



REPUBLIC OF KENYA



NJA v ZJA alias ZP (Civil Appeal 55 of 2020) [2023] KECA 937 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 937 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 55 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 28, 2023

BETWEEN

NJA APPELLANT

AND

ZJA ALIAS ZP RESPONDENT

(Being an appeal from the judgement of the Environment and Land Court at Mombasa, A Omollo, J. dated 23rd January, 2020 and delivered by Justice Sila Munyao in ELC Civil Suit No 41 of 2016)

JUDGMENT

1. The appeal arises from the judgement of A Omollo, J in the Environment and Land Court dated January 23, 2020 and delivered by S Munyao, J on February 13, 2020. The appellant NJA and ZJA alias ZP are siblings, a brother and sister respectively. By a plaint dated March 14, 2016 the appellant sued his sister the respondent over properties known as Mombasa Block XXXVII/XX and Block X/X, (hereinafter Plot XX and Plot X/XX respectively). The appellant claimed the two properties, the former by virtue of his sonship to SHM, the mother of the parties herein and the latter on basis of joint acquisition by himself, his mother and the respondent in 1981 or thereabouts.
2. The appellant pleaded that he constructed the foundation and ground floor of building on plot X/XX. That the respondent built the 2nd to 5th floor of the building. He pleaded that he occupied the ground floor for 32 years with his family, and that he took the rent of the rest of the floors to maintain the building and for the upkeep of their mother.
3. The appellant pleaded that on January 5, 2016, when the respondent caused his arrest and evicted him from the house is when he realized that the respondent had fraudulently transferred the property plot X/XX to herself in 2011. He claimed that he suffered loss and damages of Kshs 10,400,000/- due to damage of his property during eviction. He gave the particulars of fraud. He then sought nine declarations and orders;



- a. That the respondent held the suit properties under a constructive trust for the benefit of the appellant
 - b. That the appellant owns 50% of the X/XX and 2/3 of Block XXXVII/XX or any shareholding the court may determine
 - c. Permanent injunction restraining the respondent from dealing adversely with the suit properties
 - d. That the eviction of the appellant by the respondent from Block X/XX was unlawful
 - e. Special damages to the appellant for loss and destruction of household furniture and equipment incurred during eviction from Block X/XX
 - f. Special damages for loss of net income per month of Kshs 400,000/- from the date of eviction until date of reinstatement to Block X/XX
 - g. General damages
 - h. Costs of the suit
 - i. Any other relief.
4. The respondent's defence and counterclaim is dated April 18, 2016. She denied the appellant's claim that he was a beneficial owner of the suit properties, that the property Block X/XX was ever acquired jointly or that the appellant contributed Kshs 450,000/- or that the property was held in trust for the appellant.

She pleaded that the appellant collected rent as an agent by virtue of being her brother but that he was a trespasser on a portion of Block X/XX.

Regarding Plot XX, the respondent admitted it was family property but stated that the position changed when the appellant took three loans against the title as security. That as she paid back 3,250,000/- to redeem the plot from imminent sale, it became her property and the appellant has no beneficial interest in it. She counterclaimed for:

- a. A declaration that the appellant's occupation of the part of the premises standing on Plot No Block X/XX is unlawful, illegal, null and void ab initio
 - b. An order of eviction against the appellant from Block X/XX
 - c. Costs of and incidental to the suit
 - d. Any other and or further order or remedy the court may deem fit and just to grant.
5. The appellant gave evidence and called one witness to testify.
The respondent also testified and called one witness.
6. The appellant's case was that he took money from his matatu business, which he contributed in developing Plot 59.

That it was family property and he proposed that the two share it 2/3:1/3 in accordance with Muslim law. As regards Plot X/XX he contended that they bought it from their aunt ZTR for Kshs 1,350,000/- in 1986. He said that the family paid 900,000/- with the respondent contributing Kshs 450,000. He stated that he thought they bought the property in trust for their mom so that on her demise they share the property 50:50 basis.



7. That the property had a building of seven (7) floors, which they jointly built with the respondent. He stated that the land was transferred on October 21, 2011 without his knowledge and that as the mother was too frail and was on and off oxygen between October 20, 2011 to November 23, 2011, he therefore doubted that she signed the transfer form of the suit property. In cross-examination, he admitted that the property was transferred on 26th February 2004.
8. The appellant's evidence was that he took a loan from Bullion Bank using Plot XX as security and that the respondent paid off the loan as he arranged to pay it.
9. He said that he made Kshs 300,000 to Kshs 400,000 from his business. He also said he had three (3) shops on Plot XX.
10. The respondent's case was that she acquired plot 59 through the bank to save it from being auctioned because of three (3) loans taken by the appellant that he failed to repay over a period of five years.
That at the time of taking the loan, the plot was in their mother's name. She produced documents to prove the purchase. That her mother transferred plot 59 to her name in 2011.
11. As for plot X/XX she testified that she wired money to purchase the plot to one Mr M. That it was registered in her mother's name. She produced proof that she developed the property using her money, which she initially wired to the appellant, then eventually directly to the contractor. She denied committing fraud, urging that her mother was intelligent and up to her mind until her death. She said that the appellant had not complained of the transfer at any time. The respondent said that the appellant had no right to the two properties.
12. The issues that were for determination before the superior court were:
 - a. Whether or not plot XX was family plot and thus comprised part of the inheritance for the appellant and the respondent in accordance with Islamic Law.
 - b. Whether or not Plot X/XX was jointly acquired by the appellant, respondent and their mother
 - c. Whether or not the fraud pleaded against the respondent has been proved
 - d. (i) Whether or not the appellant is entitled to the orders sought
(ii) Whether or not judgement ought to be entered for the respondent as per the counterclaim
 - e. Who bears the costs of the suit?
13. The learned judge of the Superior Court considered that, of the particulars of fraud pleaded at paragraph 20 of the plaint only paragraph 20(c) would constitute fraud if proved. Paragraph 20(c) provided.

“20(c) the late SHM (deceased) was mentally and physically unwell during the time the suit property was purportedly transferred to her and then to the defendant (respondent). Therefore, she could not possibly have participated in any of the transfers.”
14. The learned trial judge found that fraud was not proved for the reason the appellant did not establish that due to the mental state of his mother at the time of the signing of the transfer of Plot XX in 2011, she was incapable of executing the transfer. Further that the appellant did not discharge his burden



of proof that the respondent's signatures on the transfer for Plot X/XX was a forgery. Owing to the strange PIN numbers used in the transfer belonging to another and not the respondent, it was the court's finding that the appellant did not plead the issue of variance of the PIN. That in any event the transfer is effected based on the signature and not the PIN number.

15. On the issue of whether the deceased mother held plot 59 in trust for the appellant and the respondent, and if the duty of trust was passed by registration to the respondent, the learned trial judge found that it was proved by documentary evidence that the appellant took three loans from Bullion Bank using Plot XX as security. That it was proved that the respondent repaid the loans to avoid the property being sold. That the appellant had benefitted from Plot XX by using it to secure loans, and since he had not reimbursed the respondent that money, the appellant could not claim constructive trust over the suit property as he had contributed to putting the property at risk of being sold.
16. On the third issue of how Plot X/XX was acquired, the learned judge considered the evidence and documents adduced by the appellant and respondent. She found that those produced by the appellant were for 2015 and 2016 that related to transactions done during those years.

The acquisition was said to have taken place in 1991 and that none of the documents he produced were related to the purchase or construction of the structures on Plot X/XX. The appellant did not present a sale agreement in respect of Plot X/XX.
17. The trial court found that the respondent proved by documentary evidence that she wired money to their relative who owned the Plot X/XX in 1991. That she also produced documents showing that in 2006 she sent monies to the appellant, which the appellant did not deny, for the development works at the plot. That she also produced documentary proof to show she sent the monies directly to the contractor. She also demonstrated how the land was transferred from their mother's name to hers in 2004; and how she transferred it back to their mother's and finally re-transferred it to herself in 2010. The learned trial judge was satisfied that if the deceased mother of the parties held the Plot X/XX in trust the same was in trust for the respondent who made contributions towards its acquisition and development.
18. The learned trial judge found that the respondent had proved her claim on a balance of probabilities and entered judgement for her as prayed in the counterclaim.
19. The appellant was granted 90 days to surrender vacant possession of any portion on Plot XXVII/XX and Plot X/XX in default eviction was to issue.
20. The appellant was aggrieved and so filed this appeal. There are thirteen (13) of appeal in the memorandum of appeal. The learned ELC court is faulted:
 - i. That, the trial court failed to consider that the appellant was a beneficial owner of the property known as Block XXVII/XX by virtue of being the son of SM (deceased).
 - ii. That, the trial court failed to consider that an equitable trust existed between the appellant and the respondent with regard to the ownership of the suit properties.
 - iii. That, the trial court erred in that it equated the respondent's payment of Kshs 3,250,000/- to Southern Credit Bank for the repayment of the loan that was secured by Block XXVII/XX as a basis of conferring absolute ownership of the said property in favor of the respondent and without considering all the other surrounding issues.
 - iv. That, the trial court failed to consider that it was the duty of the respondent to prove that registration of titles of the two suit properties in the respondent's name was proper.



- v. That, the trial court failed to consider that the misrepresentation regarding the stranger's PIN number and fraudulent signature on the transfer of land document would render the entire document fraudulent.
 - vi. That, the trial court failed to consider that that the use of the correct PIN number has a great bearing to collection of venue by the government.
 - vii. That, the trial court erred in that it failed to hold that the use of a stranger's PIN No xxxxxxxxxxxxxxxx in order to effect a transfer of Block X/XX in the respondent's name was fraudulent as the details of the transferee, the respondent herein and those of the owner of the said PIN No xxxxxxxxxxxxxxxx were different.
 - viii. That, the trial court erred in that it placed the burden of proving the validation of the said registration of certificate of titles on the appellant instead of the respondent.
 - ix. That, the trial court failed to address itself on the serious issues of illegality, fraud and the integrity of the certificate of titles for the suit properties currently registered in the respondent's name.
 - x. That, the trial court failed to consider that the respondent failed to produce any agreement of sale to prove that she had lawfully purchased the suit properties. The said failure rendered acquisition of the properties thereof by the respondent illegal for all purposes.
 - xi. That, the trial court erred in its evaluation of evidence in such a way that favored the respondent and at the same time heavily evaluated against the appellant on the question of existing the equitable trust.
 - xii. That, the trial court's findings resulted to an injustices to the parties.
 - xiii. That the learned judge erred in law in that the decision delivered on February 13, 2020 was wholly against the weight of the law, justice and the evidence before the trial court.
21. This being a first appeal, it behooves this Court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 this Court espoused that mandate or duty as follows:-
- “On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
22. We will only depart from the findings by the trial Court:
- I. If they were not based on the evidence on record;
 - II. where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or,
 - III. If its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* [1968] EA
23. We have considered this appeal based on the above principles.



Having done so, and having considered the evidence before the trial court, submissions by counsel and cases and the law cited, we find that what falls for our determination is:

1. whether the appellant had locus standi to file this suit;
2. whether the appellant proved that there was fraud involved in the acquisition of the suit properties by the respondent;
3. whether there was a trust in favour of the appellant over the suit properties.

Whether the appellant had locus standi to sue in this suit;

24. Mr Munyithya raised a jurisdictional issue and submitted that the appellant lacked *locus standi* to sue the respondent to challenge her title to the suit properties. That the only person who could file a claim to challenge how the properties were transferred was either the deceased herself before her death or a legal representative of the late mother of the parties herein, after her death. He urged that the appellant could only lay his claim through the estate of his late mother as an heir or dependent but not a direct suit against the respondent.
25. Counsel relied on *Alinoor Abdi Elmi Ali & 2 Others v Wilson Kipyegon Chelule & 2 Others* [2021] eKLR, *Ephantus Njuguna Mura v Lucy Wanjiru Njuguna & 5 Others* [2018] eKLR and *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR for the proposition that grant of letters of administration were required in cases of intestate succession.
26. Mr Gikandi in response to the issue of locus standi urged that the issue was raised for the first time on appeal. That it had no application to the facts of the case. He urged that it was raised to cause confusion.
27. We agree that the issue of locus standi was not raised at the trial court, which was the right forum to raise it, and neither was it the subject of the impugned judgment. Nothing turns on this point.
Whether the appellant proved there was fraud involved in the acquisition of the suit properties by the respondent
28. Mr Gikandi for the appellant urged the Court to consider the disparities on the face of the transfer documents used in passing title of the suit properties from the deceased mother of the appellant and the respondent to the respondent.
29. Mr Gikandi urged that the transfer of both suit properties from the deceased vendor, Shuni Haji Mirdor to the respondent was irregular. The irregularities in the transfer documents was leaving blank the space meant for entry of the vendors PIN number and the certification to verify the date the vendor, SHM, appeared before Y.A Ali & Company Advocates, and appended her signature on the transfer document. Similarly, the certification to confirm that the respondent appeared before the Y.A Ali & Company Advocates and signed the transfer document was blank. For the PIN number, the respondent admitted the one entered in the forms, as hers did not belong to her but to the Clerk of the advocate. The appellant submitted that the transfer forms for the two suit properties were incomplete and had serious irregularities, which should dictate that the ownership thereof should revert to the name of Shuni Haji Mirdor.
30. Mr Gikandi urged that under Section 155(2) (a) of the *Registered Land Act*, which was the law applicable at the time, it is an offence punishable by imprisonment or a fine to fraudulently make a certificate or other document of any documents used for transfer of land. He urged that the trial court should have frowned upon the irregularities regarding the PIN number and the absence of certification on the transfer documents.



31. Mr Gikandi for the appellant submitted that Section 3(3) of the *Law of Contract Act* provides that in matters regarding disposal of any interest in land, there must be an agreement or a memorandum in writing signed by the vendor. As such, it was the appellant's view that the particular provision is founded on the requirement that an agreement for sale would have captured the terms and conditions that the vendor and the purchaser would have agreed on. The appellant's submission was that the trial court ignored the critical question about the legality involved in the respondent's acquisition and ownership of the two properties between October and November 2011.
32. Counsel relied on the case of *Patrick Tarzan Matu & another v Nassim Shariiff Abdulla & 2 others* [2009] eKLR, and urged that in the absence of an agreement for sale, the claims made by the respondent that she acquired ownership on the basis of a consideration of love and affection, should not stand. That in the absence of any memorandum or note in writing to that effect, as required by Section 3(3) of the *Law of Contract Act* renders the transaction unfounded.
33. The appellant relied on *Munyu Maina v. Hiram Gathiba Maina* [2013] eKLR, for the proposition that the burden was upon the respondent to demonstrate that the root of the registrations were valid. It was his view that the respondent completely failed to discharge that burden as she never explained why she used a fraudulent PIN Certificate number and why the transfer documents are marred with discrepancies. The appellant also relied on the case of *Arthi Highway Developers Limited v West End Butchery & 6 others* [2015] eKLR and urged that a fraudulent certificate of title to a piece of land cannot give rise to any right, since an act that is void is in law a nullity. And in the decision in *Misty Amar Singh v. Serwano Wofunira Kulubya* UCA No 74 of 1960 for the proposition that the law does not allow any person to derive or retain a benefit out of an illegality.
34. Mr Munyithya for the respondent urged that regarding the use of the wrong KRA PIN during the registration of the transfer of the suit properties from the deceased mother of the parties to the respondent, was not pleaded by the appellant.

Furthermore, counsel urged, the respondent clarified that the PIN number used for registration was that of the clerk to the law firm who registered the transfer. It was submitted that if the appellant based his case on fraud, he cannot change the said case by introducing new grounds during cross-examination and submissions. The respondent maintained that in any case, she disclosed the owner of the PIN used during transfer and demonstrated further that indeed she was not in the country as at the time the transfer was registered. He submitted that the burden lay on the appellant to prove the allegations of fraud, forgery and misrepresentation, and not the respondent. He urged that the respondent could not answer the issue of the Pin number but the same could only be answered by the clerk of the firm which registered the transfer, but the said clerk was not included as a party to these proceedings.

35. Mr Munyithya submitted that the circumstances contemplated in the authority of *Munyu Maina*, supra are distinguishable from the facts of this case. Counsel relied on the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR to elaborate thus:

“In order for the appellant to successfully defeat the title to Makuyu/ Kiriaini Block X/XXX issued to the respondent he ought in the lower court to;

Have particularized his claim on fraud with sufficient detail;

Given evidence on the threshold stated above to show that the respondent by herself and/or with others procured the title to to Makuyu/ Kiriaini Block X/XXX fraudulently.”

In the instant appeal, the lower court after hearing the appellant's oral evidence found that the appellant made very generalized allegations of fraud and did not prove his ownership or



entitlement to Makuyu/ Kiriaini Block X/XXX. Guided by the principles and law stated above, I do not find anything to cause me to disturb the lower court's findings on the appellant's claim based on fraud."

36. It cannot be gainsaid that when the title of a party is under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. This was well captured in the case of [Munyu Maina v Hiram Gathiba Maina](#), Civil Appeal No239 of 2009 [2013] eKLR, where the Court of Appeal held that: -

"We have stated that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

37. The appellant challenged the manner in which the respondent acquired title to the suit properties. He pleaded four grounds of fraud. Although the learned trial Judge recognized only one of them as fitting the description, it is our view that in addition there was one more ground that fitted being a ground of fraud. The grounds are:

- I. The late SHM (deceased) was mentally and physically unwell during the time the suit property was purportedly transferred to her and then to the respondent. Therefore, she could not possibly have participated in any of the transfers.
- II. The aforesaid transfer was done intentionally in order to deprive the appellant his beneficial share of the property.(Emphasis added)

38. The issue to determine first is what constitutes fraud. The appellant alleged that the respondent obtained the land fraudulently.

Fraud is defined under the [Black's Law Dictionary](#) 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment".

39. The Court of Appeal in [Emfil Limited v Registrar of Titles Mombasa & 2 others](#), Mombasa Civil Appeal No 312 of 2012; [2014] eKLR held;

"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities". (Emphasis added)

40. Similarly, the Court of Appeal's decision in the case of [John Kamunya & another v John Nginyi Muchiri & 3 others](#) [2015] eKLR held that:

"We find that the law is clear as put by Mr Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."



41. In the case of *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others*, [2013] eKLR, the Court held that:

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

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga v Nyati* [1984] KLR 425, at page 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”.

42. The appellant pleaded that his mother was not in a mental state to sign the documents. We agree with the learned trial Judge that this ground was not proved. No evidence was tendered to show the mental capacity or state of the deceased mother at the time that the transfers were signed in 2004 and 2011.

43. The appellant relied on another ground, that the aforesaid transfer was done intentionally in order to deprive the appellant his beneficial share of the property. The learned trial Judge did not consider this ground.

She found that since the appellant had not proved that the mental state of his mother was wanting due to ill health at the time of signing, then fraud was not proved.

44. Were the impugned transfers intentional? The respondent said as much, they were intentional. Did they have the effect of depriving the appellant his beneficial share of the property? That is the question to answer. We must also add that once the manner in which title was acquired was questioned, the entire acquisition fell for scrutiny. That was the impact of the Court of Appeal judgment in *John Kamunya & another v John Nginyi Muchiri & 3 others* [2015] eKLR that held that

Alternatively, even though not pleaded, matters of “fraud” may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”

45. In this case, fraud was pleaded. The complaint by Mr Muniyithya is that the appellant had added new grounds in his evidence and submissions. The cited case, *John Kamunya & another*, supra suggests that there is nothing wrong with that so long as evidence is led and submissions made and left for the Court to decide. The position is the fact that the use of another’s Pin number was not pleaded is not a good reason not to consider whether it amounted to fraud.

46. In this regard, we note that the respondent admitted two crucial points to the signing of the transfers. One she admitted that the Pin number on the form purported to be hers was for a clerk to the advocate where the transfers were done. The second, which is that she was not in the country at the time the transfers, were signed. With these two admissions, it is clear that the transfer documents are a misrepresentation of facts, that it was signed at all in the manner purported.

47. The appellant has shown that the titles to the suit properties were transferred from his mother’s name to the respondent’s name without his knowledge. The respondent did not challenge that in evidence.

The transfers were therefore questionable. The appellant demonstrated that the transfer documents themselves had discrepancies that did not meet the requirements of the Registered *Land Act*, then applicable. The transfer forms are standard forms. For a transfer to be considered as properly executed it must bear signatures of the vendor and the purchaser, their Pin numbers and ID card numbers must be recorded, and a certificate by the advocate before whom the signatures were appended on the transfer



forms, to certify they signed in his presence. The appellant did not question the authenticity of the signatures of the vendor and the respondent. The missing Pin number of the vendor and the blank certifications were questioned.

48. The missing details on the transfers speak of, one that the vendor and the respondent did not sign before an advocate, and that is the reason why no advocate committed himself to have witnessed the execution of the document. Secondly, it is evidence that the transfer forms were not complete as important details were missing. The respondent admitted that the irregularities noted on the transfer documents were real. In addition, she was not even present in the country when she “signed them”. It is clear that the transfer was not above board. We find that the appellant proved that there were irregularities in the manner in which the transfers were done. The transfers were a misrepresentation, giving the impression they were done regularly, yet they had not.
49. We find that the transfers to the two (2) plots, Plots X/XX and XX, were irregular. To this extent, we find that they were fraudulent. However, given that the respondent had beneficial interest in both suit properties we will address the issue separately.

Whether there was a trust

50. As to whether a constructive trust existed in the circumstances, Mr Gikandi urged that considering the glaring irregularities on the passing of title between the deceased and the respondent, it was critical for the trial court to have carefully examined the transfer process. He referred to this Court’s decision in *RMM v BAM*, CA No 267 of 2011 for proposition that the trial court should have opted for the law that protected the interests of both parties in the dispute. According to the appellant, the trial court merely upheld the interests of the respondent and completely disregarded the interest of the appellant with regard to the two suit properties.
51. As to whether a constructive trust existed in the circumstances, the appellant submitted that his case before the trial court was that the two suit properties were held on a trust basis and that the parties herein had a right to enjoy the use of the two properties on equitable proportions. It was submitted that since the appellant was clearly in occupation of a part of Block X/XX and that the respondent had to file a suit for the eviction of the appellant, that the respondent had duty to explain on what basis the appellant had moved onto the property. In addition, the appellant was collecting rent from the tenants occupying the apartments on the suit properties, and was actively involved in the management of the properties, all which are a strong indicator of a relationship of trust between the deceased and her surviving heirs.
52. The appellant relied on the decision in *Hussey v Palmer* [1972] 3 All ER 744 and urged that a constructive trust is a trust imposed by law whenever justice and good conscience require it and that it is an equitable remedy by which the court can enable an aggrieved party to obtain restriction. Counsel urged that whether registration was proper or not the Court should hold that the respondent held the suit properties under constructive trust for his brother. Counsel urged that it cannot be that after he took care of their mother for many years, taking her for treatment to India in two occasions that the mother could give away the suit properties leaving him destitute.
53. Mr Munyithya for the respondent relied on the case of *Charles K. Kandie v. Mary Kimoi Sang* (2017) eKLR to emphasize that the four elements in a constructive trust namely; promise, transfer of property, confidential relationship and unjust enrichment were not proved in the present appeal. Mr Munyithya submitted that the appellant failed to discharge the burden of proof required under section 107 and 108 of the *Evidence Act*. It was submitted that it was not enough for the appellant to allege that he paid



Kshs 450,000/-. The fact that he used his money to dig and lay a foundation and erect a ground floor and the 1st floor of the building now standing on Block X/XX required proof.

54. The respondent further submitted that it was upon the appellant to prove to the required standard the existence of a constructive trust in relation to the suit properties and the parties in this appeal. That the burden to prove this issue did not shift to the respondent. Similarly, the burden to prove whether eviction of the appellant from the suit property was unlawful and whether because of the eviction the respondent incurred losses, never shifted from the appellant to the respondent. It was further submitted that during the trial, the appellant failed to show that the deceased did not participate in the transfer of the two plots. Consequently, the respondent argued that the evidence produced by the appellant was so weak such that the learned trial judge could not come to any other conclusion except an order for dismissal of the suit.
55. After considering the evidence, the learned trial Judge found that no trust existed in the appellant's favour. She found that the fact the respondent paid off a loan he took on the suit property, plot XX, and the fact he did not offer to pay back the money, then, he had benefited from the said property and cannot demand more. As for the plot X/XX, the Judge found that the appellant had not proved that he made any payment towards the construction on the suit property, that he had not proved he paid towards its acquisition and had not produced any sale agreement, and that he did not prove any trust existed in his favour.
56. We refer to a judgment of this Court *James Archer vs, Inger Christine Acrcher and others* Civil Appeal No 39 of 2020 (UR) (Gatembu, Nyamweya & Lesiit, JJA), where we considered various forms of trusts as follows:

“*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.”

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...”

57. It is not contested that there was no express trust created with respect to the suit properties in this appeal, and the Appellant provided no evidence of such an express trust. The appeal will therefore turn on whether a trust can be implied from the facts of the appeal. Mr Gikandi has submitted that a constructive trust existed in this matter, which Mr Munyithya for the respondent contested.



58. A constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. See *Llyods Bank Plc v Rosset*, (1991) 1 AC 107,132. This Court in *Twalib Hatayan Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR and re-stated the law on trusts as follows:

“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. ...

59. The evidence adduced before the trial court is clear that there were two suit properties Plot XX and Plot X/XX. The learned trial Judge analyzed the evidence and evaluated it exhaustively. The facts were hotly contested and there were very few areas of convergence. The appellant and the respondent are clear that Plot XX was family land that their mother inherited from her uncle. The learned trial Judge concluded that even though that property was family land, the moment the appellant used it as security for a loan, which the respondent paid for him; then the appellant had benefited from the property. The learned Judge found that the respondent paid Kshs 3, 250, 000/- for him which he had not offered to reimburse. That in the circumstances he had no beneficial interest in the property.

60. The learned Judge did not give due consideration to all the facts. Since Plot XX was family property, both the appellant and the respondent had beneficial interest in the property. That means that either of them was free to use the property, including using it as security. There is no evidence that the deceased (mother of the parties) protested the use of the property as security, bearing in mind that at the time the loan was advanced to the appellant, the property was registered in her name. The fact she did not object is a clear indication that he had an acknowledged right over the property. The learned Judge found that he put the property at the risk of being sold and so should not claim any interest in it. There is no evidence led to show the value of that property, at least there was no evidence to show that the respondent having paid Kshs 3, 250, 000/- on behalf of the appellant to redeem the property from a forced sale, that amount exhausted his interest in the property.

61. By virtue of being family property, the appellant had an equitable right over Plot XX, which right is enforceable. Constructive trust existed in that the appellant had beneficial interest in the plot to which the respondent held legal title, which her mother transferred to her. We are satisfied that the respondent held the suit property in trust for the appellant. What the trial Court should have done was to determine the appellant’s beneficial share to the property,

62. Regarding Plot X/XX, we have analyzed and evaluated the evidence afresh. We also looked at the exhibits each of the parties presented before the court in support of their claim. We are in agreement with the learned trial Judge that the appellant did not support his claim; one, he did not adduce any evidence to show he contributed any monies towards the acquisition of the property. Two he did not adduce any documentary evidence to show that he contributed towards the construction on the plot. What the appellant proved, and it was not contested by the respondent is that he helped to manage the property during the construction. Thereafter he moved into the property, collected rents and used the proceeds to manage the property, take care of their mother’s medical and other needs, and those of his family.



63. The learned trial Judge was satisfied that the respondent bought the Plot X/XX and developed it with her own resources. We confirmed the payments she made towards the purchase. She also availed evidence of payments she made for building materials, paying contractors and other professionals.

64. Having said that, the evidence is clear that after the construction was over, the appellant occupied part of the building as his home and partly as business. The respondent needed to explain under what circumstances the appellant entered the building. In addition, there was no evidence led to show whether the appellant was offering free services to the respondent, managing the properties and collecting rents. The respondent lived outside the country for many years, during which time the appellant took care of their mother and the properties. Even though the appellant had not paid for the purchase of the plot X/XX, or for the construction, he did contribute time and energy towards its development, and later in its management. That contributed towards increasing the value of the property.

The appellant had equitable interest over Plot X/XX, and therefore a constructive trust existed in his favour over this property as well.

65. We are satisfied, therefore, that the learned Judge misdirected herself and came to the wrong conclusion of the matter. Rule 33 of the Court of Appeal Rules empowers this Court to remit the proceedings to the lower court with such directions as may be appropriate and to make any necessary incidental or consequential orders.

66. We find that there was constructive trust in favour of the appellant over both properties. It was the duty of the trial court to assess what was the percentage or the value of that interest. In the result the order that commends itself to us is as follows:

- i. The judgment of the ELC (A. Omollo, J) dated January 23, 2020 be and is hereby set aside.
- ii. Pursuant to Rule 33 of the Court of Appeal Rules, we remit the proceedings back to the ELC before a Judge other than A. Omollo, J and direct that court to receive additional evidence to enable it assess and determine the value of the beneficial interest of the appellant and the respondent over Plot Nos 59 and X/XX, the suit properties. The Judge will thereupon proceed to enter Judgment based on those findings.
- iii. The Deputy Registrar of this Court to send a copy of this judgment to the Deputy Registrar of the ELC, Mombasa to place the file before the Duty Judge of that court for directions as to the fresh hearing and disposal in compliance with the directions we have given in this judgment
- iv. As this is a family matter, we make no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

