

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT

EMBU

ELC CASE NO. 7 OF 2019

ALBERT MWANIKI KWENJA.....1ST
PLAINTIFF

VICTOR MUCHANGI NJERU

As the Executor of the Estate of the Late

LEONARD IRERI KWENJA.....2ND
PLAINTIFF

BERNARD KIURA KWENJA.....3RD
PLAINTIFF

VERSUS

JANE NYAGUTHII NJOKA &

HELLEN WAMBUI MAINA as the Administrators of the

Estate of the Late **JENARDO NJOKA**

KWENJA.....DEFENDANT

JUDGMENT

1. The 1st and 3rd Plaintiffs together with the late Leonard Ileri Kwenja, the late Jenardo Njoka Kwenja and the late Ephantus Muvuria Kwenja were brothers and the sons of the late George Kwenja Muthangato. The Plaintiffs' claim is that as brothers, they owned, operated and had legal and beneficial interest in the land known as Embu/Municipality/317, Embu Town (the suit land). That in 2013 the 3rd Plaintiff, the late Leonard Ileri Kwenja and the late Jenardo Njoka Kwenja registered Nguviu

House Investments Limited which has been managing the premises erected on the suit land. They claimed that they were all shareholders in that company.

2. The Plaintiffs averred that the suit property had always been in the name of the late Jenardo Njoka Kwenja (Jenardo) to hold in trust for the 1st and 3rd Plaintiffs, the late Leonard Ireri Kwenja and the late Ephantus Muvuria Kwenja awaiting the transfer process. They averred that the dividends, rent and other earnings from the suit property continued to be shared by all the brothers with the share for their late brother, Ephantus Muvuria Kwenja, being remitted to his widow Fides Kairu Muvuria who is the administrator of his estate.
3. They claimed that the late Jenardo acknowledged that his brothers were co-owners of the suit property and oversaw the sharing of dividends and profits from the suit property to the extent that he even initiated the formation of Nguviu House Investment Limited as a vehicle to manage the suit property. The late Jenardo Njoka Kwenja wrote to his brothers and sister in law on 18/11/2018 stating that he had taken over ownership of the suit property and management of the company to the exclusion of all his brothers. They contended that this act was illegal, fraudulent and a complete misrepresentation of the facts of ownership of the suit property.
4. That in January 2019, the late Jenardo and some of his brothers went around the suit property introducing themselves as the owners of Nguviu House. They claimed that the late Jenardo attempted to take up ownership of the suit land in disregard of the shares of his brothers and sister in law in the suit property; that he claimed sole ownership without considering his

brother's contribution. Additionally, that he denied his brothers their share of earnings while purporting to take up sole management. To add to this, he caused a fraudulent letter claiming that a directors' meeting had been held which had not and he and the 3rd Plaintiff signed the document on 4/1/2018.

5. That as a result of these actions, Jenardo's brothers lost earnings and suffered special and general damages comprising of loss of drawings due to them from the Nguviu House Investment Company, loss of their share of the monthly rent paid directly to the late Jenardo or his estate and misappropriation of the rent paid directly to Jenardo or his estate. That in an attempt to defraud his brothers and sister in law, the late Jenardo introduced other people into the ownership through a power of attorney granted to Hellen Wambui Njoka.
6. The Plaintiffs sought a declaration that the late Jenardo holds and is registered as the proprietor of the suit property for himself and in trust for Albert, the estate of the late Leonard, Bernard and the estate of the late Ephantus. They sought an order of specific performance to compel the estate of the late Jenardo to transfer the suit property to Albert, the estate of the late Leonard, Benard and the estate of the late Ephantus as equal shareholders or joint proprietors.
7. They also sought to have the estate of the late Jenardo account for all the money received from the suit property and the entity known as Nguviu House Investment Limited. After the audit, they seek that a sum of Kshs. 1,600,000/= be paid to Albert on account of his entitlement as his retained share of

proceeds realized from Nguviu House Investment Limited and for the balance to be distributed among all the brothers including the estate of the late Leonard, the late Ephantus and the late Jenardo. They also sought to have all amounts paid to or earned from the suit property accounted for in this court by the estate of the late Jenardo and for the profit realized to be distributed among the brothers and the estates of their late brothers. They also sought to have the estate of the late Jenardo pay to the Plaintiffs general special damages and the costs of the suit.

8. The Defendants denied the Plaintiffs' claim and averred that sometime in 1964, the late Jenardo applied to the Embu County Council to purchase a corner plot number 317. That an allotment letter dated 10/12/1964 was issued to the late Jenardo by the Embu Council, which he accepted and paid the consideration of Kshs. 2,278.04. That he constructed two shops on the suit property and owing to engagements locally and abroad, he added his brother Bernard, the 3rd Plaintiff as a signatory to his bank account to enable him make payments when required by the contractors. They maintained that the funds that developed the suit property came from the late Jenardo's salary, savings, lump sum leave allowance and that upon his retirement, he applied his pension to develop an additional first floor to the suit property.
9. They stated that the certificate of lease together with the lease over the suit property were issued to the late Jenardo on 4/6/1998 after following up on its issuance for a long period. They urged that the late Jenardo solely managed the suit property except for one month from 8/9/2000 to 9/10/2000

when he travelled to visit his children in the US and left the 3rd Plaintiff to receive rent on his behalf. That some time in 2010, the late Jenardo invited his brothers to form an investment company where the income generated from the suit property which was lying idle in his bank account could be utilized to make meaningful investments for their benefit. That this was out of good will and love because the Plaintiffs did not contribute towards the acquisition, development or payment of the annual rates and rent over the suit property.

10. Moreover, that he did that in the hope that his brothers would also make some financial contribution to the investment company. Nguviu House Investments Limited was incorporated in December 2011. They maintained that the share capital raised and fees paid to incorporate the company were proceeds from the rent collected from the suit property, and that none of the shareholders directly raised any capital since none of the brothers was willing to inject funds into the company.
11. The Defendants urged that at some point and out of good will, the late Jenardo had consented to equal ownership of the suit property in his desire to help his brothers. However, when the company failed to be operational, he elected to take back the management, control and full ownership of the suit property. The Defendants were emphatic that at no point was the suit property transferred to Nguviu House Investments Limited or the names of the Plaintiff.
12. They denied that the late Jenardo held the suit property in trust for his brothers as the Plaintiffs pleaded in the amended plaint. They urged that any sharing of the rent from the suit

property by the late Jenardo was done on a “need basis” and was intended to assist his needy siblings meet their day to day living expenses and to educate their children but that there was intention to create a trust or entitle any of the recipients to ownership of the suit property.

13. The Defendants denied that the late Jenardo acknowledged that his brothers were co- owners of the suit property or that he oversaw the sharing of profits or dividends from the suit property. Further, they denied that the Plaintiffs had lost income or that they were entitled to the reliefs sought. They maintained that the suit was malicious, vicious and an abuse of the court process and urged the court to dismiss it with costs to the Defendants.
14. The hearing of the suit commenced on 20/2/2025. Mr. Albert Mwaniki Kwenja (Albert) gave evidence. He told the court that he and the 3rd Plaintiff were in school in class 7 in 1956 when their late father, George Kwenja Muthangato assisted them to plant coffee bushes each at 100 seedlings. The coffee bushes matured by 1959 and their father would receive and handle income from the coffee bushes on their behalf. Albert joined Kenya Posts and Telecommunication Corporation (KP&TC) and lived near his brother Jenardo until 1966 when Jenardo shifted to Westlands.
15. Albert stated that he was aware of his own knowledge that in 1964, their late father applied to the Embu County Council for allocation of a plot which is the suit property. He referred to the title deed which was issued in Jenardo’s name, which according to him he was to hold it in trust on behalf of his 4 brothers and himself. Their late father was asked to

demonstrate that he had the financial ability to develop the plot and he took to the council passbooks for his children. He relied on the minutes of the meetings held on 24/3/2018 and 28/7/2018 when he claimed that Jenardo admitted to this. He added that his late father informed him that it was he who paid the funds for acquisition of the suit property.

16. He averred that the construction of the first two shops on the suit property was done using funds from the four bank accounts of Jenardo, Ephantus, Leonard. Bernard and himself. He relied on the receipts, delivery notes and other records regarding the construction of Nguviu House. He pointed out that although the receipts for the building materials were issued in the name of Bernard Kiura, it was their father who gave him the money to make the relevant purchases and that the receipts would be handed over to their father for safekeeping.
17. He was aware that Jenardo applied for a loan from the Industrial and Commercial Development Corporation (ICDC) of Kshs. 255,000/= in 1972 which was used to construct the ground floor shops with an additional loan of 35,000/= in 1973 which was used to complete the first floor flats. Albert stated that Jenardo acknowledged during a meeting in 2008 that he had fully repaid the loan and that he had also repaid himself whatever he had spent on the premises.
18. He added that the loans were secured by collaterals which included parcels of land in which the Plaintiffs and their father had proprietary interest in including Gaturi/Weru/6 measuring 15 acres and the family land in their father's name being Ngandori/Nguviu/1402 being a 29 acre piece of land with

coffee bushes. He relied on the official searches for these parcels of land xxxxxxxxxxxxxxxxxxxxxxxxx. He believed that although Jenardo had a salary that could accommodate the loan repayment, he did not have the required collateral.

19. That up to 2008, Jenardo would withdraw and manage all income from Nguviu House. Albert was aware that the relevant bank account had two signatories, that is Jenardo and the 3rd Plaintiff. He stated that Jenardo confirmed in one of the meetings that he used the rental income from Nguviu House to finance subsequent expansions on the suit property. Albert urged that the Plaintiffs' contention is that whereas the capital for expansion of the suit premises may have been borrowed, the repayment was made through the rental income generated from the premises, which meant that all the partners contributed.
20. Albert stated that the Plaintiffs and Jenardo met on 2/6/2008 regarding ownership of the suit property, and agreed that Jenardo would apply to the Embu Municipal Council to have the names of the other brothers added to the title over the suit property. He relied on the application to the Municipal Council dated 4/6/2008 and the response from the Embu Municipal Council dated 23/7/2010.
21. When the company was formed, he opted not to participate because it was not viable and a misunderstanding had arisen in the family over another parcel of land in Manyatta that needed to be resolved. He relied on the minutes and Jenardo's affidavit dated 3/7/2013. He acknowledged receipt of Kshs. 750,000/=, which he was to invest jointly with his brother Leonard. He added that his other brothers had also received

varying amounts to invest and some chose to invest in the stock exchange.

22. He learned during the meeting of 17/11/2018 that sometime in 2017 Jenardo had without notice changed the rent collection procedure for the suit property and proceeded to open a personal account in his sole name at Nawiri Sacco Society Limited where the rent would now be credited. That development necessitated a meeting which was held on 24/3/2018 at Panesic Hotel, Embu.
23. He stated that matters relating to ownership of the suit property became complicated and Jenardo issued a stated on 1/11/2018 to explain his new position that he solely owned the suit property, to which Leonard, Fides and Bernard issued a rejoinder dated 16/11/2018. The issue of ownership of the suit property came up in meetings held on 24/3/2018 29/1/2019 but it was not resolved, which is what led to the filing of this suit. Pending determination of the suit, Jenardo was allowed to continue collecting rent from the suit property.
24. Albert emphasised that all the brothers who invested in the suit property had stable sources of income that is, Albert, Ephantus, Leonard and Bernard. He elaborated that the brothers had built permanent homes, invested in farming in their own right and had educated their children. He argued that the impression created by Jenardo that he invited his brothers to invest in the suit property so as to assist them was misleading. If anything, they must have been incorporated because they had the means and the good will to guarantee success of the venture.

25. Albert stated that he was the most aggrieved given that to date he had not received any dividends or proceeds from the rental income which he estimated to be in the sum of Kshs. 1,600,000/= because the other partners received sums between Kshs. 1,200,000/= to 1,600,000/= on diverse dates from 2008 to 2018.
26. Mr. Albert Kwenja stood down from the dock when the Defendants' advocate applied to cross-examine him on a different date.
27. Bernard Kiura Kwenja (Bernard) gave evidence on 20/2/2025 and reiterated the averments of Albert. He stated that their brother Jenardo together with their father applied for allocation of the plot in June 1964. Upon getting a positive response, Jenardo informed their father of the development and invited a businessman in Embu known as Kagoce M'Njau for joint investment. That their father instructed Jenardo to incorporate his four sons in the development of the suit property because he had savings for each of the four brothers and from coffee farming. He was aware that their father provided to Jenardo the funds accrued from the coffee farming that he had set aside as savings for the four brothers as the initial capital for construction of Nguviu House on the suit property.
28. Bernard relied on the minutes of the meetings on 24/3/2018 and 28/7/2018. He was aware that those funds were used to construct the first two units of Nguviu House and it was against that background that he became a signatory of the relevant bank account with Grindlays Bank, which is now Kenya Commercial Bank (KCB) from the outset together with

Kagoce M’Njau. That Jenardo only became a signatory to the account when Kagoce opted out of the investment in the suit property. He relied on various receipts, delivery notes and records to demonstrate that he handled the banking aspect and managed the funds that were used in the construction of Nguviu House.

29. Bernard told the court that he would collect and bank rent from Nguviu House on behalf of all the brothers-cum-partners with diligence and transparency. He relied on the bank statement relating to Nguviu House from KCB and National Bank of Kenya for 9/5/2012 and 24/7/2018. That up to 2008, Jenardo would withdraw and manage all the income from Nguviu House. He expounded that as joint signatory to the relevant bank account, he and Jenardo had to sign before those instructions were carried out.
30. He stated that the minutes of the meetings held on 2/6/2008, which culminated in the incorporation of Nguviu House Investments Limited, show that Jenardo confirmed that he used rental income from Nguviu House to finance subsequent expansion of the suit property. This was the basis for the position taken by the Plaintiffs that whereas the capital for the expansion of the suit property may have been borrowed, its repayment was through the rental income it generated which means that all the other partners contributed.
31. He also mentioned that Jenardo applied to the Embu Municipal Council to have the names of all the brothers added to the leasehold certificate for the suit property vide the letter dated 4/6/2008 and the response from the council dated 23/7/2010. He explained that Albert opted not to participate in the

formation of the company until a misunderstanding which had arisen in the family over the land in Manyatta was resolved. He elaborated that Albert did not demand a refund of his capital contribution towards the establishment of Nguviu House and that it was therefore retained and utilized.

32. Bernard stated that as brothers, they had always lived in harmony and trust for each other. That they had jointly acquired property, which was registered in the name of one of them to hold in trust for the rest. He gave the example of Gaturi/Weru/6 measuring 15 acres, which was initially registered in Jenardos name but was later subdivided without problems and each brother got their independent title. Ngandori/Kangaru/T47 was bought by Jenardo in 1959 but was registered in Bernard's name until 2012 when Jenardo requested Bernard to transfer the plot to his son Victor and he duly complied. He produced a copy of the register for that land to confirm that position.
33. Further, he stated that the securities provided for the ICDC loan included property that was jointly owned by the brothers and the family land which is in their father's name. Bernard explained that when the ICDC loan for the development of the suit property was disbursed in 1973, it was credited to the account run by him and Jenardo. He added that plot number 17 Manyatta market was registered in Jenardo's name yet his brothers had equity in it.
34. Sometime in 2017, Jenardo changed the rent collection procedure for the suit property without notice and proceeded to open a personal account in his own name at Nawiri Sacco Society Limited where the rent would be credited. He was

aware that Jenardo caused a resolution to be drafted purporting that in a meeting allegedly held on 4/1/2018, he ceased to be a signatory of the account held at National Bank of Kenya and Njoka was to remain the sole signatory. Bernard stated that he collected the draft resolution from Jenardo's office on 1/2/2018 but did not sign it.

35. The surprising turn of events necessitated a meeting, which was held on 24/3/2018 at Panesic Hotel, Embu. Matters relating to ownership of the suit property got more complicated and Jenardo issued a statement on 1/9/2018 seeking to explain his position. The other brothers issued their statement dated 16/11/2018 in response to Jenardo's statement. Other meetings were held over the ownership of the suit property on 28/11/2018 and 29/1/2019 but the dispute was not resolved. That prompted the filing of this suit.
36. He maintained that from his knowledge, all the brothers who invested in the suit property save for the late Leonard who was a student then, had stable sources of income. He was working as a teacher, Ephantus worked as KPTC as did Albert. He added there were other brothers who were needy such as Njogu but that the ones who invested in the suit property had established permanent homes and invested in farming in their own right.
37. On cross-examination, he stated that he was a retired teacher. He was employed in 1960 and was based in Embu. He stated that Jenardo held the suit property in trust for his brothers and that 5 of them were involved in the transaction. They did not purchase the suit property, it was awarded to one of them.

They contributed to the construction through the proceeds from coffee, which their father had planted.

38. During the construction, his father would give him the money to purchase the materials and would give him the receipts. He stated that the first two shops were done in 1967 and that the shop had been extended to the second floor. He maintained that his brother used the rent from the shop to construct on the suit property. He clarified that their father was not a co-owner, that it was owned by the 5 of them. That after the shops were constructed, Jenardo was collecting rent and depositing it in their joint account from which he could not withdraw without Bernard.
39. He stated that they used to share rent and that he had received more than Kshs. 1,000,000/=. The others received except Albert who moved away. From 1967 to 2008 they did not share rent because construction was still going on. The disagreement arose in 2019 when Jenardo started cheating on them. He recalled an instant when they met and Jenardo told them he had opened an account at Nawiri only for them to find out that he had opened it in his personal name. He stated that there was a meeting of shareholders in 2008 which Jenardo chaired. That meeting described how the capital was contributed. He was emphatic that Nguvu House was owned by the five of them including the suit property.
40. Albert was cross-examined on 7/5/2025. He explained that the funds were theirs but were kept by their father. That the first two shops were constructed from funds that came from their coffee. The loan was cleared using proceeds of rent. The succession case over their father's estate was still pending but

the suit property did not form part of that case. He stated that his contribution towards the development of the first two shops was Kshs. 7,000/= and that it was in his father's name. They planted coffee in 1952 and his was planted in 1956.

41. Jane Nyaguthie Njoka (Jane) gave evidence for the defence. She is one of the administrators of the estate of the late Jenardo, who was her husband. She was aware that sometime in June 1964 an advertisement for commercial plots was placed and the late Jenardo applied to purchase corner plot number 317. She was aware that an allotment letter dated 10/12/1964 was issued to Jenardo by the Embu Council. He paid the consideration of Kshs. 2278.04. Upon acceptance, the suit plot was to be developed within 48 months of the issuance of the letter of allotment.
42. She was aware that her husband put up two shops in the first phase of development on the suit property. That owing to engagements locally and abroad, her husband added his brother Bernard, the 3rd Plaintiff as a signatory to his bank account to enable him make payment to the contractors on site when needed. She was quick to add that that did not make the 3rd Plaintiff a joint owner of the suit property. She was aware that the funds which developed the two rooms came from her husband's salary and savings. Her husband applied and was granted a loan by ICDC to extend the development of the ground floor. She was aware that the loan repayments were serviced through deductions from her husband's salary. He also applied his leave allowance towards the development of the suit property. On retiring, he

dedicated his pension dues to develop an additional floor on the suit property.

43. The certificate of lease together with the lease for the suit property were issued to her husband on 4/6/1998. She maintained that her husband solely managed the suit property **except one month in 2000 when he travelled to the US**. She reiterated the averments in the defence. She stated that at some point her husband had **consented to equal ownership of the suit property because he desired to help his brothers out of goodwill**. However, when the company failed to be operationalized, he elected to take back the management, control and full ownership of the suit property.
44. Sometime in 2018, her husband communicated to his **brothers his desire to solely manage the suit property as he had done before since its acquisition**. She told the court that her husband was extremely generous and routinely gifted his brothers and particularly Bernard large sums of money and even parcels of land. In particular, that he gifted **Bernard ½ acre plot known as Gaturi/Githimu in Blue Valley Estate in Embu Town**.
45. According to her, the suit property was her husband's pride and joy having scrapped every coin to purchase and develop it. She recalled that when their fourth child was born in 1973 they were facing heavy financial strain because her husband's salary was attached to the loan repayment. That over the years, her husband put in a lot of time and money towards the improvement of the suit property and that it is only **at the time when he intended to jointly invest with his brothers that he**

invited them to share in the proceeds from the suit property out of goodwill and love.

46. She maintained that the suit property was not held in trust for her husband's brothers. Further, that no evidence of the alleged trust had been led by the Plaintiffs. She believed that had her husband's brothers' been shareholders in the suit property, her husband and her father in law would have incorporated them in the investments right from the outset. She claimed that she knew that her husband's brothers had on numerous occasions attempted to coerce her husband who was very advanced in age and ailing, to have the suit property jointly registered in their names despite having no lawful entitlement to joint ownership of the property.
47. She claimed that the allegations by the Plaintiffs that they contributed towards the acquisition of the suit property were false and baseless and added that they had not demonstrated their financial contributions towards the purchase of the suit property. She also denied the claim that the Plaintiffs' father contributed towards the acquisition of the suit property from proceeds realized from the sale of coffee arguing that if it were so then, the Plaintiffs' father would have been registered as a joint owner of the suit property the property would have formed part of his estate upon his demise. She added that her father in law passed away in 1978 and no claim had been made to date alleging that the suit property formed part of his estate.
48. According to Jane, the allegations in the Plaintiffs' witness statements that her husband and his brothers held properties in trust for each other was meant to hoodwink the court as to

the existence of a trust in relation to the suit property yet none exists. Regarding Gaturi/Weru/6, she stated that her husband paid for the land but his father requested him to divide the 15 acres among his 3 brothers, which he did. That they thereafter paid for their parcels and on full payment, her husband ensured the land was surveyed and the title deeds issued to each of his brothers. She stated that her husband was registered as the sole owner because he paid the purchase price and not because the brothers held properties in trust for each other. She argued that the fact that Bernard allegedly held Ngandori/Kangaru/T47 in trust for her late husband, which according to her was not proved, did not mean that her husband held the suit property in trust for the Plaintiffs.

49. Jane believed that the minutes for meetings that allegedly took place more than 40 years after her husband had purchased the suit property could not divest her husband of his hard-earned property. She also believed that since the case was filed more than 50 years after her husband purchased the suit property, it was caught up by limitation and should be struck out. The suit disclosed no cause of action against her late husband's estate in her view.
50. She produced copies of the advertisement dated 24/6/1964, receipts issued to Jenardo on 29/9/1964, letter of allotment dated 10/12/1964, surrender of lease dated 6/9/1974 and certificate of lease issued on 4/6/1998. She also produced various correspondence on the ICDC loan and the loan agreement. The other documents she produced was evidence of payment of his pension in 1995 and payment vouchers.

51. On cross-examination, she told the court that she wedded Jenardo in 1967 and that what would be within her knowledge is what happened in 1967 and after. She conceded that the documents produced by the Plaintiffs such as minutes had her husband's genuine signature.
52. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions. The Plaintiffs submitted that three issues arose for determination being did the late Jenardo hold the suit property in trust for himself and his 4 brothers Albert, Leonard, Bernard and Ephantus? Did the Defendants commit fraud and misrepresentation as pertains ownership of the suit property that caused the Plaintiffs loss and damage? Are the Plaintiffs entitled to the orders sought in the amended plaint?
53. The Plaintiffs submitted that their father assisted them to plant coffee and he jointly and successfully applied to be allocated the suit property in 1964 with Jenardo in Jenardo's name. That their father instructed Jenardo to incorporate his brothers and availed funds amounting to 7,000/= generated from the coffee proceeds he was managing on their behalf as their capital contribution. That those funds were used to construct the first two units of Nguviu House on the suit property.
54. They relied on the official receipts, delivery notes and other records demonstrating Bernard's intimate involvement in handling the banking and management of the funds used in the construction of Nguviu House on the suit property. They emphasised that it was in recognition of the fact that Jenardo held the suit property in trust for the Plaintiffs that Jenardo

successfully applied to the Embu Municipal Council to have his brothers' names added to the title over the suit property. They also relied on the evidence of Bernard that it was common for the Kwenja brothers to jointly acquire property but have it registered in the name of one of them to hold in trust for the rest.

55. The Plaintiffs relied on **Arvind Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others Petition No. 18(E020) of 2022**, where the Supreme Court addressed the issue of trust. The Court stated that Sections 25, 26, and 28 of the Land Registration Act recognized that while the rights of a registered proprietor of land are absolute and indefeasible, they are subject to rights and encumbrances noted in the register and overriding interests, which include trust.
56. The Supreme Court went further and stated that the limitation of the right to property is provided under law and includes a constructive trust with respect Article 24 of the Constitution. The Court noted that the doctrine of equity was part of Kenyan Law by virtue of Section 3 of the Judicature Act, and stated that Section 28 of the Land Registration Act provides that the registration of a proprietor is subject to overriding interest such as trust and would include a constructive trust.
57. The Supreme Court noted that trust was an equitable remedy which is an intervention against unconscionable conduct, and that where the circumstances of a case demanded that equity treats the legal owner as a trustee, the law would impose a trust. That the law imposes a trust whenever justice and good conscience require it. The court found that a constructive

trust could be imported in a sale agreement to defeat a registered title.

58. The Plaintiffs urged the court to follow the Supreme Court decision and hold that the doctrine of constructive trust applies in this case and arose from Jenardo's unconscionable conduct of unreasonably delaying and ultimately failing to register the application for the addition of the Plaintiff's names to the title over the suit property as equal owners despite the Embu County Council giving consent on 23/7/2010. They maintained that Jenardo held the suit property in trust for them.
59. The Plaintiffs submitted that they had pleaded and particularized the grounds of the Defendants' fraud and misrepresentation as pertains ownership of the suit property. They cited the minutes of the meetings held on 24/3/2018 and 28/7/2018 between the Plaintiffs and Jenardo. They added that the defense merely made general denials to the particulars of fraud and misrepresentation.
60. The Plaintiffs submitted that it was in recognition of the fact that he held the suit property in trust for Plaintiffs that Jenardo made a successful application to the Municipal Council of Embu to have their names added to the certificate of lease over the suit property. The Plaintiffs urged that there was confirmation of the fact that it was common for the Kwenja brothers to jointly acquire property but have it registered in one of their names to hold in trust of the rest. They referred to Gaturi/Weru/6, which was initially in Jernardo's name, Ngandori/Kangaru/T.47 that was in Bernard's name and the Manyatta plot.

61. They challenged the Defendants' claim that the late Jenardo consented to equal ownership of the suit property with the Plaintiffs out of goodwill while pointing out that the Kwenja family had 8 brothers and 5 sisters but the good will was limited to the specific 4 brothers. They took issue with the Defendants' allegation that the sharing of the rent from the suit property with the Plaintiffs by Jenardo was done on a need basis and that it was intended to assist his needy siblings meet their day to day living expenses. They pointed out that they were working and drew salaries. Further, that if it were true that Jenardo had solely managed the suit property from inception there would have been no need for him to issue the communication in 2018 to his brothers that he desired to solely manage the suit property.
62. The Plaintiffs submitted that they had suffered loss of earnings and general damages as can be demonstrated from paragraph 6 of the defence where it is admitted that the Plaintiffs used to receive rent realized from the suit property. They referred to Jenardo's signature appearing in the minutes of the meetings held on 24/3/2018 and 28/7/2018 on the origins of the investment in the suit property. They also referred to the minutes of the meeting held on 2/6/2008 on the contribution of the Plaintiffs to the venture as well as sharing of the profits. They pointed out that the minutes of the meeting held on 28/11/2018 captured Jenardo admitting that the Plaintiffs received a share of income realized from the suit property. They also mentioned the cash flow statement from Nguviu house and extract of the schedule of cash payment were presented during the meeting of 1/9/2018.

63. The Plaintiffs submitted that a constructive trust is imposed by law not only to remedy unjust enrichment but to hold the persons in different situation to high standards of trust and probity and to prevent them from retaining property which in good conscience they should not be permitted to retain. Further, that when a property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. They relied on **Harris Tr. & Sav. Bank v Salomon Smith Barney Inc., 530 U.S 238, 250-51 (2000)** where the US Supreme Court stated that whenever the legal title to property is obtained under circumstances which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favour of the one who is truly and equitably entitled to the property.
64. The Defendants set out the issues for determination as whether the late Jenardo held the suit property in trust for himself and his 4 brothers; whether a constructive trust arises from the circumstances of this case; whether the Plaintiffs have established a valid claim of proprietary estoppel; whether the Defendants engaged in fraud or misrepresentation regarding ownership of the suit property; whether Plaintiffs' claim is statute barred and lastly, whether the Plaintiffs are entitled to the reliefs sought.
65. The Defendants submitted that that the suit property was lawfully allocated to the late Jenardo by the Embu County Council in 1964 and that he developed it using his personal funds including salary, bank loans, pension and a loan without

any financial contributions from the Plaintiffs or their late father. The suit property was registered solely in his name in 1998. They argued that the Plaintiffs' assertion that the late Jenardo applied for allocation with their father was unfounded because the allocation would have been in both their names. They claimed that the Plaintiffs failed to produce evidence of a trust and that they failed to prove that the suit property was held in trust. Further, that there was no evidence of any agreement, intention or joint contribution towards the acquisition of the suit property.

66. They relied on section 107 of the evidence act on the burden of prove and urged that there was no evidence of existence of trust implied or otherwise. Further, that there was no evidence of any agreement, intention or joint contribution towards the acquisition of the suit property. They emphasized that the unregistered minutes of meetings which took place 40 years after the acquisition of the suit property could not retrospectively create a trust relationship where none existed.
67. The Defendants argued that the **Arvind Shah Case** did not support the Plaintiff's case because it recognizes that a constructive trust may arise in transactions where equity requires intervention in cases of unconscionable conduct or fraud. They submitted that there had been no fraud, no breach of trust and no conduct on the part of the Defendant that warrants the imposition of an equitable remedy. The Defendants argued that the court in **Archer v Archer [2023]KECA 298 [KLR]** emphasised that a common intention to share property must be communicated and acted upon.

68. The Defendants argued that in **Ngao V Kitheka (2024) KECA 21 (KLR)**, the court reiterated that a constructive trust arises only where there is a bargain or a mutual understanding, detrimental reliance and unconscionable denial of a right. They urged that the Plaintiffs had not demonstrated any agreement, share intentions or conduct that meets that threshold for the court to infer a trust. They urged that no fiduciary relationship or power imbalance existed to demonstrate inequitable conduct. The Defendants reiterated that there was no evidence to prove that the late Jenardo received any funds from the alleged coffee proceeds or from Mr George Kwenja for the development of the Nguviu House. They maintained that the late Jenardo solely purchased the suit property.
69. The Defendants argued that the Plaintiffs' role in the management of the funds used to construct Nguviu House was voluntary and did not justify a proprietary claim. Regarding the Kwenja brothers' history of acquiring property and registering it in the names of one brother to hold on behalf of the others, they argued that this did not establish the existence of a trust in the present case. They urged that the Plaintiffs had not produced oral or documentary evidence to show that the late Jenardo intended to hold the suit property in trust for his brothers.
70. Regarding the consent to transfer the land issued by the Embu county Council, the Defendants denied that it supported the Plaintiffs' claim of co-ownership of the suit property. They submitted that the consent was merely an administrative prerequisite and did not confer any proprietor interest. They

cited Section 39 of the Land Registration Act in support of the point that a mere consent without registration was insufficient to establish ownership rights. They contended that although the consent to transfer was obtained on 23/7/2010, the late Jenardo never effected the transfer yet he had ample time to do so before his death. They maintained that no equity arises in favour of Plaintiffs.

71. The Defendants argued that the Plaintiffs failed to prove the allegations of fraud and misrepresentation to disturb the registered ownership of the suit land. They relied on Sections 107 and 108 of the Evidence Act on the burden of proof and on whom it fell.
72. The Defendants submitted that the Plaintiffs' claim was barred under the Limitation of Actions Act. They urged that the late Jenardo took possession of the suit property in 1964 and commenced development in 1971 using his own resources. That the lease was extended in 1979 and his legal title crystallized on 4/6/1998 when a certificate of lease was issued in his name. That pursuant to Section 7 of the Limitation of Actions Act, an action to recover land must be brought within 12 years of the date the rights accrued. They contended that the suit was filed in 2019, which was 20 years after registration of the late Jenardo and five decades since he took possession. They maintained that the claim was not sustainable.
73. The Defendants submitted that the Plaintiffs were not entitled to the reliefs sought in the amended plaint. They relied on Section 24 of the Land Registration Act, which affirms the

conclusive nature of registered ownership and urged the court to dismiss the claim.

74. The main issue for determination is whether the Plaintiffs proved their claim to the required standards. It is not in contention that the suit property is registered in the name of late Jenardo and that a certificate of lease was issued in his name on 4/6/1998. The land was allocated to the Jenardo in 1964. The Plaintiffs maintained that their late father contributed Kshs 7000/= towards the acquisition and development of the suit property, which was for the benefit of Jenardo's four brothers.
75. Looking at the minutes of the meeting held on 2/6/2008 which Jenardo, Albert, Mrs Fides, Bernard and Leonard attended, Jenardo explained that the construction of the first two units on the suit property was put up with monies given by the 5 members and that the future extensions were made possible through the bank loan that he took. Jenardo confirmed at that meeting that there was no outstanding loan since it had been repaid from the earnings from the suit property over the years. He confirmed to the members that from the records the 5 people were equal partners in the building.
76. It was also communicated that there was a bank account held with Kenya Commercial Bank opened jointly by Jenardo and Bernard for the building. There were discussions regarding investments of some of the rent proceeds and monies advanced to some of the members from the rent proceeds. The members thanked Jenardo for that was the first meeting to discuss Nguviu House. They agreed that Jenardo would

continue to manage the property on their behalf. Jenardo signed the minutes alongside other members.

77. The minutes of the meeting held on 24/3/2018, which Jenardo also signed, discussed the issue of the suit property at length. It was mentioned that the development started with partnership with Mr Kagoce who later left. Their late father prevailed on Jenardo to incorporate his brothers Mwaniki, Kiura, Mvuria and Ileri in developing the plot. That each contributed an equal share of funds towards the project which was paid by the late Mzee Kwenja from proceeds of coffee that he had planted and sold on their behalf. Jenardo explained that he first developed the first two shops to protect the plot from being repossessed.
78. Jenardo claimed that he solely managed the property from inception except when he traveled out of the country, when he left its management to Mzee Kiura. He stated that their agreement to share rental proceeds began in June 2008 when all the five brothers got an equal share. That when Albert felt left out of the management, he was given Kshs. 750,000/= to go and invest. The funds were deposited in a joint account at Equity bank.
79. Bernard clarified during that meeting that the total amount deposited into the account at the initial stage was Kshs 14,000/=, half of which came from Kagoce. The other half portion came from Jenardo and their father. During that meeting, Jenardo expressed his feelings that he had put in a lot of personal time and resources to the development and management of the suit property. He felt that there should

have been compensation for that as discussions were going on the shareholding of the proposed company.

80. The minutes of 28/7/2018 discussed the fact that rent proceeds from Nguviu house were no longer being deposited into the company account. Jenardo indicated that he needed to relook at the issue of the management of Nguviu House. This fact was also discussed in the meeting held on 1/9/2018, when Jenardo acknowledged that he had stopped banking rent in that account, and was banking it in his personal account.
81. The Plaintiffs tendered evidence of payments of building materials. The bundle of receipts bear dates in May, June, July and August 1967. The receipts were issued in Bernard's name. It was Bernard's evidence that his father had contributed funds towards the development of the suit property and that was the basis upon which he went to buy the building materials. The bank statement for 2012 which the Plaintiffs produced confirmed that Bernard and Jenardo operated a joint bank account at KCB, which presumably is where rent was paid until Jenardo decided to communicate to the tenants that rent would be paid into his personal account.
82. Jenardo applied to add his brothers' names to the title on 4/6/2008. The Municipal Council of Embu granted consent on 23/7/2010. The Plaintiffs produced the register for Gaturi/Weru/6 showing that Jenardo was registered as proprietor of that land measuring 15 acres on 25/2/1966. The land was subdivided to create parcels 7622,7623 and 7624 on 28/4/2010. The register for Ngandori/ Kangaru/ T.47 shows that the land was first registered in Benard's name on 24/1/1970. He transferred the land to Victor Murimi Njoka on

20/7/2012. Ngandori/ Nguviu/1402 measuring 11.73 ha was registered in Mzee Kwenja's name and had not been transferred by 2022 yet he died in 1978.

83. When Jenardo applied for the ICDC loan, as security he gave the parcel of land within Embu municipal town, the land measuring 15 ha and another one measuring 29 ha in Embu District with the latter parcel having more than 6000 coffee trees. The evidence of the Plaintiffs that most of the securities used to secure ICDC loans belonged to their late father was not controverted.
84. What emerges from the evidence adduced by the parties is that there was a common intention to have the suit property held in trust by Jenardo for his 4 brothers. It was registered in Jenardo's name and he managed it and undertook the construction with the support of his brothers and father. He applied the rent derived from the suit property to defray the loan and by 2008 it was fully paid off and Jenardo had recouped his cost.
85. Evidence was tendered of how the sale proceeds were shared among the brothers from 2008 until 2018 when the late Jenardo gave instructions to the tenants to pay rent to his personal account. The fact that the late Jenardo applied to have names of his 4 brothers added to the certificate of lease over the suit property buttresses the Plaintiffs' assertion that the suit property was held by the late Jenardo in trust for his four brothers.
86. The minutes corroborate this fact and the court notes that the late Jenardo signed those minutes. He gave the account and background as to how the suit property was acquired and

developed and this was captured in the minutes of the meeting held on 2/6/2008 which he signed. The other persuasive fact is the evidence that the Kwenja brothers would acquire property and have it registered in the name of one of them and the land would subsequently be subdivided and transferred to the other brothers. This demonstrates that the Kwenja brothers operated with a high level of trust. Had it been that the four brothers were not entitled to the suit property, Jenardo would never have agreed to have the rent proceeds distributed among his four brothers from 2008 until 2018.

87. The Defendants claimed that the suit was statute barred. The Plaintiffs received rent derived from the suit property from 2008 to 2018. They filed this suit in 2019. The claim is not time barred.
88. The Plaintiffs have proved their case on a balance of probabilities. The court grants prayers (a), (b), (c), (d), (e), (f) and (h) of the Amended Plaint dated 27/10/2023.

Delivered virtually at Embu this 8th day of December 2025.

K. BOR
JUDGE

In the presence of: -

Mr. Edwin Omulama & Mr. Albert Kwenja for the Plaintiffs

Ms. Wanjiru Mburu for the Defendants

Court Assistant- Diana Kemboi