

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E079 OF 2023

BETWEEN

NICOLA JANE BURROUGH.....APPELLANT

AND

JOSEPH MWONGELA MUNGANIA.....RESPONDENT

**CONSOLIDATED WITH
CIVIL APPEAL NO. E128 OF**

2023 BETWEEN

JOSEPH MWONGELA MUNGANIA.....APPELLANT

AND

NICOLA JANE BURROUGH.....RESPONDENT

*(Being appeals from the Judgment and Decree of the
Environment and Land Court of Kenya at Mombasa (S. M.
Kibunja, J.) delivered on 10th May 2023*

in

ELC No. 24 of 2019)

JUDGMENT OF THE COURT

1. We have before us two appeals, *to wit*, **Civil Appeal No. E079 of 2023** filed by **Nicola Jane Burrough** as the appellant against **Joseph Mwongela Mungania** as the respondent and **Civil Appeal No. E128 of 2023** filed by **Joseph Mwongela Mungania** as the appellant against **Nicola Jane Burrough** as the respondent. By consent of counsel for the respective

parties, the two appeals were consolidated with Civil Appeal No. E079 of 2023 being the lead file. For ease and consistency of referral to parties, Nicola Jane Burrough shall throughout in this judgment be referred to as **the appellant** and Joseph Mwangela Mungania as **the respondent**.

2. As a precis, by way of a Plaint dated 18th February 2019 and amended on 5th March 2019, the appellant averred that, after a long stint of working as a nurse in the United Kingdom (**the UK**), she chanced upon, and met the respondent in the year 2014, and they both developed a romantic relationship. During her travels to Kenya, she scouted for land to build her retirement home where she would eventually settle permanently. The relocation came at a cost as she disposed of all her assets in the UK, including her farm/ranch, cattle, horses, car and her life savings and pensions.
3. Due to the trust and confidence earned between the parties, the appellant entrusted the respondent to negotiate the purchase of two parcels of land, namely **Kwale/Ukunda/5532** and **Kwale/Ukunda/915 (the suit properties)**; that she also financed the purchase of motor vehicle registration number **KCP 221D Toyota Hilux Pick- Up (the motor vehicle)** (jointly referred to as **the assets** where applicable); and that while purchasing the assets, she made it clear to the respondent that they would be solely registered in her name as the sole beneficial owner.

4. According to the appellant, after the purchase of the assets, she requested the respondent to hand over the original title deeds of the suit properties and the log book of the motor

vehicle, but that the respondent totally refused to comply by being evasive as to their whereabouts; that she later discovered that the respondent allegedly forged her signature and procured registration of the suit properties in both their joint names on the pretext that the Kenyan law prohibits foreigners from owning land in their sole names unless jointly owned by a Kenyan citizen, but that he registered the motor vehicle solely in his name in flagrant violation of the understanding between them. The appellant stated that, to the extent that the respondent registered the suit properties and the motor vehicle in their joint names and in his sole name respectively, the said assets were being held in trust for her benefit, and that the respondent was bound to account for, and revert ownership of, the assets to her unconditionally.

5. The appellant contended that she secured funds through a mortgage advanced in the UK as well as pension benefits, sent money to the respondent to facilitate construction of a home on Kwale/Ukunda/915 and a perimeter wall on Kwale/Ukunda/5532; and that, during one of her visits to Kenya, she found that the respondent had altered the construction plans of the appellant's retirement home and that, instead, he was constructing rental apartments.
6. It was also the appellant's case that, later, on his own volition and without consulting her, the respondent advertised for sale the assets through Bidi Badu Solutions, and he in fact sold the motor vehicle for Kshs.1,700,000, but that he failed to remit the proceeds of sale to her. The appellant pleaded

that failure to remit the money obtained from the sale of the motor vehicle was in breach of the trust relationship between them for which she claimed special damages. The appellant particularised the respondent's fraud, deceit, misrepresentation, illegality and breach of trust as follows:

- "i. Forging the appellant's signature on the transfer instruments for the suit properties.*
- ii. Fraudulently procuring inclusion and registration of his name as a co - owner on the title documents for the suit properties contrary to the appellant's instructions yet he did not contribute to their acquisition.*
- iii. Procuring registration of his name as the sole owner of the motor vehicle contrary to the appellant's instructions yet he did not contribute to its acquisition.*
- iv. Advertising the suit properties for sale without the appellant's knowledge or consent.*
- v. Threatening the appellant with violence should she visit the suit property.*
- vi. Threatening to illegally and fraudulently expunge the appellant's name from the register of the title deeds for the suit properties yet he had no power of attorney issued to him by the appellant.*
- vii. Advertising the motor vehicle for sale and/or purporting to sell the motor vehicle and failing to account for the proceeds of the sale, if at all.*
- viii. Advertising and letting out the apartments on Kwale/Ukunda/915 and failing to account for the proceeds from the apartments."*

7. The appellant further particularised the special damages as follows:

“Proceeds of sale of motor vehicle KCP 221D Toyota Hilux Pick Up – Kshs.1,700,000.”

8. In view of the foregoing, the appellant prayed for judgement against the respondent as follows:

- “a. A permanent injunction restraining the respondent by himself, servants, agents, representatives, assigns and/or employees from alienating, advertising for sale, selling, leasing, disposing, wasting, damaging, transferring or in any way whatsoever dealing with or interfering with the appellant’s ownership and possession of Title Numbers Kwale/Ukunda/ 5532 and Kwale/Ukunda/915.*
- b. A declaration that the portion of interest in the suit properties held by the respondent is held in trust for the appellant and that the appellant is the sole bona fide and beneficial owner of the interest held in the suit properties.*
- c. A declaration that the appellant is beneficially entitled to the sale proceeds of the sale of motor vehicle registration number KCP 221D.*
- d. A mandatory injunction compelling the respondent to forthwith and unconditionally deliver up to the appellant the original title deeds of the suit properties issued in the joint names of the appellant and the respondent together with duly executed transfer instruments and all documents necessary to transfer the suit properties in favour of the appellant.*
- e. The sum of Kshs.1,700,000 being the sale proceeds of the sale of the motor vehicle.*

- f. Costs of the suit.*
- g. Interest on (e) and (f) above at court rates.*
- h. Any other relief the court deemed fit and just to grant.”*

9. In rebuttal, the respondent filed a Defence and Counterclaim dated 18th February and amended on 16th July 2019. In the defence, the respondent denied that the appellant solely contributed to the purchase of the assets. Instead, he averred that the appellant contributed only Kshs.6,700,000 in small tranches that could not be used significantly towards the purchase of the suit properties which were worth Kshs.21,000,000. It was the respondent's case that he single-handedly purchased and developed the rental properties on Kwale/Ukunda/915, which was, by then, valued at over Kshs.16,000,000; and that, to raise these amounts, the appellant used to sell on his behalf in the UK artefacts and curios, and that she would remit the proceeds to him through Western Union money transfer.

10. In the counterclaim, the respondent averred that his romantic relationship with the appellant broke down due to irreconcilable differences; that he had an equitable and beneficial interest in the suit properties, and that he was rightly registered as a joint proprietor; that he solely financed the purchase and development of the suit properties without any direct contribution from the appellant through sale of property, proceeds of business of selling curios and other African artefacts, sale of produce from his farm in Meru and commissions earned in

selling safaris and adventures; and

that the registration of the appellant's name on the title of the suit properties was through deceit and fraudulent representation by the appellant, who promised to marry him after finalising her divorce in the UK.

11. The respondent particularised the deceit and fraud on the part of the appellant as follows:

"i. Fraudulently leading on the respondent that the appellant would divorce her husband in the UK.

ii. Fraudulently leading on the respondent that she would marry him knowing that it was false and that she had no intention to do so.

iii. Purporting to have financed the purchase and development of the suit properties knowing very well that she had no interest whatsoever in the same."

12. The respondent prayed that the appellant's suit be dismissed with costs, and that judgement be entered in his favour for:

"a. A declaration that the portion of interest in the suit properties held by the appellant is held in trust for the respondent and that the respondent is the sole bona fide and beneficial owner of the suit properties.

b. A mandatory injunction compelling the appellant to execute all necessary transfer to reflect the respondent as the sole proprietor of the suit properties.

c. Alternatively, to (b) above, an order to the Land Registrar Kwale to make all necessary entries in the land's records to reflect the respondent as the sole proprietor of the suit properties.

d. Costs and interest of the suit.

e. *Any other relief the court deemed just to grant.*”

13. In rejoinder, the appellant filed a Reply to the Amended Defence and Defence to the Counterclaim dated 21st August 2019. In the reply, she reiterated that she was the sole financier of the purchase of the suit properties, and that the respondent did not make any financial contribution; that the respondent never contributed to the development of the suit property nor ever had any meaningful source of income that would have been a source of his contribution; that the amended defence was laced with approbation and reprobation as a result of which, at the earliest opportunity, she would seek leave to strike out such contents; and that, at some point, the respondent had physically assaulted her as a means to push her out of the suit properties. She denied that she gifted the motor vehicle to the respondent, and prayed for the reliefs sought in the amended plaint.
14. In the Defence to the Counterclaim, the appellant reiterated the contents of her amended plaint, and further denied that the respondent was entitled to any equitable interest in the suit properties as alleged or at all having procured their registration in his name through deceit, fraud and misrepresentation of facts; and that the respondent held the suit properties in trust for her.
15. The appellant further reiterated that she singularly financed the purchase and development of the suit properties, and that the respondent made no financial contribution as he was jobless with no income from which he would have purchased the suit properties; and that the respondent was a trespasser onto the suit property with

no colour of right to occupy them

or claim beneficial interest. Accordingly, the appellant prayed that the respondent's defence and counterclaim be dismissed with costs, and that judgment be entered as prayed for in the Amended Plaintiff.

16. The appellant testified as PW1. She stated that she met the respondent when she was living in the **UK**; that her relationship with the respondent ended in September 2018, reasons being that, after she purchased the suit properties, the respondent told her that the properties were now his, and that if she returned to Kenya she would be finished by gangsters; and that she felt that her safety was threatened, hence she remained in the UK for the sake of her safety. The appellant stated that she purchased the suit properties using her personal savings, and that she paid for them in instalments; and that, to finance the purchase: she sold her horse transport lorry; her property in the UK; an equity loan; and mortgage from Goldsmith Williams.
17. The appellant testified that she was informed that she would not be involved in signing of the sale agreement of the suit properties since it was to be in the Kiswahili language, and that she solely relied on the advice being given to her by the respondent. She denied signing the transfer agreement. The appellant further testified that she intended to build a two- bedroomed house and two separate one-bedroomed apartments for rental but that, instead, the respondent constructed four one-bedroomed apartments.

18. The appellant further testified that she would send money to the respondent through bank and Western Union transfers.

As to the motor vehicle, the appellant testified that she purchased and paid Kshs.2,000,000, but that the respondent sold it without her consent. The appellant testified that she had endured physical assault from the respondent as a result of attempting to reclaim what was rightfully hers.

19. In support of her case, the appellant produced the following documents:

- a. *Copies of the Title Deeds for Property Title numbers Kwale/Ukunda/5532 and Kwale/Ukunda/915.*
- b. *Bundle of documents consisting of remittances of Western Union and other money transfers by the appellant to the respondent.*
- c. *Copies of Loan and Mortgage document issued to the appellant and Solicitors Messrs Goldsmith Williams, UK by Retirement Advantage, UK together with the appellant's Loan account statement.*
- d. *Copies of the correspondences and invoices dated 09/09/2017 and 08/11/2017 from the appellant's Solicitors Messrs Lewis & Co. Ltd-UK.*
- e. *Copy of building plans originally approved for construction of the appellant's retirement home on title number Kwale/Ukunda/915.*
- f. *Photographs of the apartments constructed on Title number Kwale/Ukunda/915 and the foundation laid for construction of a perimeter wall on Title number Kwale/Ukunda/5532.*
- g. *Copy of the purported Transfer for Property Title number Kwale/Ukunda/5532.*
- h. *Copies of the invoice for purchase of motor vehicle registration number KCP 221D, Toyota Hilux, Vigo and payment receipts.*

- i. Copy of the official search for the motor vehicle registration number KCP 221D together with the payment receipt.*
 - j. Copy of the adverts for the sale of motor vehicle registration number KCP 221D, Toyota Hilux, Vigo on online platforms.*
 - k. Copy of appellant's medical report in relation to the appellant's injuries sustained after the Defendant assaulted her.*
 - l. Copy of the email dated 22/09/2018 and 09/09/2018 from the respondent threatening to have the appellant's name expunged from the Title documents for the Suit Properties.*
 - m. Copy of the advert for sale of Property Title number Kwale/Ukunda/5532.*
 - n. Copy of the appellant's Email dated 16/09/2018 to Messrs Bidi Badu Solutions and their response dated 17/09/2018.*
 - o. Copy of the respondent's Email dated 17/09/2018.*
 - p. Any other documents to be produced at the Pre-trial conference."*
20. The respondent, **DW1**, while adopting his witness statements dated 2nd April 2019 and 10th September 2019 respectively, testified that he occupied himself by selling curios and tourist excursions to Wasini Island, and that he met the appellant in his curio shop through a friend called Cathy; that the money he received from the appellant was: proceeds from sale of curios that she sold on his behalf in the UK on different platforms; for charity as the appellant was assisting schools in Diani and poor families; and for his own use and upkeep. DW1's position was that

he used to save the monies

being sent to him by the appellant, and that it is out of that that he was able to purchase the suit properties; and that, in addition, he got further funding from selling his land in Meru.

21. The respondent stated that the motor vehicle was a gift from the appellant, and which he used for his *miraa* transport business; and that he opted to sell the motor vehicle after it was involved in an accident. The respondent's further position was that he decided to insert the appellant's name in the Title Deeds since he was in love with her, and that he thought that they would ultimately get married.
22. To support his evidence, the respondent produced the following documents as contained in the Supplementary List of Documents dated
 - a. Sale agreement by the respondent over Plot No. Kwale/Ukunda/915 dated 17/4/15.*
 - b. Sale agreement by the respondent over Plot No. Kwale/Ukunda/5532 dated 3/5/16.*
 - c. Sale agreement between the respondent & one Richard Mwirigi dated 13/1/2014.*
 - d. Letter from Director Nuru Tours & Tracle confirming work relationship with the respondent.*
 - e. Several Cash vouchers from Nuru Tours & Travel as bundle showing commission paid.*
 - f. Receipt from Kwale County Government for market stall No. 126134.*
 - g. Photos of curios and artefacts from the respondent's shop with the Plaintiff in the UK.*

h. Architectural design and plans of house erected on Plot No. Kwale/Ukunda/915.

- i. Respondent's certified bank statement from DTB bank
1/5/17 to 24/4/18.
- j. Western Union Receipt dated 30/11/18.
- k. Mpesa Statements for the respondent."

23. **DW2, Agnes Kitundo**, a Valuer by profession holding a Bachelor's Degree in Land Economics, Diploma in Valuation and Estate Management and with over 10 years experience, testified that she carried out valuation of the suit properties in 2019. She stated that the search indicated that the suit properties were registered in the names of both the appellant and respondent; that, at the time of valuation, Kwale/Ukunda/915 was valued at Kshs.14,750,000 while Kwale/Ukunda/5532 was valued at Kshs.6,300,000. She produced the valuation report in evidence as an exhibit.

24. In a Judgment delivered on 10th May 2023, the learned Judge (**Kibunja, J.**) outlined four (4) issues for determination. Firstly, as to whether the Environment and Land Court (**the ELC**) had jurisdiction to entertain the matter, the trial court observed that the issues raised were two-fold: the ownership and interests held in suit properties; and the dispute over the motor vehicle. While referring to the law on jurisdiction of the ELC under **Article 162(1)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**, the learned Judge held that the predominant issue in the dispute involved the two suit properties while the issue of the

motor vehicle was secondary or incidental to the main dispute. It was the ELC's opinion that, if the question over the motor

vehicle was left without determination just because it was not a land issue, the parties would most likely move to another court to litigate over it thereby incurring additional expenses to not only the parties, but to the court as well.

25. Secondly, as to whom between the appellant and the respondent were entitled to the suit properties, it was held that the freehold titles to the suit properties were both in their joint names; and that **Article 65** of the **Constitution** confers interest in land to a foreigner, but that the interest should be leasehold and not of more than 99 years.
26. Thirdly, on whether there was resultant trust created for the benefit of the appellant over the suit properties, the learned Judge interrogated the evidence of the cash flow produced by each of the parties and opined that the appellant had a steadier cash flow than the respondent for the period between 2014 to 2018. The Judge questioned whether it was factual that the respondent was earning Kshs.31,680 from his work as a tourist guide as alleged since his rent was being paid by the appellant. The Judge further observed that the petty cash invoices relied upon by the respondent to demonstrate that he had a steady income, lacked letter heads, and that he also failed to produce the title of the land he allegedly sold in Maua as well as a receipt of the purchase price.
27. It was held that the appellant was the financier of the purchase and development of the suit properties contrary

to the respondent's claim; and that it was only on that basis that the respondent ensured that the appellant's name was on the titles to the suit properties. The respondent's

counterclaim was found to be an afterthought precipitated by the appellant's suit to claim what belonged to her.

28. The ELC found that the appellant being well aware that she could not purchase the land as a foreigner, still went ahead and did so by sending money to the respondent. For this reason, the learned Judge held that the particulars of fraud against the respondent were not proved by the appellant.
29. As to whether the respondent held the suit properties in trust for the appellant, it was held that no evidence was produced by the appellant to show that there was intention to create trust between the parties, or that the respondent was to hold the assets in trust for the appellant; and that the emails between the parties indicated that there was indeed a romantic relationship between the parties. The learned Judge entertained doubt that the respondent may not have contributed towards the acquisition of the suit properties. Even as the court sympathised with the appellant, it held that the suit properties were co-owned by the parties as the title documents indicated that they were tenants in common in equal shares.
30. Finally, on the claim over the motor vehicle, the Judge held that the appellant did not prove ownership. Therefore, she could not claim entitlement to the proceeds from its sale.
31. In the end, the learned Judge held that neither party

succeeded against the other, both in the main suit and in the counterclaim and dismissed both. The trial court proceeded

on the premise of the prayer under 'any other relief' and issued the following final orders:

- “a) That both the appellant’s suit and the respondent’s counterclaim are hereby dismissed.***
- b) Each party to bear his/her own costs in both the main suit and the counterclaim;***
- c) That, having restated that the two suit properties are co-owned by the appellant and the respondent, and being cognizant of the parties unrealised desire to terminate that ownership through this suit, and so as to avoid multiplicity of litigation and costs, the court directs as follows:***
 - i. That the parties to, either directly and/or through their counsel, have the two properties valued through a licenced relevant practitioner to establish their current market price within the next thirty (30) days, and the parties to share the valuation exercise fees equally. Thereafter, any party be at liberty to buy the other half’s (50%) share of the suit properties in thirty (30) days;***
 - ii. In case there is no party buying the other’s half share as contemplated above, the parties be free to engage a real estate agent to sell the suit properties and the proceeds thereof be shared equally between the appellant and the respondent. The fees payable to the real estate agent to be shared between the appellant and the respondent equally.”***

32. Dissatisfied, the appellant preferred the instant appeal. In a Memorandum of Appeal dated 24th May 2023, she raised nine

(9) grounds of appeal which we have condensed into the following 5 grounds, namely that the learned Judge erred in law:

- a) ***by holding that the appellant had failed to prove fraud on the part of the respondent with respect to the registration of the respondent as a co-owner of the assets;***
- b) ***by holding that the appellant had failed to establish a resulting trust in the ownership of the assets despite overwhelming evidence;***
- c) ***on the principles and application of the doctrine of a resulting trust by holding that the appellant was required to produce documentary evidence to prove ownership in respect of the assets;***
- d) ***in the interpretation and application of Article 65 (3) of the Constitution with regard to trust properties and having concluded that a foreigner would be deemed to hold the suit properties on leasehold by failing to find a resulting trust in the leasehold interest in favour of the appellant and thus contradicted himself; and***
- e) ***by considering extraneous matters in holding that the respondent was entitled to be paid for unclear services at large which were an un-pleaded issue and in the absence of any evidence of an intention to create a legally binding contractual relationship.***

33. The appellant thus prayed that the appeal be allowed; the judgement delivered by the learned Judge on 10th May

2023 in ELC Case No. 24 of 2019 and the decree of the court to the extent that it dismissed the appellant's Amended Plaint dated

5th March 2019 be varied, set aside and reversed; that the Court do grant the prayers sought in the appellant's Amended Plaintiff dated 5th March 2019; the appellant be awarded costs of this appeal; and grant of any other suitable relief.

34. On his part, the respondent raised twenty (20) grounds of appeal in his Memorandum of Appeal dated 12th June 2023. The grounds of appeal can be condensed into the following **six (6)** grounds of appeal, namely that the learned Judge erred in law and in fact:

- i. in failing to find that the appellant's name in the title document is tainted with illegality and ought to be revoked;**
- ii. in failing to appreciate the provisions of the law of contract relating to the sale of land while apportioning the appellant a share of the suit property after she admitted to not signing any agreement for sale or transfer documents;**
- iii. in finding that the suit properties are to be shared matrimonially whereas the parties did not plead marriage in the matter;**
- iv. in creating a non-existent trust based on an illegality since the name of a foreigner on the title document is an illegality which cannot be cured by creating a trust;**
- v. by finding that a foreigner who did not possess a work permit could buy, own and benefit from the sale of freehold property contrary to Article 65 of the Constitution; and**

vi. in failing to apply his mind judicially and to adequately evaluate the evidence and exhibits tendered thereby arriving at a decision unsustainable in law.

35. The respondent accordingly prayed that: the appeal be allowed with costs; the judgement dated 10th May 2023 be discharged, set aside and substituted for an order dismissing the same with costs; and for any other relief that the Court may deem fit to grant.
36. The appellant filed a notice of cross appeal dated 5th November 2024. Our reading and scrutiny of the grounds raised therein reveal that they are similar to those raised by her in the Memorandum of Appeal dated 24th May 2023 and therefore see no need to restate them.
37. We heard this appeal virtually on 17th June 2025. Learned counsel **Mr. Odhiambo** appeared for the appellant while learned counsel **Mr. Kaimenyi** appeared for the respondent. Both counsel relied on the respective parties' written submissions which they orally highlighted.
38. Mr. Odhiambo confirmed filing submissions dated 15th November 2024 in respect of the appellant's appeal and written submissions dated 28th February 2025 in respect of the respondent's (cross) appeal. He submitted that both sets of submissions raise similar arguments.
39. On behalf of the appellant, it was submitted that the learned trial Judge erred in finding that the respondent had not committed any fraud, yet he caused the suit properties and the motor vehicle to be registered jointly in

his name and that

of the appellant; that the respondent did so knowing very well that he had not contributed to their purchase or development; that, furthermore, the respondent caused the transfer into the joint names using identification documents and photographs of the appellant who was then not in Kenya; that the respondent conceded that he personally appended the appellant's signature on the transfer documents as a testament that he did not present the transfer forms to the appellant to execute them; and that the concession was sufficient to show that the instrument used to vest the joint ownership in the two properties was fraudulent.

40. According to the appellant, the respondent convinced her that the transaction would only be conducted in the Swahili language and, therefore, he had undue advantage over her, and that he exploited the vulnerable position in which she found herself; and that, by the respondent misrepresenting that she (the appellant) could not own land in Kenya because she did not have a work permit, was yet another testament of fraud perpetuated by the respondent.

41. The appellant took issue with the trial court's failure to find that she had proved the existence of a resulting trust by virtue of the respondent being a joint owner of the suit properties; that the trial court failed to recognize that resulting trusts otherwise known as implied trusts are created under **Section 2** of the **Trustee's Act, Cap 167** as well as **Section 3** of the **Law of Contract Act, Cap 23**; that Section 2 of the Law of Contract Act states that

“...the expression ‘trust’ and trustee’ extend to implied and

constructive trusts, and to cases where the trustee has a beneficial interest in the trust property”; that the Judge erred in holding that, since the appellant did not produce any documents to show intention of creating a trust, then a trust between the parties could not be implied, or that the respondent held the properties in trust for the respondent; that, by virtue of Section 2 of the Law of Contract Act, the law recognises both express and implied trusts; that **Section 3(1)** of the **Judicature Act** incorporates equitable principles and remedies as part of the law of Kenya; and that, therefore, a resulting trust, which is a creation of the equitable jurisdiction of the court applies whether or not there was an express trust deed.

42. To buttress this argument, the appellant relied on the Supreme Court decision in **Shah & 7 Others vs. Mombasa Bricks & Tiles Limited & 5 Others (2023) KESC 106 (KLR)** in which it was held that the definition of a trust and trustee extends to implied and constructive trusts, which are applicable in Kenya as doctrines of equity by dint of the Judicature Act. Further reliance was placed on the decisions of this Court in **Hayatan & Another vs. Al - Heidy & 5 Others (2015) KECA 713 (KLR)** which defined both constructive and resulting trusts; and **Twalib Hayatan & another vs Saggar Al-heidy & others (2015) eKLR**, which elaborated on circumstances under which a trust can be said to exist; and that the trial court did not explain why it departed from the holdings of courts superior to it.

43. The appellant also relied on the decisions of this Court in **Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley (2017) KECA 118 (KLR); Mombasa Bricks & Tiles Ltd & 5 others vs. Arvind Shah & 7 others (2019) KECA 780 (KLR);** and **Charles K. Kandie vs. Mary Kimoi Sang (2017) KECA 775 (KLR)** to advance the argument that, in instances where a person who provides the purchase money for acquisition of an asset, a resulting trust is presumed, and that this gives rise to an equitable remedy intended to prevent wrongdoing; and that it was wrong for the trial court to hold that, since there was no trust deed executed between the parties, there did not exist a trust whether expressed or implied.
44. It was submitted that **Article 65(3)** of the **Constitution** does not prohibit foreigners from owning property in Kenya at all; that it only prohibits them from holding freehold titles, and that, in any event, freehold titles can be converted into leaseholds; that it was thus erroneous not to find that the appellant could not take ownership of the suit properties; and that, for all intents and purposes, the trial court contradicted itself because, at the same time, it upheld the continued joint ownership of the suit properties, a pointer that it was in order for the appellant to own a freehold title.
45. It was submitted that the finding of the ELC that the respondent was entitled to be paid for unspecified services in facilitating the construction/development of the suit properties by sourcing for construction materials

was an un-pleaded issue; that basing the joint ownership of the suit

properties on that reasoning was erroneous; that the trial court failed to take cognisance of the fact that the respondent had been renting out the houses on the developed property and retaining the proceeds for himself; and that the trial court also failed to consider that the respondent admitted to selling the motor vehicle which amounted to an unjust enrichment on his part.

46. In conclusion, counsel for the appellant submitted that we should take note of the fact that the appellant sold all her properties, including taking out a mortgage against her property in the UK with a view to settling in Kenya, but ended up in a situation of being unable to take over her assets, for which she had worked hard and had invested. For this and the foregoing submissions, we were urged to set aside the decision of the ELC and enter judgment for the appellant as prayed in her Memorandum of Appeal.

47. On the part of the respondent, Mr. Kaimenyi relied on written submissions dated 24th February 2025 and 29th January 2025 respectively. Counsel submitted that the parties had a romantic relationship which was proved by the email correspondence between the parties; that the appellant did not have a valid work permit, a KRA PIN Number or other documents that would have enabled her to lawfully engage in a legitimate business transaction in the country; and that she could not therefore own a freehold property in Kenya pursuant to **Article 65 of the Constitution**.

48. It was submitted that **Section 3 of the Law of Contract Act**

provides that no action shall be brought for the disposition of

an interest in land unless the contract is in writing and signed by the parties thereto, and the signatures attested by a witness present at the time of signing the contract; that, in the instant case, this requirement was not fulfilled and, as such, the trial court erred in creating by itself a non-existent trust which cannot stand by dint of **Article 65 of the Constitution**; that a trust cannot be implied where none was pleaded; that courts cannot re-write contracts for parties, and cannot also set them aside unless on account of coercion, fraud or undue influence, which exceptions must be pleaded and proved as was held by the predecessor of this Court in **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited (2022) 2 EA 503**; and that it is common ground by dint of Article 65 that foreigners can only own leasehold title, and even then, only for a term of 99 years as was emphasised by the superior court (the ELC Narok sitting in Narok) **Mara North Holdings Limited vs. Sanaet Ole Masek & 4 others (2015) KEELC 317 (KLR)**; and that, therefore, it was an error on the part of the ELC to allocate a portion of the suit properties which were freeholds to a foreigner.

49. We were urged to uphold the finding that the appellant did not establish fraud on the part of the respondent in causing the registration of the suit properties in the joint names because the appellant willingly sent money to fund the purchase of the assets; that, although the appellant pleaded fraud, no report was made to the police for purposes of investigating him; that the suit was filed with a view to enforce an illegality because the appellant failed

to prove that

completion documents were received from the vendors, lodged for registration and stamp duty duly paid; that the order to sell the suit properties was also an illegality since one of the purchasers would not have obtained a title if they did not have legitimate documents to conduct business in the country; and that, in any event, the appellant had illegally used her tourist visa to do business in the country thereby violating the immigration laws, the Land Registration Act and the Law of Contract Act.

50. Finally, the appellant contended that the learned Judge erred in determining the issue of the motor vehicle while he did not have jurisdiction to do so. We were accordingly urged to dismiss the appellant's appeal with costs and allow the cross appeal.
51. This being a first appeal, we are under an obligation to reconsider and re-evaluate the evidence on record and come to our own conclusion, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanour of the witnesses. ***See: Selle & Another vs Associated Motor Boats Company Limited (1968) EA 123***. We are also alive to the fact that, as an appellate court, we ought to pay homage to the findings of the trial court unless such findings are based on no evidence or on misapprehension of the evidence, or the trial Judge is shown to have acted on wrong principles in reaching the findings. ***See: Jabane vs. Olenja (1986) KECA 21 (KLR)***
52. We have considered the record before us, the oral and written submissions of both counsel for the respective

parties, the

authorities cited in support of each parties' case and the law. We have accordingly delineated the issues that fall for determination to be:

- i. Whether the ELC had jurisdiction to determine the issues before it.*
 - ii. Whether constructive or resulting trust was implied from the manner of ownership of the suit properties.*
 - iii. What proportion of the suit property (if any) each party is entitled to.*
53. On the issue of jurisdiction, the respondent challenged the jurisdiction of the ELC on the ground that it pronounced itself on the issue concerning the motor vehicle whereas it did not fall for determination by the Court as provided by the Constitution or statute law that confer jurisdiction to it. The appellant indeed pleaded a refund of Kshs.1,700,000, being the proceeds of sale of the motor vehicle.
54. The Black's Law Dictionary defines the word jurisdiction as ***"the power and authority constitutionally conferred upon-or recognised as existing in -a court or judge to pronounce...award remedies provided by law"***, or ***"the lawful power to act or make decisions in a legal matter"***.
55. Jurisdiction is everything and, without it, a court cannot make one more step. ***See: Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR)*** where ***Nyarangi, JA.*** pronounced himself thus:
"A question of jurisdiction ought to be raised at the earliest opportunity and the

court seized of

the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.”

56. In ***Njenga vs. Cabinet Secretary, Ministry of Information Communication and Technology & 8 others [2020] KESC 25 (KLR)***, the Supreme Court stated that:

“21. It is trite law that a jurisdiction challenge whenever raised has to be determined in limine as it goes to the core of the case for where a court finds that it has no jurisdiction, it cannot make a further step.”

57. The ELC is conferred with jurisdiction by dint of ***Articles 162*** of the ***Constitution*** and ***Section 13*** of the ***Environment and Land Court Act, (ELC Act)***. In particular, ***Section 13(1)*** and ***(2)*** of the Act provide:

13. Jurisdiction of the Court

- (1) ***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
- (2) ***In exercise of its jurisdiction under Article 162(2) (b) of the Constitution,***

the Court shall have power to hear and determine disputes-

- (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- (b) relating to compulsory acquisition of land;**
- (c) relating to land administration and management;**
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- (e) any other dispute relating to environment and land.**

58. On its part, **Article 162(2)(b)** stipulates that:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a); and

(b) the environment and the use and occupation of, and title to, land.

59. The jurisdiction of the ELC is therefore restricted to determining issues relating to the use and occupation of, and title to, land. In other words, it does not concern itself with matters not falling under the use and occupation of, and title to, land. With this in mind, the question that follows is, *was the learned Judge within his jurisdiction to determine the dispute concerning the motor vehicle alongside the dispute relating to the suit properties?* In other words, *was the learned Judge obligated to strike out*

the suit for want of jurisdiction,

the issue of the motor vehicle having been pleaded alongside that of the suit properties?

60. This is a classic case where ‘mixed grill issues’ were pleaded by the appellant. Several schools of thought have come up on how to handle or determine a case with mixed grill issues, and to what extent a court can confer to itself jurisdiction in such circumstances.

61. The learned Judge (**Kibunja, J.**) considered the ‘predominant issue’ test in the persuasive decision of **Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another (2018) KEELC 1599 (KLR)** where Munyao, J. (as he then was) held as follows:

"On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court...That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC." (emphasis ours).

62. Before we proceed, we think that it would be remiss of us not to mention a second school of thought, **“the predominant purpose test”** as viewed by Prof. Ngugi (as

he then was) in the decision of **Suzanne Achieng Butler & 4 others vs. Redhill Heights Investments Limited & Another (2016)**

KEHC 1313 (KLR) in respect of which we must point out that, on appeal to this Court under the citation **Redhill Heights Investments Limited vs. Suzanne Achieng Butler & 4 others (2018) KECA 776 (KLR)**, was not considered on merit since it was established that the parties therein filed a consent to settle the issue. The learned Judge (*as he then was*) held as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

63. A holistic reading and appreciation of the ELC’s impugned decision reveals that the predominant issue in dispute between the parties, which also dominated the findings of the ELC, was the ownership of the suit properties. The issue of the motor vehicle arose not as a peripheral one since the appellant also claimed that she was the one who purchased the motor vehicle alongside the suit properties. Indeed, its purchase, the subsequent sale and

entitlement to the

proceeds of its sale were so interlinked to the dispute over the suit properties that it was almost practically impossible to deal with each dispute separately. We therefore cannot fault the ELC for adopting the 'pre-dominant issue' approach and assuming jurisdiction over the matter before holding that:

“...ownership and interests in the two suit properties fall under the ambit of this court as they are land matters. That though the issue relating to the acquisition of the vehicle, its ownership, sale and entitlement to the proceeds thereof, do not fall within the land and environment category, and would otherwise have been outside the jurisdiction of this court, the issue is connected and intertwined with the predominant questions relating to the two suit properties.”

64. As to the issue of ownership of the assets, the fact that the appellant and the respondent were in a romantic relationship is undeniable. The other fact is that, during the subsistence of the relationship, two suit properties were acquired, one of which was Kwale/Ukunda/915, and which was developed. Lastly, it is factual that the motor vehicle was later sold by the respondent for Kshs.1,700,000.
65. The relationship between the appellant and the respondent was never formalized, neither was there any remote suggestion by either parties that they cohabitated as husband and wife. Each of them affirms that they deserve a slice of the suit properties because of their respective contribution to the purchase and developments

thereon save, as stated above, only one of the properties is fully developed. The appellant claims that a resulting trust was founded by

dint of registration of the suit properties in her name and that of the respondent.

66. We must first put into perspective that the Kenyan law does not entirely prohibit foreigners from holding land in Kenya. Instead, the Constitution limits the land tenure which a foreign citizen may hold land to 99 years' leasehold, and that, if the conveyance purports to grant a lease greater than 99 years, the same is regarded to confer on the foreigner a 99- year leasehold interest and no more. **Article 65 (1) to (3)** in this regard provide as follows:

Landholding by non-citizens.

65. (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety- nine years.

(2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine- year leasehold interest, and no more.

(3) For purposes of this Article-

(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and

(b) property held in trust shall be regarded as being held by a citizen only if all of the

beneficial interest

**of the trust is held by persons
who are citizens.**

67. Therefore, the appellant was entitled as of right to own land, but such ownership was limited to a leasehold tenure of 99 years.
68. Trusts are created either expressly or by operation of law. In the matter before us, no express trust existed, which leaves us to determine whether there existed a trust created by operation of law. A trust created by operation of law can be either constructive or resulting trust. In **Hayatan & Another (supra)**, this Court re-stated the law on trusts as follows:

“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).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable

remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.

...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of

another, is immaterial (see Snell's Equity at p.177) (supra)." (Emphasis added)

69. In ***Kabui vs. Kabui*** (Civil Appeal 415 of 2018) [2024] KECA 1396 (KLR) (11 October 2024) (Judgment), this Court pronounced itself thus:

“37. Our apex Court in the case of Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) also weighed in on this matter as follows:

‘The Trustee Act defined a “trust” and “trustee” as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.’”

70. Likewise, in ***TMG & another v AP*** (Civil Appeal 138 of 2019) [2022] KECA 612 (KLR) (6 May 2022) (Judgment), while defining what a resulting trust is, this Court observed:

“38. Did a constructive or resulting exist

**over the suit property in the 1st
appellant's favour. Halsbury's Laws of
England 4th**

Edition Vol. 48 at paragraph 597 defines a resulting trust thus;

'A resulting trust is a trust arising by operation of law:

i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or

ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or

iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.'"

71. Our perusal of the record clearly indicates with no ambiguity that the appellant made a substantial contribution towards the purchase of the suit properties. From the documentary evidence that she produced, the appellant religiously sent money to the respondent to purchase the suit properties in both Kenya Shillings and Pound currencies. On the contrary, the respondent did not lead any evidence to rebut the presumption that the money the appellant was sending was to be used in acquisition of the suit properties and later for their development.

72. The appellant proved that she indeed took a mortgage

facility of 54,650 pounds against her farm known as *Dolalau Isaf*,

Boncath, Pembrokeshire SA737 OJS, but she later sold it for a consideration of 216,904.10 pounds. She further sold a property described as *Deanlands, Blaenwaum, Whitland SA 340HX* for 312,963.20 pounds as confirmed by the instructing firm in the UK *Lewis & Lewis Company Limited* through a letter dated 29th March 2019. All these facts were not controverted. The appellant also established that she transmitted monies to Kenya *via* Western Union and bank transfers, and to her, all these were for the purchase of the assets.

73. The respondent put up a spirited attempt to claim that the monies sent to him from the UK by the appellant were proceeds of curio and artefacts which he sent to her to sell in the UK on his behalf. He also testified that he obtained money from his local curio and artefact sales and from the sale of his parcel of land in Meru. He also claimed that he received commissions earned as a tour guide. The respondent produced and relied on petty cash voucher receipts from *Nuru Tours* to demonstrate that he earned commissions. A tabulation of the alleged amount earned in commissions comes to Kshs.1,397,000 or thereabouts. In addition, the respondent produced a sale agreement of his alleged 7 acres piece of land with miraa growing thereon which he was selling to one Richard Mwirigi for Kshs.3,360,000. The sum total therefore of the estimated contribution of the respondent would stand at Kshs. 4,757,000.

74. It suffices to note that the respondent did not prove that he actually received this money by production of

documents

indicating where it was deposited. For this reason, and for all intents and purposes, his explanation as to the source of the money which he contributed to the acquisition of the suit properties, with all due respect, is unconvincing.

75. Further, we have perused the sale agreements in respect of the suit properties. The first agreement in relation to Kwale/Ukunda/915 was that it was being sold for Kshs.1,000,000 while Kwale/Ukunda/5532 was being sold for Kshs.5,000,000. The total purchase price of both parcels of land was 6,000,000. This fact in itself ousts the respondent's assertion that he substantially contributed to the purchase and development of the suit properties.
76. We also cannot ignore the fact that the sale agreements were in the Kiswahili language which appears to have been well calculated to oust the appellant's understanding of their contents. Furthermore, there was no counsel involved in the transaction, and who would give the appellant independent legal advice. The appellant made it clear that she was not familiar with the Kiswahili language both spoken and written. The respondent in this case did, and deliberately so, take undue influence and advantage over the appellant.

77. The law sees through and seeks to prevent relationships which are built on trust and confidence only for one party to abuse the vulnerability of the other party through ascendancy, domination or control. In this regard, The House of Lords in **Royal Bank of Scotland vs. Etridge (AP) (2001) UKHL 44 (11th October, 2001)** had this to say:

“Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically, this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In Allcard v Skinner (1887) 36 Ch D 145, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In Zamet v Hyman [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred

to relationships where one party owed the other an obligation of candour and protection.”

78. Faced with similar facts as the ones before us, this Court differently constituted had occasion to render itself on what becomes of relationships where one party substantially contributes towards the acquisition of properties in **Stephen Mkare Lewa (supra)** as follows:

“It is unlikely that the respondent would have gone to such great lengths to obtain money including mortgaging her house and borrowing from the bank and friends merely to keep the appellant happy. Further, the fact that the account to which the respondent remitted money was in the parties’ joint name and not in the name of the appellant only connotes an intention on the part of the respondent to exercise some control over the funds. This was not consistent with an intention to gift the monies to the appellant. The money remitted by the respondent could only have been for a serious purpose, and not just leisure or to please her lover. We are satisfied that the respondent painstakingly raised this substantial amount of money for the purpose of purchase and development of the suit property with the intention of settling in Kenya. The appellant purchased the suit property and had it registered in his name shortly after the respondent remitted Sterling pounds 11,000 on 19th August, 2003 and Sterling pounds 18,000 on 1st September 2003. He has admitted that the development of the suit property, commenced and continued during the time of his relationship with the respondent. Although, the appellant contended that he bought the suit property from his own resources, the appellant did not produce any evidence in support of his alleged

income from employment or business other than his oral assertions. Nor did the

appellant adduce any evidence to show that he remitted any funds to the joint account or that he held any other bank account on his own. In the circumstances, we come to the conclusion that the appellant bought the suit property from the monies remitted to him by the respondent. Although he registered the suit property in his own name, the beneficial owner of the suit property was actually the respondent who not only advanced the money for purchasing the suit property but also the money for developing the property. In Halsbury's Laws of England 5th Edition Volume 72 at paragraph 280 it is stated:

'Subject to any express declaration of trust where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price...'

In this case the respondent solely contributed the money for purchasing the suit property, therefore the registration of the suit property in the appellant's name gave rise to a resulting trust in favour of the respondent."

79. From the evidence adduced at trial, and from our analysis of the documentary evidence that each party produced, we are not convinced that the respondent contributed or substantially contributed to the purchase and development of the suit properties. Indeed, all facts lead to the conclusion that the appellant expected that she

would be the sole owner

of the suit properties, but the respondent, in a rather cunning manner, registered them in their joint names.

80. Furthermore, it is also ironical that the respondent informed the appellant that she could not acquire land in Kenya because she was a foreigner. The question that then begs is, *why did he then have the suit properties registered in their joint names?* Only one answer rings in our minds: he knew too well that the appellant's intention was to purchase the properties solely in her name, but because of his deceit, he caused them to be registered in their joint names so that he could later claim a share in them. We say so because, if the law were as the respondent misrepresented, he would have had the suit properties registered in his name alone since, for according to him, foreigners could not hold land in Kenya.
81. Learned counsel Mr. Kaimenyi argued that the appellant did not have the correct documentation, for instance Kenya Revenue Authority's (KRA) PIN and a work permit to enable her acquire the properties in Kenya, hence she could not be cushioned by Article 65 of the Constitution. We then pause to ask, *is this an admission by the respondent that he participated in a fraudulent scheme and colluded with the relevant land registry personnel to ensure that the appellant's name appears on the title deeds?* In our respectful view, by registration of the suit properties in both names, the respondent in no uncertain terms acknowledged the significant contribution made by the appellant, and that it was only fair that her name appeared on the titles. It is indeed strange and telling

that after the purchases and the suit

properties were developed to a certain extent as to be fit for occupation, the respondent started exhibiting a hostile attitude towards the appellant.

82. Based on the record and the facts of the case, we have no difficulty in finding that a resulting trust arose since the appellant substantially funded the acquisition of the suit properties. Equity follows the law. Whether or not the properties were registered jointly in the appellant's name; by the mere fact that she proved her significant contribution to their acquisition and development, she was entitled to claim what rightfully belonged to her. We then find and hold that the appellant is entitled to 90% share of the suit properties while we apportion the respondent 10% share.

83. Turning to the ownership of the motor vehicle, a proforma

December 2017 from Planet Motors (Msa) Limited was raised and billed to the appellant. The amount was for Kshs. 2,000,000. A receipt of even date indicated that the appellant made payments of Kshs.70,000, being non-refundable commitment fees towards purchase of the motor vehicle. There was a disclaimer that, if the balance thereof of Kshs.1,930,000 was not paid by 6th January 2018, the deal would be rendered null and void. The motor vehicle copy of records shows that the motor vehicle was registered on 9th January 2018 in the respondent's name.

84. In his testimony in chief, the respondent testified that the

motor vehicle was a gift from the appellant to facilitate his miraa business. On her part, the appellant stated that she bought it at Ksh. 2,000,000, only for the respondent to sell it

at Ksh. 1,700,000 We cannot dismiss the fact that the appellant entirely contributed to the acquisition of the motor vehicle, more so on the admission by the respondent that it was bought for him as a gift. Therefore, even if only a receipt of acknowledgment of receipt of Kshs.70,000 from Planet Motors, the car dealer, was produced, the fact remains that the respondent admitted that it was bought by the appellant. On his part, the respondent failed to produce evidence that the vehicle was a gift to him. We are thus unable to buy his assertion that it was indeed bought for him as a gift. To us, through deceit as well, he caused it to be registered in his name. We would, in the circumstances apportion to him only 10% of proceeds of its (the motor vehicle) sale, which is Ksh. 170,000.

85. From the foregoing discourse, we make the following final orders:

a) In respect to the appellant's appeal No. E079 of 2023:

i. The same partially succeeds in that we set aside the apportionment of the value of the suit properties from a ratio 50:50% and substitute therefor with an apportionment at a ratio of 90:10% in favour of the appellant.

ii. We set aside the order of the learned Judge dismissing the appellant's claim of special damages of Kshs.1,700,000, being the proceeds of sale of the motor vehicle and substitute it therefor with an order that the respondent do pay to the appellant Kshs. 1,530,000, being

90% of Kshs. 1,700,000.

- b) As to the respondent's Appeal No. E128/2023, we find that it is bereft of merit and is hereby dismissed in its entirety with costs to the appellant at 90%.**
- c) We also order that appellant is entitled to 90% of the costs of the trial court suit and of her appeal in this Court, being appeal NO. E079 of 2023.**

Orders accordingly.

Dated and delivered at Mombasa this 15th day of May, 2026.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

*I certify that this is the
true copy of the
original*

Signed

DEPUTY

REGISTRAR