



**Ngombo v Maxted (Environment & Land Case 112 of 2021)
[2024] KEELC 5450 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 112 OF 2021**

AE DENA, J

JULY 22, 2024

BETWEEN

ALEX NGOMBO PLAINTIFF

AND

CAROL MAXTED DEFENDANT

JUDGMENT

1. This suit was instituted vide a plaint filed before court on 6/3/2017. It is the Plaintiff's case that he is a joint registered owner with Daniel Thomas Ford of all that parcel of land known as KWALE/DIANI BEACH BLOCK/1497 measuring 0.1000Ha. The Plaintiff states that he is also the sole proprietor of an accommodation business known as FRANGIPAN COTTAGES situated within KWALE/DIANI BEACH BLOCK/1497. That the Defendant is the mother of the said Daniel Thomas Ford and that he had at some point cohabited with the Defendant as husband and wife more than three 3 years.
2. According to the Plaintiff, he has been conducting an accommodation business for cottages on the suit property where he sustained himself and his family later registered as business name FRANGIPAN COTTAGES in July 2016. That the Defendant restrained the Plaintiff from accessing the suit property and the business including his clients leading to the collapse of the business. The Plaintiff is apprehensive that he is in the danger of losing the suit property, the business and his other properties detained therein as the Defendant is in possession of the original title deed.
3. The Plaintiff prays that judgement be entered against the Defendant for; -
 - a. An order allowing the Plaintiff to access his business the said Frangipan Cottages situated within Kwale/Diani Beach Block/1497.
 - b. A permanent injunction restraining the Defendant whether by herself, servants, agents, employees, relatives or any other person from remaining on or continuing in occupation



of the suit properties to wit all that parcel of land known as KWALE/DIANI BEACH BLOCK/1497 measuring 0.1000Ha and FRANGIPAN COTTAGES.

- c. The Defendant be ordered to return and hand over the Plaintiff's title deed to the Plaintiff.
 - d. Costs of the suit.
4. The Defendant entered appearance and filed Statement of Defence on 16/10/2017. It is averred that there are no cottages on the suit property KWALE/DIANI BEACH BLOCK/1497. The Defendant admits that he is the mother to one Daniel Thomas Ford and that he is jointly registered as the owner of the same with the Plaintiff. The Defendant avers that she does not manage the suit property as she is normally out of the country for a better part of the year and only comes once.
 5. The suit was heard on 18/9/23 and 5/12/23 virtually.

Plaintiff's Case

6. PW1 was Alex Ngombo Kithi the Plaintiff testified that he was professionally in Food and Beverage sector as a Bar Man. That the Plaintiff is his wife under come we stay arrangements since year 2006 though they separated in 2017. The land in dispute was bought in 12/8/2007. That his role with regard to the plot that was a business was to operate the same and during low season his responsibility was to pay the few workers remaining there. That he had other opportunities to work in hotels but the Defendant asked him to stay at home because he would be coveted by other women which she did not want to happen. The witness referred to his statement dated 6/3/2017 and also a list of documents dated 6/3/2017. The Plaintiff adopted the statement as his evidence in court and further produced the documents in the witness statement as PEX 1-6.
7. On cross-examination by he testified that the land was purchased in 2007 the Defendant. The Plaintiff (sic) Defendant put his name and that of the son. That he did not contribute the money. It is Carol the Defendant who paid. That she put him as one of the owners because they were cohabiting as husband and wife until 2017. When they separated he was not informed that he was holding the land on her behalf. The land was bought the land with two structures and the rest they built slowly. At purchase there was a four-bedroom house but they then added three additional bedrooms and swimming pool. He stated that he supervised the construction of the buildings on the property and hence he contributed to the development by way of the rent collected. That the rent collected was used to put up some of the buildings. He stated that by virtue of this he was a co-owner.
8. The witness added that the Frangipan Cottages business is a registered business and that it was enough to have his name only. When referred to the certificate of registration for 5/07/2016 he testified that the business did not start in 2016. Further that the certificate of registration did not show the plot but shows the business as Frangpan Cottages. He pointed that certificate of registration dated 29/07/2016 refers to "Beach plot" but there was no number for the beach plot, the Plaintiff's name or Daniel the son. That the permits did not also show the plot number but bore Frangpan Cottages and his ID number. The plaintiff used to live in the premises. It was a family house.
9. The witness states that he was left at the suit property in February 2017. That the Defendant used to collect the rent but he could not tell how much was collected. He stated that he was entitled to what was collected and to the title deed even if he didn't buy the property. That he used to live thereon and sometimes used his money to pay the workers. That he had contributed to the Defendant for 13 years in terms of massage as a man. He never demanded for a salary. That the Defendant had told him that she would pay using the land.



10. On re-examination he stated that the Defendant had told him that he would give her the land and had the same registered in his name. He stated that he had been living on the land and that the Defendant had chased him since the year 2017 and he had never gone back since then.
11. With the above the Plaintiff's case was marked as closed.

Defence Case

12. DW1 Daniel Thomas Ford testified that Carol Maxted the Defendant is his mother. He stated that the Plaintiff was a trustee. That there is no business on the property being conducted by the Plaintiff. He testified that the suit property is a family home and its purchase was facilitated by his grandmother Emmy Watkin. He further stated that the developments on the suit property were financed by himself, his mother and grandmother jointly. He testified that currently his mother lives in the property and two work staff. The workers are paid salaries by the Defendant. The Plaintiff didn't develop the pool and cottages as alleged in his evidence.
13. On cross-examination he confirmed that the Plaintiff had met the Defendant in the year 2006 when the Defendant had come for holiday at the Diani Sea Lodge Hotel. That the Plaintiff worked as a chef at the hotel. Further that the two started disagreeing before 2017 before this suit was filed. He stated that the Plaintiff is not a co-owner. He is a trustee. When referred to the title he stated that the title had the Plaintiff as a joint owner of the property. He stated that the Defendant intended to purchase land in Ukunda but was advised that being a foreigner she could not own land individually. That the purpose of the joint ownership was for DW1 to own his mother's share and the Plaintiff to hold his own share of the property. That the Defendant was to register a trust but did not. That the property was managed by the Defendant and DW1.
14. DW2 Carol Andree Maxted the Defendant adopted her statement of 12/10/2017 as her evidence in court. The witness testified that the suit property Kwale Diani Beach BLK/1497 is known to her. That she purchased the same and her grandmother paid for it with money from her mother. The witness referred to a list of documents dated 12/10/2017 and proceeded to produce the same as exhibit DEX "e". The witness stated that she learnt one could not own land without being Kenyan. That she is the one who nominated the Plaintiff to be the joint owner. The Plaintiff didn't finance the purchase of the property. That she trusted him as she had met him at the hotel where he worked and thought he was very trustworthy for the nomination. The property was developed after purchase. That the suit property didn't have a swimming pool then. That they now have a swimming pool and three additional developments. Staff quarters at the back, bed with shower and toilet, there is a kitchen and a bathroom and toilet for the Defendant.
15. The Defendant told the court that she is the one who financed the developments. That there is one cottage for her visitors with no other cottage but staff quarters. The Defendant states that the Plaintiff couldn't run cottages. DW2 further testified that when they still had good relations with the Plaintiff, she would come to Kenya once a year October, November to March. She never saw any visitors come to rent the premises. She referred to the tuk tuk and stated that the Plaintiff kept most of the money to himself.
16. On the permits and certificate of registration for Frangpan Cottages DW2 testified that she had never seen them before and the Plaintiff had never showed them to her. She stated that she was the one who decided the Plaintiff's names to be on the title deed. The Defendant prayed that the case is dismissed with costs.



17. On cross-examination, the witness confirmed that she came for holiday in Kenya in 2006 and met the Plaintiff at Diani Sea Lodge. He was a waiter then. That they dated shortly after. That she knew the Plaintiff was a casual worker and learnt that he lost his job later. She was not aware that he lost his job because of the relationship. According to the Defendant, by 2017 they had already disagreed with the Plaintiff. The Defendant stated that they had not presented themselves as husband and wife, further that the Plaintiff was employed as a tuk tuk driver. The property was bought after they started dating.
18. The Defendant admitted that the Plaintiff is a co-owner of the property according to the title. That when she bought the property she wanted to give it to her son as he would live longer than her. That she nominated the Plaintiff to be a co-owner out of trust and not love. That she didn't tell him that he would hold a share. The witness stated that there is trust registered between her and the Plaintiff. That she would come to Kenya about 5 months every year and had not seen the Plaintiff for many years. After 2008 she would come and they were not dating then and he was working. He was living on the premises with other boys. She confirmed there is a small house on the premises.
19. The witness stated she had seen the documents from County Council of Kwale registered as the Plaintiff business. She stated that the Plaintiff's income was not the cottage his income was from the tuk tuk. On re-examination she testified that she bought a tuk tuk and it was doing well. The Plaintiff got 1000/= from each tuk tuk i.e. 6000/=. That in 2007 she would come once a year for two weeks. The defence case was marked as closed.

SUBMISSIONS

Plaintiff's Submissions

20. The Plaintiff's submissions were filed on 16/2/2024. The same identified the following issues for determination;
 - i. Whether or not the Plaintiff has proprietary interest in the suit property
 - ii. Whether or not the Plaintiff held his portion of land in trust for the defendant
 - iii. Whether or not the Plaintiff and the Defendant were married by presumption
 - iv. Whether or not there was contribution
 - v. Whether or not the Plaintiff was an employee to the Defendant
21. It is submitted that the Plaintiff has legal and proprietary interest in the suit property. That the same is confirmed by the fact that the Plaintiff is a joint registered owner of the property and owner of the developments made on the suit property where he was running a cottages business known as Frangapan Cottages while the Defendant and her son were abroad. The Plaintiff states that as per the provisions of Section 26 of the *Land Registration Act* a title deed is conclusive evidence of proprietorship except where the said title is acquired through fraud or misrepresentation. The court was referred to the dictum in *Kasarani Mall Ltd V Daniel Otieno Miganga & Others* 2017 eKLR.
22. On whether or not the Plaintiff held his portion of land in trust for the Defendant, it is averred that there was no fraud or misrepresentation under the circumstances of this case, that further there is no overriding interest in form of a trust that would divest his title to the Defendant. The Plaintiff submits that there is no evidence of registration of a trust though a trust need not be registered but the intention has to be clearly determined and demonstrable by way of evidence. That the Defendant has failed to prove a trust as was held in *Alice Wairimu Macharia V Kirigo Philip Macharia* [2019] eKLR. That the



actual reason for co ownership was to unequivocally allocate him a portion of the suit property and trust was never intended.

23. On the allegation that the Plaintiff was only registered as a co-owner as the Defendant and her son were foreigners and could not own land, it is averred that the suit property was registered during the previous constitution and as at then a foreigner had the option of owning land exclusively. That the Plaintiff did not request to be a co-owner. That after the new constitution the Defendant had the option of removing the Plaintiff as a co-owner but failed to do so. That the Defendant had the intention to allocate the Plaintiff a portion of the land until the wrangles started.
24. On whether or not the Plaintiff and the Defendant were married by presumption. It is submitted that prior to the purchase and registration of the property the Plaintiff and Defendant were cohabiting. That this evidence is uncontested. That both DW1 and DW2 admitted to the two parties having been in a relationship and married. That the concept of presumption of marriage applies in this instance as was held in *Christopher Gathambo V Samuel Munene Civil Case No 1372 of 2001* eKLR.
25. Whether or not there was contribution, it is submitted that the Plaintiff registered an accommodation business on the parcel and which he manned. That the Plaintiff's contribution to the property was thus the detailed management of the same and companionship. The Plaintiff's refers to Section 2 of the Matrimonial Properties Act 2013 on what defines contribution.
326. It is submitted that the Plaintiff was not an employee of the Defendant as alleged as there is no proof of any employment agreement. Further that the Defendant had not proved having purchased the tuk tuk. The Plaintiff prays that the suit be allowed.

Defendant's Submissions

27. The Defendant's submissions were filed before court electronically. It is submitted that the Plaintiff has failed to meet the required threshold in grant of permanent orders of injunction.
28. The Defendant submits that it is not in doubt the Plaintiff is a joint registered owner of the property with DW1. That the registration was however for purposes of ensuring that the Defendant owned land in Kenya. That Dexh 1 confirmed payment of the purchase price by the Defendant. The court is urged to consider that the Plaintiff was a joint registered owner as holding the property in trust for the Defendant and The Defendant refers to the provisions of section 25 and 28 of the *Land Registration Act* where the law provides that registered land is subject to trusts including customary trusts as an overriding interest. It is submitted that the Defendant purchased the land and made the decision to register it in the Plaintiff's name jointly with her son and by this a trust was created as the two registered owners were holding the property in trust for the Defendant. Reference is made to the holding in *Rose Naswa Masinde V Lilian Nekesa Simiyu Mukopi [2014]* eKLR and in *Yogendra Purshottam Patel V Pascalle Mirelle Baksh [Nee Patel] & 2 Others [2006]* eKLR.
29. On whether the Plaintiff will suffer irreparable loss and harm it is submitted that the Plaintiff has failed to demonstrate how much he was making in the business and whether indeed he was running the cottage business. It is stated that the Plaintiff has further failed to establish the balance of convenience and which does not lay in his favour. The Defendant seeks that the suit is dismissed with costs.

Discussions and Determination

30. I have carefully considered the Plaintiff and the Statement of Defence filed by the Defendant thereto, the respective documents produced as exhibits and submissions of the parties. Firstly, it is noteworthy that the Plaintiff has approached this court to allow him to access the suit property which he alleges



he has been denied by the Defendant whom he had cohabited with as husband and wife, who bought property and registered it in both the Plaintiff and her son's name by dint of this relationship and whose developments thereon the Plaintiff allegedly contributed to and therefore his right to the property and to be in the property where he was carrying out a business he registered as Frangipan cottages. The Plaintiff in his evidence stated that the Defendant's actions have caused him a loss of livelihood and are bound to deprive him rights of ownership of the suit property hence this suit. The Plaintiff also wants a permanent injunction against the Defendant from remaining or continuing to be in occupation of the suit property and Frangipan Cottages and for return of the title to the Plaintiff. On the other hand the Defendant denies having been married to the Plaintiff and or registering the Plaintiff as co-owner out of love but it is her case that she bought the land for the sole purpose of his son holding property in Kenya and registered it as such following advise that she could not own land as a foreigner in Kenya. To her the Plaintiff was holding the land in trust.

31. Arising from the above summary the main issue that arises for determination is whether the Plaintiff is entitled to the orders sought. On retrospection it dawned on me that to effectively adjudicate on the dispute and come up with the determination on whether the Plaintiff is entitled to the orders sought, the court must also answer the question whether there is presumption of trust between the Plaintiff and the Defendant viz a viz the suit property. Under this head will be addressed the issue of presumption of marriage and its import having featured in the proceedings.
32. It is trite that the burden of proof was on the Plaintiff to prove the existence of the facts he alleges to exist in accordance to the provisions of Section 107 of the Evidence Act Chapter 80 of the laws of Kenya. The standard of proof is on a balance of probabilities
33. What kind of interest did the Plaintiff then hold in the property? In buttressing his case the Plaintiff has produced a Title deed dated 17/8/2007 (Pexh 2) and issued the same day. This title reveals the registered proprietors as Alex Ngombo Kithi (the Plaintiff herein) and Daniel Ford Thomas, the Defendant's son. This is pleaded by the Plaintiff and admitted by the Defendant and his son DW1 and is therefore not in dispute. The dispute is to the circumstances under which the registration was made. But firstly it is necessary to deal with the legal implications of the registration.
34. The process upon which land ownership rights can be conferred upon an individual was well articulated in Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR where it was stated;

“The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependant upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership”.

35. It is submitted on behalf of the Plaintiff that the legality of ownership of land should be deduced from the title produced and that the Plaintiff is the registered indefeasible owner thereof by dint of section 26(1) of the Land Registration Act. The property was registered under the Registered Land Act (now repealed) and replaced with the Land Registration Act. The Registered Land Act speaks to a title deed being conclusive evidence of ownership of land unless the same has been procured through fraud or misrepresentation and provides as follows:-

Section 26 (i) of the Registered Land Act provides: -

“ The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all



courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

36. From the proceedings herein no allegations of fraud have been raised by the Defendant against the Plaintiff. Is there any other ground upon which the registration of the Plaintiff as a co registered proprietor can be defeated? This brings me to the Defendants case for a trust.

Section 28 of the [Land Registration Act](#) which is similar to Section 30 of Cap 300(repealed) provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (b) Trusts including customary trusts;”

43. 37 Arising from the above a trust is therefore an overriding interest. This is further buttressed by the court in Mutsonga –vs- Nyati (1984) KLR 425 and Kanyi – vs- Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered [Land Act](#) which provides for the application of the common law of England as modified by equity.

30. The Defendant challenges that the Defendant was holding the land in trust for her. The question is whether the Defendant has made a case for existence of a trust. DW1 stated in cross examination that his thinking was there should be a declaration of trust between the Plaintiff and the Defendant. He conceded there was no trust registered though the Defendant had the opportunity to register one between the year 2007 and 2017. DW2 testified that after paying for the suit property, she was made aware that foreigners were not allowed to hold title and they must have a Kenyan on the title whereupon she nominated the Plaintiff whom she had trusted for registration of the property together with her son DW2. DW2 did not deny having dated the Plaintiff and to me she must have built this trust out of the relationship and which she stated in her oral testimony there were times the relationship was good. DW2 denies having registered the Plaintiff as proprietor out of love.

39. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, the Court 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. ...(Emphasis is mine)

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).” (Emphasis is mine).

40. In *Dyer v Dyer* (1788) 2 Cox Eq, 92 at 93, (quoted in Snells, Equity, 13th Edition, Sweet & Maxwell, page 206) it was stated as follows: -

That position was further reinstated in the case of *Calverley Vs Green* 56 ALR where it was held as follows: -

“Where a person pays the purchase price of a property and causes it to be transferred to another, the property is presumed to be held by the transferee upon trust for the person who provided the purchase price.”

41. Applying the above case law and statutes quoted it is imperative to note therefore that there is no need for the endorsement on the title that the same is being held in trust, the same can be implied. The Plaintiff testified that the Defendant did not inform him when they separated that he was holding the land on the Defendant’s behalf. Indeed this to me goes to confirm DW2 testimony in cross examination that she did not tell the Plaintiff he would hold a share and cements the Defendant’s case. I had no problem believing that the Plaintiff had desired to buy property in Kenya and was advised there must be a local in the title and out of this yearning she proceeded to do so and in any case she had known a Kenyan she could trust.
42. Who advanced the money for the purchase of the suit property? Indeed the Defendant testified that she paid through her mother and produced before court evidence of this financial contribution. This was a form for Making a Barclays International Payment and which was not disputed by the Plaintiff.



In any case PW1 conceded in cross examination thus ‘I did not contribute the money. It is Carol the Defendant who paid’.

43. The Plaintiff’s case is that he contributed to the development of the suit property through the rental income the Defendant used to collect. However, he was not able to give further details of the account where this rent was being deposited. The court could therefore not vouch for this. The Defendant has on the other hand led court to evidence of having made further developments on the suit property with the help of her family and which evidence is corroborated by DW1. PW1 further testified in cross examination that his contribution is that he would use his own money to pay the workers at the premises when the Defendant was away but did not produce any proof of the records he maintained in respect of these payments. Again I must emphasize this is a court of evidence.
44. The Plaintiff further disputes the trust and testified that he cohabited with the Plaintiff and were married. Firstly the Plaintiff has not presented any documentation in proof of the existence of a marriage between the parties even though he states the same was by cohabitation. PW1 testified that DW2 used to come and go for a period of about 6 months in a year. That for 13 years he contributed as a man and never demanded a salary. At this juncture the court finds it necessary to discuss presumption of marriage as raised in support of the Plaintiff’s case.
45. The Supreme Court in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021)* [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) had the following to say on presumption of marriage;

“Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed”.
46. The presumption of marriage was first applied in Kenya in *Hortensia Wanjiku Yawe v The Public Trustee Nairobi* [1976] eKLR. The principles distilled from this former Court of Appeal (Wambuzi P, Mustafa VP and Musoke JA) for East Africa decision were outlined in *Mary Njoki v John Kinyanjui Muthuru & 3 Others, (Mary Njoki)* [1985] eKLR by Kneller JA as follows: -
 - i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, ‘on the balance of probabilities;
 - iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (*Mwagiru v Mumbi*, [1967] EA 639, 642);
 - iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
 - v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate* [1937] 3 All ER 105);
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456).
47. I have to acknowledge that the issues to do with proof and determination of whether or not a marriage existed between parties is a preserve of the High Court. However, this issue having been raised herein makes the suit a mixed grill of some sort with a majority of the issues being under the preserve of this



court. Having said that and guided by the above case law on presumption of marriage, the parties herein have both acknowledged being in a relationship. My concern is that no evidence has been tendered as to the time spent together and the evidence of a third party attesting to having assumed the two were married. The period when the Defendant is said to be in the country is clearly broken to less than half a year at any time. The Plaintiff states they were in this relationship for 13 years which he does not fully corroborate. DW1 states that the two disagreed before 2017 which corroborated his mother's evidence. The Plaintiff had the opportunity of calling evidence that the two presented themselves as married which he did not. Infact I noted his testimony in cross examination that his family would also come and he and the Defendant would stop the business, none of these family members was called to testify on behalf of the Plaintiff.

48. With the evidence placed before me I was not persuaded to find in favor of a marriage by cohabitation and repute. And therefore in view of this and the fact that Plaintiff did not in any way demonstrate that he contributed a cent towards the purchase of the suit property I have no hesitation in making a finding that the registration of the Plaintiff was in trust for the Defendant.
49. Having stated the above the courts task is to answer whether the Plaintiff is entitled to the orders sought. The first discussion would be on the fate of the Frangipan Cottages since the Plaintiff desires to access the same as his business and which he states is situate within Kwale/Diani Beach Block/1497. The Plaintiff produced in this regard Certificate of registration dated 29/7/2016, Certificate of registration dated 5/7/2016, Bundle of single business permits and Demand letter dated 15/2/2017. The Defendant refers to the suit property as a family holiday home to the exclusion of the Plaintiff while the Plaintiff states that the property served as his business premises. The court noted the business permits and registration of the business name that the Plaintiff presented before court. PW1 indicated before court that it was enough to only have his name on the same. It did not make sense that the same are registered only in his name but rent was being collected by the Defendant with the details of the account unknown to him. It is not explained how and why he opted to solely register the business without the involvement of the co registered owner of the suit property. For me it is one thing to have such registration and it is another to have the business running. I say so because I did not seem to find any evidence of the business having really been up and running as alleged. No evidence of any payments made by clients or any visitors was presented especially amidst denial by the Defendant and DW1.
50. Based on the foregoing I would hesitate to make a finding that the Plaintiff is entitled to access the suit premises for purposes of Frangipan Cottages.
51. The Plaintiff has also sought for an order of permanent injunction restraining the Defendant and her agents, servants, employees, relatives or any other person from remaining on or continuing in occupation of the suit properties and FRANGIPAN COTTAGES. The court in Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR pronounced itself as follows with regard to what constitutes a permanent injunction; -

“ A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected”.

52. Arising from the above therefore orders of Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. In view of the various findings in my analysis of the proceedings after hearing the parties these orders cannot issue. In my opinion, the



Plaintiff has failed to prove a prima facie case as expected from the nature of the prayers sought. Further the issue of loss being suffered from the denied use of the suit premises has not been sufficiently proved. Registration of a business and payment of permits for the same does not necessarily mean that the same is in use unless evidence had been proved on the contrary. PW1 testified in cross examination that he could only tell how much he had lost if he undertook a valuation of everything. The valuation was not before court though he conceded he was not a valuer. The balance of convenience automatically tilts towards the Defendant the trust having been proved.

53. Additionally, PW1 during cross examination clearly indicated that he did not want the Defendant stopped from being in occupation of the suit premises contradicting his own prayers in the Plaint.
54. The upshot of the foregoing is that this court finds that the Plaintiff has failed to prove his case to the required threshold that of a balance of probabilities to warrant the orders sought. The Plaintiff's suit is hereby dismissed.
55. The court is aware of the provisions of section 27 of the *Civil Procedure Act* that ordinarily costs would follow the successful party but I also note it is discretionary. The Plaintiff testified in court that he had not been in good health having suffered a fracture of his hand. I will for this reason not make any orders as to costs.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 22ND DAY OF JULY 2024.

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A.E DENA

JUDGE

Ms. Mkungu Holding for Mr. Nyanje for the Plaintiff

Ms. Mukabane for the Defendant

Mr. Daniel Disii – Court Assistant

