



**TS v NMS & 2 others (Environment & Land Case 144 of 2021)
[2024] KEELC 3795 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 144 OF 2021**

**AE DENA, J
APRIL 12, 2024**

BETWEEN

TS PLAINTIFF

AND

NMS 1ST DEFENDANT

GERHARD HEIDUK 2ND DEFENDANT

WOLFGANG GEORG JOHAN EHGARTNER 3RD DEFENDANT

JUDGMENT

Plaintiff's Case

1. This case was formerly Mombasa ELC 411 of 2016 filed by the Plaintiff against the 1st Defendant. It was then consolidated with Mombasa ELC Case No. HCCC 442 of 2017 filed by the Plaintiff against the 3 Defendants. The matter was then transferred to Kwale following the establishment of the ELC court and allocated new numbers. The Plaintiff in ELC 411 of 2016 is dated 22/12/2016 while the Plaintiff in Kwale ELC 144 of 2021 is dated 31/10/2017. For purposes of the proceedings the lead file has been Kwale ELC 144 of 2021. It is important to note that Kenya Power & Lighting Company Limited was sued initially sued as one of Defendants but they were struck out by an order of the court.
2. That the Plaintiff and 1st Defendant were once very known to each other is not in dispute. It is further not in dispute that initially, the Plaintiff was married to one MGFS (but divorced) and together they purchased Kwale/Kinondo/xxx the suit property herein. The property was developed with 4 residential houses, a pool area, gazebo and store. At the time of their divorce it was allegedly agreed that the Plaintiff would retain the suit property. Other than being their banker, it is the Plaintiff's case that the 1st Defendant was a financial advisor to him and his ex-wife and she was known to both of them in that capacity.



3. According to the Plaintiff, after his divorce, he moved in with the 1st Defendant with whom he got romantically involved and referred to her as his wife. I must mention that these allegations are strongly disputed by the 1st Defendant. That together the two formed a company [Particulars Withheld] Limited having developed a trust relationship. The suit property was then transferred to the company. That in the year 2012 the Plaintiff wanted to dispose part of the suit property but was advised by the 1st Defendant that the property would not be subdivided while in the name of the company and the same was therefore transferred to the 1st Defendant for ease of the transaction. That on 3/2/2012 the Plaintiff and 1st Defendant signed an agreement that the 1st Defendant would hold the properties in trust for the Plaintiff and upon sale of the same, she would be entitled to 12% of the purchase price. That the suit property was thereafter subdivided by the 1st Defendant into 3 portions being Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx.
4. The Plaintiff avers that he was able to procure the 2nd and 3rd Defendant as buyers whom he clearly informed the property was registered in his wife's name, the 1st Defendant. It is alleged that the 1st Defendant vide an agreement for sale dated 5/11/2015 sold plot No. Kwale/Kinondo/xxxx to the 2nd and 3rd Defendants for a sum of about Kshs 12 million and failed to remit the sum minus her 12% as agreed. It is the Plaintiff's case that the 1st Defendant is now claiming plots Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx with threats of evicting the Plaintiff.
5. The Plaintiff further states that the 1st Defendant acted fraudulently by transferring the suit property in her names purporting that the Plaintiff could not transact in his own capacity and betrayed the trust between the parties. The particulars of fraud as committed by the 1st Defendant are listed under paragraph 16 of the plaint.
6. In the consolidated suit the Plaintiff seeks for Judgement against the Defendant for; -
 - a. Permanent injunction restraining the 1st Defendant herein by herself, through her servants and/or agents and/or employees from subdividing, selling, disposing, transferring, constructing, evicting, threatening and/or interfering in any other manner with the property known as plot numbers Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx and the Applicant herein, his family and/or occupants residing on the suit property.
 - b. A declaration that the interest of the 1st Defendants herein in property known as plot numbers Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx be and is hereby extinguished.
 - c. An order directing the Land Registrar Kwale to cancel all entries on the green card[s] and/or register of the property known as plot numbers Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx indicating the 1st Defendant as the registered owner and in place replace and/or register the Plaintiff herein as the owner of the property known as plot numbers Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx.
 - d. Permanent injunction against the 2nd and 3rd Defendants regarding Kwale/Kinondo/xxxx.
 - e. Cancellation of the names of 2nd and 3rd Defendants in the register of Kwale/Kinondo/xxxx.
 - f. Alternative order that the Defendants to remit the value of Kwale/Kinondo/xxxx to the Plaintiff.
 - g. Costs of this suit and interest at courts rates.



The 1st Defendant's Defence

7. The 1st Defendant filed Statement of Defence dated 25/04/2018 which was amended on 28/6/2018. It is averred that the Plaintiff was neither the registered legal nor beneficial owner of the suit property before its subdivision. The 1st Defendant states that she purchased the property from Rising Eagle Limited in 2012 and no complaints had been made against the transfer by the said company. That during the entire time the Plaintiff was present, secured the potential buyers being the 2nd and 3rd Defendants and it was clear to them and the public that the 1st Defendant was the lawful owner of the property. That the Plaintiff was aware of her activities and never raised any claims of ownership or interests in the suit property.
8. It is also stated that the 1st Defendant did not have any agreement with the Plaintiff regarding the suit property and acquired no lease over the same and his interest in the suit property had been extinguished since 2009. The 1st Defendant states that the Plaintiff did not transfer the suit property to her as he had no legal rights over the same and that the alleged agreement dated 3/2/2012 is a forgery. It is the 1st Defendants case that as at the time of transfer of Kwale/Kinondo/2460 to the 2nd and 3rd Defendants, the same was legitimately hers and that she had the capacity to transfer the same. That at the time of subdivision of Kwale/Kinondo/xxx she also had the legal capacity to do so. Further that the Plaintiff was well aware of the subdivisions but did not raise any issue. The 1st Defendant denies the trust agreement alluded to by the Plaintiff and states that the same was non-existent.
9. The 1st Defendant further filed a counterclaim to the suit and sought for the following prayers;
 - a. A declaration that the 1st Defendant is the legitimate owner of properties known as Kwale/Kinondo/2458 and Kwale/Kinondo xxx.
 - b. An order that the Plaintiff surrenders vacant possession of the house within the suit property which he is currently illegally occupying.
 - c. Permanent injunction restraining the Plaintiff by himself, his agents, hirelings, surrogates, servants, employees and/or and other people claiming interest on his behalf from accessing, occupying, developing and/or interfering with the proprietary interest and rights of the Defendant and/or her tenants, agents, servants or employees in the properties known as Kwale/Kinondo/2458 and Kwale/Kinondo/xxx.
 - d. Mesne profits since 2013 upto the determination of the case and interests at courts rates.
 - e. Costs of the suit and counterclaim.

The 2nd and 3rd Defendants' Defence

10. The 2nd and 3rd Defendants filed their statement of defence dated 20/04/18 on 26/4/2018. They state that they purchased the property Kwale/Kinondo/xxxx from the 1st Defendant who was then the registered owner. It is averred that it is the Plaintiff who had introduced the 1st Defendant to them describing her as the owner of the suit property. That at the time of negotiations and the correspondence between them and the 1st Defendant, the Plaintiff never raised any objection. That all the relevant documents to facilitate the transfer were signed and no objection was further raised.
11. The 2nd and 3rd Defendants deny ownership of properties Kwale/Kinondo/xxxx and xxxx. At paragraph 10 of the defence, the 2nd and 3rd Defendants stated that from the history of the property, it can be deduced that [Particulars Withheld] Limited was the owner of the suit property [mother parcel]



Kwale/Kinondo/xxx between 2009 and 2012. The 1st Defendant owned the suit property between 2012 and 2016 when the same was subdivided and the property belonging to the 2nd and 3rd Defendants created. The 2nd and 3rd Defendants pray that the Plaintiffs suit is dismissed.

Evidence

12. This suit was heard on 7/7/2022, 17/10/22, 2/3/2023 and 30/6/23. The Plaintiff was represented by Ms. Mukoya Advocate and the Defendants by Mr. Abitha Advocate.

Plaintiff's Case

13. PW1 Thomas Schiering, the Plaintiff testified that all the Defendants were known to him. That the suit property before and after subdivision belonged to him. He testified that he got the suit property in the year 2006 and registered it in May 2007 at the land registry. The property was owned jointly with his former wife. That the property Kwale/Kinondo/xxx was transferred to Rising Eagle Limited around 2008 (4/01/ 2008). Rising Eagle Limited is owned by him and the 1st Defendant. That the 1st Defendant had informed him that for one to own property in Kenya the same must be through a company and there must be a Kenyan in the company for his property to be safe.
14. PW1 testified that his shares in the company were 50% against the 1st Defendant 50%. That he gave the 1st Defendant full power over the property and she held the same in trust for him. They also had an agreement over this transfer of property to the 1st Defendant. That it was further agreed to subdivide the property and the same was subdivided into three. He admitted to knowing the rest of the Defendants through an advertisement for sale of the property. He negotiated the price and showed them around. The witness stated that after the sale of the property he never got anything of the money. He didn't get 88% as the 1st Defendant was to have the 12%.
15. The Plaintiff told the court that he lives on the property to date. He paid land rates from 2007 upto 2022 for plot xxx because there were no records of the subdivisions at Kwale. That none of the Defendants were paying the rates. It was further his testimony that in June, 2016 there was a fire, it affected all the 4 houses the house on xxxx was completely destroyed and the one on xxxx was 50 % damaged. That he reported the fire incident to Diani Police Station and what was destroyed is listed, among them was the original agreement. That he took care of the electricity bills. The witness referred to emails between him and the Defendants over the sale of the subdivided part of the suit property. He produced two bundles as his evidence PEx "1-11", Further list 5,6,7 and a Document Examination Report.
16. PW1 lastly testified that the 1st Defendant did not pay a penny when he transferred Kwale/Kinondo/xxx to her. He sought for restoration of Kwale/Kinondo/xxx or for money received from the sale. He in the alternative asked for the remaining subdivision and for the property that was sold.
17. On Cross-examination he testified that he has lived on Kwale/Kinondo/xxx since 2007 having bought it from one Mr. Brunleliner. That initially the property was registered in his name and that of his ex-wife. Later it was transferred to [Particulars Withheld] Ltd. In 2012 the property was transferred from [Particulars Withheld] to the 1st Defendant on 1/2/2012. He conceded that as at the said 1/2/2012, he was a director of [Particulars Withheld] and he did not raise any objection to this transfer and that he did sign the transfer. He confirmed that an agreement had been signed but he could not remember the specific date.
18. The witness stated that the 1st Defendant held the property in trust for him from 4/1/2008. On re-examination PW1 clarified that he had not found it necessary to bring an agreement for purchase of



the suit property from the people he bought from as no complaints had been made by that vendor. That he had never seen the 3 titles for the subdivisions though he was aware the 2nd and 3rd Defendant bought one of the subdivisions.

19. PW2 Alex Mwongera a document examiner at DCI Headquarters Nairobi testified that on 8/12/2018 the office received some exhibits for examination by letter from Omulama E.M and Company Advocates to examine the signature pointed by black arrows in exhibit A1 which is a copy of agreement between the Plaintiff and the 1st Defendant. That he was to compare the signature on exhibit BI – B29 known signature of the 1st Defendant pointed by black arrows. In his opinion, the signatures were made by the same person that is, the 1st Defendant. He produced the document examination report.
20. On Cross-Examination he listed his qualifications and training. He testified that he had received instructions on the report on 28/12/2018 through his then Boss Mr. Muchira Ndege. He admitted the forwarding letter bore an endorsement “Chief Inspector Mwongera PS deal”. The letter was received on 13/12/2018, it was then referred to OCS Incharge document examination. He maintained that he stood by the report and its contents/findings. On Re-Examination he testified that he did not meet the Plaintiff and had no reason to. The Plaintiff’s case was marked as closed.

Defence Case

21. DW1 Wolfgang Ehgartner the 3rd Defendant based in Germany testified on his own behalf and that of the 2nd Defendant whom he stated was his friend and neighbour in Germany. He adopted his witness statement dated 25/11/2021 as his evidence in chief. He also produced documents 56 – 101 and 102 – 136 in the Defendants bundle as DEXH 1 and 2 as respective bundles. It is his evidence that the Plaintiff is known to him, they met in September 2015 when he was on holiday in Kenya and the Plaintiff informed him of a plot that was up for sale.
22. The 3rd Defendant stated that the plot belonged to the Plaintiff and would be subdivided and sold at Euro 500 and another 500 for surveyor. That the Plaintiff informed him that the 1st Defendant was by then in Nairobi on work related issues. Later upon the 1st Defendant coming back, they met and discussed about the property and sale thereof. They communicated with the Plaintiff via email from September 2015 (page 57-58) the Plaintiff confirmed purchase would be Euros 122,000 including housing, pool and all the developments. The Plaintiff confirmed that the property belonged to the 1st Defendant. That the Plaintiff was well aware of the purchase process and even transfer of the property to the 2nd and 3rd Defendants and was not opposed to the same.
23. On Cross-Examination DW1 testified that he was not aware the Plaintiff had an interest in the land though it is him who was engaged in finding the purchaser and the whole process. The 1st Defendant was in Nairobi by then. Upon Re-Examination he stated that he met the 1st Defendant twice and she did not inform him the Plaintiff had an interest in the suit property.
24. DW2 Nereah Michael Said the 1st Defendant referred to her witness statement dated 27/7/2018 and adopted the same as her evidence. She further produced the list of documents at page 23-37 and 37-55 as DW2 EX 2 and 3 as bundles in the order listed in the respective lists. She testified that the Plaintiff was known to her having been introduced to her by his then wife Meilken Schrieng who was an acquaintance of hers. That the Plaintiff and his then wife had an interest in operating villa business in Kenya and she suggested that they register a company. The name Rising Eagle came up and they suggested 50% as family and the other 50% for the 1st Defendant. This was agreed upon in 2008.
25. The 1st Defendant stated that separate capital injection was suggested to be Kshs.2 million and then Kshs.2 million to start the business. That they negotiated at Kshs.1.7 million for each but they later



indicated they had financial constraints. That the Plaintiff and his ex-wife proposed that the 1.7 million capital by the 1st Defendant be used to purchase the property Galu/Kinondo/xxx(sic should be xxx) which she then paid in instalments from 2008. The property was then registered in the name of the company. The witness stated that the company was from 25/3/2009 owned by herself, the Plaintiff and his wife. She testified that there was no trust implied as at that time she was acquiring the property in her personal capacity after discussions.

26. The witness stated that the Plaintiff was aware of the sale of the property and subsequent transfer. That the agreement of 3/2/2012 was not signed by her. She referred to the signature as a forgery and distanced herself from the said documents and its contents. That she had submitted her signature for examination by an expert who ascertained that the signature did not belong to her. DW2 testified that the Plaintiff was aware of the sale of the subdivided portion and had no objection to the same. The witness denied ever being the Plaintiff's wife. She testified that payment of utilities is not proof of ownership. The 1st Defendant prayed that the Plaintiff's suit be dismissed with costs and the counterclaim of 28/6/2018 be allowed.
27. On cross-examination the witness stated she did not have any document to show that she had purchased the suit property using the money she had injected in the company as capital for the business. That there was further no agreement between her and the Rising Eagle Company over the transfer. She also testified that there was agreement to pay the Plaintiff any fees for finding a buyer and the issue of the 88% commission was farfetched. On allegations of being the Plaintiff's wife she admitted some of the documents before her employer DTB bank indicated the Plaintiff as her husband. She admitted to the personal details on the said form. The witness testified that she had allowed the Plaintiff to live on the suit property and that he was residing in the main house without paying rent. She denied the fraud allegations against her.
28. On re-examination the witness testified that she did not have documents for the 1.7 million paid for the suit property as the Plaintiff had taken possession of many documents belonging to her.
29. DW3 Geoffrey Chania a forensic documents examiner based at the DCI Headquarters Nairobi presented a report to court dated 4/5/2022. He explained the process of submitting documents for examination at the DC1 headquarters. He explained further that there was an allocation register where the in charge allocates work to the 18 officers in the department including himself. This is to avoid conflict and for equal distribution because of the workload. That upon receiving the C1, C2, B1 and B2, A and the documents from Msambweni, he proceeded for analysis of the same. The witness stated that his conclusion was the agreement dated 3/2/2012 is a forged document as the signature purportedly belonging to the 1st Defendant was not hers.
30. He produced the report together with the image and the forwarding letter from DCI 29/4/2022 and the court order dated 25/4/2022 and letter from Abidha Advocates dated 26/4/2022 as "DEX5". In reference to the report dated 31/12/2018 by Alex Mwongera Matheu PW2, he testified that the file Ref CID/ORG/3/8/1/1500 did not exist in their database/records and the correct file number was CID/ORG/8/3/1/1500. The reference used in the report did not have details of the year and it would be hard to trace the same in their office.
31. On cross-examination he testified that initially individuals used to do requests for reports but that was no longer the case. He clarified the file worked by PW2 was later traced. He stated PW2 never followed the procedure notably the absence of authentication or verification.



SUBMISSIONS

Plaintiff's Submissions

32. The Plaintiff's submissions were filed on 2/11/2023. The Plaintiff reiterates the pleadings filed and the evidence tendered before court at the time of hearing of the matter and states that he has locus to file and litigate upon this suit. The Plaintiff states that the transactions between him and the 1st Defendant are vitiated by operation of undue influence exerted by the 1st Defendant. The court is referred to the Court of Appeal decision of Mombasa Bricks & Tiles Ltd & 5 Others V Arvind Shah & 7 Others [2019] eKLR where it was stated that the rationale behind the doctrine of undue influence is to ensure that the influence of one person over another is not abused.
33. According to the Plaintiff, the manner in how the property moved from the Plaintiff and his ex-wife and eventually to the 1st Defendant's hands was due to trust and confidence placed by the Plaintiff on the 1st Defendant. That in proof of this assertion, there is no proof of payment given to the court of when the property was transferred to the company. That the 1st Defendant further failed to give any proof of the purchase price being paid to the company upon purchase of the suit property by the 1st Defendant as alleged. The Plaintiff submits that this events show that there was a trust relationship between the plaintiff and the 1st Defendant.
34. To rebut the 1st Defendant's testimony that she purchased the suit property, it is submitted that there was no proof of transaction, business venture to cement the alleged shares in the company or any agreement to indicate the alleged capital injection. The Plaintiff refers the court to the holding in Twalib Hatayan & Another V Said Saggat Ahmed Al Heidy & Others [2015] eKLR on creation of an express trust. The court is urged to make a finding that there existed a trust relationship between the plaintiff and the 1st defendant. The court is further asked to lift the corporate veil and deem the plaintiff and defendant as one and the same with the company in respect of the transactions in issue.
35. On the contradictory opinion of the expert witnesses called to testify, the Plaintiff submits that the court should form its own independent opinion as per the evidence of the parties as was held in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko Civil Appeal No 203 of 2001[2007] 1 EA 139. The Plaintiff further questions the decision by the Defendants to be represented by one Counsel and submit that the 1st Defendant did not pass any good title to the 2nd and 3rd Defendants, the court is urged to find so. In conclusion the Plaintiff states that he has proved his case on a balance of probabilities as per the required standard of proof to warrant grant of the orders sought.

Defendants' Submissions

34. The Defendants' submissions highlight the following issues for determination;
 - a. Whether parties are bound by their pleadings.
 - b. Whether the Plaintiff has locus standi in this case.
 - c. Whether the doctrine of estoppel is applicable in this case.
 - d. Whether ownership of properties Kwale/Kinondo/xxxx,xxxx and xxxx is in dispute.
 - e. Whether the 1st Defendant held the property as trustee of the Plaintiff or not.
 - f. Whether the reliefs sought by the Plaintiff are available.
 - g. Whether the counterclaim should be allowed as sought.



- h. Whether the prayers of the 2nd and 3rd Defendant should be allowed.
34. The court is urged to restrict itself to the prayers sought in the plaint and not to what the Plaintiff seeks to expound in his testimony as parties are bound by their pleadings. Reference is made to the holding in IEBC Versus Stephen Mutinda Mule & 3 Others [2014] eKLR.
35. It is submitted that as at the year 2012, the registered owner of Kwale/Kinondo/xxx was Rising Eagle Limited. That the Plaintiff as a director cannot sue for wrongs against Rising Eagle Ltd and thus has no locus standi to institute this suit. The court is referred to the holding in George Musila Mbiti, Reuben Mutuma Ngumi & 72 Others V Tropical Farm Management Kenya Ltd & 4 Others [2010] eKLR where it was held that a limited liability company has a separate personality from its directors and shareholders who have no rights and interests in the property of the company.
36. On whether the doctrine of estoppel is applicable in this case, it is submitted that the Plaintiff has confirmed in his pleadings that he is not the one who transferred the suit property to the 1st Defendant but rising eagle limited. That it had further not been indicated in the green card that the 1st Defendant was holding the property in trust for him. The Defendants submit that there was non-disclosure of the purported agreement of 3/2/2012, that there had been correspondences between the Plaintiff and the 2nd and 3rd Defendant which the Plaintiff did not deny. That the agreement dated 5/11/2015 did not bear the Plaintiff's name and that he had lastly acknowledged that the 2nd and 3rd Defendants were the owners of Kwale/Galu Kinondo/xxxx.
37. The court is referred to the holding in Serah Njeri Versus John Kimani Njoroge where the court held that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.
38. On the issue of ownership of properties Kwale/Galu Kinondo/xxxx, xxxx and xxxx it is submitted that the Plaintiff by his own admission stated that property Kwale/Galu Kinondo/xxxx belongs to the 2nd and 3rd Defendants while he also admitted to being aware of the transaction between [Particulars Withheld] Company and the 1st Defendant and having raised no objection to it, the two other parcels therefore belong to the 1st Defendant.
39. On whether the 1st Defendant ever held the suit property as a trustee of the Plaintiff, it is submitted that no trust has been established in this case, that as per the pleadings submitted the Plaintiff cannot rely on express trust instrument or any other trust whether implied or resulting. That it was impossible for the Plaintiff to create a trust in 2012 when the title was not in his names but that of the company. Further that the alleged agreement signed between the 1st Defendant and the Plaintiff has contradictions with regard to the report by the expert witnesses over the signature purportedly signed by the 1st Defendant. The court is invited to interrogate the issue of any trust in light of the Defendants submissions on estoppel.
40. It is submitted that fraud has not been proved to the required standard as the Plaintiff has failed to disclose the alleged trust. That he failed to inform the 2nd and 3rd Defendants of any trust between him and the 1st Defendant at the time of selling the subdivided portion. That the Plaintiff has failed to prove any alleged fraud committed by the 1st Defendant and the prayer is liable for dismissal. It is lastly submitted that the prayers sought by the Plaintiff are not available the case having not been proved. On the 1st Defendants counterclaim, it is submitted that the same was never opposed and should be allowed. The 2nd and 3rd Defendants seek that the Plaintiff unnecessarily dragged them to court as he does not dispute their ownership of their parcel of land, they seek that the case against them be dismissed with costs against the Plaintiff.



Issues for Determination

41. I have considered the pleadings, the facts brought out in evidence, documents produced and the submissions of the parties. The court has identified the undernoted issue for determination; -

Whether the Plaintiff has locus standi to bring this suit.

Whether a trust could be presumed to have been created in the circumstances of this case.

If yes whether the Plaintiff is entitled to orders of cancellation of all entries on the green card[s] and/or register of the property known as plot numbers Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx.

Whether the 1st Defendant is entitled to the Prayers in the counterclaim..

Who should bear the cost of the suit and the Counterclaim.

Whether the Plaintiff has locus standi to bring this suit

42. It has been submitted on behalf of the Defendants that since the registered owner of Kwale/Kinondo/xxx was [Particulars Withheld] Limited, the Plaintiff as a director cannot sue for wrongs against [Particulars Withheld] Ltd. This is on the basis that a limited liability company has a separate personality from its directors and shareholders who have no rights and interests in the property of the company. Looking at the circumstances of this case the Plaintiff in my understanding is aggrieved as an individual and is not blaming the company for what it has done. It is the acts of one of its directors that is being put into question and the company has not been sued in the present case.

43. Additionally, this court is enjoined to uphold substantive justice and shun technicalities. The Supreme Court in *Raila Odinga v. I.E.B.C & others* (2013) eKLR, the Court observed that “Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice”.

The Supreme Court reiterated in PETITION NO. 18 (E020) OF 2022 Arvind Shah & 7 Others Vs Mombasa Bricks & Tiles Limited & 5 Others thus; -

[106] Courts are an integral part of the Kenyan judicial system, viewed as vehicles for redressing wrongs. As a result, they are entrusted with the responsibility of adjudicating disputes and administering justice, in accordance with *the Constitution*'s ethos, values and principles. In carrying out their judicial duties, they are obligated to adhere to the principles outlined under Article 159 of *the Constitution*. This guarantees that the objectives and tenets of *the Constitution* are upheld.

44. Consequently, I choose to uphold substantive justice and not shut out the Plaintiff from the seat of justice and determine this dispute on merits.

Whether the 1st Defendant is holding the suit properties in trust for the Plaintiff.

45. The question that arises is basically whether the 1st Defendant is holding the suit property in trust for the Plaintiff. It is firstly important to lay out the position in law on trusts. This has been a subject of many court decisions both in the Courts of Appeal and Supreme Court of Kenya. The court of Appeal



in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, examined and stated the law on trusts as follows: -

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).” Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ... A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).”

46. The supreme Court in PETITION NO. 18 (E020) OF 2022 *Arvind Shah & 7 Others Vs Mombasa Bricks & Tiles Limited & 5 Others* had this to say; -

(66) The *Trustee Act*, Cap 167 Laws of Kenya defines a “trust” and “trustee” as extending to implied and constructive trusts. The Black’s Law Dictionary, 9th Edition defines a trust as: “The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).

(67) It further defines a constructive trust at pg. 1649 as: “An equitable remedy that a court imposes against one who has obtained property by wrong doing. [68] Halsbury’s Laws of England, 4th Edition, Volume 48 at paragraph 690 states as follows on constructive trusts: “A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not



consciously formulate that intention or even acted with some different intention which he did not communicate. The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive. Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.” [69] A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust: “The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

47. I think I have laid out enough legal background and the jurisprudence on trusts. Arising from the above pronouncement it is clear trusts can be express and can also be created by operation of the law.
48. It was incumbent upon the Plaintiff to prove the creation and or existence of the trust in his favour. He who asserts must prove. The subject of the dispute revolves around the property originally known as Kwale/Galu Kinondo/xxx which I will refer to as the mother title. It is not in dispute the mother title was registered in name of the Plaintiff and ex-wife having obtained the same from the Government of Kenya as lease. Indeed, this was supported by a copy of Certificate of Lease dated 17/5/2007 produced as part of the Plaintiff's bundle of exhibits. Subsequently the mother title was transferred by the then couple to Rising Eagle Company Ltd where the Plaintiff and 1st Defendant were shareholders. A transfer dated 4/01/2008 and registered on 25/3/2009 was produced in proof as well as a search confirming the registration of the company and its directorship.
49. It is stated that in the year 2012 the Plaintiff wanted to sell a portion of the property, the 1st Defendant advised the property could not be subdivided while in the name of the company and hence the need for the same to be transferred into the 1st Defendant's name as well as ease of the transaction. The court has seen the transfer dated 30/01/2012 and registered on 1/02/2012 from Rising Eagle to the



- 1st Defendant. It is the Plaintiff evidence that before this transfer an agreement dated 3/02/2012 was entered with the 1st Defendant where she was to hold the land in trust for the Plaintiff, sell the portion and be entitled to 12% of the proceeds. It is pleaded in the Plaintiff that all the above was done upon advice by the 1st Defendant whom he trusted and which trust the 1st Defendant fraudulently breached in a bid to dispose the Plaintiff of his property.
50. Guided by the case law above and from the foregoing it is clear that the Plaintiff has established that he has an interest in the suit property herein. It has also been demonstrated that the land is now registered in the name of the 1st Defendant as proprietor. The courts next step or task is to determine if the Plaintiff has proved the existence of a trust in his favour and if yes, the type of the trust created if any.
51. The Plaintiff adopted his witness statement dated 22/12/2016 filed on 23/12/2016 in ELC 411 of 2016. He testified that he had an agreement with 1st Defendant where it was agreed that the property would be held in trust. This agreement is the one dated 3/12/2012. What I hear PW1 to be saying is that there was an express trust by dint of this agreement. But the validity of this agreement has raised a lot of contestation. The 1st Defendant denies ever signing such agreement and this hurdle must be resolved. During cross examination PW1 could not remember who prepared the agreement dated 3/12/2012. That it was prepared as the process of the sell herein was ongoing and before it there was no such previous agreement. Basically, there was very little the witness could remember about this agreement and which he attributed to passage of time. He could not remember if he availed this agreement to his lawyer Lynette Oketch. For me I was not convinced because this was a very critical document in his case unless he simply chose not to remember it. He stated in re-examination he could not remember if he showed this agreement to 2nd and 3rd Defendants at the time they were purchasing the property and he did not find it necessary to send them the agreement. DW2 also clarified in re-examination that PW1 never showed him the agreement between him and Nereah. PW1 alluded to a fire that destroyed all his documents but it came out in cross examination that he was able to present some original documents but not some. To me this was being selective.
52. My review of the alleged agreement in terms of language is clear that this agreement was drafted by the Plaintiff who is German and not an English-speaking person. To make matters worse the agreement is not witnessed by any third party to corroborate the same. The court was left with a lot of reservations about this agreement and I think a foregoing observation alone are sufficient to support why the court was left with these doubts. But those were the courts observations. What about the expert opinion?
53. Two expert witnesses gave evidence in this case to authenticate the 1st Defendants signature on the said agreement. PW2 Alex Mwongera Mathiu informed the court he is a document examiner and produced a report dated 31/12/2018 (PEX 17). His opinion was that the signature in the agreement was that of the 1st Defendant. DW3 was Geoffrey Chania a document examiner and produced a report (DEx 5). The witness took the court through an elaborate explanation on the process, what should be compared and the various considerations. I noted this witness obtained a known signature dated closely with the questioned document which he explained the closest dates minimizes variations. His conclusion was that the signature on the agreement herein was traced. An elaborate explanation was given to show the characteristic of a traced signature and the reasons why vis a vis a natural signature. The explanations were to me very plausible and the witness appeared to me to be very well versed with the subject and was not destabilised in cross examination. The peer review mechanism for me was important. This is confirmed by the witness who stated in his evidence in chief that a review by a second eye is key. While I noted that the witness conceded that this was not a requirement before the year 2020 for me confronted with two contradictory reports, the peer review mechanism enhanced the credibility of such report and the report could be owned by the other officers as stated in re-examination.



54. Based on the foregoing including the court's observations earlier stated I would make a finding that the agreement was not signed by the 1st Defendant. But having made such a finding is all lost for the Plaintiff?
55. The court has noted Mr. Abitha's submission that the Plaintiff having pleaded the existence of the said agreement he is limited to the express trust and not the other types of trust implied by law. I respectfully disagree with Counsel in this regard. I say so because the law and precedent avails and recognises other types of trust and which the court is given jurisdiction to imply depending with the circumstances of the case. The fact that an express trust has been pleaded does not take away the powers of the court granted. In any event a review of the pleadings the Plaintiff clearly sets out how he did everything in trust even before he introduced the issue of the agreement. PW1 confirmed that before the alleged agreement there was no such agreement and that he trusted the Defendant.
56. I will therefore proceed to interrogate the other forms of trust and if they can be implied by the court. Do the facts of this case present the absolute necessity or justification for the court to imply a trust? Guided by case law I will now discuss the nature of the relationship enjoyed by the parties. According to the proceedings even if the 1st Defendant denies 'marriage' or romantic relationship between herself and the Plaintiff to me they had a relationship which went beyond business and which in my view was that of parties who trusted each other. I will pick some instances from DW2 oral testimony which in my view corroborates this observation.
57. DW2 the 1st Defendant herein, in her evidence in chief told the court that in the year 2007 she was introduced to the Plaintiff by his ex-wife who was her acquaintance and alluded to discussions on an offer made to her to join the couple in their business venture entailing vacation homes on short term basis. That she found the same attractive and they settled at formation of a company where she was to be a 50% shareholder and the couple 50%. That her capital injection was to be Kshs. 1.8 Million. Strangely the company is formed where the 1st Defendant holds 50% shares and the other shareholder is only the Plaintiff. DW2 does not produce any agreement to support the existence of a business venture and the agreed terms. Proof of payment of the DW2 contribution or injection to the venture is not availed to the court. Again, a property is transferred to the 1st Defendant at a consideration of Kshs. 1,700,000/= which proof of payment is also not presented before court and which the 1st Defendant links the same to the business venture which I have noted was not presented. This is confirmed in cross examination where DW2 concedes the documentation on the negotiations was not before court. Further on being shown the transfer registered on 25/3/09 from the couple to Rising Eagle (see page 24 & 25 of the 1st Defendants bundle) DW2 conceded in cross examination that she had an agreement in support of this transfer though she did not produce it. Further that Rising Eagle has two directors, there is no Markel (Plaintiff's ex-wife) and who was meant to feature. As per the CR 12 produced in court there was no indication that the Plaintiff was holding the shares for himself and the ex-wife.
58. While this court noted DW2 clarification in re-examination that she did not have the proof of the payment because the Plaintiff had taken most of her documents to me this was not enough considering it was her evidence that she was a banker. What was so difficult for her to retrieve such records from her bank? Moreover, at no point was the court led into evidence that the Plaintiff as shareholder of Rising Eagle relinquished his rights and shares to the 1st Defendant legally. DW2 on being referred to paragraph 15 of her witness statement, stated in cross examination that she allowed the Plaintiff to live in one of the properties, though there was no lease between herself (as owner) and the Plaintiff and no indication of the rent payable and which the witness stated the Plaintiff was not paying any rent.
59. In further cross examination DW2 was shown page 147 of the Plaintiff's bundle, she conceded it was a receipt from Loreto Convent, bearing her sons Antony' name and that she had applied for him



to join the said school in the year 2012. On being shown a bundle of documents from DTB, DW2 confirmed she worked at DTB and the spouse therein was reflected as Thomas Schering the Plaintiff. The documents bore her signatures which she did not categorically deny were not hers though she conceded the ID. Card number they bore was hers. As a follow-up on the spouse issue DW1 who is her own witness represented by Mr. Abidha confirmed in cross examination that the Plaintiff always referred to Nereah the 1st Defendant as his wife and which Nereah never refuted. I found no reason for the court not to believe this witness.

60. DW2 in cross examination explained her understanding of trust as ‘is to believe in something, person or God’. On being asked about payment of rates in the name of Rising Eagle, the witness stated ‘ ... its true he stated in his testimony he was paying. Maybe Thomas trusted me...’ I have taken time to enumerate the foregoing instances to show that from the proceedings and circumstances of this case there was enough evidence to lead to a conclusion that the relationship between the Plaintiff and the 1st Defendant went beyond the normal business relationship, the parties were closer and trusted each other than what the 1st Defendant wanted the court to believe and which she did not succeed to do.
61. It is the foregoing that emboldens me to make a finding that there was a relationship where the transactions herein were undertaken in trust by the Plaintiff to imply the existence of a trust and that the Plaintiff never intended to confer absolute interest on the properties to the 1st Defendant. I have noted the Defendants submission that the Plaintiff conceded to signing the transfers and never complained at any point. To me it does not matter that the Plaintiff did not dispute the transfer. I say so firstly for the reason that he has pleaded and it is his evidence he acted on trust in doing what he did. The trust is the underlying driver. Instead the Plaintiff proceeded to breach the trust and kept the purchase price to herself and which she has not denied never receiving or even led proof that the proceeds were received by the Plaintiff.
62. Having arrived at the aforesaid findings what does this portend for the titles registered in the name of the 1st Defendant and the 2nd & 3rd Defendants respectively? This takes me to the 1st Defendants Counterclaim. Transfer documents and green cards were produced in evidence confirming the initial plot 755 was subsequently subdivided and registered in the names of the 1st Defendant and Certificates of lease issued. My perusal of the court proceedings does not reveal that the Plaintiff responded to the Counterclaim. In the submissions filed on behalf of the Defendants it is pointed that there is no Defence to Counterclaim. That on 23/08/2018 parties appeared before the DR where the 1st Defendant brought the matter to the attention of the court whereupon the DR suggested that the Defendant ought to move the court by way of applying for judgement in default. It is submitted on behalf of the 1st Defendant that since the counterclaim was never opposed the court ought to enter judgement as prayed. I respectfully disagree and decline the invitation. It is trite that a counterclaim is an independent suit and the claimant is expected to prosecute it and prove their case to the required standard. In any event the claim in the counterclaim is not a liquidated claim and therefore the claim would have to proceed for hearing.
63. The gist of the 1st Defendant’s counterclaim is that she is the legitimate owner of the properties Kwale/ Kinondo 2458 and 2459 having acquired the properties legally through a process not questioned by the transferor. That the Plaintiff having failed to prove fraud on the part of the 1st Defendant the titles cannot be impeached. This court takes the view that having made a finding that there was a trust and the reasons given for my finding I do not find it necessary to delve into the allegations of fraud. But I must address the question whether the titles can be impeached for any other reason.
64. The Supreme Court in PETITION NO. 18 (E020) OF 2022 Arvind Shah & 7 Others Vs Mombasa Bricks & Tiles Limited & 5 Others stated as follows;-



- 85] While Sections 25, 26 and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of *the Constitution* therefore, the limitation of the right to property is provided under law, and includes a constructive trust.
- (86) We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the *Judicature Act*. And while *the Constitution* entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the *Land Registration Act* provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust. (emphasis is mine)
- (87) We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title. (Emphasis is mine).
65. I have already given the reasons for finding that the suit properties were transferred to the 1st Defendant on the basis of trust to hold for the Plaintiff for ease of the subdivisions for purposes of hiving off the portion for sale as was the Plaintiffs desire. Instead the 1st Defendant reneged and kept the sale proceeds to herself and then demands that the rest of the subdivisions belong to her as the registered proprietor. Really? This is manifestly unjust enrichment on the part of the 1st Defendant. To me this is unconscionable conduct. It would be inequitable to let the 1st Defendant go scot free. The court cannot fathom how someone could just wish their property away and be left with nothing. Guided by the above caselaw this court will not hesitate to impeach the titles and right the wrong. I find support in the holding of the Court of Appeal and which was upheld by the Supreme Court in *Arvind Shah & 7 Others Vs Mombasa Bricks & Tiles Limited & 5 Others* (supra).
66. For the foregoing reasons the counterclaim cannot be sustained.
67. What reliefs should the court make in the circumstances of this case? Section 13(7) of the *Environment and Land Court Act* 2011 provides that in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) cost. This court is also guided by Section 1A, 1B and 3A of the *Civil Procedure Act* which obligates it to facilitate the just and expeditious resolution of disputes and to make orders that may be necessary for the ends of justice to be met.
68. The Plaintiff seeks a declaration that the interest of the 1st Defendants herein in property known as plot numbers Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx be and is hereby extinguished. I have already given my reasons why the court has found it proper to impose a trust on the transfers of the suit properties to the Plaintiff and thus impeaching the titles. I find no reason for not granting the prayers seeking the rectification of the registers for these two properties.



69. But what about Kwale/Kinondo/xxxx? My review of the proceedings and evidence led to conclusion that the Plaintiff did not appear to be much interested in this specific property. It is his evidence that it was his intention to sell a portion of the suit property. His only problem is that he never received the 88% of the proceeds of the sale. For me based on the finding imposing a trust herein, the 1st Defendant must remit the said 88% of the price at which the property was sold based on the Plaintiff own testimony that he was to receive 88% of the proceeds. The purchase price was Euros. 122,000 based on the Agreement for sale between Nereah Michael Said and Gerhard Heiduk and Wolfgang Ehgartner. The Plaintiff would therefore be entitled to the amount less 12%. This shall be at the then applicable exchange rate since I note the matter has been in court for a long period of time which could also be attributable to both the litigants and the nature of our court system.
70. This court makes a finding that the Plaintiff has proved his case on a balance of probabilities and enters judgement for the Plaintiff against the 1st Defendant in the following terms; -
- i. The 1st Defendant's counterclaim lacks merit and it is hereby dismissed.
 - ii. A declaration that plot numbers Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx are held in trust for the Plaintiff by the 1st Defendant.
 - iii. A declaration that the interest of the 1st Defendants herein in property known as plot numbers Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx be and is hereby extinguished.
 - iv. An order directing the Land Registrar Kwale to cancel all entries on the green card[s] and/or register of the property known as plot numbers Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx indicating the 1st Defendant as the registered owner and in place replace and/or register the Plaintiff herein as the owner of the property known as plot numbers Kwale/Kinondo/xxxx, Kwale/Kinondo/xxxx.
 - v. The 1st Defendant shall remit to the Plaintiff the purchase price of Euros 122,000 to the Plaintiff less 12 % thereof at the applicable exchange rate at the time of the said sale, within a period of 90 days from the date of this judgement. I shall not grant interest on the same.
 - vi. Let each party bear its costs in view of the orders (v) above.

It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 12TH DAY OF APRIL 2024.

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A.E DENA

JUDGE.

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mukoya for the Plaintiff

Mr. Abitha for the Defendants

Mr. Daniel Disii – Court Assistant

