IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 189 OF 2007

BETWEEN

NISHITH YOGENDRA PATEL.....APPELLANT

The legal representative of the Deceased Plaintiff YOGENDRA

PURSHOTTAM PATEL

AND

PASCALE MIREILEE BAKSH (nee Patel).....1ST RESPONDENT

NILESH PRAHLADBHAI PATEL.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi ***(Githinji, J.)*** *dated 13th March, 2006*

in

HCCC No. 617 of 1995)

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JUDGMENT OF THE COURT

This appeal and the preceding protracted litigation bear the imprimatur of family and human tragedy brought about by a deficit of honesty, a surrender to greed, a lionization of pride, and a heedless pursuit of egotistical satisfaction at any cost. All that is compounded by the fact that the three parties before us, the children of their fathers - three brothers who are now long dead - rejected outright our entreaties that in the name of family, in the memory of their fathers and for the sake of amity, they ought to do all within their powers to seek an amicable settlement. They would hear none of it and so it falls on us to make *ex cathedra* pronouncement over some three properties purchased and nurtured to prosperity by their fallen fathers. We think that the intransigence, the absolute refusal to budge or accommodate each other is a present-day exemplification of what Lau Tsu, the ancient Chinese thinker stated back in the 6th Century before Christ;

"There is no greater guilt than discontentment And there is no greater disaster than greed."

We entirely agree and as a result of human nature, discontentment and greed are central to this dispute. We add that entitlement and lack of accommodation resulted in this dispute reaching to this level and taking more than a decade to be resolved.

Now this appeal is a challenge to the judgment and decree of the High Court rendered on 13th March, 2006, by Githinji JA, the learned Judge having been elevated to this Court somewhere along the litigation which had been commenced more than a decade previously. By that judgment the learned Judge dismissed the suit filed by **Yogendra Purshottam Patel** (hereinafter referred to as) (Y.P) who died before the judgment was rendered and was duly substituted by his son **Nishith Yogendra Patel** (the appellant).

That suit was against **Pascale Mireille Baksh** who was the daughter and administratix of the estate of **Rajnikant Purshottam Patel** (R.P) and **Nilesh Prahladbhai Patel**, the son and administrator of the estate of **Prahladbhai Purshottam Patel** (P.P). He had also sued his own mother **Chanchabhen Purshottam Patel** as the third defendant but she died on 8th March, 1995, which was shortly after the suit was filed

and the suit as against her abated and she does not feature in this appeal.

In the suit Y.P. had sought against the defendants jointly and severally orders that can be summarized thus;

(a) A declaration that he was the sole proprietor of the Nairobi West house erected on L.R. 37/243/2, I.R. 12237 and of Kigwa Farm comprising L.R. 12826, I.R. No. 47884 and L.R. 12442, I.R. No. 33904.

(b) An order directing the defendants to transfer their undivided shares in the Nairobi West house and Kigwa Farm into his name, and if they failed to do so a vesting order empowering the Registrar of the High Court to execute the transfers.

(c) An injunction to restrain the estate of R.P and P.P. and their servants or agents from dealing with the house and farm.

(d) In the alternative special damages of Kshs. 88,166,667 per the amended plaint, plus interest at court rates.

(e) A declaration that moneys show standing to the credit of Y.P's books of account were his property.

(f) A declaration that Y.P. was the real, true, rightful and beneficial owner of the farm and house and his late brothers R.P. and P.P. were mere benamidars.

(g) A declaration that the late brothers R.P and P.P. held the house and the farm in trust as trustees for him.

(h) An account of the rental income received by Nilesh and that he do pay the sum due to Y.P upon taking of accounts.

(i) Costs plus interest.

The two defendants denied the claims against them maintaining that the three brothers bought the house and farm by joint and common efforts and that they each were entitled to a third share of the same. They raised the funds for their purchase and used income therefrom to develop the properties. They also mounted counterclaims seeking declaration of their entitlement to income and proceeds from the partnership of the farm Kigwa Estate, and from the house together with interest. They prayed that the properties be sold and the proceeds thereof be shared equally between Y.P. and the estates of R.P. and P.P.

As already mentioned, YP's suit was dismissed with costs. The counterclaims were allowed in these terms;

(a) The estates of P.P. and R.P. were entitled to the income and proceeds accruing out of the Nairobi West house and Kigwa Farm from the dates of their deaths.

(b) An order of accounts since 1991 and the plaintiff to pay the sums found due to the estates of P.P. and R.P.

(c) An order that the 1st defendant be at liberty to sell her one-third undivided share in the Nairobi West house and Kigwa Farm to both or one of the Co-owners as first priority failing which any close family member, failing which any interested party.

(d) The plaintiff to pay the costs of the counterclaims.

Aggrieved by that judgment the appellant **Nishith Yogendra Patel** filed a notice of appeal. This was followed by a massive eleven volume, nearly 5000-page record of appeal. In the record is an astonishing 122-ground memorandum of appeal that runs into 29-pages. We cannot fathom, less still accept as proper, and we say so with greatest respect to the firm of M.G. Sharma advocate who drafted this monstrous memorandum of appeal, that it is possible for the learned Judge's 65-page judgment to have contained that many alleged errors. At any rate, having perused the said grounds of appeal, many of them offend the rules on crafting of memoranda of appeal as they contain narrative, are argumentative, repetitive and anything but concise. There appears to have been no attempt to comply with the clear requirements of ***Rule 86(1)*** of the Court of Appeal Rules, nonetheless, it is our judicial task and mandate to sieve through the prolixity of the record of appeal however burdensome it may be.

We have had occasion to castigate memoranda of appeal that defy the rules and end up being a vexation to both opposing parties and the Court. In ***KENYA PORTS AUTHORITY vs. MODERN HOLDINGS [E.A] LIMITED [2017] eKLR*** it was stated, and it bears repeating;

> ***"This appeal challenges that decision on a whooping 28 grounds, which were condensed and argued in the written submissions as five, leading us to wonder what purpose it served to bring an appeal on such a long list of grounds only to abandon nearly all. We can do better than to remind counsel of the provisions of Rule 86 of the Court of Appeal Rules, 2010 that;***
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> > *,, 86(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.?"*

That case quoted with approval the judgment in ***WILLIAM KOROSS vs. HEZEKIAH KIPTOO KOMEN & 4 OTHERS***, **Eldoret Civil Appeal No. 223 of 2013**, where we stated as follows;

> ***"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."***

Given the sheer length of those grounds and the manner of their crafting, it would be an exercise in futility, and one of doubtful utility to attempt to summarize them here, but through sheer hard work and in line with our constitutional responsibility, we shall attempt to do so. The summary we shall attempt to undertake is not in any way meant to disrespect or dilute the case of the appellant.

One would expect that the written submissions filed by the appellant would help clarify and concretize issues but, alas, not in this appeal. The submissions were filed on 17th November 2016 and are a lengthy 152 pages! It is precisely to curb such verbosity that in keeping with the Practice Directions, which were in force when the appellant's so-called submissions were filed, the Court rarely permits written submissions to be longer than 20 pages. Indeed, the submissions filed for the respondents are a mere 16 pages long and by them counsel believe they did justice to the subject.

Mr. A.B. Shah, learned counsel leading **Mr. M.A. Khan** for the appellant was keenly aware of the burden of those numerous grounds of appeal and the unreasonably lengthy written submissions, which, to his credit, he did not attempt to dwell on. In fact, his main focus during his address to us was the 8-page appellants response to the respondents' submissions filed by himself on 17th June, 2017. He first asserted that all the payments for the house and the farm were made by Y.P. notwithstanding that the properties were registered in the names of the three brothers. He faulted the learned Judge for confusing a *benami* transaction with a *resulting trust*. A benami transaction is a Hindu/Muslim concept that was binding on the parties. According to counsel, the learned Judge was wrong to apply the principle espoused in ***PETTIT vs. PETTIT [1967] ALL ER 385, WILSON vs. WILSON* [*1963] 2 ALL ER 447** and ***GOODMAN vs. GALLANT [1986] 1 ALL ER 311,*** which were *"based on **section 17** of the **Married Womans Property Act** of 1882 of England, which is a procedural section, enabling the court only to pronounce what interest a wife has in a property owned by her husband*." In counsel's view, the learned Judge ought to have considered and applied, instead of distinguishing, the Indian case of ***MULCHAND & ANOR vs. MADHO RAM I.L.R. 10 ALL 421***. He urged that the distinction the learned Judge drew between that Indian case and the present one on the basis that in the former the brothers were registered *jointly* while in the latter they were registered as *tenants-in common*, was *„a monumental error*.' He also urged that **section 98** of the **Evidence Act,** which expresses the exclusion of parole evidence to vary, contradict, add or subtract from the terms of a document evidencing a transaction involving land, was inapplicable in the circumstances of the case. **Mr. Shah** then urged that the suit by Y.P was not time-barred because the issue was not pleaded, and also does not apply to trusts. He then explained that Y.P. filed suit against his brothers' children *"within two years of the beginning of their troubles"*.

He reiterated that Y.P. *"paid every penny for the two properties in which were then registered in the joint names"* of the three brothers. Y.P. did not file suit against the brothers because they never challenged the position that he was the true owner and did not protest against his running of the properties. Counsel asserted that the learned Judge ought to have given full effect to the Australian decision of ***CALVERLY vs. GREEN 56 ALR 483*** which held that where a person pays the purchase price of a property and causes it to be transferred to another and himself jointly, the property is presumed to be held by the transferees upon trust for the person who provided the purchase price. He pointed out that the learned Judge properly observed that parole evidence is admissible to show who provided the purchase price and thus support the trust.

Mr. Kiragu, learned counsel for the respondents started by laying the context of the appeal thus; the properties in question are registered in the names of the three brothers who are now all deceased; Y.P. never filed suit against his brothers during their life time and finally did so in 1995 when R.P. had been a dozen years dead and P.P. four years deceased; the brothers' mother sued by Y.P. filed a defence which was essentially a wholesale admission of YP's claim against the estates of his dead brothers; regarding the acquisition of the properties only Y.P. testified while the 1st and 2nd respondents presented evidence to counter his version, and, finally, the burden was always on Y.P to show that the transaction was *benami* and he was the beneficial owner of the properties to the exclusion of his brothers and their estates. The properties in question were bought more than half a century ago, the Nairobi West house in 1961, and Kigwe farm in 1962 and the transfer effected on 1965. All of this was between 30 and 35 years before the suit was filed.

Counsel referred to the written submissions filed on 29th May, 2017 in which the respondent complains that the respondents aforementioned 150-page submissions are offensive in that the appellant purports to introduce new evidence thereby *"testifying in his submissions"* without having sought or obtained the Court's leave to adduce further evidence. He asserted that the only evidence that this Court can properly consider is that which was adduced before the trial court. We think that position to be too plain for argument and we have accordingly confined our consideration of this appeal, which as a first appeal proceeds by way of a rehearing, to what is on record. We are to evaluate the evidence in a fresh and exhaustive way and draw on our inferences of fact while always alive to the fact that we have not had the advantage of seeing and hearing the witnesses in live testimony, which the trial court had. We therefore make due allowance for that and will be slow to disturb his factual findings, especially those based on credibility of witnesses, doing so only if his conclusions are based on no findings, proceed from a misapprehension of the evidence or are plainly wrong and untenable. See ***SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD [1968] 123; PIL KENYA LTD vs. OPPONG [2009] KLR 442; SUSAN MUNYI vs. KESHAR SHIANI [2013] eKLR***. Turning to the 112 grounds of appeal which he described "verbose," counsel stated that they could be summarized into just four issues for determination; namely;

> ***"(a) Whether the judge erred in law or in fact holding that the appellant's suit was time barred.***
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> ***(b) Whether the judge erred in law or in fact by holding that the appellant and the respondents are tenants in common with equal shares.***
>
> ***(c) Whether the judge erred in law or in fact by holding that the appellant failed to prove that there was a resulting trust and that the respondents' only interest in the property is as trustees.***
>
> ***(d) Whether the learned judge erred in law and in fact when he awarded the respondents the costs of the suit."***

On the question of the plaintiff's claim having been time-barred, Mr. Kiragu defended the learned Judge's affirmative finding as correct given the suit was filed more than three decades after the registration of the properties in the brothers' names as tenants in common. The **Limitation of Actions Act** provides at ***section 7*** that an action to recover land may not be brought after the end of 12 years from the date on which the right of action accrues. He went on to assert, on the strength of the judgment of Makhandia, JA in ***MTANA LEWA vs. KAHINDI NGALA MWANGANDI [2015] eKLR*** that the statute apart, it behoves a plaintiff to pursue his action with reasonable diligence as equity does not aid the indolent.

We note from the judgment of the learned Judge that even though this was a jurisdictional issue that was potentially dispositive of the suit before him, he did not deal with it *in limine* notwithstanding that it had been pleaded in, for instance, the 1st defendant's re-amended defence filed on 19th June, 2001. It had the potential to dispose of the matter in entirety but the learned Judge adverted to it only after dealing with the merits of the case.

His decision on the point was to first reject the plaintiffs' contention that the suit was not time-barred as it sought a declaratory judgment; the plaintiff was in possession of the properties throughout; and the defendants raised their claims to the land for the first time in 1993. He found, instead, that Y.P's claim was for recovery of land from each of his brothers who were registered with him as tenants in common and as such, it should have been filed within 12 years but came in too late after more than three decades. He also held that statutory limitation aside, the suit was filed way too late in the day and Y. P. was therefore guilty of laches.

We think, with respect, that the learned Judge was right in the two holdings. Y.P. was doubtless seeking to recover land from his brothers and in the circumstances of this case he suffered no disability that would have explained, justified or excused his failure to file suit within the prescribed period. Also, outside of statute, it seems to us quite plain that it cannot be just or equitable that a person should be allowed to mount a claim such as Y.P's after 30 to 35 years of inaction and acceptance of a certain state of affairs. There is a practical wisdom to the public policy against the filing of suits long after the causes of action arise. Such delays prove prejudicial because the belated suits attempt to disturb settled rights and also embarrass the fair trial of the claims since memories fade or fail, documents age and disappear and, in some cases, parties and witnesses die. Such, indeed, is the fate that befell the suit before us/We think, therefore, that the criticism against the learned Judge on this score is unfounded and is for rejection.

> On whether the learned Judge erred in holding that the appellant failed to prove that there was a resulting trust with the respondents' interests being as trustees only, Mr. Kiragu extolled the learned Judge's findings as correct. He submitted that the learned Judge was right to reject Y.P's claim that the house and farm were held by R.P. and P.P., and their legal representatives after them, in trust for him because Y.P. did not furnish proof of a resulting trust. Citing this Court's decision in ***GICHUKI vs. GICHUKI [1982] KLR 285***, counsel urged that the burden to prove the creation and existence of a trust was with the person seeking to rely on such trust. Y.P failed to discharge that burden as his only claim to sole ownership of the properties in dispute was that payments for them were made through his bank account yet the Judge found that there were payments for that purpose that were made from other sources on behalf of the three brothers. Mr. Kiragu asserted that the learned Judge arrived at the conclusion that the 3 brothers were the beneficial owners after a thorough analysis of the payments made. A court would not imply a trust unless there was clear evidence that it was the intent of the parties to create if. For this he cited ***MBOTHU & 8 OTHERS vs. WAITITU*** & ***11 OTHERS [1986] KLR 171.***

He proceeded to urge that the intention of the parties is to be found or established from the instruments executed by the parties.

The documents showed that the brothers were registered as owners in common in equal shares with no indication of a holding in trust for Y.P. Urging that an alleged resulting trust could not defeat a title that is indefeasible under statute, he cited ***EHRMANTRAUT vs. KEITH G. COLLINS LTD 2008 MBQB*** 140, a decision of the Court of Queen Bench of Manitoba, Canada, when McKelvey, J. stated at para 41;

> ***"I find that the operation of the section [section 59 of the Real Property Act] does render indefeasible any title in the absence of clear evidence of an agreement between the titleholders to the contrary, fraud or other exceptions as set out in s. 58 of the Act. There are no cases where a Court has expressly held that a resulting trust can be applied to overcome the indefeasibility provision of s. 59 of the Act. Section 59 is clear, and restrictive in its language."***

Any alleged trust would, according to counsel, offend ***section 32*** of the **Registration of Title Act Cap 289** (repealed) as the said statute does not contemplate any manner of passing interest in land other than by a registered instrument and in this case there was no trust deed registered or noted on the certificate of title for the house and farm. A resulting trust could not be presumed in the instant case to defeat the express provisions of statute and so the registered owners would have to take the properties in equal shares as expressly shown by the titles thereto. He reiterated that Y.P. failed to prove that he alone raised the purchase price for the suit properties in the face of clear evidence that his brothers contributed to the purchase, as the respondents' witnesses testified.

Having gone through the massive record ourselves, we cannot but agree that Y.P. did not discharge his burden of proof. Regarding the purchase of the land for the Nairobi West house, we agree with the learned Judge that the mere production of three cheque counterfoils by Y.P. could not amount to proof that the Kshs. 16,000 they represented between 2nd November, 1959 and 6th December 1960 were towards the purchase of the house in the absence of bank statements showing whether the payments were made, and into which account. Moreover, there is no evidence of the balance having been paid by Y.P. The mortgage taken for the development of the plot was executed by the three brothers. In the closely knit family, that was living together, there was evidence of P.P. and Y.P paying the parents' expenses while their sister Urmillaben was categorical that the house and the farm were joint ventures by the three brothers. So also was Shardaben, PP's widow, who testified as DW6. The plot having been conveyed into the names of the three brothers to hold in common in equal shares, and they all having executed the mortgage, followed by the whole family moving in and sharing expenses up to about 1967, after it had been designed by R.P. as a house for the "*PYR. Family*," the evidence appears to us to be quite overwhelming that the house was always regarded in fact, as it was indeed, as equally owned by the brothers.

Y.P. himself declared the brothers' respective share of rental income from the house in the tax returns that he filed on behalf of his brothers, and also showed their one third share in the house and farm as part of their estates in the Succession Causes that he filed or instructed to be filed regarding their estates. We think, with respect, that the learned Judge was absolutely justified to hold regarding the house as follows;

> ***"It is not necessary to deal with the rest of the evidence, for, in my view, the plaintiff's evidence does not establish that he alone provided the purchase price. Indeed his claim has been disproved by overwhelming oral and documentary evidence."***

The evidence and totality of circumstances of the purchase and running of the Kigwa farm leads to the same conclusion irresistibly. This includes the agreement dated 5th September 1963 which indicated the price as Kshs. 200,000 of which a deposit of Kshs. 60,000 was to be paid before execution and the balance either in lump sum on or before 30th September of the same year, or by instalments.

Y.P. claimed to have raised the deposit solely by, among other ways, borrowing some Ksh. 30,000 from his sister Urmillaben. He also stated that he paid the balance on his own. Y.P's evidence as presented was contradictory and inconsistent or otherwise falsified and negated by the testimony of other witnesses as well as the documents available. Given what we have seen from the record, and not having had the benefit of observing Y.P. in testimony, we think that the learned Judge was within rights to make the following observations and findings which speak to Y.P's credibility;

> ***"If the agreement of sale is read together with the plaintiff's statement of account at page 13 of Ex.5A then it seems that the deposit of Shs. 60,000 was paid by three instalments of Shs. 20,000 on 20th August, 1963; Shs. 38,000 on 4th September, 1963; Shs. 38,000 on 4th September, 1963 and Shs. 2,000 on 5th September, 1963.***
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> ***The finding contradicts the plaintiff's earlier evidence and pleadings that the deposit was paid by two instalments of Shs. 20,000 and 40,000 respectively.***

Further plaintiff's prevaricates and gives contradictory evidence on the source of the credits to his account to raise the deposit. What he said in his evidence in chief and in cross-examination by Mr. Havelock and Mr. Kiragu is totally inconsistent.

> ***It is true that his sister Urmillaben gave admitted that she lent money for the purchase of Kigwa farm but she was categorical that she lent a total of Shs. 30,000 to the three brothers to purchase the Kigwa farm on the advise of her mother. The letter dated 25th May, 1974 from her bank – document No. 24 of Ex D5 shows that she withdrew Shs. 20,000 from her account on 20th August, 1963; Shs. 2,000 on 25th July, 1994 and Shs. 8,000 on 3rd December, 1964.***
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> ***Plaintiff admitted that the Shs. 30,000 lent by Urmellaben Patel was used for the purchase of Kigwa farm. The Shs. 20,000 credited on the plaintiff's account on 20th August, 1963 must be the money given by Urmillaben and cannot be a bridging loan from an unknown friend as explained by the plaintiff. Further, the additional Shs. 10,000 leant by Urmillaben was lent in two installments in 1964 and therefore cannot be part of the Shs. 11,950 credited to the plaintiff's account on 17th August, 1963.***
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> ***As for the payment of the balance of the purchase price, plaintiff claimed that annual instalments were substantially raised from his two businesses in Paramount Steel Wares and Ngara stores. According to the plaintiff the two businesses belonged to the same partners. There is evidence from defence witnesses that the two were small businesses but plaintiff refutes that evidences, saying that the two businesses were profit making and successful businesses. There is no concrete evidence that the plaintiff was earning high volumes of profits which would have met the annual instalments for payment of purchase price for Kigwa farm as plaintiff would want the court to believe. Firstly, plaintiff could not raise any substantial part of the deposit of Shs. 60,000. He had only a saving of about Shs. 5000 in his house according to his evidence."***

It is not in dispute that Y.P. had charge and control over all the documents belonging to P.P. and Y.P. which they left at Kigwa Farm where the entire family resided at some point. Y.P. failed to produce statements of account for Kigwa Farm in respect of the coffee delivered to the Kenya Planters Co-operative Union (KPCU) between 1963 and 1967. Again, touching in his credibility, the learned Judge observed as follows;

> ***"Plaintiff only belatedly produced the statement of account of Kigwa farm for periods January 1982 to December 1993 and from January, 1994-January 2002.***
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> ***Those statements of accounts are incidentally addressed to Patel P.P. and Y.P. Patel thereby indicating (contrary to plaintiff's evidence) that the account is in the name of P.P. Patel and Y.P. Patel. I draw the inference from failure by plaintiff to produce such vital statements of account that the relevant entries in the missing statements are adverse to his case."***

Whereas it was Y.P's case before the High Court, and maintained by the appellant in this appeal, that R.P. and P.P "*did not pay a single penny*" towards the purchase and running of Kigwa Farm, yet there was plenty of credible evidence to the contrary. R.P.

Patel was the head of Department of Engineering at the University of Nairobi and his wife Mireille (DW 2) who herself worked full time while in Kenya, testified that he was an external examiner at several universities abroad. Y.P. had to admit, albeit reluctantly that R.P. was earning double Y.P's salary. Like the learned Judge, we are unable to accept Y.P's narrative that R.P. did not have the means to pay towards the purchase of the farm on which he lived with the rest of the family. It is equally incredible that P.P. did not have the means to make like payment, notwithstanding Y.P's selective and self-serving production of documents belonging to P.P that had been left at Kigwa Farm. The learned Judge rejected Y.P's attempt to make a case out of the documents that were in his possession as against his dead brothers' interests and we have no difficulty doing the same. We think he was taking advantage by giving concocted stories, half-baked truths and documents intended to mislead the court.

Specifically, on the evidence of purchase of Kigwa farm, we think that the following passage in the learned Judge's judgment which is based on the testimony he received, is a correct reflection of what transpired:

> ***"There is oral evidence particularly from Nilesh Patel (2nd defendant) Mireille Rota (DW2) Urmillaben D. Patel (DW4) and Shardaben Patel (DW6) that Kigwa farm was bought by the three brothers and that each contributed to the purchase price. According to Urmillaben, she lent Shs. 30,000 to the three brothers for the purchase of Kigwa farm and that before the farm was purchased P.P. Patel, Y.P. Patel and N.K. Patel visited their uncle. I.B. Patel in Arusha. The evidence that Urmillaben lent Shs.30,000 for the purchase of the farm is admitted by the plaintiff. However, plaintiff stated that the money was lent to him and not to the three brothers. I found Urmillaben to e a credible witness. I believe her evidence that she lent the money to the three brothers on the advice of her mother. According to Mireille Rota the buying of the Kigwa farm was a big event for the whole family."***

There is little doubt that the three brothers and their respective families were all engaged in the affairs of Kigwa Farm. Nilesh and Jaykumar both visited regularly from the United Kingdom and the former stayed and worked on it in the quarter century between 1969 and 1994, leaving only when a dispute arose between him and Y.P. over his father's share therein. Jaykumar, his brother, came and stayed for over a decade bringing his engineering background to the development of the farm. Indeed, Nilesh, as admitted by Y.P., operated Y.P's personal account into which milk proceeds from the farm were paid, while rental income paid by a tenant by the name **Peter Dann** (PW3) was paid into an overseas account in the name of Nilesh and Rajendra his brother, sons of

P.P. All this evidence is uncontroverted and uncontested by the appellant.

Another significant piece of evidence was the preparation of a sub-division of scheme for Kigwa Farm with the intent of selling some 24 pieces measuring 2.5 acres each. Y.P. had to admit and the learned Judge noted that this was "*after some hesitation,*" that he authorized the sub-division of the farm and in fact transfers were signed in respect of such sub-division to a couple, Mr. and Mrs Githenji. The approval of the sub-division scheme and signature on the transfer all showed that the farm was co-owned by Y.P. and his brothers. The balance sheets from the farm indicated that up to 1991 the three brothers were partners in Kigwa Farm and Y.P. did receive a salary as well as supervision and technical charges. This stopped in 1991 when, all of a sudden, Y.P. started showing himself the sole proprietor. That belated change really would not avail much and we agree with the learned Judge's finding in these terms;

> ***"Both counsel analyzed the accounts exhaustively but the above summary is sufficient to show that until 1991 the accounts prepared with the authority of the plaintiff showed that Kigwa farm was a partnership property of the three brothers each of who contributed to the share capital, progressively increased their share capital and earned profits from the partnership farm and that plaintiff was being paid a salary as a partner and for services rendered to the partnership. The plaintiff's evidence that all those entries were for accounting purposes and did not reflect the reality is not credible. Those accounts are clear admission by plaintiff that farm belonged to the three brothers."***

The appellant in essence admitted that he falsified documents for accounting purposes, which shows or demonstrates the extent he was prepared to go in order to have his way. The trial Judge rightly questioned his integrity and credibility for falsifying documents and came to the conclusion that the farm was purchased by and belonged to the 3 brothers equally. It pains us, why the appellant would be involved in what amounts to a criminal activity or mislead, or misrepresent to the relevant authorities in order to hide his obligation and avoid responsibility. Such conduct is nothing but deceit and deception. Again what the appellant is doing is a perpetuation of his illegal and dishonest behavior in order to steal from his deceased brothers.

It is equally instructive that Y.P. swore in the affidavit to support the petition for grant of letters of administration for the estate of RP, being **Succession Cause No. 424 of 1986**, that the assets included as credit balance in the partnership of Kigwa Farm, while for P.P. **Succession Cause No. 251 of 1994**, the deceased's estate included one-third share of the two parcels of land comprising Kigwa Farm. That is what the appellant deposed to on oath but now he wants to run away from his own words.

We think, on a consideration of all the record, the evidence was simply overwhelming from the instruments executed by the brothers, the documents relevant to the case, the testimony of the witnesses and the totality of the circumstances of the case that there is absolutely no truth in Y.P's claim that he was the true, real owner of the properties, and that his brothers were mere trustees holding their shares in trust for him. He failed to prove his allegations to that effect and the preponderance of evidence spoke to ownership by the three in equal shares. It is clear from what we have seen on the record that the learned Judge found him to be economical with the truth or generous with legal fiction.

We think that given those categorical and inevitable factual conclusions, Y.P. failed to discharge his onus and prove his case on a preponderance of probabilities and his suit was destined to fail as it did. See ***MILLER vs. MINISTER OF PENSIONS [1947] 2 ALL ER 372*** and ***KIRUGI vs. ANOR vs. KABIYA & 3 OTHERS*** **[1987] KLR 347,** the latter being a decision of this Court. The titles to the house and the farm very explicitly showed the three brothers to be owners in equal shares without any suggestion of a trust. Their title as such was indefeasible under ***section 23*** of the RTA save on grounds neither alleged nor were extant herein. This has been affirmed in a long line of authorities including ***JOSEPH ARAP NGOK vs. MOIJI OLE KEIWA & 4 OTHERS [1997] eKLR***, ***MBOTHU & EIGHT OTHERS vs. WAITITU & ELEVEN OTHERS*** (supra) and ***NAIROBI PERMANENT MARKETS SOCIETY & OTHERS vs. SALIMA ENTERPRISES & OTHERS [1995-1998] 1 EA 238.***

With the evidence and the facts standing in such clarity in proof of equal ownership on the basis of the titles and all of the circumstances surrounding purchase and dealings with the properties, we have no difficulty agreeing with the learned Judge that the properties having been held by the brothers expressly as "*tenants in common in equal shares*," there was no ambiguity , and there was no room for finding a resulting trust as would have been possible had they been registered as joint owners. We are satisfied that he appreciated the law in this area correctly and that his conclusions out of its application to the facts of this case were sound. We think that given the express provisions of the deeds herein, there was no room for the trial court to imply or presume any trust. Nor is there any basis upon which we ourselves can do so for, as was stated nearly half a millennium ago in ***COOK vs. FOUNTAIN*** **[1676]36 ER 984** at **987**, ***"the law never implies, the court never presumes a trust, but in a case of absolute necessity."*** We do not see this as one such case. See also ***AYOUB vs. STANDARD BANK OF***

***SA* [1963] EA 619**.

One last matter is the application of ***benami*** to Kenya. **Mr. Shah** asked us to pronounce on this question, while **Mr. Kiragu** was emphatic that we need not do so as it is a practice of Hindu custom that has no place in Kenyan law. Moreover, being a custom, it had to be proved by evidence or expert opinion by the party seeking to rely on it, which Y.P. did not do. For this he cited the case of ***KIMANI vs. GIKANGA* [1965] EA 735**.

We think that given the clear findings already reached, we need not be drawn into the polemics surrounding *benami* transactions and their applicably in Kenya. We think it is enough for us to say that we see no error on the learned Judge's treatment of *benami* transactions as the same has the effect of a resulting trust in English law. His reasoning below is sound and we readily affirm it;

> ***"It has been strenuously argued by the defendants counsel that the concept of a benami transaction is not part of the Kenya law and is not applicable in this case. He may be right, at least partially; seeing that there are Indian statues which govern the benami system such as the Indian Trusts Act and the Benami Transaction (Prohibition) Act 1988 which statutes are not part of our law.***
>
> ***However, it is not necessary for purposes of deciding the legal issue presently under consideration to make a definitive finding whether the benami concept (which has been applied in Kenya in the past amongst Hindus and Muslims) is infact applicable today in its purest form. This is so because a benami principle as applied in India is the counter-part of the principle of English resulting trust which is applicable in Kenya.***
>
> ***The plaintiff in this case is not setting up a benami transaction against a son or a wife in which case on proof of purchase in the name of son or wife a presumption of benami would be readily drawn as opposed to presumption of advancement under English law, (see Bishen Singh Chadha v Mohinder Singh & Another (supra); Shallow maryam (supra). In reality the plaintiff's cause of action is based on the equitable principle of trust whether the plaintiff categorizes it as presumption of a resulting trust or a benami transaction. The nomenclature is for all intents and purposes immaterial and or the purpose of the suit I will treat benami transaction as synonymous with a resulting trust.***
>
> ***Indeed, the learned counsel for the plaintiffs concedes that a conclusion that the transaction was a benami transaction and the conclusion that the transaction was a resulting trust produces the same result."***

Having gone through the record of appeal together with the submissions filed by the parties herein, we find no error or monumental mistake was committed by the trial judge. We commend him for his clarity, understanding and appreciation of the facts and the application of law. Having done so, he came to the correct conclusion. We have no basis to fault him.

The conclusion he arrived at in the end, with which we agree, accords with the conclusion arrived at by the learned authors of ***MEYNER'S HINDU LAW & USAGE*** 14th Edn. chapter 29;

> ***"1. A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating his intention to benefit the other. The bemidar therefore has no beneficial interest in the property or business that stands in his name, he represents in fact the real owner and so far as their relative legal position is concerned he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England.***
>
> ***The general rule and principle of the Indian law as to resulting trusts differs but little if at all from the general rule of English law upon the same subject."***
>
> (Our emphasis)

Ultimately, as far as utility and pragmatism is concerned, we think we are invited to pronounce on a distinction without a difference. This, in our view, would be merely academic to do so, especially where the case of *benami* is a non-issue in view of the correct and cogent conclusions we have arrived at.

We come to the conclusion that the learned Judge was right to reject and dismiss the plaintiff's claim. Having found that R.P. and P.P. were equal owners, it would follow in the circumstances, that it was prudent, meet and just that the prayers for declarations accounts, payments and liberty to sell prayed for in the counterclaims had to succeed. Costs following the event, the defendants were entitled thereto upon their success. In our view, there is no *benami* transaction that was entered into or envisaged by the parties. This is a case of 3 parties jointly buying the suit properties in their joint names. We do not understand how and why *benami* transaction can be imported or implied in a clear and uncontroverted intention of the parties. Again, we do not understand how one party can allege or be allowed to say that the joint registration is inferior to *benami*, when he had the opportunity to say so during the lifetime of the other parties. We think this is a case of a party trying by any means or routes to divest or disinherit genuine and registered proprietors. The joint registration and conduct of the parties during their lifetime is a clear manifestation that no *benami* transaction or resulting trust was intended or can be implied. We decline to do.

In sum, this appeal is devoid of merit and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

M. WARSAME

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR