MB v BBAM (Civil Appeal 181 of 2020) [2022] KECA 895 (KLR) (28 April 2022) (Judgment) (with dissent - S ole Kantai, JA)

Neutral citation: [2022] KECA 895 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 181 OF 2020

AK MURGOR, S OLE KANTAI & JW LESSIT, JJA

APRIL 28, 2022

BETWEEN

MB ..... APPELLANT

AND

BBAM ..... RESPONDENT

(Being an Appeal from the Judgement of the Environment and Land Court at Nairobi (Obaga, J.) delivered on 24th October 2019 in ELC Case No. 1302 of 2016)

JUDGMENT

JUDGMENT OF MURGOR, JA

1. This appeal concerns a dispute between the appellant, MB and the respondent, BBAM over Maisonette [Particulars Withheld] , Nairobi erected on LR No. xxx/xx (the suit premises) that was registered in the parties' joint names.

2. The respondent and the appellant met in London in the late 1990's. They were both divorcees who resided in their own houses in the United Kingdom. The respondent sold his house in the United Kingdom and would reside in the appellant's house or with his brother who also resided in the United Kingdom.

3. In 2007, the respondent purchased the suit premises and came to reside in Kenya. The appellant who was still working in the United Kingdom would occasionally visit and spend time with him in Kenya. Subsequently, she relocated to Kenya and acquired an alien resident visa to enable her also reside in the country. She would renew her alien resident visa periodically.

4. In 2012, the appellant returned to reside in the United Kingdom for the reason that the respondent had started dating other women, and soon after returning, she married someone else in the United Kingdom on June 21, 2015.

5. In 2016, the respondent through his lawyer wrote to the appellant to request her to sign forms relinquishing her interest in the suit premises for the reason that the respondent had discharged her from the trusteeship position that she held in respect of the suit premises. The appellant declined to sign the forms arguing that she was entitled to a 50% share of the suit premises.

6. The appellant's response prompted the respondent to file a suit against her where he prayed for; -

    a. A declaration that the registration of the Appellant on the property LR No.xxx/xx Maisonette No.x in Nairobi, without any contribution by the Appellant towards acquisition of the property, whatsoever, created a Resulting Trust in favour of the Respondent, and the Appellant is liable to yield the interest to the Respondent upon demand;

    b. An order directing the Appellant to execute a transfer of the interest registered to her over LR No.xxx/xx maisonette No.x in Nairobi in favour of the Plaintiff, within seven (7) days of service of Judgement and decree of Court, failing which the Deputy Registrar of the Court to execute the Transfer in favour of the Respondent;

    c. Costs of this suit;

7. The respondent's case was that he provided the funds to purchase the suit premises and that the appellant did not contribute a single cent towards the purchase price. He contended that the registration of the suit premises in the appellant's name was purely as a trustee, and that it was never intended to confer any interest in the suit premises upon her. He nevertheless claimed that he included her name in the lease because he was aging and wanted the appellant to transfer the property to his grandchildren, in the event of his demise. He denied the appellant's claim that they lived as a married couple or that she was entitled to a share of the suit premises.

8. It was the respondent's evidence that he had met the appellant in 1999. She was a good friend, and they both had their own houses and resided in the United Kingdom. They were both working in the United Kingdom at the time; that he had later sold his house and moved into the appellant's house in 2001. When he retired from employment, he relocated to Kenya where he purchased the suit premises which he registered in their joint names on November 16, 2007. It was where they cohabited when the appellant visited the country. He stated that they had both sold their houses in the United Kingdom because the appellant would spend long periods in Kenya. He further stated that he had persuaded her to obtain a resident permit and conceded that she had shipped her car to Kenya; that she would pay for the international trips abroad that they made while they were a couple; that they played golf and socialised together.

9. He testified that he had lived with the appellant for 7 years before putting her name on the lease agreement and that he had not promised her that she was entitled to a 50% share of the house.

10. The appellant on her part stated that she met the respondent in the United Kingdom in 1999, and that when the respondent re-located to Kenya, he purchased the suit premises where she resided with him whenever she was visiting; that she paid for domestic shopping, DSTV and the wages of their domestic staff, including a gardener who at times acted as their caddie during golf tournaments. She said she also purchased curtains for the house, paid for their international holidays to various destinations and hosted golf tournaments at the Nairobi Royal Golf Club where they were both members.

11. It was her evidence that after they moved to Kenya she resigned from her employment, sold her house and shipped her car to Kenya. They had decided to live together but not get married. The appellant stated that the respondent "...put her name on the title because she had served him with dedication for long...".She went on to state that she had left Kenya in 2012 after she discovered that the respondent

was unfaithful, as he started seeing other women. She argued that she was entitled to her 50% share of the suit premises on account of the contributions made towards its improvement.

12. The appellant filed a counter-claim in which she sought for orders that;

    a. The Respondents suit be dismissed with costs;

    b. A declaration that the parties are joint owners in equal shares and that the property be sold and the proceeds be distributed to the parties in equal shares.

    c. An order for payment of mesne profits from May 2013 to the date of Judgement at the rate of Kshs. 80,000 per month or the Respondent do pay the Appellant a sum equivalent to the value of her half share in the suit property.

13. Upon considering the parties' rival positions, the trial judge, allowed the respondent's claim and dismissed the appellant's counterclaim, for the reason that notwithstanding the joint tenancy, a resulting trust had come into existence in favour of the respondent for the reason that he had paid the purchase price for the suit premises. In so finding, the court also dismissed the appellant's counterclaim.

14. The appellant was aggrieved by the decision of the trial court and filed this appeal on the grounds that the learned judge misdirected himself in failing to recognise that she was registered as joint owner of the suit premises and in finding that she was not entitled to a 50% share of the suit premises for the reason that a resulting trust was created by the respondent; in disregarding her contributions both monetary and in kind, and in dismissing her counter claim and awarding costs thereof to the respondent.

15. When the appeal came up for hearing, learned counsel Ms. K. Kioko holding brief for Ms. N. Onyango appeared for the appellant. Counsel stated that she had filed written submissions which she sought to briefly highlight.

16. Counsel begun by faulting the learned judge for failing to appreciate that the appellant was registered as a joint tenant and owner of the suit premises for the unexpired residue of the lease, and on this basis, it was submitted, she was entitled to a 50% share of the suit premises. In support of this contention, the appellant cited the case of *Cornella Nabangala Nabwana vs Edward Vitalis Akuku & 2 others* [2017] eKLR.

17. On the question of whether the trial judge rightly dismissed the appellant's counter claim and awarded costs to the respondent, it was contended that, the appellant cohabited with the respondent in various parts of the world between 2005 and 2014; that four witnesses had testified that they knew the appellant and the respondent as husband and wife; that during the period of cohabitation the appellant made financial contributions towards their relationship and upkeep, which contributions the trial judge was wrong to disregard; that it was after the appellant discovered that the respondent had been unfaithful that her relationship with him came to an end.

18. With respect to the contention that a resulting trust had been created in favour of the respondent over the appellant's share of the suit premises, it was submitted that nothing in the evidence showed that the respondent had ever established a resulting trust or that the appellant was to hold the suit premises as trustee. Furthermore, counsel asserted, the respondent neither pleaded any particulars in respect of the alleged trust nor produced any document to prove the existence of trust. The case of *Charles K. Kandie vs Mary Kimoi Sang* [2017] eKLR was cited to support this proposition.

19. Turning to the appellant's financial contribution to the relationship, it was submitted that a relationship existed between the appellant and the respondent, and that in exchange for love and affection, the respondent registered the appellant as a joint owner.

20. On behalf of the respondent, learned counsel Mr. Mukuha holding brief for Mr. Bwire informed us that he would rely on the respondent's written submissions in their entirety.

21. On the existence of a resulting trust, it was submitted that the entire purchase price was paid by the respondent for the suit premises and the respondent had made it known to the appellant that the intention for registering her as a joint owner was so that she would pass on ownership of the suit premises to his grandchildren in the event he predeceased her, that having wholly financed the purchase of the suit premises, coupled with the communication to the appellant of the existence of a trust, meant that a resulting trust was properly created.

22. With regard to joint ownership of the suit premises and the appellant's entitlement to a 50% share, it was submitted that the appellant had no basis on which to claim a portion of the suit premises; that granting her a 50% share would in effect lead to the unjust enrichment of the appellant. Citing the case of *O K N vs M P N* [2017] eKLR the respondent stated that there having been no contribution from the appellant, and the appellant having admitted that her cohabitation with the respondent was not intended to culminate in a marriage, there was no basis upon which the appellant could lay claim to the half share of the suit premises.

> "I have considered the grounds of appeal, the parties' submissions and the law. This being the first appeal, rule 29 of the Court of Appeal Rules requires this Court to re-appraise the evidence and draw inferences from the facts. This principle was emphasized in the oft-cited case of Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123 where it was stated this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider 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 this respect...."

23. Given the above, in my view is that the following issues fall for consideration;

    i) whether the appellant was registered as a joint owner of the suit premises;

    ii) whether a resulting trust was created in favour of the respondent; and

    iii) whether the learned judge rightly dismissed the appellant's counterclaim and awarded costs to the respondent;

24. Beginning with whether the appellant was registered as a joint owner of the suit premises, an examination of the lease dated November 16, 2007 shows that the suit premises was registered as a lease for a term 50 years under the Registration of Titles Act, (now repealed). What is clear from the document is that both appellant and the respondent signed it as lessees and joint tenants. The lease further stipulates that a "Lessee" includes "...persons deriving title under or through the Lessor". As such with her name appearing on the lease as joint lessee, it stands to reason that the appellant was a joint tenant, and therefore a title holder of the suit premises, and I so find. I will return to this issue later.

25. The next issue was whether a resulting trust was created, and whether the appellant was made a trustee following her registration as a joint tenant. In finding that a resulting trust was created the judge had this to say;

> "The plaintiff having paid the entire purchase price and having examined the origin of the relationship and how the suit property was purchased, it is clear that the plaintiff had no

intention to confer any interest upon the defendant... this is a clear case where the court can automatically infer a resulting trust."

26. As to whether a resulting trust came into existence is a matter that requires to be discerned from the circumstances of each case. I begin by observing that a review of the respondent's plaint shows that though the respondent acknowledged that the appellant was registered as a joint tenant, he went on to state that by registering her as a joint tenant, a resulting trust was created. But having so asserted, it is significant that the claim of a resulting trust was neither specifically particularised or proved. The respondent having failed to specify the particulars of the resulting trust raises doubt as to whether a trust existed or indeed whether the respondent intended to create a trust.

Halsbury's Laws of England 4th Edition Vol. 48 at paragraph 597 defines a resulting trust thus;

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

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

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

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

27. The case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & others* [2015] eKLR, outlined the basic tenets of a resulting trust thus;

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

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

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

28. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see *Halsbury's Laws of England supra* at 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. ..."

29. And in relying on the same case, the learned judge went on to find that a resulting trust had automatically come into existence in favor of the person who had advanced the full purchase price, which in this case was the respondent.

30. But the matter ought not to have ended there. This is because the presumption of a trust should only arise in cases of absolute necessity. Courts are hesitant to presume that a trust has come into existence without first having ascertained what the intentions of the parties were, and whether as between them there was a clear intention to establish a trust.

31. In the case of *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR it was Court succinctly observed;

> The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily.The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied." Emphasis added.

32. This is for the reason that the presumption of a resulting trust is rebuttable. Gary Watt's text book on Trusts and Equity 3rd Edition at page 153; clearly states that much as there exists the presumption of a resulting trust, it should be recognised that the presumption "...is easily rebutted by evidence that the transferor intended the transfer to take effect in some other way. It may be that the transferor intended an outright gift, or that he intended the transfer of property by way of loan or some other contractual arrangement."

33. In the case of Fowkes vs Pascoe (1875) LR 10 Ch App 343, the English Court of Appeal held that the presumption of a resulting trust had been rebutted by evidence that a gift had been intended.

34. In the case at hand, though the learned judge found that a resulting trust had been presumed in favour of the respondent, what the judge failed to take into account was that the presumption of a resulting trust was rebutted by the relationship that existed between the couple at the time that the suit premises was purchased, and the fact that at no time was there any documentary or other evidence presented to the court that would lead to the conclusion that such a trust had come into existence. The respondent's inclusion of the appellant on the lease is reminiscent of an outright gift. There

35. were no strings attached to the gift, and no conditions precedent. She was not required to have done anything for her name to be included as a joint tenant. The respondent intended to gift the appellant by registering her as a joint tenant, and having done so it was 'a fait accompli", in other words "the transaction was complete and it could not be undone'. This being the nature of the transaction at the time, I find that the learned judge's conclusion that the joint tenancy pointed to a resulting trust is not supported by the evidence.

36. Furthermore, the respondent's testimony that he had made her a trustee, for a trust that was for the benefit of his grandchildren, is far-fetched. There is nothing in the evidence that supports this assertion. The record is replete with email communications between the appellant and the respondent. None of the emails remotely mention the existence of such a trust. It is also irreconcilable that, on the one hand, the respondent's evidence is that he intended to create a trust for the benefit of his grandchildren. Yet the learned judge on the other hand goes on to find that a resulting trust was created in favour of the respondent. It becomes clear that the learned judge's conclusions bear no relationship with the evidence that was before the court, and I find that this was a misdirection on the learned judge's part.

37. Returning to the question of the joint tenancy. As seen earlier, there is no dispute that the appellant and the respondent were registered as joint tenants of the suit premises. And having found as I have that no resulting trust came into existence, I now turn to consider the nature and effect of the joint tenancy that the appellant and respondent had entered into.

38. In the case of Isabel Chelangat vs Samwel Tiro Rotich & 5 Others [2012] eKLR the nature and effect of joint tenancies and tenants in common were expansively discussed thus;

> At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts. Megary & Ward, The Law of Real Property and Cheshire & Burn's, Modern Law of Real Property. According to Burn, "... a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares ...." Further, that "there is a thorough and intimate union between joint tenants. Together, they form one person. A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of survivorship (just accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are;
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> (i). The unity of possession.
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> (ii). The unity of interest.
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> (iii). The unity of title.
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> (iv). The unity of time.

39. On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. if he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of Law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time. Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property is equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential. A joint tenancy can be

converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain."

40. In the text book Elements of Land Law 5th Edition ,at page 914 Kevin Gray and Susan Francis Gray aptly describe the nature of joint tenancies thus;

> The essence of joint tenancy consists in the theory that each joint tenant is wholly entitled to the whole of the interest which is the subject of co-ownership..... the key to understanding joint tenancy is the realization that no joint tenant holds a specific or distinct share himself but which is (together with other joint tenant or tenants) interested with the totality of the co-owned interest. The whole is not so much the sum of the parts, for each and every part is itself co-extensive with the whole.....Each holds everything and yet holds nothing."
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> At Para 7.4.3, the authors state that:
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> "Joint owners are bound up in a thorough and intimate union of interest and possession. So comprehensive is this co-ownership that joint tenants comprise, in the eyes of the law a collective entity one composite person – together holding one and the same estate in the subject land, whether that estate be freehold or leasehold. Accordingly, any transfer of land to two or more persons as joint tenants operates so as to make them, vis a vis the outside world, one single owner."

41. Incorporating the prerequisites set out above into the circumstances of this case, it becomes apparent that once the respondent and appellant were registered as joint owners, they were bound by the unities of possession, interest, title and time since the interest they held was as a single owner of the suit premises as opposed to separate ownership. Their interest was not equal or similar but one and the same, a concurrent interest in the whole property. And more importantly, where "... no joint tenant holds a specific or distinct share...".

42. What this all means is that in accepting to hold the suit premises as joint tenants, it followed that the appellant and the respondent at all times intended to hold it as single owners with neither of them holding a specific or distinct share. So that, the only way in which the parties shares can become separate and distinct is by severing the joint tenancy.

43. The parties' intention is to sever the joint tenancy, is made clear from, on the one hand, the respondent's prayer for an order directing the appellant to execute a transfer of the interest registered in the suit premises in his favour. And on the other, the appellant prayer for a declaration that the parties are joint owners in equal shares and for the property to be sold and the proceeds distributed to the parties.

44. At this juncture, it begs the question as to what share, if any, would each party be entitled to? Maraga J.(as he then was) in the case of C P M vs V K M [2008] eKLR observed thus;

> "...I agree with what the authors of Chesire and Burn's Modern Law of Property, 16th/ Edition state at page 242 that in such situation, that is, where property is registered in the names of two or more persons as joint tenants, without the addition of any restrictive, exclusive or explanatory words, the law feels bound to give effect to the whole of the grant, by creating an equal estate in them. In the circumstances I hold that the registration of the suit property in this case in the joint names of the parties connotes equality."

45. And in the case of D E N vs P N N [2015] eKLR this Court held that;

> "Turning to the law, we are also in agreement that the learned trial judge properly drew inspiration from the decision in the case of Kamore versus Kamore (supra) and Kivuitu

versus Kivuitu (supra) as giving the correct proposition in law that the fact that the property is registered in the joint names of the disputants it meant that each party owns an undivided share there in; and, two, that the law assumes that such property is held by the parties in equal shares."

46. I agree and adopt the mode of sharing specified by the above cited authorities. Given the facts, it is evident that by the time the respondent registered the appellant as a joint owner, it was understood that she was an equal joint owner. There is nothing in the record to suggest that the appellant would be anything less than an equal and joint owner of the suit premises, and the record unequivocally bears this out. Consequently, I am satisfied that in severing the joint tenancy, the appellant is entitled to her half share of the suit premises, and I so find.

47. As concerns the claim for mesne profits, since this claim was not substantiated, I find that it has not been proved and therefore it is without merit.

48. For the reasons set out above, the judgment of the trial court is set aside. The respondent's claim is dismissed, prayer a) of the appellant's counterclaim is allowed, but prayers b) and c) are accordingly dismissed. Costs to the appellant.

49. As Lesiit, JA agrees, this will be the judgment of the Court with Kantai, JA dissenting.

50. It is so ordered

Concurring Judgment of Lesiit, JA

1. I have had the advantage of reading in draft the judgment of Murgor, JA. I am in full agreement with her reasoning and conclusions and, have nothing useful to add.

Dissenting Judgment of Kantai, JA

1. I have read in draft the Judgment of my learned Sister, Murgor, JA., and, with respect, I am unable to agree with the reasoning or the conclusion reached. The appellant, Maria Burton, and the respondent, BBAM, did not marry at any time at all. As residents and citizens of the United Kingdom they were married to different partners but those marriages both ended in divorce. The appellant and the respondent met after their divorces and started a relationship. The respondent, who suffered from arthritis, decided to relocate to the warm climate in Kenya and in 2007 they both came to Kenya where the respondent acquired a resident permit but the appellant acquired a permit that allowed her to occasionally visit the respondent in Kenya.

2. It is not disputed that upon arrival in Kenya the respondent purchased a property known as L.R. No. XXX/XX (the suit property) and the same was registered in their joint names. They lived together for a while but when the appellant discovered that the respondent's roving eyes were seeing other women she abandoned ship, left Kenya and went back to the United Kingdom where she got married to somebody else.

3. In a plaint filed at the High Court of Kenya at Nairobi the respondent stated that he and the appellant were registered as joint owners of the suit property and that whereas the suit property was so registered, the respondent had paid the entire purchase price, stamp duty fees, costs of conveyancing and all incidental expenses for the transfer of the property. Further, that:

"... the Defendant was registered on the property, at the election of the Plaintiff for her repose on the said title at the pleasure of the Plaintiff...".

4. It was further contended in the plaint that the appellant was registered on the suit property as a trustee of the respondent, in a resulting trust; that by a letter dated 12th July, 2016 the respondent had determined the trust by indicating to the appellant that he wanted the suit property conveyed fully to his name but that the appellant had declined to act accordingly instead laying claim to the suit property. It was therefore prayed that a declaration do issue to the effect that registration of the appellant on the suit property without any contribution towards its acquisition created a resulting trust in favour of the respondent and that the appellant was liable to yield the interest to the respondent upon demand; that the appellant be ordered to execute a transfer of her interest in the suit property in favour of the respondent failing which the Deputy Registrar of the ELC do so.

5. The plaint was accompanied by a witness statement where the respondent repeated the matters I have summarized from the plaint. The respondent stated further that he had paid the purchase price by cheque No. xxxx dated 19th April, 2007 for Ksh.13,500,000; a deposit of Ksh.1,500,000 having been paid on his behalf by a company M/S Super Marketing and Distribution Limited which sum he had reimbursed by cheque No. xxxx dated 15th May, 2007. There was also a List of Documents with various annextures.

6. The appellant delivered a statement of defence and counter-claim (which was later amended) where it was stated that the appellant and the respondent were registered as joint owners of the suit property in equal shares and thus co-owners; that the appellant and the respondent had cohabited from 2005 to 2014:

> "...and for all intends (sic) and purpose were viewed by all and sundry as a husband and wife. By reason of such prolonged cohabitation and for love and affection, the Plaintiff willfully agreed to be jointly registered with the Defendant as co-owners. The alleged claim of a resulting trust cannot therefore arise..."

7. The appellant denied that she was the respondent's trustee stating that the respondent had failed to disclose material facts relating to their relationship. In the counter-claim the appellant repeated that she had co-habited with the respondent in Kenya and elsewhere from 2005 to 2014 and that by reason of that cohabitation they were viewed as husband and wife. Further, that she was entitled to 50% share of the suit property and mesne profits at the rate of Ksh.80,000 per month and she sought an order that the suit property be sold and proceeds thereof be distributed in equal shares between her and the respondent. At paragraph 18 of the statement of defence and counter-claim the appellant stated:

> 18. The defendant avers that she made financial and material contribution in their cohabitation and expended energy and time in the upkeep of the household as well as emotional comfort to the Plaintiff and thus the Plaintiff willfully enjoined the Defendant in registration of the property and has prior to these proceedings submitted and offered to the Defendant 50% value of the property."

8. She prayed that the suit be dismissed; that a declaration be made to the effect that the parties were joint owners in equal shares of the suit property which should be sold and proceeds thereof shared in equal shares and an order be made for payment of mesne profits from May 2014 to the date of Judgment at the rate of Ksh.80,000 per month or that the respondent pay to the appellant a sum equivalent to the value of her half share in the suit property.

9. The statement of defence was accompanied by a witness statement where the appellant further to the defence stated that she was a holder of a British Passport and was resident at 30 Balmoral Close,

Stevenage, SG2 8 UA; that she knew the respondent who she had met in the UK in 1999 where they then resided; that they had become friends; that the respondent would occasionally stay at her house or other times stay with his brother; that the respondent, to avoid tax issues, had given up his UK residence in the year 2000 but would occasionally travel back to the UK where he would stay either with her or with his brother; he had persuaded her, and she had agreed, to apply for a resident permit in Kenya. As a result she had terminated her employment in the UK to spend more time in Kenya where she had brought her car which was registered in Kenya; she had not returned to Kenya from 2012 as she had to travel to Singapore to attend to her ailing mother but in any event she had in February 2014 decided to end her relationship with the respondent after finding that he was unfaithful. Of her contribution during their companionship she says at paragraphs 11 to 14 (inclusive) of the witness statement:

> 11. In all times we were together I contributed to various items in our lives. I recall specifically the following. Paid accommodation around South Africa trip 2005, around Los Angeles 2002, Spain 2000 and other part of Europe. (See photos taken of these holidays in the documents produced).
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> 12. I also undertook various normal duties as couple would share. For instance occasionally I did shopping for our household needs, purchased curtains for the property in question and paid for the installation of the DSTV (MultiChoice) and a year subscription using my credit card.
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> 13. The plaintiff and I are Golfers, we decided to join as couple membership at Royal Nairobi golf club (which I am still a country member) copy of my membership card submit for evidence. As an active member in the said club, I undertook duties especially tournaments held by the Plaintiff's Madhivani family – see the photos attached and DVD of one of such events that I retained 2 years running 2010 and 2011.
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> 13. That our friends and acquaintances knew that we were respectful couple and treat us as such."

10. Further, that the suit property was purchased on or about 16th November, 2017 and that the respondent had included her name in the registration "...in view of our relationship and my contribution in various expenses as aforesaid ...". She denied that she was registered as a trustee of the respondent stating that she lived with the respondent as husband and wife.

11. The suit was heard by Obaga, J. who in a considered Judgment delivered on October 24, 2019 found that the respondent had proved his case to the required standard; that the appellant had failed to prove the counter-claim. The counter-claim was dismissed and Judgment was entered for the respondent.

12. The appellant was dissatisfied with those findings and through her lawyers M/S Njeri Onyango & Company Advocates she filed a Memorandum of Appeal where 6 grounds of appeal are set out which, in sum, state that the learned Judge erred in fact and misdirected himself in law by failing to recognize that the appellant is registered as a joint owner of the suit property; that the counter-claim was dismissed without just and fair reasoning; that the Judge erred by finding that the appellant was not entitled to 50% share of the suit property; that the Judge erred in awarding costs of the counter-

claim to the respondent; that the Judge erred in finding that a resulting trust had been created in favour of the respondent, and finally:

> "The Learned Judge erred in fact, and in law by ignoring and/or downplaying the Applicant's contribution both in monetary terms and in kind during the period of cohabitation."

13. It is prayed that the appeal be allowed, the decision of the High Court be set aside and costs be awarded to the appellant.

14. I will not go into the submissions made by learned counsel for the parties when the appeal came up for hearing before us on June 29, 2021 as they are well captured in the Judgment of Murgor, JA.

15. To enable me navigate the issues for determination in the appeal it is necessary to look at the evidence that was presented before the Judge who determined the case in the way we have already seen.

16. In a further witness statement filed in Court on April 11, 2007 the respondent reiterated that the appellant's registration as joint owner of the suit property was as a trustee; that the appellant had not paid any part of the purchase price or attendant costs or fees. He denied that there was any marriage of any sort between him and the appellant asserting that he provided to the appellant a place of residence wherever she visited Kenya.

17. Of the joint registration of the suit property the respondent stated that because of his advancing age he required a trustee for half interest of the suit property for purposes of his eventual estate and that the appellant was well aware of this hence her conducting a monogamous marriage when she wedded in the UK immediately after relocating from Kenya. He denied that the appellant was entitled to 50% share of the suit property.

18. There were other witness statements filed in court.

19. In support of the appellant's case Douglas Maranga Obachi stated that he had worked as a guard with a security firm called [Particulars Withheld] Company who provided security services at [Particulars Withheld] where the suit property was situate. He knew the appellant and respondent for the 4 years he worked there and regarded them as husband and wife.

20. GMK worked as a househelp for the appellant and respondent from 2011 to 2016. They both paid her wages. She knew that they were husband and wife.

21. SOM was engaged as a general worker by the appellant and the respondent and he knew that they lived as husband and wife until the appellant left Kenya in 2012.

22. Then there was AB who met the appellant and the respondent in the year 2007 where he furnished to them curtains for the house on Grevillea Gardens (the suit property). They were his clients at the place where he worked until 2012.

23. There was oral evidence given before the Judge.

24. In adopting the 2 witness statements which I have already summarized the respondent testified that he had paid the entire purchase price for the suit property inclusive of fees and costs stating that he had decided to register the property in their joint names:

> " ....in case anything happened to me, she would pass on the burton(sic) to my grandchildren. MB the defendant herein did not contribute even a single penny towards purchase of that suit property...."

25. Further, that the appellant was his good friend, they never married but she had assisted him to furnish the house. He wanted her name removed from the title.

26. In testimony before the Judge the appellant also adopted witness statements filed in Court adding that she and the respondent had separately divorced in London from their spouses; she met the respondent in London in 1999 and he moved to her house but they decided not to marry. They vacationed in South Africa where she met the bills but sometime later the respondent decided to relocate to Kenya where playing or hosting golf tournaments was cheaper. She accompanied him and would stay in Kenya occasionally; they decided to buy a house and in her own words:

> " ... I did not contribute any money towards the purchase of the house. I only purchased curtains, kitchen ware, had DSTV installed etc..."

27. Of household expenses she denied that the respondent would refund the same stating that it is she who met those bills. When she discovered that the respondent was communicating with another woman on SKYPE she decided to leave. She claimed 50% as her rightful share of the suit property.

28. The appellant called as witnesses the househelp (GMK), the general worker (SOM) and the man who sold curtains (AB) who adopted witness statements which I have already discussed and it is not necessary to go into that again here.

29. That was the substance of the case made before the Judge and upon consideration the suit was allowed and the counter-claim dismissed.

30. The main issue for determination in this appeal is what was the effect of joint registration of the suit property in favour of the appellant and the respondent and flowing from that issue is what, if any, is the appellant's entitlement to the suit property.

31. The Judge found as fact on the evidence that the suit property was purchased through money provided by the respondent. He examined the circumstances of the case where the appellant and the respondent had met in London after their respective divorces; had ended up in Kenya where the respondent had purchased the suit property but had decided to register the title in their joint names for the stated purpose that should he die the appellant would transfer the suit property to the respondent's grandchildren; the appellant had relocated to the UK after discovering that the respondent was seeing another woman; the appellant had re-married in the UK. The Judge found that all those circumstances led to an inference of a resulting trust in favour of the respondent.

32. Black's Law Dictionary 11th Edition by Bryan A. Garner defines resulting trust as:

> " A remedy imposed by equity when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property – Also termed implied trust; presumptive trust. Cf. constructive trust.
>
> " The main distinction between express and resulting trusts is this: In an express trust an intention to create a trust is always expressed or declared. In a resulting trust the intention is not expressed, but is inferred by operation of law from the terms of the conveyance or will, or from the accompanying facts and circumstances." Norman Fetter, Handbook of Equity Jurisprudence §124, at 191 (1985)."

The Judge cited, correctly, I think, this Court's decision in the case of Twalib Hatayan & Another v Said Saggar Ahmed Al Heidy & Others [2015] eKLR

where it was stated of a resulting trust:

> "A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).
>
> Dealing with the first issue, according to the Black's Law Dictionary, 9th Edition; a trust is defined as
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*, "...the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
>
> 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. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (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.
>
> This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally

expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra)."

33. There is, of course, a rebuttable presumption that where a property is registered in the joint names of the parties those parties made equal contribution towards its acquisition – See the old case of Kivuitu v Kivuitu [1991] KLR 248. That presumption is rebuttable by either party showing that their contributions were not equal.

34. This Court's holding in the case of Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR is material in our case. It was held on the issue of a resulting trust:

> "The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

35. I need not go back to the facts of the case which I have set out more than once in this Judgment. The parties to the dispute before the trial Judge were not and did not intend to marry. They lived together occasionally in London, while on holiday in South Africa and later in Kenya. The appellant stated expressly that all purchase money for the suit property was paid by the respondent. Evidence was produced to that effect. According to the appellant she purchased curtains for the house on the suit property – no evidence was placed before the court that the appellant paid for them as the witness Barngetuny testified that he sold curtains to the appellant and the respondent. The witnesses who managed the suit property testified that their wages were met sometimes by the appellant and other times by the respondent.

36. The respondent testified that his sole purpose of having the appellant registered as a joint owner of the suit property was his fear that he was getting old and he wanted to ensure that the property would go to his grandchildren. He had no intention at any time to confer any interest of the suit property to the appellant at all who was not his wife.

37. The appellant claimed in the counter-claim, and this is part of her case before us, that she was entitled to 50% share of the suit property. I think she is wrong. There was no material on which she could be so entitled. She did not pay any part of the purchase price. Her contribution, if any, during the occasional times she resided with the respondent was miniscule. Even in situations where parties are married and that marriage ends in divorce there is no law that states that each party is entitled to 50% share of property. In the case of EGM v BMM [2020] eKLR properties had been purchased by the husband where the wife claimed that her role was a supportive wife, mother and homemaker and that her earnings from employment supplemented money in the home. The High Court ordered equal division of the suit properties. This is what we said on appeal:

> "We think it was erroneous for the learned judge to assume and hold that *the Constitution* gives spouses an automatic 50% share of the matrimonial property simply by being married. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance

with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.

The learned judge committed a reversible error and misdirected himself in not applying the relevant provisions of the *Matrimonial Property Act*, 2013. Far from being inconsistent therewith, the statute in fact effectuates the principle entrenched in Article 45 (3). The Act reflects the equality of both parties before, during and at dissolution of a marriage.

Section 7 then provides that ownership of matrimonial property, at the dissolution of a marriage, is vested to parties according to their respective contribution. It is the duty of the courts to fairly and accurately determine such distribution and the learned judge but abducted that duty. His blanket of a 50:50 formular ostensibly on the basis of Article 45(3) of *the Constitution* effectively made the distributive scheme of the statute completely of no effect and orchestrated a failure of justice."

38. In the even more recent case of ENK v MNNN Civil Appeal 559 of 2019 [2021] KECA 219 [KLR] where Judgment was delivered on 3rd December, 2021 the husband had purchased all the suit properties, financed the costs of the matrimonial home and also funded the operations of his wife's NGO. Properties were jointly registered. The wife claimed to have contributed to the home through purchase of foodstuff and clothing claiming that properties were acquired through joint efforts. The High Court shared the properties equally. This is what we said on appeal:

> "Evidence showed that the appellant paid for the properties in full with no monetary contribution by the respondent at all. Although the properties were registered in their joint names, the appellant was able to show that he did that purely for the affection he had for his wife at the material time. When divorce came the appellant proved to the required standard that he had personally purchased and paid for the properties. The respondent did not make any monetary contribution. The appellant was able to rebut the presumption that the properties which were jointly registered were equally owned. In any case marriage per se is not a ground for sharing properties acquired during marriage in an equal basis. The law in a well-trodden path has established that parties must show evidence of their respective contribution to the properties and secondly to the family well-being. It is clear beyond doubt that there was no issue to the marriage for the respondent to assert that she was taking care of children and other family issues. Admittedly both parties were top professionals who pursued their personal and professional interest separately."

39. I think I have said more than enough to show that the Judge was right to find that a resulting trust existed and that upon termination the property belonged to the respondent solely. The counter-claim had no merit and was properly dismissed. Being of those views and having answered the main issues in the appeal I need not navigate any other issues raised in the appeal which are secondary to the main issues. I would dismiss the appeal in its entirety and award costs to the respondent.

40. I am however in the minority and the final orders will be as proposed by the majority.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

A. K. MURGOR

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR