

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ELC NO. E011 OF 2022

**DAMAN KUMAR RAM NATH SHADI RAM
PLAINTIFF**

VERSUS

**RUPA BULBULI GUPTA (SUED AS THE
PERSONAL REPRESENTATIVE AND ADMINISTRATOR
OF THE ESTATE OF PREM LAL RAMNATH
A.K.A. PREM LAL RAMNATH GUPTA A.K.A.**

**PREM GUPTA (DECEASED) 1ST
DEFENDANT**

**THE LAND REGISTRAR - KWALE COUNTY 2ND
DEFENDANT**

JUDGMENT

1. **Daman Kumar Ram Nath Shadi Ram** brought this suit vide a plaint dated 23rd February 2022. The Plaintiff sought the following reliefs; -

a) A declaration that the transfer of the land parcel No. Kwale/Diani Beach Block/47 from the name of the Plaintiff and into the joint name of the Plaintiff and the deceased 1st Defendant was done irregularly, unprocedurally and illegally and is therefore null and void.

b) An order directed to the County Land Registrar - Kwale County to have the land parcel No.

Kwale/Diani Beach Block/47 reverted into the Plaintiff's sole name.

c) A permanent injunction restraining the 1st Defendant whether by themselves, their agents, servants or other person claiming through them from trespassing on land parcel No. Kwale/Diani Beach Block/47.

d) Costs of this suit and interest of the suit.

2. The Plaintiff avers that he is the lawful lessee of land parcel No. Kwale/Diani Beach Block/47, having acquired the leasehold interest therein from Kershaw (East Africa) Limited on 1st July 1979 for a term of ninety-nine (99) years commencing from the same date. He states that he has at all material times held the suit property solely in his name and has never at any time jointly owned the same with the deceased, Prem Lal Ramnath a.k.a. Prem Lal Ramnath Gupta a.k.a. Prem Gupta, or with any other person. However, sometime in the year 2021, upon being served with pleadings relating to High Court Mombasa Succession Cause No. 5 of 2020, the Plaintiff discovered among the filed documents a copy of a title deed purportedly issued on 6th January 2017 indicating that the suit property had been registered in the joint names of the Plaintiff and the deceased for a term of ninety-nine (99) years from 1st July 1979, a development that came as a complete surprise to him.

3. The Plaintiff avers that he never executed any transfer of lease, consent, or other document authorizing the inclusion of the deceased as a joint proprietor of the suit property, nor did he ever sell, transfer, or receive any consideration in exchange for any interest therein. He contends that the purported joint registration was procured fraudulently and without his knowledge, consent, or authority. In particular, the Plaintiff avers that the deceased fraudulently impersonated his signature on the transfer of lease forms dated 8th July 2016 and similarly forged the signature of his wife, Sunita Gupta, on the affidavit of spousal consent sworn on the same date before one Catherine Mutisya, a person unknown to the Plaintiff and whom he has never met. He further states that the transfer and subsequent joint registration were the result of illegal, unlawful, and fraudulent dealings intended to deprive him of his sole ownership of the suit property.
4. The Plaintiff therefore avers that the registration of the suit property in the joint names of himself and the deceased was irregular, unprocedural, illegal, and fraudulent, and is consequently null and void.

The 1st Defendant's Response

5. The 1st defendant denied the above allegations vide a Statement of Defence dated 12th July 2022 through the firm of Khalid Salim and Company Advocates. She avers that the suit property known as land parcel No. Kwale/Diani Beach

Block/47 was acquired in the year 1979 jointly by the Plaintiff and the deceased, Prem Lal Ramnath a.k.a. Prem Lal Ramnath Gupta a.k.a. Prem Gupta, who were brothers and long-time business partners engaged in several joint ventures and companies. She contends that it was mutually agreed between them at the time of acquisition that the Plaintiff would hold the deceased's share in trust, and although the property was registered solely in the Plaintiff's name, such registration did not negate the deceased's beneficial ownership, as the parties co-owned the property and peacefully enjoyed their respective interests therein for over thirty-eight (38) years without dispute or interference.

6. The 1st Defendant further avers that pursuant to their joint ownership and business relationship, the Plaintiff and the deceased established and incorporated a company known as Wayside Beach Apartments Limited in March 1991, through which they developed the suit property by constructing holiday apartments and resorts for purposes of generating rental income and profit. She states that the Plaintiff and the deceased jointly managed and operated the said development, with the Plaintiff holding the legal title in trust for the deceased's share. She adds that following the deceased's illness and the emergence of family disputes, the Plaintiff and the deceased mutually resolved in the year 2017 to formally register the property in their joint names so as to safeguard each party's interest and prevent future conflicts,

and that the subsequent registration of the deceased as co-proprietor was done lawfully, procedurally, and with the full knowledge and agreement of the Plaintiff.

7. The 1st Defendant denies all allegations of fraud, illegality, impersonation, or irregularity in the transfer and registration of the suit property and puts the Plaintiff to strict proof thereof. She maintains that the Plaintiff never solely owned the suit property but held the deceased's share in trust until the same was formally transferred and registered in their joint names in 2017, thereby vesting each of them with a lawful and independent interest. She contends that the Plaintiff has no legal or equitable claim over the deceased's share and that the present suit does not disclose any reasonable cause of action, and consequently prays that the Plaintiff's suit be dismissed with costs.

The Plaintiff's Reply to the 1st Defendant's Statement of Defence

8. The Plaintiff filed a Reply to the 1st Defendant's Statement of Defence dated 23rd September 2022, wherein he joined issue with the 1st Defendant and denied each and every allegation contained therein save for those expressly admitted. He contended that the Defence consisted largely of general denials and unsubstantiated assertions and reiterated the averments contained in paragraphs 5 to 15 of the Plaint. The Plaintiff maintained that he was at all material times the sole registered proprietor of land parcel No. Kwale/Diani Beach

Block/47 and denied that he ever held any portion thereof in trust for the deceased or that the deceased had any beneficial or legal interest in the suit property prior to the impugned registration.

9. The Plaintiff further denied the allegations that the suit property was jointly acquired, jointly developed, or jointly managed together with the deceased, and put the 1st Defendant to strict proof thereof. He disputed the claim that the registration of the deceased as a joint proprietor in the year 2017 was done lawfully, procedurally, or with his consent, and maintained that the same was effected fraudulently, illegally, and without his knowledge, authority, or participation. Consequently, the Plaintiff urged the Court to disregard and dismiss the 1st Defendant's Statement of Defence and to enter judgment in his favour as prayed in the Plaint, together with costs of the suit.

THE 2ND DEFENDANT'S RESPONSE

10. The 2nd defendant filed a defense dated 20th June 2022 through Mr. Mwandeje M. Mng'ong'o a Senior Litigation Counsel in the Office of the Attorney General, denying each and every allegation contained in the Plaint save for the descriptive particulars of the parties and the Court's jurisdiction. The 2nd Defendant further averred that he was a stranger to the averments contained in paragraphs 5, 6, 7, 8, and 9 of the Plaint relating to the acquisition, ownership, and

alleged joint registration of land parcel No. Kwale/Diani Beach Block/47, and therefore could not admit the same.

11. The 2nd Defendant specifically denied the allegations of fraud and illegality pleaded in paragraph 10 of the Plaint and averred and maintained that at all material times the Land Registrar acted strictly within the confines of its statutory mandate, which includes facilitating lawful registration processes, registering interests in land based on duly lodged documents, and ensuring that all land registration procedures are conducted in accordance with the applicable law and supporting documentation. He further denied that any of the land registrars actions were intended to deprive the Plaintiff of his property or to confer any unlawful benefit upon the deceased or any other party and put the Plaintiff to strict proof of all allegations of fraud, collusion, or impropriety.
12. The 2nd Defendant maintained that the Plaintiff had not established any wrongdoing on the part of the land registrar and averred that the Plaintiff's claim was misconceived, unmerited, and unsupported by evidence, and therefore prayed that the suit against the 2nd defendant be dismissed with costs.

HEARING AND EVIDENCE OF THE PARTIES

13. The case was heard on 8/12/2022 and 9/10/2024.

PLAINTIFF'S CASE

14. PW1, Daman Kumar Gupta, testified on his behalf as the plaintiff in the matter. He adopted his witness statement dated and sworn on 9/3/2022 as his evidence in chief. He stated that he is the lawful lessee of land parcel No. Kwale/Diani Beach Block/47, having acquired the same from Kershaw (East Africa) Limited on 1st July 1979 for a term of ninety-nine (99) years. His statement reiterates the averments in the plaint which I have already enumerated at the beginning of this judgement.
15. Additionally, according to the witness statement PW1 testified that the photograph and signature appearing on the transfer documents were not his. He also testified that the transfer documents bore an expired passport number which was no longer valid as at the time of the alleged transfer, and that he had since been issued with a different valid passport, thereby further demonstrating that the transfer was fraudulent.
16. PW1 testified that the signature on the affidavit of spousal consent was not that of his wife as he knew her signature due to the long years of marriage.
17. It was PW1's further testimony as per the witness statement that he never received any payment, consideration, or compensation from the deceased or from any other person in respect of any transfer or sharing of ownership of the suit property. He maintained that the registration of the suit property in joint names was the

product of fraud, illegality, and impersonation, and that he remained the sole lawful owner of the suit land. He urged the Court to declare the impugned transfer null and void, to order rectification of the land register to restore the property into his sole name, to restrain the 1st Defendant from interfering with the suit property, and to award him costs of the suit.

18. PW1 produced a list of documents dated 23/2/2022 as PW1 Exh 1 - 6. The documents were Copy of a current search for the land parcel No. Kwale/Diani Beach Block/47, Copy of the tile deed for the land parcel No. Kwale/Diani Beach Block/47 in the Plaintiff's name only along with the relevant surrender of lease by the instant prior lessee and a letter of consent to transfer from the prior lessee to the Plaintiff, A copy of the Plaintiff's passport no. A777076 and the passport No. A2032976, A copy of the transfer of lease form dated 8th July, 2016, A copy of an affidavit of consent of spouse sworn by Sunita Gupta at Mombasa in 2016, and A copy of the letters of administration issued in Mombasa High Court Succession Cause No. 5 of 2020 to the 1st Defendant.
19. PW 1 went ahead and denounced the emails in item 1 in the 1st defendant list of documents dated 12/07/2022. He confirmed that he never wrote the emails and reiterated his prayers in the plaint.
20. On Cross Examination by Ms. Amina counsel on record for the 1st defendant, PW1 confirmed that Mr. Prem Gupta was his

brother and they had several properties together. That Mr. Prem had his own businesses while PW 1 had his own. They had a shopping complex at Bamburi and Mr. Prem operated Bamburi Supermarkets while PW 1 operated Rem developments Limited on the same complex. PW 1 denounced the email dated 25/11/2014 since the email address used damangupta46@yahoo.co.uk was not in operation and they had another email in use though he was not conversant with the use of emails and laptops and that he never wrote any emails. That he lived in Kenya and later on moved to United Kingdom. That he went to UK twice in a year since he had medical issues with his kidney.

21. PW 1 further testified that due to the illness his brother Prem used to control everything. PW 1 stated that he is older than Prem who controlled all the cash and used it the way he wanted. PW 1 told the court that he obtained loans from hire purchase companies to buy land such as the Diamond Trust Bank. He told the court that in Kwale Diani Beach 47 there are beach apartments named Wayside Beach Apartments. That Wayside Beach Apartments is a business name and also registered as a company which was found by his brother and himself as shareholders. That his brother used to collect rent which he approximated at Ksh. 125,000 but upon being shown paragraph 5 of the email dated 25/11/2014 he confirmed the figure is 115,000/=. That the property was

- initially rented but he never saw any money since Prem took over the property and placed his own son, Varun, as manager.
22. PW 1 further testified in cross examination that Tipu and Kuny were her sons. PW 1 confirmed that he was aware of the development in accordance with paragraph 3 of the email. That the property was initially in his name but they used Wayside due to licence requirements. That the buildings belonged to him because they were built on loans. He conceded rent was being collected and paid to Prem who was not the owner but paid to him out of his interference. That they he had agreed with Prem that each retains one Bamburi Supermarket and Rem developments and there were no shares. PW 1 confirmed that he was to keep Rem Properties Limited. PW 1 denied he was aware of Mombasa Case No. 1367 of 2021 Bamburi Supermarkets Limited versus Estate of Prem Gupta where he sued Rem. PW 1 confirmed that his signature was forged and stated he gave his lawyers copies of his passport for comparison. That he reported the matter at Diani Police. PW 1 conceded he didn't have a forensic examiners report and had not been given any OB Number at Diani Police.
23. PW 1 testified that in relation with the spousal consent that ladies do not interfere with business. He reiterated that his wife did not sign any document though he had not produced any document as proof that the signature was not his wife's signature. PW 1 confirmed that he had never met Catherine

Mutisya, never contacted her and he did not understand why he needed to contact her. PW 1 could not remember whether he was in Kenya in 2016 at the time of the transfer whether he had produced evidence to confirm he was not in Kenya then. PW 1 confirmed that his wife was not a witness in the case since wives do not interfere with business.

24. On being referred to the email dated 21/5/2015 PW1 pointed that his family has never conned anybody. PW 1 disagreed with the contents of the email dated 16/7/2015 stating that they wanted to gobble up Gupta's property since Gupta was not present to defend himself. He confirmed that his brother died in 2019 and reiterated that he wants his share since the land was not for both of them. PW 1 denied being greedy for money and he left his brother to do whatever he wanted to do. PW 1 evaded answering the question whether he was strategically suing after the death of his brother. He testified they had many misunderstanding with Gupta and Gupta did not make contributions. PW 1 confirmed that Kuny and Tipu never managed Wayside.

25. On cross examination by Mr. Mwanjeje, a State Counsel in the office of the Attorney General, PW 1 confirmed that he resides in United Kingdom. That he came back to Kenya in 2017 since he comes back twice a year. In relation to paragraph 4 of his witness statement the witness stated he is not the one who perused the court documents therein and he cannot remember who perused them. That he did not ask his

brother about the title though the witness was very evasive in answering this question.

26. PW 1 further testified that he had not come back to Kenya since 2019. On being shown paragraph 3 of his witness statement he confirmed that he learnt of the Mombasa High Court Succession Cause from Baron his late brother's son which he termed unprocedural because he was not served with the same. PW 1 stated that it was not possible for his wife to have interacted with Mrs. Mutisya since all their businesses are conducted by males with exception where Rupa was interfering a lot. He reiterated his wife has been in the United Kingdom since 2005 and cannot have interacted with Catherine. PW 1 confirmed that he alluded to fraud and forgery and had reported the matter to Diani Police Station but did not have the OB in court.
27. On reexamination PW 1 clarified that in 1979 he bought the property in his sole name as a Kenyan citizen. That he started ailing in the year 2000 and his medical treatment begun in 2005. PW 1 confirmed that he did not give authority to Prem to run his business and Prem had access to finances and company emails. That he learnt of the double registration in the succession cause filed in 2001 when his brother had passed away and could not confront him. PW 1 clarified that Wayside was for business only. PW 1 clarified further that the transfer is false and he knows how his signature and that of his wife looks like and his wife has never been in Kenya since

2005. PW 1 confirmed that Barun the deceased son informed him of the joint registration. That while in the United Kingdom he never authorized anything since he was under intense medication. PW 1 clarified that in relation to the letter dated 21/5/2015 he never wrote it and cannot recall it at all.

28. With the above, the plaintiff's case was marked as closed.

1ST DEFENDANTS CASE

29. DW 1 was Mrs. RUPA BULBULI GUPTA, the 1st Defendant. She stated that she lives in Nyali and manages her husband complex as her work. She adopted her witness statement dated 12/7/2022 as her evidence in chief. DW 1 testified as the personal representative of the estate of the 1st Defendant herein.

30. According to the witness statement DW1 testified that the deceased and the Plaintiff herein were brothers who had multiple businesses and companies registered, of which they were both directors, and by virtue of their relationship the two used to carry on their business together.

31. That the deceased and the Plaintiff acquired the leasehold parcel of land known as Kwale/Diani Beach Block/47 from Kershaw (East Africa) Limited in 1979 for a period of ninety-nine (99) years. She stated that during the purchase of the property, it was agreed between the deceased and the Plaintiff that the Plaintiff would hold the deceased's share in trust, and that only the Plaintiff's name was to be registered on the property. She confirmed that from the date of

acquisition, the deceased's share in the property was legally being held in trust by the Plaintiff for his brother, and that only the Plaintiff's name appeared on the title.

32. That the parties co-owned the property and enjoyed its use freely and without any hindrance whatsoever, the co-ownership arrangement having in no way been affected by the manner of registration. She stated that it was resolved between the Plaintiff and the deceased that they would inject funds and develop the acquired property by constructing holiday resorts so as to maximize on the land use and acquire profits therefrom.
33. That the Plaintiff and the deceased established and incorporated a company known as Wayside Beach Apartments Limited in March 1991 and commenced the construction of blocks of apartments on the suit property for rentals, as agreed between themselves. She stated that the Plaintiff and the deceased jointly ran and managed the said business of short-term and long-term rental of holiday apartments and/or resorts built on the suit property, which was registered in the Plaintiff's name, with the Plaintiff holding his brother's share in trust.
34. That the deceased was later taken ill and, as time went by, family disputes began to arise, making it necessary for the parties to resolve the issues between themselves. She stated that sometime in 2017, the Plaintiff and the deceased came to an agreement and resolved to have the property registered

in their joint names so as to avoid any future family conflicts and confusion in the event of the death of either of them.

35. That upon following all the requisite legal procedures, the deceased was registered as co-owner of the subject property, thereby holding his fifty percent (50%) share in the property in his own name, which share was no longer being held in trust for him by the Plaintiff. The Plaintiff never solely purchased the suit property, as the deceased's share had been held in trust by the Plaintiff from the date of acquisition up until 2017 when the property was registered in both their names, and that as such the Plaintiff does not have any right, legal or otherwise, over the deceased's share in the property.
36. DW 1 concluded in her statement by stating that the Plaintiff's assertion of fraud is without any basis, unsubstantiated, and ought not to be granted by this Honourable Court, and she prayed that the same be dismissed with costs.
37. DW1 produced DW 1 Exh 1 - 4 according to her list of documents dated 12/7/2022 being Copy of emails dated 25th November 2014 and 6th July 2015, Letter dated 21st May 2015 and Copy of the Certificate of Lease.
38. DW 1 added that the property was the initial home at purchase of Daman Gupta who is a brother to her husband. That the reason why the name of Daman was placed in the title was because her husband was not a Kenyan Citizen and therefore could not buy the property in his name. DW 1

testified that it was agreed that in the future her husband was to get 50% share on the property to do business.

39. DW1 added that there are other properties that her husband owned with her brother-in-law. That Prem had spent all his money to buy the property and Prem later acquired citizenship though she could not remember the date. DW 1 confirmed from the Plaintiff Exhibit 3A that the passport photo in the passport was still Daman's. On Plaintiff Exhibit 3b she confirmed the passport photo was that of Daman except that people age. On PEX4 Exhibit 4 -Transfer of Lease she confirmed the picture as Daman Gupta though the photo was not clear.
40. With regards to the email produced in her bundle dated 25/11/2014 DW1 confirmed it was from Daman Gupta addressed to the planetguta@gmail.com, and the email was run by the late Prem Gupta. DW 1 was referred to the last paragraph where she confirmed the paragraph states that Prem is a partner and the issues referred therein as for sorting out was for the property that they owned together and which included Way Side Apartments Limited.
41. DW 1 could not however confirm whether they sorted the issues but confirmed that for Way Side Apartments Limited they were able to resolve by the 50% shares around 2016/17. That before 2016/17 Prem was not receiving rent thus the need for the 50% share arrangement. DW 1 confirmed that the allegation of Daman that he didn't sign the transfer and

his wife on the 50% share to Prem was a narrative that have been brought since Prem was dead and they insist that DW 1 knows nothing. DW 1 was referred to a letter dated 21/5/2015 to Prem from Daman, page 2 of paragraph 5 and testified that the property was to be transferred to Prem because of the 50%. On the paragraph 8 of the email dated 6/7/2016 from Daman Gupta to Prem she told the court they were disturbing him so that he could die before the plan matured. DW 1 confirmed that according to her the process of transferring the 50% share was properly done and her husband had done everything above board and had a lawyer. DW 1 confirmed that Daman was aware of everything but was just pretending that he doesn't know about the transfer.

42. On cross examination by Mr. Osodo DW 1 confirmed that the property was purchased from Kershaw East Africa Limited though she did not have the sale agreement. DW 1 was referred to her witness statement in terms of paragraph 4 and 11 where she stated that Prem was to hold the property in trust, but confirmed she had no documents to support this. DW 1 confirmed that she has no document to support that Prem sent money for the purchase of the property. DW 1 confirmed that on Wayside Apartments Limited the land has never been registered in this name. DW 1 confirmed that she has Prem Kenyan citizenship though she had not produced it same before court. DW 1 confirmed that the emails she has produced referred to various family issues being loans, KRA,

purchase of fridges, Bamburi Supermarkets and the problems have not been fully settled. DW 1 confirmed that she has been involved since she got married. DW 1 confirmed that to her everything was legal and the actions were undertaken by lawyers. On LCB consent she conceded she had none.

43. Upon cross examination by Mr. Mwandeje DW 1 confirmed that the plaintiff and Prem are brothers. On the Certificate of Lease in her bundle the witness confirmed that it bears two names Prem and Daman and her understanding was that the property belongs to both the proprietors.

44. On reexamination DW1 reaffirmed that there is no agreement of trust but she alluded to the same because Daman was the older brother and there was respect between them and trust. She confirmed that the transaction took place in 1979 and in terms of who lent money she would not be aware. She indicated she is not aware why the property was not registered in the name of Wayside. In 6/7/2015 there was reference to "gobble up" and there was a change of plan Prem had a terminal illness which was long term in nature and they took advantage of this and this is the reason why Wayside name was never used. With regard to the issues referred to in the emails her husband tried to have them resolved and they agreed but after he died, they wanted to grab everything because she DW 1 is all alone. DW 1 confirmed that the parties would always agree when Prem was alive but after his demise they were disturbing her. DW 1

confirmed that on the issue of LCB consent her husband handled everything through his lawyers and she was not a lawyer. She reiterated that the title bears two names and is a proper title.

45. With the above the 1st Defendant case was closed.

46. DW 2 was Ms. Susan Mueni, Land Registrar Kwale Personal Number 2015000474. She confirmed that the suit property is Kwale/Diani Beach Block/47 a leasehold and produced a bundle of Green Cards as DW 2 Exh 1 (page 1 - 5). The witness told the court that the land registry has a green card and a white card. The land was government land allocated to Kershaw East Africa Limited in 1981, who transferred to Daman Kumar Ram on 11/4/1990 and certificate of lease issued on the same day. In 1991 the property was charged to DTB for Kshs. 5Million. That on 6/01/2017 two documents were booked at the lands registry for registration and one was a discharge of charge the other was a transfer from Daman Kumar to Daman Kumar jointly with Prem Gupta. DW2 confirmed that discharge was registered on the same day and transfer done and a certificate of lease issued to the two joint proprietors.

47. DW 2 confirmed that from the current lands' registry records the property is registered to Daman Kumar the plaintiff and Prem Gupta. On the charge Daman got the property in 1990, and charged it in 1991 and only discharged it in 2017 at the point of doing the transfer. Apart from the

green cards the witness told the court that the transactions are supported by documents namely transfer from Keshaw to Daman Kumar dated 11/4/1990; charge document, discharge of charge and transfer registered on 26/01/2017. She confirmed that all the completion documents are in the file being the rates certificate, payment of stamp duty, consent to transfer from land officer and the original title in the name of Kershaw and the one that was discharged to Daman Kumar and which were both surrendered as required.

48. Mr. Osodo did not cross examine the witness.
49. On cross examination by Ms. Amina DW 2 confirmed that all the completion documents are available and stated that leases do not require LCB consent as the land was not freehold. DW 2 confirmed that all the required documents were presented in the transaction.
50. There was no reexamination on the part of Mr. Mwandeje.
51. With the above the 2nd Defendant's case was closed.

SUBMISSIONS

52. The court issued directions on filing of final submissions by counsel. On 11/12/2024 leave was granted to the plaintiff and the 2nd defendant to file their submissions.

PLAINTIFF SUBMISSIONS

53. The Plaintiff's submissions are dated 5th May 2025 and identified two (2) issues for determination, namely:
 - I. Who is the bona fide and legitimate owner of land parcel Kwale/Diani Beach Block/47, the suit property herein?

II. Who is entitled to the costs of the suit?

Who is the bonafide and legitimate owner of land parcel Kwale/Diani Beach Block/47

54. Rehashing the Plaintiff case and evidence Counsel on record for the Plaintiff submitted that the right to acquire and own property is constitutionally protected under Article 40 of the Constitution of Kenya, 2010, which guarantees every person the right to acquire and own property individually or in association with others. It was contended that the actions of the Defendants amounted to an infringement of the Plaintiff's constitutional right to property.
55. It was submitted that the transfer into joint ownership was procured through fraud as pleaded at paragraph 10 of the Plaint. That the Plaintiff had tendered documentary evidence demonstrating the root of his title, including the original Certificate of Lease issued in his sole name and the supporting documentation relating to the surrender of lease and consent to transfer from the previous lessee, Kershaw (East Africa) Limited. That this evidence established beyond dispute that he was the original and lawful proprietor of the suit property.
56. It was submitted that allegations of fraud must be strictly pleaded and proved to a higher standard than a mere balance of probabilities the court was referred to various authorities on the subject - **Emfil Limited v Registrar of Titles**

Mombasa & 2 Others [2014] eKLR, John Kamunya & Another v John Nginyi Muchiri & 3 Others [2015] eKLR, Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others [2013] eKLR,

57. Revisiting the plaintiffs' evidence, it was submitted that the plaintiff never authorized the transfer of the suit property into joint ownership. It was contended that the deceased brother took advantage of the Plaintiff's absence from the country and his deteriorating health to forge documents and procure a transfer of the property.
58. Counsel submitted that the Plaintiff's passport records demonstrate that he was not present in Kenya on the date when the impugned transfer documents were allegedly executed before a Commissioner for Oaths. This, it was argued, cast serious doubt on the authenticity of the documents relied upon to effect the transfer.
59. The Plaintiff also denied knowledge of the advocate who purportedly attested to the transfer documents and maintained that neither he nor his wife executed any spousal consent in relation to the suit property.
60. On the contention that the plaintiff held the suit property in trust for the deceased Defendant. Counsel submitted that no documentary evidence was produced to demonstrate the existence of such a trust arrangement. It was argued that if the alleged trust had existed, the same would have been reflected in the title or documented through formal agreements.

61. In support of the legal principles governing trusts, reliance was placed on **Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR**, where the Court of Appeal elaborated on the distinction between constructive and resulting trusts and emphasized that such trusts arise only where the circumstances justify the intervention of equity.
62. The Plaintiff further cited **Kazungu Fondo Shutu & Another v Japhet Noti Charo & Another [2021] eKLR** and **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR**, in which the Court of Appeal held that a trust cannot be presumed by a court in the absence of clear intention and sufficient evidence demonstrating the parties' intention to create such a trust.
63. It was therefore submitted that the 1st Defendant failed to establish any evidence showing that the deceased Defendant contributed to the purchase of the suit property or that there existed any agreement or understanding that the Plaintiff was holding the property in trust.
64. The Plaintiff also submitted that no sale agreement, consideration, or documentary evidence was produced to demonstrate that a valid transfer or sale transaction took place. Counsel argued that the absence of such evidence further supports the Plaintiff's position that the transfer was fraudulent.

65. The Plaintiff drew the Court's attention to the testimony of the Land Registrar, Kwale County, who confirmed that a charge had previously been registered over the suit property in favour of Diamond Trust Bank and subsequently discharged before the property was transferred into joint ownership. It was contended that the Plaintiff had no knowledge of the charge or the subsequent discharge.
66. Counsel argued that although the Land Registry records show a sequence of transactions culminating in the issuance of the joint title, the Registrar does not verify the authenticity of signatures appearing on instruments presented for registration. The Plaintiff maintained that the signatures attributed to him in the transfer documents were forged.
67. It was submitted that the Court was confronted with two competing titles in respect of the same property: the earlier Certificate of Lease issued in the Plaintiff's sole name on 11th April 1990 and the later Certificate of Lease issued on 6th January 2017 reflecting joint ownership. Reliance was placed on **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that when faced with competing titles, the Court must investigate the root of each title and determine which title was lawfully acquired.
68. The Plaintiff also cited **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, where the Court of Appeal held that once the root of a title is challenged, the registered proprietor

must go beyond the instrument of title and demonstrate the legality of its acquisition.

69. Counsel further referred to Section 26(1) of the Land Registration Act, which provides that a certificate of title is prima facie evidence of ownership but may be challenged where it is shown that the title was acquired through fraud, misrepresentation, illegality, or an unprocedural process.

70. The Plaintiff therefore urged the Court to find that the earlier title issued in his sole name was validly obtained, whereas the subsequent joint title was procured fraudulently and should be nullified.

Who is entitled to costs?

71. On the issue of costs, the Plaintiff submitted that the general principle is that costs follow the event. He therefore urged the Court to award the costs of the suit in his favour should the Court find merit in his claim and grant the orders sought.

1ST DEFENDANTS SUBMISSIONS

72. The 1st Defendant's written submissions dated 26th November 2024 were filed in opposition to the Plaintiff's claim. From the pleadings, the evidence on record, and the submissions by counsel, the 1st Defendant framed two (2) issues for determination, namely:

- I. Whether the Plaintiff has proved the allegation of fraud;
- and

- II. Whether the transfer of the suit property into the joint names of the Plaintiff and the deceased Defendant was lawful and procedural.

Whether the Plaintiff has proved the allegation of fraud

73. The 1st Defendant submitted that the Plaintiff's case is founded entirely on allegations of fraud against the deceased Defendant. That According to the Plaintiff, the transfer of land parcel Kwale/Diani Beach Block/47 into joint ownership was procured through forged signatures appearing on the transfer of lease forms and on the spousal consent affidavit.
74. The 1st Defendant, however, contended that the Plaintiff and the deceased were brothers who had engaged in several joint business ventures over the years. It was submitted that the suit property was one of the investments acquired jointly by the two brothers for purposes of operating rental apartments and other business activities.
75. Counsel for the 1st Defendant submitted that although the property was initially registered in the name of the Plaintiff, the same was done for convenience and in trust for the deceased Defendant. It was argued that at the time of acquisition the deceased had not yet obtained Kenyan citizenship, and prevailing legal restrictions made it difficult for non-citizens to hold property interests. As such, the parties

agreed that the property be registered in the Plaintiff's name while he held it in trust for the deceased.

76. It was further submitted that the brothers developed the property together and constructed apartments which were operated as short- and long-term rental units. To facilitate the management of the business, they incorporated a company known as Wayside Beach Apartments Limited in the year 1991.
77. According to the 1st Defendant, both brothers continued to invest resources into the development and management of the business over the years. The arrangement, it was submitted, worked harmoniously until family disagreements arose following the deterioration of the deceased's health.
78. The 1st Defendant further submitted that sometime between the years 2016 and 2017, the brothers mutually agreed to formalize their ownership interests by registering the property in their joint names. The intention, it was argued, was to avoid potential disputes between their respective families in the event of death.
79. Counsel submitted that the said decision was communicated through email correspondence exchanged between the Plaintiff and the deceased, which correspondence was produced in evidence during the hearing.
80. The 1st Defendant therefore contended that the transfer of the property into joint ownership was undertaken with the

knowledge and consent of the Plaintiff and was part of a mutual arrangement between the two brothers.

81. On the allegation of fraud, the 1st Defendant argued that the burden of proof lay squarely on the Plaintiff. Reliance was placed on Section 109 of the Evidence Act, which provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence.
82. Counsel submitted that the Plaintiff failed to discharge this burden as he did not produce any expert or handwriting analysis to demonstrate that the signatures appearing on the impugned documents were forged. In support of this argument, reliance was placed on **Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] KLR 76**, **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR**, where the Court held that allegations of fraud must be strictly proved and require a standard of proof higher than the ordinary balance of probabilities and **Ndolo v Ndolo [2008] 1 KLR (G & F) 742**, where the Court reiterated that where serious allegations such as fraud or forgery are made, the party alleging them bears a heavier evidentiary burden.
83. Counsel therefore submitted that the Plaintiff merely denied signing the documents without providing any independent evidence to support his allegation that the signatures were forged.

84. In the circumstances, the 1st Defendant urged the Court to find that the Plaintiff had failed to prove the allegations of fraud to the required legal standard.

Whether the transfer into the joint names of the Plaintiff and the deceased Defendant was lawful and procedural

85. On the second issue, the 1st Defendant submitted that the transfer of the suit property into joint ownership was undertaken in accordance with the law and proper procedures.

86. Counsel referred to the testimony of the Land Registrar, Kwale County, who confirmed that the land registry records contained all the necessary documentation relating to the history of the property.

87. It was submitted that the white card (register) reflected the full chain of transactions affecting the property, including the original lease from Kershaw (East Africa) Limited to the Plaintiff, the surrender of that lease, and the subsequent transfer into the joint names of the Plaintiff and the deceased Defendant. Further that all completion documents required to effect the transfer were available in the land registry records. These included evidence of payment of land rates and rent, the relevant consent from the Land Officer authorizing the transfer, and the supporting instruments of transfer.

88. On absence of consent from the Land Control Board it was submitted that such consent was not required in the present case since the suit property is leasehold land, and the

applicable requirement was consent from the Land Officer rather than consent from the Land Control Board, which typically applies to transactions involving agricultural freehold land.

89. According to the 1st Defendant, the necessary consent from the relevant Land Officer was duly obtained and forms part of the land registry records.
90. Counsel argued that the Plaintiff had not presented any credible evidence demonstrating that the land registry procedures were irregular or that the transfer was effected unlawfully.
91. The 1st Defendant therefore urged the Court to find that the transfer was regular, lawful, and procedural, and that the deceased Defendant's half share in the property rightfully forms part of his estate.
92. In conclusion, the 1st Defendant submitted that the Plaintiff had failed to discharge the burden of proof placed upon him under Section 109 of the Evidence Act.
93. It was contended that the allegations of fraud and forgery were not supported by sufficient evidence and remained mere assertions without proof.
94. The 1st Defendant therefore urged the Court to find that the Plaintiff had failed to establish his case on the required standard of proof.
95. Accordingly, the 1st Defendant prayed that the Plaintiff's suit be dismissed with costs to the 1st Defendant.

THE 2ND DEFENDANTS SUBMISSIONS

96. The 2nd Defendant's written submissions dated 11th December 2024 identified two (2) issues for determination, namely:

- I. Who is the bona fide owner of land parcel Kwale/Diani Beach Block/47; and
- II. Whether there was any fraud, illegality, or impropriety on the part of the 2nd Defendant in the registration of the suit property in the joint names of the Plaintiff and the 1st Defendant.

Who is the bona fide owner of land parcel Kwale/Diani Beach Block/47

97. Rehashing the evidence as presented by DW2 on the suit property's history and entries as contained in the green cards of the parcel it was submitted that the constitutional right to property ownership is protected under Article 40 of the Constitution of Kenya, 2010, which guarantees every person the right to acquire and own property individually or in association with others.

98. Counsel further submitted that under Section 26(1) of the Land Registration Act, a certificate of title issued by the Registrar upon registration shall be taken by courts as prima facie evidence that the person named therein is the absolute and indefeasible owner of the property, unless it is shown that

the title was obtained through fraud, misrepresentation, illegality, or an unprocedural process.

99. The 2nd Defendant submitted that the land registry records clearly demonstrate that a transfer instrument was duly registered at the Lands Office and that the property is currently reflected as being registered in the joint names of the Plaintiff and the deceased 1st Defendant.
100. Counsel pointed out that the Plaintiff himself produced an official search confirming the same position as reflected in the green card records maintained at the land registry.
101. In view of the foregoing, the 2nd Defendant submitted that both the Plaintiff and the deceased 1st Defendant appear in the land registry records as joint proprietors of the suit property.
102. The 2nd Defendant further submitted that the burden of proving that the transfer instrument was forged or fraudulently executed lies squarely on the Plaintiff. Reliance was placed on Section 109 of the Evidence Act, which provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence.
103. It was therefore submitted that unless the Plaintiff proves that the transfer instrument was forged or fraudulently obtained, the land registry records remain valid and continue to reflect the lawful proprietors of the property.

104. It was further submitted that both the Plaintiff and the 1st Defendant attempted to demonstrate how their respective interests in the suit property arose, and the documentary evidence presented by both parties corresponds with the records maintained at the Lands Office. Therefore, according to the official land records, ownership of the suit property presently vests jointly in the Plaintiff and the deceased 1st Defendant.

Whether there was fraud or illegality on the part of the 2nd Defendant in the registration of the property

105. It was submitted that the 1st defendant was not involved in any fraudulent or unlawful conduct in the registration of the transfer instrument or the issuance of the Certificate of Lease to the joint proprietors.

106. It was emphasized that allegations of fraud must be specifically pleaded and strictly proved by the party making the allegations. The court was referred to the decision in **Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR**, **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR**, **Kinyanjui Kamau v George Kamau [2015] eKLR**, and **Ndolo v Ndolo [2008] 1 KLR (G & F) 742**, in which the Court held that fraud must not be inferred from facts but must be distinctly pleaded and proved at a higher standard of evidence than the ordinary civil standard of proof.

107. Counsel further relied on the decision in **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**, where the Court explained the principles governing the burden of proof under Sections 107, 108, and 109 of the Evidence Act.
108. It was submitted that the Plaintiff bears both the legal and evidential burden of demonstrating that the transfer instrument was forged or fraudulently registered.
109. According to the 2nd Defendant, the Plaintiff did not produce any expert evidence, such as handwriting analysis, to demonstrate that the signatures appearing on the transfer instrument were not his. That no evidence was presented to demonstrate that the Land Registrar acted unlawfully or that the registration of the joint proprietorship was tainted with fraud or illegality.
110. In the circumstances, the 2nd Defendant urged the Court to find that the registration of the suit property in the joint names of the Plaintiff and the deceased 1st Defendant was carried out in accordance with the law and based on the documents presented to the Lands Office.
111. In conclusion, the 2nd Defendant submitted that the land registry records clearly demonstrate that the suit property is presently registered in the joint names of the Plaintiff and the deceased 1st Defendant.
112. It was further submitted that the Plaintiff has not discharged the burden of proving that the transfer instrument was fraudulent, illegal, or improperly registered.

113. The 2nd Defendant therefore urged the Court to consider the law and the authorities cited, evaluate the evidence on record, and render a just determination based on the applicable legal principles.

ISSUES FOR DETERMINATION

114. Upon considering the pleadings, the evidence led, the rival submissions of the parties and the law and authorities cited the following issues commend determination.

- a) Whether the Plaintiff held the suit property in trust for the deceased 1st Defendant husband;
- b) Whether the transfer of land parcel No. Kwale/Diani Beach Block/47 into the joint names of the Plaintiff and the deceased 1st Defendant was lawful and procedural;
- c) Whether the Plaintiff has proved the allegations of fraud in the transfer and registration of the suit property; and
- d) Whether the Plaintiff is entitled to the reliefs sought in the Plaint and
- e) Who bears the cost of the suit

Whether the Plaintiff held the suit property in trust for the deceased 1st Defendant?

115. The 1st Defendant's case is that the Plaintiff and the deceased, Prem Lal Ramnath a.k.a. Prem Gupta, were brothers who jointly acquired land parcel No. Kwale/Diani Beach

Block/47 from Kershaw (East Africa) Limited in 1979 for a term of ninety-nine (99) years. It is averred that at the time of acquisition, the deceased was not yet a Kenyan citizen and was therefore legally unable to hold property in his own name, and that it was accordingly agreed between the brothers that the property would be registered solely in the Plaintiff's name while the Plaintiff held the deceased's beneficial interest in trust.

116. The Plaintiff, on the other hand, maintains that he solely acquired the suit property in his own right and capacity as a Kenyan citizen, and that the deceased held no interest therein, whether legal or beneficial. This Court must therefore determine, whether a trust arrangement existed between the Plaintiff and the deceased over the suit property from 1979 onwards.

117. According to the Black's Law Dictionary, 9th Edition; a trust is defined as;-

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

118. In Kenya the Court of Appeal in **Twalib Hatayan & Another v Said Saggah Ahmed Al-Heidy & Others [2015] eKLR** elaborated comprehensively on the distinction between

resulting and constructive trusts and held that a resulting trust arises by operation of law where property is acquired in the name of one person but another person contributes to the purchase price or where the circumstances surrounding acquisition demonstrate a common intention that the beneficial ownership should not follow the legal title. A constructive trust, on the other hand, is imposed by equity to prevent unconscionable conduct where it would be inequitable to allow the legal proprietor to assert sole ownership.

119. In **Kazungu Fondo Shutu & Another v Japhet Noti Charo & Another [2021] eKLR**, the Court of Appeal confirmed that a trust may be established by examining the conduct and dealings of the parties over time, particularly where formal documentation is absent but the circumstances clearly disclose a common intention to share ownership. The Court further held that the absence of a formal declaration of trust is not necessarily fatal to establishing its existence, particularly where the parties shared a close familial or business relationship and the surrounding circumstances are consistent with a trust arrangement.

120. In the case of **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR**, the Court of Appeal observed that in assessing whether a trust exists, the court must look at all available evidence, including the conduct of the parties, their business dealings, communications, and any financial arrangements that shed

light on the nature of their relationship with respect to the property in question.

121. In the present case several uncontroverted facts emerge. Firstly, DW1 testified that the reason the property was registered solely in the Plaintiff's name in 1979 was that the deceased was not a Kenyan citizen at the time and was legally precluded from holding property. This evidence was not effectively challenged by the Plaintiff. PW1, on cross-examination, admitted that the deceased was his brother and that they had several properties and businesses together. PW1 further admitted that the deceased operated Bamburi Supermarkets while he operated Ram Developments Limited on the same complex, demonstrating an established pattern of joint investment and shared enterprise between the two brothers.

122. Secondly, both the Plaintiff and the 1st Defendant confirm that the suit property was developed through the joint efforts of the Plaintiff and the deceased. DW1 testified that funds were injected to construct holiday apartments on the property, and Wayside Beach Apartments Limited was incorporated in March 1991 with both brothers as shareholders for the purpose of managing rental income from the development on the suit property. PW1 himself confirmed on cross-examination that Wayside Beach Apartments was founded by his brother and himself as shareholders and that rent was collected from the property. This joint development of

the suit property and the joint management of the business built upon it strongly supports the 1st Defendant's account of a shared beneficial interest from the outset.

123. Thirdly, PW1 told the court that he entrusted the management of the suit property and collection of rental income entirely to the deceased during the period he was resident in the United Kingdom. The Plaintiff's testimony that the deceased 'used to collect rent' and 'took over the property' and that he 'left his brother to do whatever he wanted' is consistent with the existence of a trust arrangement under which the deceased was exercising his rights as a beneficial co-owner, rather than a mere agent or manager. PW1's own admission that 'due to illness his brother Prem used to control everything' and that Prem 'controlled all the cash and used it the way he wanted' reflects the exercise of proprietary authority over the property rather than mere stewardship on behalf of another.

124. Fourthly, the email correspondence produced by the 1st Defendant, including the email dated 25th November 2014 from the address associated with the Plaintiff to the deceased's email address planetgupta@gmail.com, contains an express reference to Prem Gupta as a 'partner' and to the need to resolve matters pertaining to their jointly owned properties including Wayside Apartments Limited. The same correspondence references monthly rental income of approximately Kshs. 115,000 from the suit property, consistent

with DW1's testimony about the deceased's entitlement to a share of the rental income. Although PW1 denied authoring the emails, he was unable to establish that he had taken any steps to report the alleged misuse of his email credentials, and the emails are consistent with the entirety of the surrounding factual matrix.

125. Fifthly, PW1 made the telling concession that he '*agreed with Prem that each retains one Bamburi Supermarket and Rem Developments and there were no shares,*' indicating the brothers were in the process of separating their jointly held interests across their various businesses. This admission is wholly inconsistent with the Plaintiff's primary case that the deceased had no interest whatsoever in any of the jointly operated properties and businesses. It instead confirms the 1st Defendant's case that the brothers held multiple joint interests that required formal apportionment.

126. I have noted the plaintiff's contention that no documentary evidence was produced to demonstrate the existence of a trust and had the alleged trust existed, the same would have been reflected in the title or documented through formal agreements. However, I must point out that based on the caselaw above the circumstances of the case rule out an express trust.

127. The property was registered in the Plaintiff's sole name for reasons of convenience and legal necessity arising from the

deceased's citizenship status at the time, but the beneficial interest was shared between the brothers in equal measure. This arrangement is consistent with the principles articulated in **Twalib Hatayan supra** and is further supported by the totality of the parties' conduct over more than three decades of joint development, joint management, and shared enjoyment of the property.

128. This Court therefore finds, on a balance of probabilities, that the Plaintiff held the suit property in trust for the himself and the deceased from the time of its acquisition in 1979.

Whether the transfer of land parcel No. Kwale/Diani Beach Block/47 into the joint names of the Plaintiff and the deceased 1st Defendant was lawful and procedural;

129. The 1st Defendant's case is that sometime between 2016 and 2017, the Plaintiff and the deceased mutually agreed to have the property registered in their joint names so as to avoid future family disputes, and that all requisite legal procedures were duly followed. The Plaintiff contends that the registration was effected without his knowledge, consent, or participation.

130. Section 26(1) of the Land Registration Act, No. 3 of 2012 provides that;

26. Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

131. The joint Certificate of Lease issued on 6th January 2017 therefore attracts this presumption of regularity and legality until otherwise proven. But I must quickly add that my review of the Certificate of Lease dated 6/01/2017 produced

by DW1 and search produced does not reflect a joint ownership nor a common ownership. It is silent. It is trite that in the absence of that distinction then the ownership shall be treated as a tenancy in common.

132. Section 91 of the Land Registration Act No. 3 of 2012 provides for co tenancy as follows;

1. In this Act, co tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common. 2. Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there is a presumption that they hold the interests as tenants in common in equal shares.

133. One of the key distinctions of a tenancy in common is the absence of the right of survivorship. This means that upon the death of a tenant in common, their share of the property does not transfer to the surviving owners. Instead, it becomes part of the deceased's estate and is distributed according to their will or the laws of intestate succession. I found it pertinent to make this clarification.

134. DW2, Ms. Susan Mueni, the Land Registrar, Kwale County, testified that all requisite completion documents were available for the 2017 transfer. These included a duly executed transfer instrument, evidence of discharge of the Diamond Trust Bank charge, proof of payment of land rent and rates,

and a consent to transfer from the Land Officer. DW2 further confirmed, on cross-examination by counsel for the 1st Defendant, that for leasehold property such as the suit property, the relevant consent required is from the Land Officer and not from the Land Control Board, which applies to freehold agricultural land. The Land Control Board consent was therefore not required in this transaction, and its absence does not render the transfer defective. The court agrees with this position.

135. DW2 confirmed that the transfer registered on 6th January 2017 was from the Plaintiff jointly with the deceased, and that both a discharge of charge and the transfer instrument were registered on the same day. A new Certificate of Lease was issued to the two proprietors as joint owners. All of this is consistent with a regular and procedurally compliant registration process.

136. This Court finds no basis, on the evidence before it, to hold that the registration process was irregular or procedurally defective. The requirements of the Land Registration Act were satisfied, the consent of the appropriate authority was obtained, and a valid Certificate of Lease was issued. This Court accordingly finds that the registration of the suit property in the names of the Plaintiff and the deceased 1st Defendant was lawful and procedural.

Whether the Plaintiff has proved the allegations of fraud in the transfer and registration of the suit property

137. It is trite that fraud is a serious allegation that can lead to cancellation of a title. The provision of Section 26 (1) of the Land Registration Act states that a Certificate of Title, which is 'prima facie' conclusive evidence of ownership can be challenged on the ground of fraud or misrepresentation to which the person is proved to be party to. The Court of Appeal of Uganda held in **Katende - Versus - Haridas and Company Limited (2008) EA 173** held that: -

“For a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must attribute either directly or by necessary implications that is, the transferee must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and had notice of fraud.”

138. The burden of proof requires that the Plaintiff must specifically plead fraud and prove it, since it's a question of evidence as stated in the provision of Sections 107, 108 & 109 of the Evidence Act, Cap. 80. The court has been referred to a myriad authority on the subject which are binding upon this court including the threshold for proving fraud as follows; -

139. In the case of **R. G Patel - Versus - Lalji Makanji (1957)** **EA 314** where it was stated: -

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

140. Fraud has been defined in Black's Law Dictionary 11th Edition as: -

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

141. The Court of Appeal in **Vijay Morjaria - Versus - Nansingh, Madhusingh Darbar & another [2000] eKLR** held that:

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

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

142. In the present case fraud was specifically pleaded in paragraph 10 of the plaint and the particulars thereof itemized which I will refer to later in this judgement.

143. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is slightly higher than in the ordinary civil cases. In the case of **Koinange & 13 others - Versus - Charles Karuga Koinange 1986 KLR at page 23** the court held thus:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

144. Additionally in the case of **Kinyanjui Kamau - Versus - George Kamau [2015] eKLR** the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo - Versus - Ndolo [2008]1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was

alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..." In case where fraud is alleged it is not enough to simply infer fraud from the facts.

145. The Plaintiff's case is premised on the allegation that the deceased fraudulently forged the Plaintiff's signature and the signature of the Plaintiff's wife, Sunita Gupta, on the transfer of lease forms and the affidavit of spousal consent respectively, all dated 8th July 2016. It is further alleged that the Plaintiff was not present in Kenya at the time and had no knowledge of the transfer.

146. Guided by the case law cited herein I will examine whether the allegations have been established to the requisite standard of proof. The Plaintiff particularized the fraud as follows:

- I. forging his signature on the transfer of lease forms dated 8th July 2016;
- II. forging the signature of his wife, Sunita Gupta, on the affidavit of spousal consent; and

III. effecting the transfer of the property into joint names without lawful authority.

147. In support of these particulars, the Plaintiff relied solely on his own oral testimony and the production of his two passports. No forensic or handwriting expert analysis was produced. No police report or Occurrence Book number was produced, PW1 conceded under cross-examination that he did not receive an OB number when he purportedly reported the matter at Diani Police Station. The Plaintiff did not call his wife, Sunita Gupta, to testify, though she is described as the person whose signature was allegedly forged and whose evidence would have been material and directly probative.

148. On the question of the passports, the Plaintiff testified that the passport number appearing on the transfer documents was from an expired passport. However, PW1 confirmed that the photograph on the transfer of lease, though not entirely clear, was identified by DW1 as being that of the Plaintiff. The expired passport argument does not establish forgery. Moreover, the two passports produced do not show the entries and immigration stamps into and out of Kenya to rule out that he was not in Kenya at the time since he would travel twice a year to the UK.

149. On the question of the Plaintiff's wife, PW1 testified that Sunita Gupta had been in the United Kingdom since 2005. This was not independently corroborated by any passport stamps, immigration records, airline bookings, or other

documentary evidence. Sunita Gupta did not testify. The mere assertion that his wife was not in Kenya in 2016 is insufficient, without independent corroboration or the wife's own evidence, to establish that the signature on the spousal consent affidavit was forged.

150. On the question of the advocate Catherine Mutisya, the Plaintiff testified that he had never met her and had never instructed her. However, this does not necessarily establish fraud. The Plaintiff offered no evidence that the advocate acted improperly or that any complaint was made against her to the Law Society of Kenya or any law enforcement authority.

151. In **John Kamunya & Another v John Nginyi Muchiri & 3 Others [2015] eKLR**, the Court of Appeal observed that fraud may in appropriate cases be proved by circumstantial evidence. However, the Court also cautioned that circumstantial evidence sufficient to establish fraud must be cogent, consistent, and irreconcilable with any innocent explanation. In the present case, the circumstances advanced by the Plaintiff are, as demonstrated above, equally consistent with the 1st Defendant's account that the joint registration was effected with the Plaintiff's knowledge and as part of a mutual arrangement to formalize their long-standing co-ownership. The Plaintiff's denial of knowledge, advanced many years after the registration and only after the death of the deceased falls far short of the compelling evidence required to establish fraud.

152. Additionally the evidence in support of fraud is the Plaintiff's own testimony, uncorroborated by any independent witness, forensic expert, police record, or documentary evidence. Moreover the 1st Defendant has produced email correspondence, a Certificate of Lease bearing two names, and the evidence of the Land Registrar confirming a procedurally regular registration, all of which are consistent with a consensual joint registration.

153. This Court accordingly finds that the Plaintiff has failed to discharge the burden of proof placed upon him under Section 109 of the Evidence Act. The Plaintiff's case rests on bare assertion and denial, advanced in the absence of independent corroboration, expert analysis, or credible documentary support. The allegation that the deceased fraudulently procured the joint registration is not proved and must therefore fail.

154. The foregoing analysis will also apply to the 2nd Defendants case. No evidence was led to show that the 2nd defendant participated in any fraud in registration of the transfer. DW2 confirmed that all competition documents were presented. In this regard the court is further guided by the decision in the **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR)** where the Court of Appeal rendered itself thus; -

86. 'We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts

done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this.' Emphasis is mine.

Whether the Plaintiff is entitled to the reliefs sought in the Plaint and who bears the costs of the suit.

155. The Plaintiff having failed to prove his case on a balance of probabilities and including fraud against the registration of the title in the two names to the required threshold and the court having imposed a trust then clearly the Plaintiff is not entitled to the orders sought in the plaint dated 23rd February 2022.

Who bears the cost of the suit

156. This court is aware that costs follow the event pursuant to Section 27 (1) of the Civil Procedure Rules Cap. 21. However, the court is also granted discretion in exceptional circumstances.

157. In the case of: - **Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another - Versus - Mutula Kilonzo & 2 others [2013] eKLR** quoted the case of **"Levben Products - Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227"** the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

158. Exercising the Court discretion noting the litigants are drawn from the same families I find it prudent that each party should shoulder their own costs of this suit.

159. The upshot of the foregoing is that the Plaintiff has failed to establish his case against the Defendants to the required standard. The Plaintiff suit against the defendants is hereby dismissed and each party shall bear

Judgement dated signed and delivered this 30th Day of April 2026

HON. LADY JUSTICE A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform; -

In the presence of:

No appearance for the Plaintiff

Mr Omollo for the 1st Defendant

No appearance for the 2nd Defendant

Ms. Asmaa Muftah - Court Assistant.

ORIGINAL