on 9th April 2010. A restriction is a major red flag. The core question for the court will be: Did the Land Registrar’s office check the register, see the restriction, and ignore it? Or did the 1st Defendant’s fraud somehow bypass this?
103. The Plaintiff has not proven active collusion or dishonesty on the part of the 3rd Defendant. There is no evidence of a corrupt agreement. The Plaintiff has strongly suggested that the 3rd Defendant acted unprocedurally by processing the 1st Defendant’s applications without regard to the duly registered restriction. The 3rd Defendant, as a necessary party, did not file a defence or call evidence to explain the procedure followed. In civil litigation, a party who fails to adduce evidence in support of their case is deemed to have admitted the allegations. Therefore, the court finds that the 3rd Defendant acted unprocedurally and in breach of statutory duty by allowing the transactions to proceed without resolving the restriction issue first.
104. Therefore, the Plaintiff has successfully proven his claim of fraud against the 1st Defendant and his claim of unprocedural conduct against the 3rd Defendant. This finding directly justify the orders sought of revoking the subdivision, cancelling the new titles, and reinstating the original title.

Issue No. c). Whether the Plaintiff is entitled to the remedies sought, specifically a declaration that the 2nd Defendant holds the suit property in trust for him and an order for its transfer.

105. Under this sub title, the Honourable Court shall examine the remedies the Plaintiff is entitled to as sought in the Plaint. Given my findings on the first two issues, the Plaintiff is entitled to the remedies sought.
106. On the declaration that the 2nd Defendant holds the property in trust for the Plaintiff, this declaration is the foundational remedy. If granted by this Honourable Court, it establishes the Plaintiff’s beneficial ownership, making the subsequent order for transfer a logical consequence. The law upholds the principle of freedom of contract. An express trust, clearly documented in writing and signed, is the strongest evidence of the parties’ intention. The *Law of Contract Act* (Section 3(3)) gives legal force to such written, attested agreements concerning land.
107. The Plaintiff tendered the Declaration of Trust as evidence, where the 1st Defendant unequivocally states that “the entire shareholding..... belongs to the Plaintiff.” The 1st Defendant’s claim of duress is severely undermined by his subsequent act of accepting a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) from the Plaintiff. A party acting under true duress does not willingly accept a benefit from the agreement.



108. In the case of:- “Cyrus Karanja Mbugua – Versus - Priscilla Nyawira Mbugua [supra]”, the Court of Appeal emphasized that the court’s duty is to give effect to a clear express declaration of trust. The Plaintiff’s case is built on exactly such a declaration.
109. Even if the Declaration were to be set aside (which is highly unlikely), the Plaintiff would still be entitled to a declaration based on a resulting trust. A resulting trust arises by operation of law to reflect the common intention that the person who provided the purchase money for a property should enjoy the beneficial interest in it. The legal title holder is thus deemed to hold the property in trust for the financier.
110. It is uncontested that the Plaintiff provided the entire capital (USD 352,332) for purchasing the suit property. The 1st Defendant made no financial contribution. The 2nd Defendant Company was merely the legal vehicle chosen for registration. Equity looks to intent rather than form, and the intent was for the Plaintiff to be the true owner. I am guided by the case of “Karis and another v Njeru and others [2006] 1 KLR” establishes that where property is purchased in the name of another, but the purchase price is paid by someone else, a resulting trust in favour of the payer is presumed. The 1st Defendant has provided no evidence to rebut this presumption.
111. The Plaintiff has proven his case on both grounds. The express declaration is valid and enforceable and in this alternative, the facts incontrovertibly give rise to a resulting trust. The Honourable Court therefore grants this declaration.
112. On the order for transfer of the suit property to the Plaintiff, this Honourable Court notes that the remedy flows directly from the declaration of trust. Once the Plaintiff is declared the sole beneficial owner, the court’s role is to perfect his title and rectify the register to reflect the true position. The order for transfer is a necessary step to give practical effect to the declaration of trust. It would be an empty victory for the Plaintiff to be declared the beneficial owner if the legal title remains in the name of a company controlled by a hostile 1st Defendant.
113. The Legal justification for this order is based on the fraudulent conduct of the 1st Defendant; the 1st Defendant’s actions (false affidavit, fraudulent subdivision) have made it impossible for the parties to work together within the company structure. The court will not allow a fraudulent party to use the corporate veil to retain control over an asset that in equity belongs to another. Further, lifting of the corporate veil; the 2nd Defendant is a classic “shell company” – incorporated for a specific purpose (to hold this asset) with no other business operations. Courts will ‘pierce the corporate veil’ to prevent fraud, injustice, or to give effect to a trust.
114. I make reference to the case of “Nelson Kivuwai & 4 others – Versus - Credit Bank Limited & another [2018] eKLR”, the court affirmed that the corporate veil can be lifted where a company is used as a sham or a vehicle for fraud. The 1st Defendant’s actions justify this remedy. Section 80 of the [Land Registration Act, 2012](#) empowers the court to order the rectification of the register by directing the cancellation of a title and issuing a new one to the rightful owner, where a registration was obtained by fraud or mistake. The fraudulent subdivision titles must be cancelled to facilitate the transfer.
115. On the specific order sought, the Plaintiff has wisely sought an alternative order that if the Defendants fail to execute the transfer within 10 days, the Deputy Registrar of the court shall do so. This is a standard and effective procedural mechanism to ensure the judgment is not frustrated by the Defendant’s refusal to comply.
116. The Plaintiff is entitled to the remedies sought because he has:
 - a. The Plaintiff has proved the existence of a trust, both express and resulting.



- b. Fraud was proved on the part of the 1st Defendant which justifies this Honourable Court's intervention to rectify the situation.
 - c. There is a demonstration that the corporate structure is being used to perpetuate an injustice, justifying the piercing of the corporate veil.
117. For the foregoing reasons, this Honourable Court grants specific prayers from the Plaintiff: -
- i. Prayer (iv): An order declaring that the property Title Number MSA/Block XVII/1129 is registered and being held by the 2nd Defendant in trust and wholly for the benefit of the Plaintiff.
 - ii. Prayer (vi): An order that Title Number MSA/Block XVII/1129 be transferred in favour of the Plaintiff within 10 days of the decree, failing which the Deputy Registrar of the Honourable Court shall execute the transfer.
 - iii. Ancillary Orders: The court will also grant the necessary orders to facilitate this transfer:
 - a. Prayer (i) & (ii): An injunction restraining dealings with the subdivided plots and an order for the revocation/annulment of the fraudulent subdivision and the titles created (MSA/XVII/1611 to 1632).
 - b. Prayer (iii): An order for the reinstatement of the original title (MSA/Block XVII/1129) in the name of the 2nd Defendant, so that it can then be transferred to the Plaintiff.
118. Consequently, I discern that the Plaintiff's case is found to be highly merited and is hereby allowed. It follows, therefore, that Judgment is entered for the Plaintiff against the Defendants jointly and severally.

Issue No. d). Who bears the costs of the suit?

119. The issue of Costs is the discretion of Court. Costs is an award that is granted to a party at the conclusion of any legal action or proceedings in any litigation. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
120. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. In the case of: "Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-
- "The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."
121. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the Plaintiff has successfully established its case and thus is entitled to the costs of the suit.



VIII. Conclusion and Disposition

122. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has established his case against the Defendant. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Plaintiff as per the Plaint dated 6th December, 2016 in its entirety with costs.
- b. That a declaration be and is hereby issued that the property known as Title Number MSA/Block XVII/1129 is registered and is held by the 2nd Defendant in trust wholly for the benefit of the Plaintiff, Saleh Omar Ba Mahdi.
- c. That a declaration be and is hereby made that the sub-division of the original title into MSA/XVII/1611 to 1632 be and is hereby declared unlawful, null and void. Pursuant to the provision of Section 80 (1) & (2) of the land Registration Act, No. 3 of 2012, the Land Registrar, Mombasa, be and is hereby directed and/or ordered to forthwith cancel and revoke all resultant titles and reinstate the original Title Number MSA/Block XVII/1129.
- d. That an order be and is hereby issued against the 1st and 2nd Defendant to execute all necessary documents to facilitate the transfer of Title Number MSA/Block XVII/1129 to the name of the Plaintiff within the next sixty (60) Days from the date of this Judgment.
- e. That in the event of default of Order (3) above, the Deputy Registrar of this Court is hereby authorized to execute all necessary documents on behalf of the Defendants to effect the transfer.
- f. That a Permanent Injunction do and is hereby issued restraining the 1st and 3rd Defendants, their agents, servants, or representatives from any further dealing with, transferring, subdividing, trespassing onto, or in any other way interfering with the suit property, Title Number MSA/Block XVII/1129.
- g. That an order be and is hereby issued against the 1st Defendant to provide a full and accurate account of all proceeds from the sale of:
 - i. Portion No. 2045 (Original 4185/2) Malindi.
 - ii. The second, unidentified Malindi plot (and to disclose its title number).
 - iii. The sale of water from the suit property, Title Number MSA/Block XVII/1129.
 - iv. The account shall be rendered to the Plaintiff within the next ninety (90) days from this date hereof.
- h. That the court awards the costs of litigation of the Plaint to the Plaintiff to be borne by the 1st, 2nd & 3rd Defendants jointly and severally.

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF SEPTEMBER, 2025.

.....

HON. MR. JUSTICE L.L. NAIKUNI



**ENVIRONMENT AND LAND COURT
AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Mogaka Advocate for the Plaintiff.
- c. M/s. Fatuma in person and appearing on behalf of the 1st, 2nd & 3rd Defendants.

HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)

