Kutto & 3 others v Kruger & another (Environment & Land Case 11 of 2022) [2024] KEELC 5825 (KLR) (7 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5825 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 11 OF 2022

JM ONYANGO, J

AUGUST 7, 2024

BETWEEN

JOHN KUTTO .... 1ST PLAINTIFF

FLORENCE A MURGOR .... 2ND PLAINTIFF

IMMACULATE KANDIE .... 3RD PLAINTIFF

SERGOEK HILL GAA LIMITED .... 4TH PLAINTIFF

AND

STEPHANUS PETRUS KRUGER .... 1ST DEFENDANT

EMO INVESTMENT LTD .... 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 9th February, 2022 and amended on 10th March, 2021 (sic) the Plaintiffs filed suit against the Defendants. The gist of Plaintiffs' case is that the defendants acted fraudulently by failing to transfer to the plaintiffs the parcel of land they bought from the 1st defendant after the Plaintiffs paid a deposit of Kshs.24.7 million to the 1st defendant and instead transferred the entire parcel of land to the 2nd Defendant. It is the Plaintiff's' contention that the 2nd defendant holds the suit property in trust for the plaintiffs. The Plaintiffs therefore seek the following reliefs from the defendants:

    a. The revocation of titles over LR No. 28962/106.107,112,113,116,117,122,123,177,180,186 and 187 issued in favour of the 2nd defendant.

    b. An order of revocation of any transactions in favour of the 2nd Defendant involving the sum of 24.7 million paid by the plaintiffs to the 1st defendant to instead cause a transfer of 123.5 acres in favour of the 4th Plaintiff for the land comprised in LR No. 28962/106.107,112,113,116,117,122,123,177,180,186 and 187

c. A declaration that the 2nd defendant holds tittle LR No. 28962/106.107,112,113,116,117,122,123,177,180,186 and 187 in trust for the Plaintiffs and the 2nd defendant be directed to transfer a portion of the suit land measuring 123.5 acres equivalent to 24.7 million paid by the plaintiffs to the 1st defendant and in default, the Deputy Registrar of this court be mandated to sign the transfers on behalf of the Plaintiffs.

d. Costs of the suit together with interest thereon at such rate and for such a period of time as this honourble court may deem fit to grant.

e. Any other relief that this Honourable court may deem fit to grant.

2. Both defendants filed Defences to the Amended Plaint denying the Plaintiffs' claim. By a Defence dated 4th April 2022, the 1st Defendant denied that he approached the 1st, 2nd and 3rd Plaintiffs to purchase land parcel No. LR No. 9127,9278,21792/4 and 5822 for the sum of Kshs.200,000 per acre or any lesser or greater amount. He denied that he was informed of the 4th plaintiff's incorporation.

3. He admitted that he put up for sale land parcels Nos. 9127,9278,21792/4 and 5822 together with all the movables on the said parcels of land. That he was approached by some individuals who expressed interest in purchasing the said parcels of land but he denies entering into any sale agreement with them. The said individuals requested for his bank account and told him that they would deposit an amount of Kshs.280,000,000 which he required as a deposit before they could enter into a sale agreement with him but they never raised the said amount.

4. He averred that between 2006 and 2007, the said individuals had deposited Kshs.24,700,000 in his account which was below the expected deposit and therefore no discussion materialized for the sale of his land.

5. It was his contention that the said individuals informed him that they would rope in the 2nd defendant Company as a purchaser under whose umbrella they would buy the suit property and that the money they had deposited in his account would be converted into the said individuals' shares in the 2nd Defendant company.

6. The 1st defendant stated that he entered into a sale agreement dated 17th September 2008 with the 2nd Defendant and a variation agreement dated 9th June 2009 for the sale of parcels LR Nos. 9127,9278,21792/3 21792/4 and 5822 together with the movable assets on the said pieces of land. However, the 2nd defendant was unable to pay the full purchase price whereupon the 1st defendant entered into an exit agreement dated 15th October 2011 whereby the 1st defendant agreed to transfer some of the sub-divisions of the suit properties to the 2nd defendant, equivalent to the sum of Kshs.113,579,280 which had been paid to the 1st defendant. The said sub-divisions are LR No. 28962/106;28962/107;28162/112; 28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;28962/187.

7. The 1st defendant maintained that during the sale agreement and exit agreement, he never engaged the individuals who had deposited Kshs.24.7 million in his account separately as he was under the impression that they were under the umbrella of the 2nd defendant. It is his contention that after they signed the exit agreement, he obtained the consent of the Land Control Board and transferred the agreed parcels to the 2nd defendant.

8. The 1st Defendant averred that the sale of the suit parcels took place between 2007 and 2009 before the 4th Plaintiff Company was incorporated and he could therefore not have transacted business with

a non-existent entity. He refuted the Plaintiff's claim that the court should infer a trust in favour of the plaintiffs.

9. The 1st defendant states that the plaintiffs lack the capacity to sue and that the suit is statute- barred as the transactions took place between 2006 and 2007. He adds that the plaintiffs' suit offends the provisions of the *Law of Contract Act* and the *Land Control Act*.

10. In its Defence dated 20th July 2022, the 2nd Defendant denies the Plaintiffs' claim that they paid Kshs.24.7 million for the purchase of land parcels LR Nos 9127,9278, 21992/3,21792/4 and 5822 at the price of Kshs.200,000 per acre or that the 2nd defendant acquired portions of the suit property with the acquiescence of the Plaintiffs and states that it bought the suit properties on behalf of its shareholders.

11. The 2nd Defendant further state that it filed ELD HCCC No. 163 of 2010 against the 1st Defendant seeking orders of specific performance in respect to the sale agreement dated 17.9.2008 but the said suit was dismissed with costs.

12. The 2nd defendant states that the 1st Defendant transferred parcels 9127,9278,21792/3 21792/4 and 5822 together with the movable assets on the said pieces of land to the 2nd defendant pursuant to the exit agreement dated 15th October, 2011.

13. The 2nd Defendant avers that the 3rd plaintiff together with other members of Sergoit Hill Limited were shareholders in the 2nd Defendant company and the sum raised by their group was converted into equity and shares allocated to each individual according to the amount paid. It avers that there is no agency relationship between the 2nd defendant and the plaintiffs in which the 2nd defendant company was mandated to purchase 123.5 acres comprised in the suit property exclusively for the plaintiffs.

14. The 2nd Defendant denies that the transfer of parcels LR Nos 9127,9278,21792/3 21792/4 and 5822 in its favour was fraudulent and denies all the particulars of fraud in paragraph 12 of the plaint.

15. It is the 2nd Defendant's contention that there is no trust relationship between itself and the plaintiffs and that the plaintiffs' pleadings do not disclose any common intention between the parties. The 2nd Defendant is of the view that the Plaintiffs introduced the plea of trust to defeat the provisions of the *Limitation of Actions Act*.

16. It is the 2nd Defendant's further assertion that the Plaintiff's suit is statute barred pursuant to the provisions of section 6 of the *Limitation of Actions Act*.

17. The suit was set down for hearing and both parties testified and called their witnesses.

Plaintiffs' Case

18. The plaintiff called one witness Dr. Florence Murgor (2nd Plaintiff) who testified as PW1 on behalf of all the Plaintiffs. She introduced herself as an official of Sergoit Hill Group. It was her testimony that the 4th plaintiff was incorporated for purposes of holding the suit property on behalf of its members. She informed the court that the 1st-3rd plaintiffs on behalf of their members were approached by the 1st defendant to purchase his property at Sergoit comprised in titles LR Nos. 9127,9278,21792/3 21792/4 and 5822 at a price of Kshs.200,000 per acre. The 1st, 2nd and 3rd Plaintiffs paid Kshs.24.7 million to the 1st defendant on behalf of its members. The 1st, 2nd and 3rd Plaintiffs subsequently incorporated the 4th plaintiff as joint vehicle for purposes of completing the payment and holding the property on behalf of its members.

19. It was PW1's testimony that since they were unable to raise the full purchase price, they approached the 2nd defendant to join them in the acquisition of the suit property from the 1st defendant. She further testified that the 2nd defendant entered into an agreement with the 1st defendant for the purchase of the suit property but the 1st defendant did not complete the sale prompting the 2nd defendant to sue the 1st Defendant from breach of contract vide ELD HCCC No. 163 of 2010. The plaintiffs were however not made aware of the said suit. The suit resulted in a compromise whereby an exit agreement was reached. Pursuant to the said exit agreement the 1st Defendant transferred to the 2nd defendant a portion measuring 568 acres comprised in LR Nos. 9127,9278,21792/3 21792/4 and 5822 at. The purchase price of the said parcels was Kshs.113,579.280 which translates to Kshs.200,000 per acre. It is the 1st Defendant's failure to transfer a portion of the said land to the Plaintiffs that necessitated the filing of this suit.

20. Cross-examined by Ms. Odwa learned counsel for the 1st Defendant, PW1 stated that she was not a shareholder of the 4th Plaintiff nor had she produced the list of members of Sergoit Hill Ltd. She admitted that they did not enter into a sale agreement with the 1st Defendant. She told the court that the 4th Plaintiff was registered in 2013 and she was not aware of any sale agreement between the 4th Plaintiff and the 1st Defendant. She stated that there was no formal communication from Sergoit Hill Group requesting the 1st Defendant to transfer land equivalent to 24.7 million to them. There was however a letter dated 11th June, 2010 by Sergoit Hill Ltd informing Mr. Kruger to treat the amount of Kshs.24.7 million as shareholding.

21. She stated that she was aware that some of the land parcels had been amalgamated and others sub-divided and that the suit properties are no longer in the name of the 1st defendant. She admitted that it was not stated anywhere in the sale agreement between the 1st and 2nd defendants that the plaintiffs had paid Kshs.24.7million. She insisted that the land they were supposed to buy from the 1st Defendant was worth Kshs.200,000 per acre.

22. Upon being cross-examined by Mr. Kipnyekwei learned counsel for the 2nd Defendant, PW1 stated that she had filed suit in her capacity as an official of Sergoit Hill Group and an interested party who had paid money as a member. She clarified that their members were not shareholders of Sergoit Hill Limited. She confirmed that at the time they entered into negotiations with Mr. Kruger the 4th Plaintiff company had not been incorporated and it was subsequently registered in 2013. They did not get any letter of offer from Mr. Kruger for the sale of 123.5 acres of his land and there was no clause in the sale agreement between EMO Investments Limited and Mr. Kruger stating that Sergoit. Hill Group would get a share of land equivalent to Khs.24.7 million. She confirmed that the 2nd Defendant bought the land in 2008 and took immediate possession thereof. She admitted that she withdrew her money from the 4th Plaintiff but said that she later returned it. She also stated that she was aware that the 2nd Defendant was not supposed sub-divide the land it bought among its shareholders.

Defendant's Case

23. The 2nd Defendant called Charles Kimutai Chelimo, the Chief Executive Officer of EMO Investments Limited and Reverend John Kimeli Kipsangut who testified as DW1 and DW2 respectively. Mr Chelimo told the court that the 2nd Defendant company was incorporated on 13th November, 2006 and it changed its name to Enterprise Mobilization and Investments Ltd on 22nd April, 2022. He produced the certificates of incorporation and Memorandum and Articles of Association as exhibits.

24. Mr. Chelimo testified that the officials of the 4th Plaintiff approached them with a request to join EMO Investments for purposes of buying land from the 1st Defendant. He explained that the members of

the 4th plaintiff who joined the 2nd Defendant company were registered as individuals and they became shareholders. The amount they paid was treated as shares and thy were issued with share certificates. He produced the counterfoils of some of the share certificates as 2nd Defendant's exhibits 6(i) – (xiii). He stated that out of the 264 members, 127 had collected their share certificates. He told the court that the 1st and 2nd Defendants were not shareholders of the 2nd Defendant company.

25. He produced the sale agreement between the 2nd Defendant Company and Mr. Kruger (1st Defendant) for 5 parcels of land comprised in LR Nos 9127,9278,21792/3 21792/4 and 5822 measuring 4823 acres together with all movable assets on the said land parcels at a consideration of Kshs.800 million. It was his testimony that the 2nd Defendant company was not merely a land-buying company but an investment company. He said that EMO Investments explained to the shareholders including those from the 4th Plaintiff that they would get shares in the company and not land.

26. The shareholders of the 2nd Defendant were unable to raise the full purchase price of Kshs.800 million and they entered into a variation agreement dated 2nd June, 2009 but they were still unable to raise the balance of the purchase. By an exit agreement dated 15th October, 2011 the 2nd Defendant agreed to buy 568 acres comprised in land parcels Nos. 28962/106;28962/107;28162/112;28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;28962/187 at a purchase price of Kshs.113, 579,280 from Mr. Kruger. The said land was subsequently transferred to the 2nd Defendant and the company took possession thereof. He confirmed that none of the Plaintiffs have ever been in possession of the suit property.

27. Upon being cross-examined by Mr. Tororei, learned counsel for the Plaintiffs, he stated that the Plaintiffs joined EMO Investments Ltd through a company resolution although he did not get a copy of the same in the company file. He confirmed that the amount of Kshs.24.7 million was paid by members of the 4th Plaintiff through the 1st, 2nd and 3rd plaintiffs. He stated that the 4th Plaintiff's payment was equivalent to 21.7 per cent of the purchase price of Kshs.113,579,280 which translates to 123 acres. He however clarified that what the company bought was a business and not land per se as it included other assets. He admitted that the company had since sold 12 acres of the suit property.

28. In response to a question by the court, DW1 stated that the question of members being given land by the 2nd Defendant commensurate with their shares had severally arisen in the company's Annual General Meeting but it had always been shot down by the members.

29. John Kimeli Kipsangut (DW2) introduced himself as a director of the 2nd Defendant and also a member of the Sergoek Hill Ltd. He explained that sometime in 2006 the 1st Plaintiff told them that Mr. Kruger intended to sell to the members of Sergoek Hill Ltd a parcel of land measuring 5000 acres at a consideration of Kshs.200 million. They only managed to raise Kshs.24.7 million. Together with some officials of Sergoek Hill Ltd, they approached the 2nd Defendant to join them in the venture. The 2nd Defendant agreed to come on board to buy the land as long as the land was not sub-divided but managed as an investment for its members. This information was relayed to the members of the 2nd Defendant after which they entered into a sale agreement with Mr. Kruger. He clarified that the 1st and 2nd Plaintiffs were not shareholders of the EMO Investments Ltd as the 1st Plaintiff never bought any shares in the company while the 2nd Plaintiff withdrew her shares in 2007. The 3rd Plaintiff is however a member of EMO Investments Ltd.

30. It was his testimony that the interests of the 264 members of Sergoek Hill Ltd who joined EMO Investments Ltd are the same and the company has since acquired more assets from which the members have benefitted. He corroborated the evidence of DW1 regarding the sale agreement in respect of the suit property.

31. The 1st Defendant's witness Mr. Stephanus Petrus Kruger testified as DW3. He denied having entered into a sale agreement with the 4th Plaintiff. He produced the Exit Agreement dated 15.10.2011 as 1st Defendant's exhibit 1. He told the court that he put up his land for sale at a price of Khs.200 million. He was approached by a group of individuals led by John Kutto (1stPlantiff) who managed to raise Kshs.24.7 million. The said individuals were subsequently joined by EMO Investments Ltd

32. DW3 later entered into a sale agreement with EMO Investment Ltd for the sale of his land measuring 5000 acres at a price of Kshs.800 million. He treated the Kshs.24.7 million that had been paid by the group of individuals as part of the purchase price. He eventually sold 568 acres to EMO Investment at a price of Kshs.113,579,280. He then transferred the suit property to EMO Investment Ltd in accordance with the exit agreement. He stated that he was not aware of Sergoit Hill Ltd. It was his testimony that between 2008 and 2022, none of the 264 members of EMO Investment had sought a refund of their money from him nor had they accused him of transferring the suit property to EMO Investment contrary to their expectations. He said the issue of transfer of the land to the 1st, 2nd and 3rd Plaintiffs was an issue purely between the said plaintiffs and the 2nd Defendant.

Plaintiffs' Submissions

33. The Plaintiffs filed their submissions dated 5th December, 2023 through the firm of Tororei & Company Advocates. After summarizing the pleadings and evidence adduced by the parties they distilled the following issues for determination:

    a. Whether the 2nd Defendants hold the titles in L.R Nos. 28962/106;28962/107;28162/112;28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;289 in trust for the Plaintiff and whether the 2nd Ddefendant should be directed to transfer a portion of the suit land equivalent to Kshs.24.7 million to the Plaintiffs.

    b. Whether the titles over the suit properties issued in favour of the 2nd Defendant should be revoked.

    c. Who should bear the costs of the suit.

34. With regard to the first issue, counsel described the circumstances under which a constructive trust arises. He posited that a constructive trust is an equitable remedy imposed by the court to benefit a party that has been wrongfully deprived of its rights due to either a person obtaining or holding a legal property which they should not possess due to unjust enrichment or inference or due to breach of a fiduciary duty. He relied on the case of Twalib Hatayan & another v said Saggar Ahmed Alheidy & 5 Others (2015) eKLR.

35. It was counsel's contention that the Plaintiff's paid the sum of Kshs.24.7 million to the 1st Defendant for the purchase of land and it was never their intention to acquire equity in the 2nd Defendant company. He denies that the plaintiffs were invited to be shareholders in the 2nd Defendant company as there was no correspondence to show that the Plaintiffs agreed to covert the sum of Kshs.24.7 million into equity. He submitted that the 2nd Defendant held itself out as acting for itself and the Plaintiffs as a result of which the 1st Defendant transferred the land equivalent to 24.7 million to the 2nd Defendant. He is therefore of the view that the 2nd Defendant holds the said parcel of land in trust for the Plaintiffs and asks the court to find that there is a resulting trust in favour of the Plaintiffs.

36. Counsel submitted that there are two key differences between a resulting trust and a constructive trust. The first is that for a resulting trust, there must be proof of financial contribution to the purchase of the property which is not necessary in a constructive trust. Secondly, a resulting trust can only arise at

the time of acquisition of the property and the financial contribution must be made to the purchase price that is paid to the vendor. Reliance was placed on Halsbury's Laws of England Fifth Edition, Volume 72 Para 280 where the principles of resulting trusts are elaborated as follows:

> " Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean as shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imprecise the terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she had acted to his or her detriment or significantly altered her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."

37. He urged that the plaintiffs were basing their claim on a resulting trust which 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.

38. After stating that the plaintiffs based their claim on a resulting trust, counsel went on to submit that the court should infer a constructive trust which in terms of the holding in the case of Twalib Hatayan (supra) is a trust created by operation of the law and will automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

39. Turning the second issue on whether the titles to the suit property should be revoked, counsel submitted that the said titles should be revoked as the 2nd Defendant acted fraudulently by failing to transfer the same to the Plaintiffs despite the payment of Kshs.24.7 million made to the 1st Defendant. He relied on the cases of Republic v Kisumu Lands Office & Another (2020) eKLR) and Super Nova Properties & Another v District Land Registrar Mombasa & 2 Other (2018) eKLR where the court held that only the court can counsel or amend a title if the court is of the view that registration has been obtained, made or omitted through fraud, illegality or mistake.

40. On whether the suit is statute barred, counsel contended that the issue was spent as the Court had already pronounced itself on the issue vide the ruling of Justice Kibunja delivered on 15th June 2022 where the court held that the suit was not statute barred. He was of the view that since the Defendants had not appealed against the said ruling the court could not revisit the same.

1st Defendants' Submissions

41. The 1st Defendant's submissions dated 8th December, 2023 were filed by Miss Odwa of Nyairo & Company Advocates. Counsel summarized the pleadings and evidence and set out the following issues as warranting determination by the court:

    a. Whether the Plaintiff's suit is competent.

    b. Whether the suit is time- barred.

c. Whether the Plaintiff has established any proprietary interest over land parcel numbers 28962/106;28962/107;28162/112;28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;289

d. Whether the Plaintiffs proved fraud.

e. Whether the Plaintiff has established any reasonable claim against the 1st Defendant.

f. Whether the Plaintiffs are entitled to any relief.

42. With regard to the first issue, counsel pointed out that the 1st, 2nd and 3rd Plaintiffs' suit was incompetent as they purported to file the suit on behalf of over 200 members without complying with the requirements of Order 1 Rule 8 of the Civil Procedure Rules which stipulates that where a suit is commenced by one or more persons on behalf of numerous persons, the persons on whose behalf the suit has been filed must be served either personally or by way of an advertisement in the press as the court may direct.

43. Additionally, Order 1 Rule 13 of the Civil Procedure Rules provides that where there are more than plaintiffs, any one of them may be authorized by the others to plead or act for the others in the proceedings by filing an authority signed by the parties giving the authority. It is counsel's submission that in so far as the suit herein purports to be filed on behalf of unidentified third parties, the same cannot stand in law. She relied on the case of Law Society of Kenya v Commissioner of Lands & Others (2001) eKLR.

44. Counsel further submitted that the 4th Plaintiff's claim was similarly incompetent for want of a company resolution. She relied on the case of Kariuki Njoroge & 4 Others v Stephen Mugo Mutohori & 2 others (2004) eKLR and Edward Moonge Lengusuranga v James Lanaiyara & another (2019) eKLR for the proposition that the issue of authority and capacity to sue goes to jurisdiction and that parties must come to court properly and with authority.

45. On whether the suit is time barred, counsel relied on section 26 of the *Limitation of Actions Act* which provides that where a claim is based upon fraud or where the right of action is concealed by the said fraud, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

46. Counsel submitted that according to the evidence of PW1 she was aware that the suit property had changed hands in 2011 yet the suit was filed 11 years later in 2022 which was well over the three- year limitation period provided by the Act.

47. On whether the Plaintiff has proprietary interest over the land parcels Nos. 28962/106;28962/107;28162/112;28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;28962/187 counsel submitted that the Plaintiff's claim that they purchased L.R No.9278,21798/3, 21792/4 and LR 5822 and paid Kshs.24.7 million. They stated that the said parcels of land were subsequently amalgamated and others sub-divided to create the suit properties. The suit properties were then transferred to the 2nd Defendant. It is her submission that even though the Plaintiffs claim 123.5 acres from the defendants, they were unable to identify the said parcel of land. Additionally, they failed to produce any sale agreement to show that they entered into an agreement with the 1st Defendant as required by the provisions of the *Law of Contract Act* Cap 23 of the Laws of Kenya. They also failed to prove that they obtained the consent of the Land Control Board within a period of 6 months. She concluded that in the absence of such proof, the Plaintiffs failed to demonstrate that they have a proprietary interest in the suit property.

48. With regard to the allegations of fraud, counsel submitted that the same were not proved as the plaintiffs conceded that they brought on board the 2nd Defendant to enable them acquire the suit property from the 1st defendant. She pointed out that in his testimony the 1st Defendant stated that when the 1st, 2nd and 3rd Plaintiffs who were officials of Sergoit Hill Group introduced the 2nd Defendant to him, they told him that they hand joined hands with them in the purchase of the suit property.

49. Counsel relied on the case of Eldoret Express Limited v Tawai Limited & Another (2019) eKLR for the proposition that fraud is a serious thing to allege and it must be particularized and proved to standard higher than a mere balance of probabilities.

50. Counsel maintained that the Plaintiffs had failed to establish a cause of action against the 1st Defendant as firstly, they did not exhibit any sale agreement between themselves and the 1st defendant. Secondly, the suit property is no longer registered in the name of the 1st Defendant and he is therefore incapable of transferring it to the plaintiffs. She urged the court not to grant any of the reliefs sought by the Plaintiffs.

2nd Defendant's Submissions

51. The 2nd Defendants filed their submissions dated 17th May, 2024 through the firm of Nyekwei & Company Advocates. After summarizing the pleadings and evidence Counsel for the 2nd Defendant submitted on the following issues:

    a. Whether the suit is competent

    b. Whether the Plaintiffs purchased the land measuring 123.5 acres at a consideration of 24.7 million

    c. On which side of the divide do the 264 members of Sergoit Hill Limited (Sergoek Hill Limited) (unregistered) fall?

    d. Whether the 2nd Defendant holds 123.5 acres in trust for the Plaintiffs

    e. Whether the Plaintiffs are deserving of the prayers sought.

    f. Who will bear the costs of this suit?

52. Counsel began by attacking the competency of the suit on various grounds. Firstly, he submitted that even though the 1st, 2nd and 3rd Plaintiffs have raised a claim in their individual capacities as per paragraphs 1,2,3,6,10,12, and 13 of the plaint, they did not seek any individual reliefs. He adds that they also failed to prove their individual claims as none of them furnished proof of the amount of money they paid for the suit property. He relied on the case of Northend Trading Company Limited v City Council of Nairobi (2019) eKLR and CMC Aviation Limited v Cruisair (No.1) 1987 KLR 103 for the propositions that averments depend on evidence for proof of their contents. She urged the court to find that the 1st, 3rd and 4th Plaintiffs failed to prove their case as they did not adduce any evidence.

53. Secondly he faulted the 2nd Plaintiffs' capacity to testify on behalf of the other Plaintiffs in the absence of a written authority contrary to Order 1 Rule 13 of the Civil Procedure Rules.

54. Thirdly, counsel contends that even though the 2nd Plaintiff testified that she, the 1st and 3rd plaintiffs had filed suit on behalf of 264 members of the 4th Plaintiffs, she never produced the list of the said members nor did she produce any written authority indicating that she was authorized to represent them. The said members were also not served with a Notice of the suit that was supposedly instituted on their behalf. It is therefore counsel's contention that the suit violates Order 1 Rules 8 (1) and (2)

of the Civil Procedure Rules. He relied on the case of James Chabuga V Nathan Popo (2003) eKLR for the proposition that where a suit is filed on behalf of a group of several individuals then the written consent of such individuals must be filed in court and leave of the court sought for the suit to proceed as a representative suit.

55. Fourthly, counsel submitted that since it was clear that the 3rd Plaintiff was a shareholder of the 2nd Defendant, he could not file a derivative suit against the 2nd Defendant company without leave of the court as provided under section 239 of the *Companies Act*.

56. The fifth point of attack is that the 4th Plaintiff's suit is not supported by a Verifying Affidavit sworn by the company's authorized agent as envisaged by Order 4 Rule1 and 4 of the Civil Procedure Rules and therefore the 4th Plaintiff's suit is incompetent.

57. Lastly on the issue of competence, it is counsel's contention that the 4th Plaintiff company cannot sue on a contract that was made before the said company was incorporated. He relied on the case of Consolidated Chemicals Limited v KEL Chemicals Limited Nairobi CA Civil Appeal No. 6 of 1981 (1981) eKLR where the Court of Appel held that in order for a company to be bound by a pre-incorporation contract, there must be an agreement to ratify the previous contract.

58. Turning to the second issue regarding the purchase of 123.5 acres by the Plaintiffs, Counsel submitted that the Plaintiffs did not produce any sale agreement between themselves and the 1st Defendant in respect of 123.5 acres nor did they prove the amount paid by each of the 4 Plaintiffs. It is also not in dispute that the 4th Plaintiff was incorporated in 2013, long after the purchase price had been paid in 2008. Counsel therefore contends that the Plaintiffs failed to prove that they purchased 123.5 acres of land from the 1st Defendant.

59. On the status of the 264 members of the Sergoit Hill Limited (Sergoek Hill Ltd) who raised the Kshs.24.7 million, counsel submitted that since the said members were absorbed into the 2nd defendant company as shareholders and their contributions converted into equity, they could not claim the suit property from the Defendants. He was of the view that only the 3rd Plaintiff was entitled to claim that the 4th Defendant was holding he suit property in trust for him. However, his claim could not succeed as he did not testify in support of his claim.

60. On whether the 2nd Defendant holds the suit property in trust for the Plaintiffs, counsel submitted that the Plaintiffs have failed to prove that there was common intention between themselves and the Defendants which is a fundamental ingredient for one to succeed in a claim based on trust. In support of this submission he contends that whereas the plaint at paragraph *7* states that the 4th Plaintiff was incorporated for purposes of holding the suit land they had acquired, paragraphs *12* (1) states that the Plaintiffs were aggrieved by the transfer of the suit land in the 2nd Defendant's name. The issue of converting the Kshs.24.7 million into equity in the 2nd Defendant company also seems not to have been agreed upon by all the 264 members of Sergoit Hill Limited.

Analysis And Determination

61. I have carefully considered the pleadings, oral and documentary evidence on record and the rival submissions and I am of the opinion that the determination of this case will turn on the following issues:

    i. Whether the suit is time- barred.

    ii. Whether the Plaintiffs have established any proprietary interest over land parcel numbers 28962/106;28962/107;28162/112;28962/116;28962/117;28962/123;28962/177;28962/180;28962/186;289

iii. Whether the 2nd Defendants hold the suit land in trust for the Plaintiffs and whether the 2nd Defendant should be directed to transfer a portion of the suit land equivalent to Kshs.24.7 million to the plaintiffs.

iv. Whether the Plaintiffs have established fraud against the Defendants.

v. Whether the Plaintiffs are entitled to the reliefs sought.

vi. Who will bear the costs of this suit?

I now turn to the determination of the issues.

Whether the suit is time- barred.

62. The 1st and 2nd Defendants both stated in their respective Defences that the Plaintiffs' suit is time-barred as the cause of action arose between 2006 and 2008 when the 1st Defendant entered into a contract with the 2nd Defendant who had ostensibly linked up with the Plaintiffs. Counsel for the 2nd Defendant urged that since the Plaintiff's suit is based on fraud, same ought to have been filed as soon as the alleged fraud was discovered in terms of section 26 of the *Limitation of Actions Act* which is to the effect that where a Plaintiff bases his claim on fraud, the suit ought to be filed as soon as the fraud is discovered.

63. The issue of limitation was addressed in the ruling of this court delivered on 22nd June, 2022 where the court held that the cause of action arose when the exit agreement was signed in 2011 between the 1st and 2nd defendants and therefore the suit was not time barred. The court having pronounced itself on the issue of limitation, the question is moot and cannot be re-visited as that would amount to this court sitting on appeal on its own decision.

Whether the Plaintiffs have established any proprietary interest in the suit land

64. It is not in dispute that the Plaintiffs failed to produce any sale agreement to show that they entered into an agreement with the 1st Defendant. This contravenes the provisions of the *Law of Contract Act* Cap 23 of the Laws of Kenya. Section 3(3) of the *Law of Contract Act* (Cap. 23) provides that:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. the contract upon which the suit is founded

i. Is in writing

ii. Is signed by all parties thereto; and

b. the signature by each party signing has been attested by a witness who is present when the contract was signed by such party

Provided that this subsection shall not apply to a contract made in the course of a public auction by the auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

65. Additionally, the Plaintiffs failed to prove that they obtained the consent of the Land Control Board within a period of six (6) months. In the absence of a written agreement signed by the parties, the plaintiffs' claim has no legs to stand on.

66. Although the 1st defendant admitted that he received the sum of Kshs.24.7 from some individuals who were members of Sergoit Hill Group who had expressed an interest in purchasing his land, it is not clear how much each of the 264 members contributed. More particularly the 1st and 2nd Plaintiffs did not

produce any evidence of their individual contributions. In fact, DW1 testified that the 1st Defendant's name was not in the list of the 264 members who contributed the amount of Kshs.24.7 million while the 2nd Plaintiff is alleged to have withdrawn her contribution. Her evidence that she withdrew the money in 2007 and returned it was not supported by any documentary proof. It is therefore the finding of the court that the Plaintiffs have not established any proprietary interest in the suit land.

Whether the 2nd Defendants hold the suit land in trust for the Plaintiffs

67. The courts have had occasion to express themselves on the question of trust. In the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, the Court elaborated 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)." Emphasis added

68. What can be gleaned from the above authority and the passage in Halsbury's Laws of England Fifth Edition, Volume 72 cited in paragraph *36* is that in order for the court to make a finding that there is a resulting trust, it must satisfy itself that prior to the acquisition of the property, there was an agreement reached between the parties that the property be shared beneficially.

69. In the instant case, it is not in dispute that the suit land was bought with the funds comprising of Kshs.24.7 million contributed by of Sergoit Hill Group and Kshs.88 million by the 2nd Defendant. However, the Plaintiffs have not placed any material before the court from which an inference may be drawn that there was a common intention to share the suit land that was acquired among the 264 members of the Group and the 2nd Defendant. The absence of an agreement between the 1st, 2nd and 3rd Plaintiffs on the one hand and the 1st Defendant on the other and the admission by PW1 that the 4th Plaintiff was incorporated in 2013, five years after the 2nd Defendant paid for the land does not help the Plaintiffs' case. In the circumstances, the court is unable to hold that there is a resulting trust in favour of the Plaintiffs.

Whether the Plaintiffs have established fraud against the Defendants

70. It is trite law that allegations of fraud must be strictly proved. In the case of Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR at page 23 Justice Amin citing the case of Ratilal Patel Makanji (1957) EA 314 observed as follows:

> " When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required"

71. Furthermore in the case of Vijay Morjaria .v. Nansingh Madhusingh Darbar& another [2000]eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:-

> " ...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

72. This decision was upheld by the Court of Appeal in Nairobi in the case of Kinyanjui Kamau .v. George Kamau Njoroge [2015] eKLR(Civil Appeal No 132 of 2005)where it was stated that;

> to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.

73. The Court of Appeal in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR in considering the issue of fraud observed as follows:-

> " It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:
>
> "Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

> The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".

74. It is common ground that the 1st, 2nd and 3rd Plaintiffs who are members of Sergoit Hill Limited Group did not enter into any written sale agreement with the 1st defendant. It is also not in dispute that when they realized that they were unable to raise the sum of Kshs.200 million, they approached the 2nd Defendant to join them in purchasing the suit property from the 1st Defendant and informed the 1st Defendant accordingly.

75. Once again, the plaintiffs did not enter into any written agreement with the 2nd Defendants about their joint venture in purchasing the suit land. However, according to the 2nd Defendant, it was agreed that whatever money had been raised by members of Sergoit Hill Limited Group would be converted to equity by the 2nd Defendant and the members of Sergoit Hill Ltd would become shareholders in the 2nd Defendant Company. The 2nd defendant then entered into a sale agreement dated 17th September, 2008 and a variation agreement dated 9th June, 2009 with the 1st Defendant for the sale of the suit land measuring 5000 acres at a consideration of Kshs.200,000 per acre. The 2nd Defendant was unable to raise the full purchase price and they entered into an Exit Agreement dated 15th October, 2011 whereby the 2nd Defendant agreed to purchase 568 acres at a consideration of Kshs.113,579,280. This amount included the initial deposit of Kshs.24.7 paid by the members of Sergoit Hill Limited. The 1st Defendant subsequently transferred the land 568 acres to the 2nd Defendant.

76. Although the plaintiffs have alleged that the 1st Defendant fraudulently transferred the suit land to the 2nd Defendant, their evidence does not support their claim as at the time of entering into the sale agreement with the 1st Defendant, they held themselves out as one entity with the 2nd Defendant. The Plaintiffs have only themselves to blame for failing to enter into a formal agreement with the 2nd Defendant in order to make their relationship and intentions clear. It is also difficult to believe that it took the Plaintiffs more than 10 years to realize that they had allegedly been defrauded by the defendants. What is even more intriguing is that more than 127 members of the 4th Plaintiff including the 3rd Plaintiff have collected their share certificates from the 2nd Defendant and they have been enjoying annual dividends. On the basis of the evidence on record it is my finding that the claim of fraud has not been proved.

77. Having considered the pleadings, evidence on record, rival submissions together with the authorities cited by the parties as well as the relevant law, I have come to the inescapable conclusion that the plaintiffs have failed to prove their case on a balance of probabilities.

78. With regard to costs, it is trite law that costs follow the event and this case is no exception.

79. Accordingly, the Plaintiffs' suit is dismissed with costs to the Defendants.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF AUGUST 2024.

....

J.M ONYANGO

JUDGE

In the presence of

Mr. Tororei for the Plaintiff

Ms Odwa for the 1st Defendant

No appearance for the 2nd Defendant

Court Assistant: Brian