Archer & another v Archer & 2 others (Civil Appeal 39 of 2020)
[2023] KECA 298 (KLR) (17 March 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 39 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 17, 2023

BETWEEN

JAMES ARCHER ..... 1ST APPELLANT

JOANNA TRENT ..... 2ND APPELLANT

AND

INGER CHRISTINE ARCHER ..... 1ST RESPONDENT

ANNALISE ARCHER CLARK ..... 2ND RESPONDENT

HELLEN KAY HARTLEY ..... 3RD RESPONDENT

(An appeal against the judgment of the Environment and Land Court at Mombasa (Yano J.) dated on 26th November 2019 in Mombasa ELC Suit 345 of 2017)

JUDGMENT

1. James Archer and Joanna Trent, the Appellants herein, have appealed a judgment delivered on 26th November 2019 by the Environment and Land Court (Yano J.), which dismissed a suit they had filed by way of an Originating Summons dated 5th June 2012. The Appellants had in the said suit, sought beneficial interests in the properties known as Kwale/Diani Beach Block/806, 807 and 808 (hereinafter "the suit properties"), which were registered in the names of Inger Christine Archer, Annalise Archer Clark and Hellen Kay Hartley, the Respondents herein. The Appellants claimed that the said properties were held by the said Respondents in trust for the 1st Appellant, 2nd Appellant and one Robert D. Archer. According to the Appellants, the 1st, 2nd and 3rd Respondents jointly held one undivided share in the suit properties, while the 1st Appellant, 2nd Appellant and Robert D. Archer each held one undivided share. The Appellants also sought a further order that the Respondents do execute transfers to effect registration of the 1st and 2nd Appellants and two nominees of the Respondents as

joint proprietors of the leasehold interest in the suit properties, and in default therefore, the Registrar of the High Court be authorised to execute the transfer under section 98 of the *Civil Procedure Act*.

2. The Appellants' case is that they are entitled to a beneficial interest in the suit properties held by the Respondents under a constructive trust. Their case is set out in detail in an affidavit sworn on 5th June 2012 by the 1st Appellant in support of the Originating Summons, and further affidavits sworn on 2th October 2014 by the 2nd Appellant, and on 19th November 2014 by one Jean Hartley, a bookkeeper by profession and one Ushwin R. Patel a Certified Public Accountant. In summary, the Appellants' asserted that the 1st Appellant, 2nd Appellant, one Robert D. Archer, and Christopher John Archer who is since deceased (hereinafter referred to as "the siblings"), are the children of Howard Archer, also deceased. That in 1967, the siblings verbally agreed as a family to collectively purchase premises known as Diani House which was located on the suit properties, and that with their father Howard Archer, agreed to provide the capital of £5,000 for the purchase of the premises on the understanding and agreement that the siblings would repay him back over a period of time.

3. Reference was made to various correspondence and documents annexed by the Appellants, to demonstrate that the siblings did make payments in accordance with the verbal agreement, and that between 1967 and 1982, Christopher John Archer circulated the annual accounts on the suit properties and correspondence regarding costs and expenditures on improvements of the properties, on the basis that the Appellants had a beneficial interest in the properties, and in which they were shown as being long term creditors.

4. Further, that at the time of purchase of the premises, the siblings received legal advice that the suit properties, being beach property, was required be held in the name of a Kenyan citizen, and the properties were therefore registered in the name of Christopher John Archer, who at the time was the only sibling who was a Kenyan citizen, and on the understanding that he would hold them in trust for the other siblings. However, that misunderstandings started to arise in 1976 when Christopher John Archer sought to sub-divide the suit properties without the knowledge or consent of the other siblings, and later on in 1982 when the 1st Appellant questioned the annual accounts, and Christopher John Archer thereafter stopped circulating the said accounts. The Appellants referred to various legal and expert advice that they received on a trust arising over the suit properties in the circumstances.

5. The Appellants also made reference to various documents and emails which showed that Christopher John Archer and the Respondents had all along acknowledged the existence of the trust, and that the Appellants hoped that they would do the right thing, hence their reluctance to proceed by legal action and given that they had misgivings about the judicial system at the time. The 1st Appellant gave a description of his personal history and career as an architect and in community work, and the correlation thereof to his interest in the suit properties.

6. The Respondents, who are the children of Christopher John Archer, responded to the claim by way of a replying affidavit sworn on 23rd October 2012 and a further replying affidavit sworn on 26th March 2013, both by the 3rd Respondent. Their case is that in 1966 their father identified agricultural land in Diani that he wished to purchase, and asked his father, late Howard D. Archer, for a loan of £ 5000 for the purchase, and the property, being Diani/MS//227, was subsequently registered in the Respondents' father's name and he obtained a lease in his favour. According to the Respondents, the intention of their grandfather and father was that the house on the property would be available to the entire family to use on holiday, and that the family did use the property after its purchase. Further, that Howard D. Archer was not the purchaser of the suit properties, and the said properties were therefore not available for him to gift or will to the Appellants.

7. On the allegations of the repayment of the loan to purchase the suit properties and other contributions made by the siblings, the Respondents' averred that the siblings granted loans to Christopher John Archer to assist him to pay off the loan from Howard D. Archer and thereby became his creditors, which status was demonstrated by the financial statements annexed by the Appellants, and that these payments were not contributions to the purchase price and did not entitle the Appellants to any equitable interest in the suit properties. Furthermore, that even though the siblings contributed sums towards the maintenance and upkeep of the house in the early 70s, they thereafter stopped doing so, and the Respondent's father continued to meet the costs of repair and running of the house.

8. The Respondents referred to correspondence between the 1st Appellant's advocates and their father's advocates on the different legal opinions as to whether the property was held in trust by their father, and stated that the relationship between their father and Appellants deteriorated, with their father contemplating refunding the monies that the Appellants had paid towards the upkeep up the house to avoid bad blood between the siblings. The Respondent's stated that this was evidenced by their father's letter dated 29th January 1977 which they annexed, together with a letter dated 24th January 1977 from their father's lawyer with legal advice to this effect. Lastly, the Respondent's confirmed that they are now registered as proprietors of the remainder portions of the suit properties following its subdivision.

9. After hearing the parties, the learned trial Judge found that from the evidence adduced, the late Howard D. Archer made available a loan to the late Christopher John Archer to purchase the suit properties, and did not acquire any beneficial interest in the properties considering that the loan was subsequently settled, nor were the Appellants entitled to any beneficial interest in the suit property solely on the basis that the loan funds were made available by their father. In addition, that the Appellant's claim of trust based on the fact of certain loan repayment instalments to Howard D. Archer, the financial statements of Diani House business, the letters by the late Christopher John Archer, his accountant and advocates was insufficient evidence to demonstrate that the late Christopher John Archer held the suit property in trust for the Appellants. Lastly, that the issue whether the late Christopher John Archer held the suit property in trust for the plaintiffs was a long running dispute which commenced on 8th December, 1976, and the Appellants were guilty of laches, as claims of entitlement to a share of property under the doctrine of constructive trust and resulting trust are claims of equitable relief which may not be brought after the end of 6 years as per the provisions of Section 4(1) (e) of the *Limitation of Actions Act*.

10. The Appellants, being dissatisfied with this outcome, lodged an appeal in this Court and have raised ten grounds of appeal in their Memorandum of appeal dated 18th March 2020, on three main areas, namely that the trial Court misadvised itself on the facts and issues arising in the suit, misinterpreted and misapplied the law on trusts, and misinterpreted and misapplied the law on laches. During the pendency of the appeal this Court allowed an application by the Appellants to addduce additional evidence to show that the suit properties have since been sub-divided into eight parcels of land, and to file a supplementary record of appeal consisting of the absolute and leasehold cards for the said subdivisions, being land parcels Kwale/Diani Beach Blocks/1745, 1746, 1747, 1748, 1749, 1750, 1751, and 1752.

11. We heard the appeal virtually on 22nd March 2022, and learned counsel Mr. Bryant appeared for the Appellants, while learned counsel Mr. Muthama appeared for Respondents. Mr. Bryant relied on and highlighted two sets of submissions, dated 5th July 2021 and 25th February 2022. Mr. Muthama also relied on two sets of written submissions dated 30th July 2021 and 15th March 2022. Our duty as the first appellate Court in this respect, as set out in *Selle and Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and law. We will only depart from the findings by the trial Court if they were not based on the

evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) E.A.

12. The three issues arising for determination in this appeal are whether the Respondents hold the suit properties in trust for the Appellants, and if so, whether the Appellants' suit was time barred. If the suit is found to have been brought within time, we will then proceed with the third issue of the reliefs if any, that are available to the Appellants. On the first issue, Mr. Bryant submitted that there was a common intention between the siblings to own the suit property with the beneficial interest being held jointly, and that the legal interest was split from the beneficial interest because at the time it was wrongly understood that only Kenyan citizens could own beach-front houses. Therefore, that the Respondents' father, Christopher John Archer holding a Kenyan passport, was consequently registered as the legal proprietor.

13. The counsel submitted that the trial Court misinterpreted and misdirected itself on the evidence by finding that the late Howard D. Archer made available to the late Christopher John Archer a loan of £5,000 towards the purchase of the suit property, as no evidence exists to support this finding. According to the Appellants the evidence on record was that the siblings purchased the suit properties with a loan from Howard D. Archer, and the properties were purchased for the siblings' purposes with the purchase price being paid directly by their father to the vendor. Further, that Howard D. Archer required that his children repay the loan back to him, which the siblings duly did and completed in 1966. In addition, that there was no evidence of a vendor known as Johannes Theodorus Oberholzer, or of negotiations or of a sale agreement between Mr. Oberholzer and Christopher John Archer as found by the trial Court.

14. Other findings and omissions by the trial Court that were faulted by the Appellants' counsel as not being supported by the evidence or law, were that the Appellants have never claimed nor averred in their pleadings that Howard D. Archer sought or acquired any such beneficial interest as found by the trial Court, that the contents of the accounting records which set out the financial contribution made by the Appellants and Christopher John Archer to the purchase of the suit properties and demonstrated the detrimental reliance the Appellants placed upon the words and conduct of Christopher John Archer were not considered by the trial Court, as was the letter penned by Christopher John Archer dated 14th April 1982 addressing among others the Appellants, which clearly sets out a discussion among the siblings as to the future of the property, the money spent upon the property and the money needed to maintain/develop the property.

15. Reliance was placed on the decisions in *Lloyds Bank vs Rosset* [1991] 1 AC 107 that where there is no evidence to support a finding of an agreement or arrangement to share the Court will rely on the conduct of the parties as the basis from which to infer a common intention to share the property beneficially and that direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. The Appellant's counsel in this regard made reference to the decision of this Court in *Gideon Mwangi Chege vs Joseph Gachanja Gituto* [2015] eKLR that applied the decision in *Lloyds Bank vs Rosset* [*supra*].

16. Also cited were the holdings in *Oxley vs Hiscock* [2004] EWCA Civ 546, that the whole course of dealing in relation to the property including the arrangements made in order to meet the outgoings such as mortgage contributions, council tax and utilities, repairs, insurance and housekeeping will also be considered; in *Stokes vs Anderson* (1991) 1 FLR 391 that the court can look to an agreement, arrangement or understanding subsequent to the acquisition of title to the property; in *Stack vs Dowden* [2007] UKHL 17 that mortgage repayments are the equivalent of payment of the purchase

price, and for the submission that repayment of the loan was tantamount to a mortgage repayment; in *Zipporah Wanjiru Mwangi vs Zipporah Wanjiru Njoroge* (2017) eKLR and *Mbothu & 8 Others vs Waitimu & 11 Others* (1986) KLR 171 that the courts only imply a trust in order to give effect to the intentions of the parties which must be clearly determined.

17. Further, that the learned trial judge erred in his judgment by intimating that a constructive trust cannot be found where familial relationships make financial contributions to a business such as an investment property and reliance was placed on the English decisions in *Pallant vs Morgan* [1953] Ch. 43 and *Banner Homes Group Pic vs Luff Developments Ltd* [2000] Ch. 372 to submit that the Appellants and Christopher John Archer discussed the acquisition of the suit property and the manner in which the legal and beneficial interest shall be held prior to the purchase. Further, that the Appellants acted to their detriment by repaying not just the loan but also the interest to their father and making financial contributions to the suit properties for their maintenance, upkeep and development.

18. In addition, that the commercial usage of the suit properties did not prevent the Court from inferring a common intention constructive trust, and the Appellants' counsel cited the Australian decision in *Muschinski vs Dodds* (1985) 160 CLR 583 for the proposition that evidence of a common intention can lead to the finding of a constructive trust in circumstances where there is collapse of the commercial venture and failure of personal relationships. Also relied on was the decision in *Paragon Finance Pic vs Thakerer & Co* [1999] 1 All E.R. 400 that a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the property owner (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.

19. The Respondents' counsel on his part reiterated that Christopher John Archer obtained a loan from his father, the late Howard D. Archer, and thereafter entered into an agreement for the sale and purchase of the suit properties which he paid for using the said loan. The Respondents contested the allegation that there was an intention, whether express, constructive, or otherwise, between Christopher John Archer and the Appellants to create a trust interest in respect of the said property, and their case is that the Appellants agreed to assist Christopher John Archer in repaying the loan in exchange for an equity interest in the share of profits from the holiday home rental business operated and run by Christopher John Archer in the residential development erected on the suit properties. Further, that the Appellants on one hand claim that the alleged trust arose from their father, the late Howard D. Archer who as the settlor, intended that the suit properties would be held in trust by Christopher John Archer for himself and the rest of the family which includes the Appellants. On the other hand, that there was a common intention trust between Christopher John Archer and the Appellants that Christopher John Archer would hold the suit properties in trust for all of them as siblings. However, that it is either one position or the other because the two assertions cannot co-exist simultaneously.

20. The counsel further submitted that where a person grants a loan to another for the purchase of a property, as was the case between Howard D. Archer and Christopher John Archer, the lender does not become a settlor in respect of the property purchased from the loan facility more so when the loan is repaid, and placed reliance on the decision in *Re Sharpe* [1980) 1 WLR 219 where it was held that where money is advanced on intention that it be repaid, then the lender does not acquire an interest in the property purchased by the borrower by virtue of such advancement. That in this case the Appellants did plead that the loan by Howard D. Archer was repaid by the Appellants and Christopher John Archer. In addition, that there is no evidence demonstrating any prior agreement between Christopher John Archer and the Appellants to purchase the property in question without putting up any money or on the understanding that Howard D. Archer would provide the purchase price, and the counsel

cited the case of *Curley vs Parkes* [2004] EWCA Civ 1515 for the proposition that the subsequent payment by way of instalments toward the repayment of the loan given by Howard D. Archer to Christopher John Archer which was utilized as the purchase price for the suit properties did not entitle the contributors to an equitable share over the property purchased by way of trust as has been claimed or at all.

21. Lastly, it was submitted that the Diani House Accounts merely demonstrate the existence of a business relationship as between Christopher John Archer and the Appellants and do not support the existence of the claimed trust over the suit properties for two reasons. First, that the Appellants have not demonstrated the time within which they started making the said contribution payments toward assisting Christopher John Archer clear the loan debt due to Howard D Archer. That this is critical because if the contributions were made after the purchase, then as contributors, they cannot lay any claim over the property that was purchased their contribution notwithstanding, and that the authorities of Banner Homes PLC and Paragon Finance PLC cited by the Appellants are therefore irrelevant to the circumstances prevailing in this appeal. Second, that though the Respondents do not contest the fact that the Accounts of the Diani House show the Appellants as financial contributors to the Diani House Business, those contributions are made specifically in respect of the Diani House business as a going concern and are in no way a demonstration of an equity share in the property in question. In addition, that the letter dated 14th April, 1982 written by Christopher John Archer does not support the existence of a trust over the suit property as contended by the Appellants. And merely demonstrated how the proceeds of sale of the business would settle the Appellants' liabilities as creditors of the business.

22. In conclusion, the Respondents submitted that the Appellants have not tendered any evidence at all to demonstrate the existence of a pre- acquisition agreement between Christopher John Archer and the Appellants or even between Christopher John Archer and Howard D. Archer for the purchase of the suit property; that the contributions that were made by the Appellants were made for the running of the Diani House business, and were made after the suit property had been purchased by Christopher John Archer and were made only as repayments of the loan from Howard D. Archer to Christopher John Archer; and that the case of Pallant Morgan relied upon by the Appellants was therefore also not relevant.

23. *Black's Law Dictionary*, 9th Edition; defines a trust as "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)." There are three types of trusts that can arise with respect to land, as explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 824 paragraph 7.1.11:

> "Trusts relating to land can be classified as either express trusts or implied trusts, the latter category subdividing into further categories of resulting and constructive trusts ... Consistently with the characteristic preoccupation of equity, the primacy of intention is exemplified in each of these three cases of trust. The trust is the express very embodiment of an intention explicitly formulated by a legal owner regarding the beneficial ownership of his land. Implied trusts arise by operation of law, but do so against a background of actual or presumed beneficial intentions as to beneficial title. Yet, although premised alike upon intended beneficial ownership, the resulting trust and the constructive trust have traditionally enjoyed distinct spheres of operation."

24. This position was confirmed by this Court (Makhandia, Ouko & M'inoti, JJ.A.) in *Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & 5 Others* [2015] eKLR as follows:

> " Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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..."

25. It is not contested that there was no express trust created with respect to the suit properties in this appeal, and no evidence of such an express trust was provided by the Appellants. The Appellants' case therefore turns on whether a trust can be implied from the facts of the appeal. The authors of *Elements of Land Law* (*supra*) explain when a resulting trust arises as follows at page 825 in paragraphs 7.1.12:

> " Resulting trusts are intrinsically concerned with the money contributions laid out in the purchase of an estate in land. The beneficial ownership implied under a resulting trust gives effect to the intention presumptively disclosed by the pattern of money purchase. Thus, in the absence of any evidence of countervailing intention, a financial contribution towards the acquisition of a legal estate in the name of another normally generates a resulting trust in favour of the contributor, the latter's beneficial entitlement being directly proportional to his or her cash contribution."

26. The two main requirements for a resulting trust to arise are firstly, the intention and contribution to the purchase of the property must be contemporaneous with the taking of legal title, as was held in *Pettit vs Pettit* (1970) AC 777 and in *Gissing vs Gissing* (1971) AC 886. The relevant time frame for the existence of the required intention and contribution is therefore at the point of purchase of the land, which is the time the beneficial entitlement crystallises, and resulting trusts cannot in principle be founded on intentions, events or circumstances which arise after the date of purchase. Secondly, the clearest instances of resulting trust emerge from direct cash or other forms of financial contributions to the purchase of property at the point of purchase.

27. This Court has also held in *Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & 5 Others* (*supra*) and in *Juletabi African Adventure Limited & another vs. Christopher Michael Lockley* [2017] eKLR that 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 or her name. Therefore, many of the cases cited and relied upon by the Appellants and Respondents turn on the question of whether there were quantifiable contributions of money directly channelled towards the point of purchase for a resulting trust to arise, or whether there were other kinds of contributory activity, whether before or after the acquisition of title, which are assessed in terms of a constructive trust. For example, in *Curley vs Parkes*, (*supra*) it was held that there was no resulting trust because the money paid by the Appellant therein to compensate the Respondent was paid after the purchase, and is authority for the principle that only payments to the purchase price, or equivalent contributions made at the time of the purchase are relevant to the presumption of resulting trust.

28. On the other hand, there has been a pragmatic shift in English law towards recognising constructive trusts as the primary phenomenon in the area of implied trusts, as illustrated by the decisions in *Lloyds Bank PlC vs Rosset* (*supra*), *Stokes vs Anderson* (*supra*), *Oxley v Hiscock* (*supra*) and *Stack vs Dowden* (*supra*) which were relied on by the Appellants. There may however be instances when the two forms of

implied trusts overlap arising from their common feature of the existence of demonstrated intention as regards the beneficial ownership of property which may exist from the time of purchase and thereafter, and as a result both forms of implied trusts are often simultaneously pleaded for this reason.

29. Coming to the present appeal, it is not in contest that the subject suit properties were registered in the name of Christopher John Archer in 1966. It appears from the title documents provided in the record of appeal that initially the suit property was initially registered as Mombasa/Mainland South/Diani Beach Block/ 55 and transferred to Christopher John Archer on 30th August 1966, and the Certificate of Lease later issued to him on 8th June 1990 where the title of the property was renamed as Kwale/ Diane Beach Block/227. On 16th December 1996, the property was then subdivided into the three parcels of land known as Kwale/Diani Beach Block/806, 807 and 808, and their certificate of leases issued to Christopher John Archer. This was the description of the suit properties obtaining at the time the Appellants filed suit in the trial Court. It is also not in dispute that the purchase money for the suit properties was provided by a loan advanced by Howard D. Archer, the father of Christopher John Archer and the Appellants. What is in dispute is the manner of repayment of the said loan.

30. No evidence was adduced in this respect by the Appellants as to the intention of Howard D. Archer at the time of purchase, and even if such an intention had been demonstrated by the Appellants, under the applicable principles of law a resulting trust would only have arisen in favour by Howard D. Archer. The trial Judge noted as follows:

> " The question which arises is whether Howard D. Archer acquired any beneficial interest that was purchased by the late Christopher John Archer by virtue of the loan that he made available to the late Christopher John Archer.
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> 18. From the evidence on record, I am not persuaded that the late Howard D. Archer acquired any beneficial interest in the suit property. I am persuaded by the passage cited by the defendants in 'Underhill Law relating to Trusts and Trustees' (supra) in which the legal position regarding loans subsequently applied by the borrower in the purchase of property is documented as follows: "Loans: where the purchase money is provided by a third party at the request of and by way of loan to the person to whom the property is conveyed there is no resulting trust in favour of the third party, for the lender did not advance the purchase money as purchaser but merely as lender."
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> 19. In this case, the evidence that has emerged is that the late Christopher John Archer identified the property in question and thereafter approached his father, the late Howard D. Archer to lend him money for purposes of purchasing the said property, and the late Howard D. Archer then made available the said loan to the late Christopher John Archer who then purchased the property in question. There is no evidence that has been laid before this court to demonstrate that the late Howard D. Archer in making the loan available to one of his sons also intended to acquire an interest in the property his son wanted to purchase rather than an ultimate repayment of the loan. Arising from the clear circumstances obtaining in this case, it is my finding that the late Howard D. Archer did not acquire any beneficial interest in the property that was purchased by the late Christopher John Archer, especially considering that the loan by the late Howard D. Archer was subsequently settled. This being the case, it is also my finding that the plaintiffs are not entitled to any beneficial interest in the suit property that was purchased by

the late Christopher John Archer solely on the basis that the loan funds were made available to him by their father".

31. The trial Court was therefore not in error in its finding that Howard D. Archer did not acquire any beneficial interest, and that there was no evidence of the creation of a resulting trust in his favour, or of a resulting trust in favour of the Appellants, in the absence of an express trust to this effect by Howard D. Archer. That having been said, it is nevertheless notable that the question posed and answered by the trial Court, as regards whether or not Howard D. Archer acquired a beneficial interest in the suit properties, was not specifically pleaded by the Appellants. The specific questions that were pleaded were regarding the facts of payment of the loan and its repayments; the intentions of Howard D. Archer thereby; and the implications and knowledge of the said actions and intention on the part of the Respondents; and were as follows:

    1. Did Howard D. Archer (HDA) provide the purchase monies of Kenya Pounds 5000.00 for the purchase of the mother title to Diani House under a loan arrangement under which his four children (James, Joanna, Robert and Christopher (hereinafter 'the siblings')) would pay the principal plus interest back to him while Christopher John Archer (CJA) would be registered as proprietor of the mother title?

    2. Did the 1st Plaintiff and Robert D. Archer (RDA) as part of a common intention agreed to between the four siblings and Howard D. Archer, pay back to Howard D. Archer certain instalments of principal and interest?...

    5. Does documentary evidence exist that shows that the 1st, 2nd and 3rd Defendants admitted, prior to the death of Christopher John Archer to having knowledge that Howard D. Archer has intentions that the Diani House was to be for the use of his four children and that the plot was left in trust to Christopher John Archer by Howard D. Archer (the father of the 1st, 2nd, and 3rd Defendants)? ..."

32. We however find that it may have been necessary and did not prejudice any party if the preliminary question of whether a resulting trust was created in favour of Howard D. Archer was resolved, even though not specifically pleaded, for purposes of clarity. What however concerns us is that the question asked and pleaded as regards the Appellants' entitlement to, and beneficial interest in the suit properties arising from the existence of a constructive trust as opposed to a resulting trust, was neither captured nor addressed in the judgment by the learned trial Judge. This question was as follows:

    "7. Are the 1st and 2nd Plaintiffs, under the principles of a common intention proprietary constructive trust, each entitled to ¼ undivided shares in the property known as Diani House registered as title numbers Kwale/Diani Beach /806, 807, 808?"

33. The Appellants consequently sought various orders in their favour as regards the beneficial interest held by the Respondents in the said properties specifically arising from the constructive trust. A reading of the judgment by the learned trial judge reveals that there was no analysis of the principles that apply and regulate the manner that beneficial interests arise and are implied under a constructive trust, their manner of creation, and it is not evident how and whether the said principles were applied to the facts of the case. It therefore behoves us to consider these principles, as the existence of a constructive trust was specifically pleaded by the Appellants.

34. In this regard, it is explained in *Elements of Land Law* (*supra*) as follows at page 825 in paragraph 7.1.13:

> "By contrast, constructive trusts are intimately concerned not so much with money, but rather with expressly or implicitly bargained commitments respecting equitable entitlement. A constructive trust arises in circumstances where it would be unconscionable not to give effect to a common intention which has provided the basis of the parties' mutual expectations and dealings. A constructive trust emerges, in effect, where it would be fraudulent for the owner of a legal estate to maintain beneficial ownership of rights which have already been bargained away informally to another. The existence of the prior agreement, once relied on to the detriment of the claimant party, renders it improper for the legal owner to assert his beneficial title to the exclusion of the claimant. To prevent such inequitable outcomes equity imposes or "constructs" a trust to give effect to the parties' antecedent bargain as to their respective equitable rights."

35. A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in *Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others* (*supra*) as follows:

> A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (Supra). 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 para1453). 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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled."

36. Therefore, while the resulting trust focuses on monetary contribution towards purchase of a property, a constructive trust is concerned with the bargain or common intention of the parties relating to ownership of the subject property. It is also notable that the focus in resulting trusts is on the unilateral intention of the provider of the purchase money, while constructive trusts are rooted on the bilateral intentions of the relevant actors. The House of Lords in Stack vs Dowden (*supra*) held that a common intention is recognised as relevant, only if one party alters his or her position in detrimental reliance upon some form of bargain that would confer upon them a sufficiently defined beneficial interest in the subject property, and an unconscionable denial of rights would result if the legal estate owner tries to evade the bargain. As regards the timing of the bargain, this can precede, be contemporaneous with, or occur after the acquisition of title.

37. The common intention may be proved by direct evidence, that is by way of an agreement or express words and communication between the parties that they are to have beneficial interests in the subject property, or may be inferred by the Court from the parties actions and conduct. The types of evidence from which the courts are most often asked to infer such intention include contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In Oxley vs

Hiscock (*supra*) , LJ Chadwick of the English Court of Appeal, after analysing the decisions on how a constructive trust arises when property is purchased in the sole name of one of the parties and there was no express declaration of trust, held as follows:

> " 68. ....The first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In many such cases – of which the present is an example – there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge's categories in Lloyds Bank Plc v Rosset. In other cases – where the evidence is that the matter was not discussed at all – an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge's second category. And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention."

38. The Supreme Court of Kenya has recently upheld this position in *MNK vs POM*; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) and reiterated that in the context of the cohabiting parties in that case, the common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust. Even though this decision was delivered after we heard this appeal, it is notable that the Supreme Court approved of the holding in the English decision in Oxley vs A Hiscock (supra) that has been cited in this appeal.

39. The question therefore before us is whether there was evidence tendered of a common intention between the siblings, and between the Appellants and Respondents that the suit properties were to be held in trust. The learned trial Judge, when interrogating and analysing the evidence, focused on the accounts and evidence of financial contribution, and after analysing the various account documents found that the Appellants had presented insufficient evidence for the following reasons:

> " 20. .....In the bundle of annexures to the supporting affidavit sworn by James H. Archer on 5th June 2012, the Financial statements therein which include balance sheets indicate the payments respectively made by R. D. Archer and the other plaintiffs are clearly treated as current liabilities and the plaintiffs listed therein as sundry creditors. On the other hand, the late Christophe John Archer is represented as the capital account in the balance sheet. On this issue, I am in agreement with the defendants submission that in ordinary accounting parlance to which the financial statements adduced by the plaintiffs are subject, the term 'capital accounts' refer to a General Ledger Account which is part of the balance sheet classification 'owners' equity' referring to the owner of the business. On the other hand, the term 'sundry creditor' refer to people who are owed by the business entity or owner of that business. In their submissions, the plaintiffs admit that they were long term investors in Diani House business. If that be the case, then the plaintiffs no doubt were creditors in the business run by the late Christopher John Archer at the Diani House. The plaintiffs cannot at the same breath seek to have their position as sundry creditors in the business on the suit property changed so as to acquire a beneficial

> trust interest in the property itself. In my considered view, the plaintiffs were and possibly still remain creditors in proportion to their respective contributions towards the running of the business and therefore their remedy lies against the late Christopher John Archer or his estate in respect of the said contribution as creditors, not against the defendants especially long after the development of his estate. This also applies to the plaintiffs' claims that they made contributions towards the repayment of the loan made available to the late Christopher John Archer by the late Howard D. Archer by making payment of certain loan instalment themselves. I arrive at this finding because the alleged contributions were made after the property had already been acquired by the late Christopher John Archer. I do not think that such payments would in themselves entitle the plaintiffs to ownership rights over the suit property.

40. It is our view that had the learned Judge applied his mind to the elements and requirements for proof of a constructive trust, he would have examined if there was evidence of the common intention of the parties not only in light of the account and financial statements but also in light of the evidence in other documents and correspondence on the dealings between the parties that was provided by the Appellants. It is also notable in this respect that the financial statements relied upon by the trial Judge emanated from a third party and not from the siblings. We in this respect ascribe to the holding by in Baroness Hale in Stack vs Dowden [*supra*] as follows:

> "69.In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to defining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses".

41. We will commence with an examination of the evidence on the parties' intentions as regards the payments made by the siblings whether in repayment of the loan, or for the upkeep of the suit properties. The Appellants did provide evidence of a document titled "Diani House Accounts" at pages 672 to 673 of the Record of Appeal, which showed the credits made in 1966 and 1967 by all the siblings including CJA (Christopher John Archer), and including payments made by RDA (Robert D. Archer) and JHA (James Archer –the 1st Appellant herein) to HAD (Howard D. Archer) of 521 pounds each. The debits from the account included for the maintenance, electricity, wages and insurance for the premises on the suit properties. There is no mention of the Appellants being creditors in the said document, which also clearly controverts the argument made by the Respondents that the Appellants were repaying the loan to Christopher John Archer, as it evidenced direct payments by the siblings both to the account of Diani House and to Howard D. Archer, and therefore an implied intention that the payments were being made both for the purchase and common running and managements of the suit properties.

42. This intention is more clearly manifested in a letter by Christopher John Archer dated 25th June 1969, which was addressed to the 1st Appellant and the other siblings, and which also clearly acknowledges the financial contributions to and beneficial interests of the other siblings in the suit properties. Given the requirement to proof of common intention either by way of express agreement or conduct, it is necessary to reproduce the contents of the entire letter, which were as follows:

> " To: R.D. Archer, R.H. Archer, Mrs. J .C.Trent Dear Jim Diani House
>
> I think I have mentioned to you on various occasions my concern that Diani House property is an agricultural lease. In the Diani area several properties were confiscated last year, because the owners were not developing them properly as agricultural land. I think it is very doubtful that our property would be confiscated in this manner, but accusations can justly be levelled at us for not developing agricultural land.
>
> I therefore approached Archer & Wilcock for advice and subsequently asked them to see if we could have the lease changed from Agricultural to Domestic. (A photostat of the reply from Archer & Wilcock dated 7th January 1969 is enclosed).
>
> Please note from Archer & Willcock's letter, page 1" since this transaction involves development ... in other words, change of user will be granted only if development is intended. I therefore asked Terence O'Meara to prepare a sub-division proposal, of Which I enclose one print together with a Photostat copy of his letter dated 13th May 1969.
>
> It is still necessary for me to correctly place Diani House, the water supply and electricity supply onto this drawing of the property, which I will do.
>
> It now seems to me that we can do one of the following things-
>
> 1. Nothing!
> 2. subdivide the back area of 11.2 acres and hand it back to Government. (This would enable us to change the remaining land title to domestic). Let us face it, that back area is no use to us, and I very much doubt of any use to anyone else. We would require a right of access for our road. Undoubtedly this move would put us in very good favour with the local District council, and we might even prevail on Government to do the survey and carry survey expenses for us.
> 3. Do 2. above together with the further subdivision of 8 plots, each of 0.57 acres. I think this would cost us probably 600-700£. We would then be in a position to sell these plots whenever we wished with electricity and water laid on, a further expense of course, I believe the front line of plots could be sold at least £1.200 each and the back plots at, say, £750 each. I believe this is a good thing to do. It would provide us with some ready cash, all income tax free, as there is no capital gains tax, would develop the area and would leave untouched our own house and our most valuable asset; the beach front - except for a 15' wide footpath access, re-quired by law. Should we decide to do no. 3 above, I do not think we would sell the plots at once, but sell them when a good offer was received and when we needed some money.
>
> May I please have your reactions to these suggestions.

Alibhai Kanji & Co. ha.ve now completed the plumbing and drainage to the two existing bathrooms and completed the redecoration of' the house, except for the kitchen outside, the store and the servants quarters and choo.

so our present position is this,

2. Works done by- Alibhai Kanji &. Co. prior to Easter 1969:

    a. Knock out living room wall, build in reinforced concrete lintel and Mvuli sliding shutters.

    b. Build large Mvuli beams to living room ceiling and paint ceiling black.

    c. Extend verandah, lay- quarry tile floor and replace timber posts with Mvuli posts.

    d. Replace L-shaped room front door with new and build new frame.

    e. Replace VIP suite room front door frame.

    f. Take out all old burglar bars and replace with new galvanized 2" x 2" veldmeah and place timber plates over frames.

2. Work done by Alibha.i Kanji & Co-. after Easter 1969 and now complete.

    a. Build in new low level W. c. suites to the bathrooms.

    b. Build in shower with recessed footbath in "middle" bathroom.

    c. Build shower over bath in VIP suite bathroom.

    d. Build dwarf wall to bathroom.

    e. Dig soakage pit down to sea level, 36/, for W.C.s. and foul water and connect to the W.C.s, bath, etc.

    f. Connect mains water to bathrooms, hot water boiler and wash- up.

    g. Redecorate house inside and out.

Alibhai Kanji & CO. wish to buy my beat "Helen Kay" and trailer, which I have agreed to sell at £300, which they have agreed cancels out what we owe them for item 1. above. I have asked Alibhai Kanji & Co. to send us a bill for item 2. Above, but the paint was given to us as a sample free of charge by Bobbialec.

Our current Diani House Account stands at shs 3187.30. My proposal is that you agree to credit Birgit and me with the £300 for my boat, which would be added to our credit account with Diani House. The position would then be credit

C. J. A. 7813.15 + 6000.00 = 13813.15

H.D.A 6933.35

J.H.A. 7840.00

J.C.T. Nil

If there are any comments arising from the above I would. be grateful if you would write to me. With love

Signed"

43. Over ten years later, another letter dated 14th April 1982 was written to the siblings by Christopher John Archer, whose contents we will also reproduce verbatim for effect, as they clearly manifest the same intention as follows:

> " Mr. R.O. Archer Mr. J.H. Archer Mrs. J.C. Trent April 14th 1982 Dear Jim, Diani House
>
> Over this last Christmas I had an opportunity to go to England where I very much enjoyed being with my two daughters Christine and Lulu.
>
> I also visited Bob and Janet in Darlington which was completely snow bound, but I had a very warm welcome! Michael and Stephen took me for a walk onto the Dales, which were covered in snow. Very beautiful but very cold.
>
> Bob, Janet and I talked about, amongst many other things, Diani House. We agreed that I should summarise our discussions by writing to all three and put various proposals to you. For these purposes I enclose a valuation by Burn & Fawcett, 013 copy of the accounts for Jo (the others have had copies) and a sheet of suggested improvements with sketches by me and the current "handout".
>
> Over the years it is quite obvious from a look at the accounts that our income does not balance expenditure. The Bank over-draft stands at approximately shs.70.000/=. The reasons for this are quite straight forward:-
>
> 1. Jim. and myself and our families have had use of the house over school holiday periods free of charge.
> 2. The costs of maintenance and repairs to our property at the coast are high.
> 3. To let the property over certain periods is difficult, although this is not as difficult as it was, as people are accepting that there is no "season" at the coast. The most popular periods are of course the school holidays.
> 4. As you see from the "handout" we now charge shs.450/= per night occupied.
> 5. The staff now consists of and their monthly wages are:- Bakari Shs.650/= Caretaker Omari Shs.550/= General Help Jumaa Shs.450/= Night Watchman Silimani Shs.125/= Night Watchman for 4 nights per month
> 6. Monthly electricity consumption amounts to approximately shs.250/=. Monthly gas consumption amounts to approximately shs.200/=. Monthly water consumption amounts to approximately shs.200/=.
>
> There is no doubt that we could charge more, but we need to make some basic additions and improvements. These I have shown on my list of suggested improvements and we need to

rethatch with makuti, the two end bedrooms. With the implementation of these suggestions and the need for rethatching carried out, I think we could charge upto shs.600/= per night. This would of course help.

However, there is undoubtedly a need for capital injection.

The cost of the suggestions plus the rethatching if undertaken by me with my own labour and friendly contractors, would I estimate cost in the region of shs.20,000/= to shs.30,000/=.

The Bank Manager will not accept any increase in our overdraft facility.

I have written to Jim and he knows of the situation with regard to finances. During the holiday period of August/September 1981 Jim and his friends used the house for 30 days and during Christmas for 14 days. I have told Jim that the account cannot afford to have this free of charge and will therefore debit him at the amount of Shs. 450/= per night.

There is the matter of my own use. I can only write that I have been paying out of my own pocket for various repairs, maintenance, alterations etc. over the years. This is hard to estimate, but I have asked Easterbrooks, our accountant, to put his mind to this and he comes up with the figures of shs.76,284/= (from the accounts up to July 1980} and a loss by me of shs.20,000/=. So there it is, we need a capital injection of about shs. 100, 000/= between us. May I please have some suggestions?

On the brighter side just see what has happened to our property!! Look at the last page of the Burn & Fawcett report.

There are various ways we could look at Diani House for future. The possibilities that occur to me are:-

1: Leave the place as it is, but maintaining the fabric properly and well. In my view the revenue from letting will never be sufficient to cover outgoings, overheads and maintenance. So we will continue to have to pump in capital every so often. The value of the place will continue to escalate and we could look at the injection of capital as a very small investment in a rapidly escalating asset.

The dangers are that greedy men will sooner or later notice that our property is underdeveloped and will try to force us to part with it. The property is Agricultural land and underdeveloped Agricultural land can be subject to forfeiture.

2: Sell the place either as it is or after a change of user. See the Burn and Fawcett report.

Problem here is that CJA will have to find all the capital gains tax, as the property is in his names also how does CJA then give ROA, JHA and JCT their share. RDA's and JCT's share would be frozen by the Central Bank and they would only be able to take this out as interest in Government stocks over a period of 5 years. Before receiving the capital (this is as the law stands now, which could of course be changed).

We would lose Diani. Presumably JHA and CJA then look for other beach properties elsewhere?

3: We all become shareholders in a Hotel Company and our contribution to the development of the Hotel would be the value of the property, which we would receive as shares.

This would give us all a steady income but ROA andC JCT would be subjected to the Central Bank as (2) above, also we lose Diani House. 4: We form a Company. We invite some prominent business- men in Kenya to pay us in advance for rent over say a 10 year period and with the money we build them a house, which they will have rent free for the period for the use of their Senior Staff. At the end of the period the houses Would be for our sole use to lease out as we wished. Say we build 6 houses.

This seems good, but needs very careful looking at to ascertain problems of Income Tax and ownership.

There may also be problems in forming a Company when the ownership of the property is in the name of CJA.

5: Obtain change of user from Agricultural to Domestic subdivide the property: ... then sell plots 1, 2, 3 and 6. Plot No.5 is given by me to Jim. From money received all stamp duties, subdivision charges etc. and professional fees are met. The Bank· account is placed in credit and the balance is split equally between CJA and JHA.

A letter is written between us whereby Jim agrees to hold plot No.5 in trust for Jo and she in return releaves CJA of any obligations in respect of Diani house: Jim writes a similar letter releasing CJA of any obligations in respect of himself towards Diani house.

You may have other suggestions and ideas, which I would welcome and I look forward to these.

I am shortly due to go to Momhasa on business and I will talk over the alternatives with Aistain Burn.

Yours sincerely,

C.J. Archer

c.c: Mrs. Birgit Archer"

44. The Appellants also provided copies of various emails exchanged with the 1st and 2nd Respondents ("Christine" and "Lulu"), in which the two Respondents expressly acknowledge that they were aware of the intentions that the suit properties were to be held in trust by their father, and of note are two emails of 10th July 2007 as follows:

" Tuesday, July 10, 2007 9 :32 AM...

Dear Jim

We do know about Grandpa's intentions that the house was to be for the use of his 4 children and that he left it to Chriso 'in-trust' with this intention. Of course we know this. What Lulu is asking is is there a document? Is there an actual deed of Trust? If so where? Cx.....

Tue, Jul 10, 2007 at 11 :52 AM...

Dear Jim,

Christine is right - I am not disputing that the land was held by dad in trust for the family - but for me it has always just been hear-say - if dad is to be persuaded, some form of document may need to be produced?

Lulu."

45. There is also evidence that the 1st Respondent intended to formalise the trust arrangement in her letter of 9th January 2008 as follows:

" Dear all,

Happy New Year everybody. We are all thinking so much about what's happening in Kenya. I joined a peace march in London last week, where there were about 100 people singing all the way from Westminster to the High Commission in Portland Place. It was fantastic. I hope it helped in some way.

I am writing in response to Jim's letter to Chriso and to the follow up email sent on the 26th December.

I have indeed had some good talks with Jim about Diani House and possible projects there. I would like to share with you my thoughts about the best way forward not just for us all here and now but for the next generation of Diani House goers.

I really do believe that we would all agree on the following: To ensure that Diani House is the wonderful place where we can all continue to spend holidays, that it continues to be the 'star in the crown' of Diani Beach, a model of excellence in preserving its landscape and natural surroundings, original architecture, and of course in the way we treat our employees and other

local people. Of course, very importantly, it must be financially self- supporting. if this is indeed our aim, then I would like to propose that the appropriate and best way for us to manage it is as follows:

1. That a trust (or company) is established - 'The Diani House Trust". Chriso leaves DH to the trust in his will (to avoid large stamp duty payments) but in effect hands it over to the trust now. Forming a trust ensures that OH is not owned by one, or any group of individuals and that no one or group of individuals either benefits or has liability for it.

2. That the trust is run by a number of trustees. Clearly this should be those of us who are willing and keen to take responsibility and give time to running it, and a lawyer who would advise the trustees.

3. That the trustees are responsible for running the trust and for achieving the objectives above. This may well involve developing it in some way to ensure that it can generate revenue whilst also being available for the family to use (and of course raising the necessary funds to do so).

I do hope that you Chriso, Jo, Jim, and Bob will agree on this broad principle. Clearly there is some work to be done on creating the trust and the remit of the trustees and we need to take advice on this. I spoke to James this morning who is on his way to Kenya and will talk

with Jim, Helen and Lulu (and maybe Rupert Watson/Peter Walker). I really look forward to hearing how it goes. I hope to come to Kenya in March but have not yet decided my dates.

With very much love to you all, Christine"

46. As regards the intention on the part of the Appellants, there was evidence on record of various letters from their lawyers to Christopher John Archer, dated 8th December 1976, 27th August 1991 and 30th September 1991 which we shall reproduce and analyse later on in this judgment, and which consistently reiterated that the suit properties were held in trust by Christopher John Archer on behalf of his siblings. Our conclusion therefore, from our analysis and revaluation of the evidence, is that it is evident that it was the common intention of Christopher John Archer and his siblings including the Appellants from the time of purchase of the suit properties and at least until 1982, that they all had beneficial interests in the suit properties, and that up until 2008, it was the common intention of the Appellants and Respondents that the suit properties were trust property. It is also our conclusion that the Appellants have provided evidence that shows that the siblings did pay instalments to Howard D. Archer in repayment of the loan advanced for the purchase of the suit properties, and did make financial contributions to the maintenance and upkeep of the suit properties to their detriment arising from this understanding. We therefore find that contrary to the holding by the trial Judge, there was sufficient evidence of a common intention that the suit properties were to be held in trust by Christopher John Archer, and after his death, by the Respondents for the benefit of the other siblings. The trial Judge erred in failing to find that there was a constructive trust thereby created in favour of the Appellants.

47. This finding leads us to the second issue, as to whether the Appellants' claim is defeated by laches and is time barred, which was the response by the Respondents to the existence of any beneficial interests in the suit properties by the Appellants. While making reference to the various letters written by the 1st Appellants' lawyers on 8th December 1976, 7th August, 1991, 27th August 1991. and 30th September 1991, the Respondents' counsel submitted that the Appellants were indeed aware of the fact that the Respondents' father was inclined to act in violation, breach, or in defiance of their alleged trust interest in the suit properties, and that it was evident that as far back as the year 1991, both the Appellants and Christopher John Archer had already taken strong positions in the dispute with Christopher John Archer asserting exclusive ownership rights through subdivision of the suit properties and advertisement for sale, and the Appellants contending that Christopher John Archer held the property in trust for all of the siblings.

48. Therefore, that as at 5th June 2012 when the Appellants' Originating Summons was filed in the trial Court, over thirty - six (36) years had lapsed from the date of the Appellants' demand letter dated 8th December 1976. In addition, that over twenty-one (21) years had lapsed since the subsequent letters dated 7th August, 1991, 27th August 1991. and 30th September 1991 were written by or to the Appellants. In addition, that the Appellants elected to take no action to enforce their alleged trust interest in the suit property but instead waited until long after the demise of their own father, the late Howard D. Archer on 27th August 1967, long after the demise of the Christopher John Archer on 2nd April 2008, and well after the succession proceedings in respect of his Estate, which expressly included the suit properties herein had been conducted and the beneficiaries named in his Will who are the Respondents herein registered as the proprietors of their respective shares of the suit properties by way of transmission. Further, that the suit was prejudicial to the Respondents because the evidence of the persons would have been vital in establishing their claimed intentions over the suit properties could not be procured.

49. Reliance was placed on the decision of this Court in *Benjoh Amalgamated Limited & Another versus Kenya Commercial Bank Limited* (2014] eKLR that a claimant in equity is bound to prosecute his

claim without undue delay, since equity aids the vigilant, not the indolent and delay defeats equities, to submit that the Appellants' claim was defeated by unreasonable and unconscionable laches. On the question of limitation, the Respondents' counsel submitted that the suit was equally also barred by the provisions of section 4 (1) (e) of the *Limitation of Actions Act*, which is clear that actions seeking an equitable relief, such as the Appellants' action before the trial Court, may not be brought after a period of six years from the date when the cause of action arose and that the learned trial Judge could not be faulted in finding so.

50. The Appellants' counsel submitted that the Appellants' claim sought to enforce their beneficial rights in which the cause of action arose when the Respondents' transferred the suit property to their own name acting as executors, which was a threat to the Appellants' interests in the suit property. Further, that this was done after the Respondents admitted knowledge of the existence of the trust, and that the Respondent's claim as to the Appellants' delay failed because there were no prior transactions adverse to the Appellants interest on the suit land. According to the counsel, the Appellants had diligently prosecuted their claim since the cause of action arose, they brought the claim before the end of the six years, and there was no unreasonable delay. Reliance was placed on the case of *Diana Kathumbi Kiio vs Reuben Musyoki* (2018) eKLR, where this court referred to Lord Diplock's definition of a cause of action in the case of *Letang v Cooper* [1964] 2 ALL ER 929.

51. The learned trial Judge found as follows in this regard:

> " 22. It is also not in dispute that the issue on whether the late Christopher John Archer held the suit property in trust for the plaintiffs is a long running dispute which commenced as far back as on 8th December, 1976. There is no good explanation given as to why the plaintiff waited until 5th June 2012 when they filed the summons herein. In this regard, I do agree with the defendants' submission that the plaintiffs are guilty of laches. The plaintiff not only waited until several years after the demise and distribution of the estate of the late Howard D. Archer but also waited until after 4 years after the late Christopher John Archer had died and the assets of his estate, including the suit property, transferred to the defendants by transmission before taking action. There is no explanation whatsoever that has been given by the Plaintiffs for such long delay before any action to secure their alleged interest in the suit property. Further, Section 4 (1)(e) of the *Limitation of Actions Act* provided that actions, including actions claiming equitable relief, for which no other period of limitation is provided by the Act or by any other written law, may not be brought after the end of 6 years. In this case, the plaintiffs are claiming entitlement to a share in the suit properties under the doctrine of constructive trust and resulting trust. In my view, these are remedies imposed by equity and are within the class of claims under equitable relief as per the provisions of Section 4(1) (e) of the *Limitation of Actions Act*"

52. Laches is defined in *Black's Law Dictionary* Ninth Edition at page 953 as " the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." Limitation of actions is on the other hand defined at page 1012 as "a statutory period after which a lawsuit for prosecution cannot be brought in court". Section 4 (1)(e) of the *Limitation of Action Act* in this respect provides that in cases of breach

of trust, there is a limitation period of six years from the date on which the cause of action accrued. As regards equitable claims to land, the Act provides as follows in section 18:

> " 18.
>
> (1) Subject to section 20 (1), this Act applies to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as it applies to legal estates, and accordingly a right to action to recover the land, for the purposes of this Act but not otherwise, accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.
>
> (2) Where land is held upon trust, including a trust for sale, and the period of limitation prescribed for an action by the trustees to recover the land has expired, the estate of the trustees is not extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but when the right of action is so barred the estate of the trustees is extinguished.
>
> (3) Where any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the trustees would apart from this subsection have been barred by this Act.
>
> (4) Where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale".

53. Under section 7 of the Act an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued. In this respect, it is also notable that section 18 is made subject to section 20(1) of the Act, which contains a unique exception to limitation of time when it comes to actions for recovery of land by a beneficiary of a trust, and provides as follows :

> " 20. (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action
>
> a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use. "

The import of these provisions was determined by the Victoria Court of Appeal in the Australian case of *McNab vs Graham* [2017] VSCA 352 and Supreme Court of the United Kingdom in the case of *Burnden Holdings (UK) Ltd vs Fielding & Another* [2018] UKSC 14 which is that where a constructive trustee misappropriates or converts trust property for their own use, then an action by a beneficiary for the recovery of trust property will be a cause of action within the meaning of section 21(1)(b) and, will not be time barred. In effect this section creates a permanent liability for trustees with respect to trust property in the circumstances set out in those provisions.

54. On the distinction and relationship between laches and limitation of actions it is explained as follows by John F. O'Connell in *Remedies in a Nutshell*, 2nd Edition at page 16:

> " Early in its history Chancery developed the doctrine that where the plaintiff in equity delayed beyond the period of the statute applicable at law, relief would be refused on the grounds of laches even though no specific prejudice to the defendant was shown. Today, in most states, there are statutes of limitation applying to suits in equity. Despite this, however, the doctrine still holds that even if the delay is for a shorter period of time than that of the statute, it may still bar equitable relief if it is unreasonable and prejudicial to the defendant."

55. The doctrine of laches will therefore apply whether or not a suit is time barred, except that where the suit is not time barred, the delay needs to be demonstrated to have been unreasonable and prejudicial to the other parties. As regards when time starts to run, time typically starts to run from the point when the breach of trust has been committed, that is when a trustee fails to comply with the duties imposed upon him or her by equity, and the key applicable obligation and duty in the case of a constructive trustee is the duty to safeguard the trust assets. It was held in Paragon Finance Plc vs D B Thakerar and Others (*supra*), that a constructive trustee does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and his possession of the property is coloured from the first by the trust and confidence by means of which he obtained it. Therefore, that any subsequent appropriation of the property to his own use is a breach of that trust.

56. Applying the applicable law to the facts of this case, no question of limitation of actions can arise, since the suit by the Appellants was an action by beneficiaries to recover trust property which was initially held by Christopher John Archer, and was later converted to the Respondents' personal use, and therefore fell within the exception provided for in section 20(1)(b) of the Limitation of Action Act. Be that as it may, we will proceed to address the claim as regards the application of the doctrine of laches.

57. The Respondents in this respect allege that the cause of action arose on 8th December 1976, by a letter written by the 1st Appellant's lawyer to Christopher John Archer, which they term a demand letter and which stated as follows

> " ..Dear Sir, Diani House
>
> We have been consulted by Mr. J. H. Archer on your letter of 29 November 1976 in order to deal adequately with the matter, we think that we should first comment at some length on the letter from Mr Easterbrook of 22nd November 1976,

Our client's contention is that the Diani house was to be held in trust for all the children, and that it was registered in your name as such trustee. This is to be supported by the second paragraph of Mr. Easterbrook's letter, and also by the subsequent happenings are set out in the third paragraph.

In addition, our client has received the annual statements referred to, which he would hardly have done had he not been a beneficiary of the trust. This is also confirmed by the fifth paragraph and the expression "as tenants in common."

With reference to the statements at the top of the second page that Cook Sutton recommended changes in the form of the accounts, our client comments that this in no way changes the legal position, since he was not consulted and did not agree to any such change which it is clear was not intended to affect legal relationships in any event. Delegations met in the second paragraph on the second page is not within our client's knowledge, but this may have resulted from the discontinuous of the practise of debiting to every beneficiary who use the house as some representing their user. We are instructed that you are very much the greatest user of the house. We do not understand the third paragraph on the second page. In view of the nature of the trust any losses as well as any profits properly substantiated are of course the responsibility of all the beneficiaries. With reference to the last paragraph on the second page, as we have pointed out but the account shown did not affect the legal position and therefore a client does not accept your offer, and will return your cheque.

We set out what we consider to be the legal position which is:-

> that the house is held by you in trust for all beneficiaries; to allow all four equal user as a holiday house;
>
> to hold the title for any beneficiary who may become able to take a transfer of his share;
>
> to account to all beneficiaries in the meanwhile; and finally to hold the proceeds of sale equally between all four should the property be sold.

We would be grateful for your confirmation that this properly sets out the legal position and that you will act in accordance with it in the future.

Yours faithfully,

Hamilton Harrison & Mathews"

58. It is notable that firstly, the said letter is a response to previous letter by Christopher Archer dated 29 November 1976 which the Respondents annexed to their replying affidavit and in which Christopher John Archer had made an offer to pay the siblings their share of the suit property which was being contested by the letter of 8th December 1976, and secondly, that it seeks a confirmation from Christopher John Archer as regards the position of the suit properties as trust properties. More significantly though, is that after this letter was received, Christopher John Archer subsequently wrote the letter dated 14th April 1982 which we have reproduced in the foregoing, expressly confirming the beneficial interests of the siblings in the suit properties. It cannot therefore be said that the Appellants acted unreasonably in proceedings with the state of affairs, or that time started to ran with respect to any cause of action in light of this acknowledgement, and as expressly provided in section 23 to 25 of the *Limitation of Action Act* as follows:

23.

(1) Where - (a) a right of action (including a foreclosure action) to recover land; or (b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and- (i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; the right accrues on and not before the date of the acknowledgement or payment.

24.

(1) Every acknowledgment of the kind mentioned in section 23 must be in writing and signed by the person making it. (2) The acknowledgment or payment mentioned in section 23 is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

25.

(1) An acknowledgment of the title to any land or mortgaged movable property, by any person in possession thereof, binds all other persons in possession during the ensuing period of limitation.

59. As regards the letters of 7th August, 1991 and 27th August 1991, these were correspondence between the 1st Appellant and his lawyer regarding advice as regards sub-division of the suit properties and planned advertising of the subdivided plots for sale by Christopher John Archer. It is however important to reproduce the contents of the letter of 30th September 1991, which was thereafter written to Christopher John Archer by the Appellants' lawyer, which read as follows:

> " ...Dear Sir,
>
> We have been consulted by Mr. J. H. Archer & Mrs. J.C. Trent concerning Kwale/Diani Beach Block/55.
>
> As you are aware our clients have at all times contended that the land is held by you in trust for all the family and it is not our understanding that you have ever disputed this.
>
> They have been informed that some of the land has been put on the market for sale and they would therefore be grateful for full information on how this has come about.
>
> We would also be grateful if you would note that no sales should take place without their specific authority.
>
> Yours faithfully,
>
> Hamilton Harrison & Mathews..."

60. The letter requested confirmation of the planned sale, which was not forthcoming, and in any event it is evident that the sale did not take place in Christopher John Archer's lifetime as he bequeathed the suit properties to the Respondents in his will. This fact is also important in determining when the causes of action in this matter accrued, which could only be when Christopher John Archer acted inconsistently with the other siblings' beneficial interests in the suit properties by bequeathing the properties to the Respondents by a will dated 24th July 2007. The cause of action against the Respondents accrued when they, with the demonstrated knowledge that the suit properties was held by their father in trust for the other siblings, purported to convert the properties to their own use and dispose of them during the pendency of the Appellants' suit in the trial Court and during the pendency of this appeal, as shown

later on in this judgment. There was thus no unreasonable delay by the Appellants in bringing his claim, and the learned trial Judge also erred in applying the wrong provisions of the law as regards limitation of action to the facts of this case, and in finding that the Appellants' suit was time barred.

61. What then are the remedies, if any, available to the Appellants, which is the last issue before us for determination. The Appellant's counsel submitted that the Appellants contributed approximately 25% each of the purchase price and maintenance of the suit property, and while applying the principles set out by the Supreme Court of the United Kingdom in *Jones vs Kernott* [2011] UKSC 53, stated that the starting point is that in 1966, all four siblings had a 25% share each, and that in 2022, after the dispositions carried out by the Respondents, the plots that are remaining fall under the 50% share that the Appellants were entitled to in equity in 1966. Therefore, that it is only fair, just and equitable that they be awarded the remaining plot being Kwale/Diani Beach Block 1752 measuring 6.5058 acres. The counsel therefore sought orders that the judgment delivered by the trial Court on 26th November 2019 be set aside, that judgment be entered in favour of the Appellants on the terms of their Originating Summons dated 5th June 2012, but amended to state that Title Number: Kwale/ Diani Beach Block/1752 be registered in the names of the two Appellants as prayed in the Appellants' Supplementary Memorandum of Appeal, and for costs of the trial and this appeal.

62. The Respondents' counsel in response submitted that the appeal has been irredeemably overtaken by events and this Court should not act in vain, and referred us to the record of this Court in Mombasa Civil Application No. E078 of 2021- James Archer and Joanna Trent vs Inger Christine Archer, Annelise Archer-Clark and Helen Kay Hartley, which was application by the Appellants for an injunction pending appeal. and the Replying Affidavit sworn therein by Helen Kay Hartley on 8th November 2021 and annexures thereto that demonstrate that all of the suit properties have been dealt with by way of transfers to third parties who are not before this Court, and who shall definitely be affected by any orders which may be issued in this Appeal in respect of the suit properties.

63. The prevailing position in respect of the suit properties, which now comprise of the eight (8) subdivision plots known as Kwale/Diani Beach Blocks 1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752, was stated by the Respondents to be as follows:-

    a. The plots known as Kwale/Diani Beach Blocks 1745 and 1747 were vide a Transfer Instrument dated 5.03.2019 which was registered on 2.12.2019 transferred for valuable consideration to one Anne Vaughan who is not a party to this appeal and a Certificate of Lease issued .

    b. The plots known as Kwale/Diani Beach Blocks 1746, 1748, 1749, 1750 and 1751 were vide an Transfer Instrument dated 5.05.2021 which was registered on 19.05.2021 also transferred for valuable consideration to a company known as Snapdragon Enterprises Limited and a Certificate of Lease issued to the said company which is also not a party to this appeal.

    c. The plot known as Kwale/Diani Beach Block/1752 was also vide a Transfer Instrument dated 5.05.2021 which was registered on 19.05.2021 also transferred for valuable consideration to a company known as Kama Kawaida Property Limited and a Certificate of Lease issued to the said company which is also not a party to this appeal.

64. It is evident that the Respondents have disposed of the suit properties, and thereby dissipated the Appellants' beneficial interests in the suit property. In our view this action by the Respondents were not only unconscionable but also resulted in unjust enrichment of the Respondents, who we have found were aware and had also intended that the suit property was to be held in trust. In this regard, even if the suit property was transmitted by will to the Respondents, it was subject to the trust and Christopher John Archer could only bequeath his share of the beneficial interest in the suit properties. In essence the Respondents were firstly, constructive trustees arising from their knowledge

and common intention that the suit property was held in trust by their father for his siblings; and secondly, being the successor in titles of the suit properties, held the Appellants' share of the beneficial interest in trust.

65. The Respondents therefore had a duty of care and to account with respect to the Appellants' share of the beneficial interest in the suit properties. It is notable in this respect that the initial intention and pattern of contributions were premised on each sibling having an equal share and responsibility for the suit properties. However, in the course of the dealings between the siblings, Robert D. Archer indicated by an affidavit he swore on 1st November 2007 that while he was of the view that the suit properties were held in trust for the siblings, he had no interest in seeking redress.

66. We are of the view that whereas we may not be able to restore to the Appellants the suit properties which they have been wrongly deprived of, the Appellants are not without remedy, as this is a Court of justice and equity, which is expressly mandated under Article 159(2) of the *Constitution* and section 3B of the *Appellate Jurisdiction Act* to dispense substantive and expeditious justice. Under Rule 33 of the *Court of Appeal Rules* of 2022 (then Rule 30 of the 2010 Rules,) we also have the power, upon hearing an appeal, to confirm, reverse or vary the decision of the trial court, to remit the proceedings to the trial court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.

67. We accordingly find merit in this appeal, and set aside the judgment of the Environment and Land Court at Mombasa (Yano J.) delivered in Mombasa ELC Suit 345 of 2017 on 26th November 2019 in its entirety. We in addition grant the following orders:

I. A declaration that the 1st Appellant, 2nd Appellant and one Robert D. Archer held a beneficial interest in the properties previously known as Kwale/Diani Beach Block/806, 807 and 808 and later sub-divided into the eight (8) parcels of land known as Kwale/Diani Beach Blocks 1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752 , that were registered in the names of Inger Christine Archer, Annalise Archer Clark and Hellen Kay Hartley, the 1st, 2nd and 3rd Respondents herein.

II. A declaration that the properties previously known as Kwale/Diani Beach Block/806, 807 and 808 and later sub-divided into the eight (8) parcels of land known as Kwale/Diani Beach Blocks 1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752, were held in trust by Inger Christine Archer, Annalise Archer Clark and Hellen Kay Hartley, the 1st, 2nd and 3rd Respondents herein, as constructive trustees for the 1st Appellant, 2nd Appellant and one Robert D. Archer.

III. The parties' respective shares of the beneficial interest in the properties previously known as Kwale/Diani Beach Block/806, 807 and 808, and later sub-divided into the eight (8) parcels of land known as Kwale/Diani Beach Blocks 1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752 that were registered in the names of Inger Christine Archer, Annalise Archer Clark and Hellen Kay Hartley, the 1st, 2nd and 3rd Respondents herein are hereby apportioned and quantified as follows:

a. The 1st, 2nd and 3rd Respondents' joint share was 25%

b. The 1st Appellant's share was 25%,

c. The 2nd Appellant's share was 25%,

d. Robert D. Archer's share was 25%.

IV. This matter shall be remitted back to the Environment and Land Court before a Judge other than Yano J., for appropriate directions and to take evidence on the consequential issue arising from this judgment, namely the furnishing of accounts by the 1st, 2ndand 3rd Respondents on the sale and transfer of the properties previously known as Kwale/Diani Beach Block/806, 807 and 808 and later sub- divided into the eight (8) parcels of land known as Kwale/Diani Beach Blocks 1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752; and to subsequently enter judgment on the quantum due to the 1st and 2nd Appellants and payable by the 1st, 2nd and 3rd Respondents from the proceeds of sale of the said properties, in line with parties' respective shares as found and ordered by this Court in Order III hereinabove.

V. The 1st and 2nd Appellants shall have the costs of the suit of the trial in the Environment and Land Court and of this appeal.

68. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR